JD(ATL)–32–10
Deerfield Beach, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

D. R. HORTON, INC.

and **CASE 12–CA–25764**

MICHAEL CUDA, an Individual

John F. King, Esq., for the General Counsel.
Mark Stubley, Esq. & Bernard P. Jeweler, Esq., (Ogletree Deakins), for the Respondent.

DECISION

Statement of the Case

William N. Cates, Administrative Law Judge. This matter arises out of a consolidated complaint and notice of hearing issued on November 26, 2008, against D.R. Horton, Inc. (the Respondent), stemming from unfair labor practice (ULP) charges filed by Michael Cuda, an individual. The complaint, as amended, alleges that the Respondent violated Section 8(a)(1) and (4) of the National Labor Relations Act (the Act) by maintaining and enforcing individual arbitration agreements that employees have been required to execute as a condition of employment. [1]

Pursuant to notice, I conducted a trial in Miami, Florida, on November 8, 2010, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

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[1] On April 20, 2009, the Regional Director issued an order severing cases, approving withdrawal of certain allegations of complaint, and approving withdrawal of charge in Case 12–CA–25766. As a result, co-respondent DHI Mortgage Co. LTD, a subsidiary of the Respondent, was removed from the complaint. Accordingly, I will not address evidence that pertained to it as distinct from the Respondent per se.

Issues

1) Has the Respondent violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration agreement with its employees that unlawfully prohibits them from engaging in protected concerted activities, including joint arbitration claims or class action lawsuits?

2) Do such agreements lead employees reasonably to believe that they are barred or restricted from filing charges with the NLRB, thereby violating Section 8(a)(4) and (1)?

Facts

Based on the entire record, including testimony, documents, and stipulations, as well as the thoughtful post trial briefs filed by the General Counsel and the Respondent, I find the following.

The salient facts are undisputed. The Respondent, a Delaware corporation with an office and place of business located in Deerfield Beach, Florida (the facility), is engaged in the business of building and selling homes. The Respondent has admitted Board jurisdiction as alleged in the complaint, and I so find.

In January 2006, Respondent, on a corporate-wide basis, implemented a policy of requiring each current and new employee to sign a mutual arbitration agreement as a condition of employment.[2] The agreement provides, inter alia, that all employment disputes and claims shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator. Specifically included are claims for discrimination or harassment; wages, benefits, or other compensation; breach of contract; violations of public policy; personal injury; and tort claims. In reference to employees' statutory rights, the only express exclusions are employee claims for workers' compensation or unemployment benefits.

Paragraph six of the agreement states:

> [T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

At around the time of the distribution of the arbitration agreement to employees, the Respondent provided facility supervisors with a list of employees' frequently asked questions

[2] Jt. Exh. 2.

and the appropriate responses.[3] One of the instructions was to tell employees who expressed concern about the scope of the agreement that the agreement applied to relief sought through the courts and that they would still be able to go to the EEOC or similar agency with a complaint. However, the Respondent did not provide these questions and answers to employees at the time, and there is no evidence it ever communicated to them the above clarification of the scope of the agreement to its employees.

By letter dated February 13, 2008,[4] Cuda's attorney, Richard Celler, notified the Respondent that his law firm had been retained to represent Cuda and a class of similarly situated current and former "Superintendents" the Respondent employed on a national basis, to contest the Respondent's "misclassification" of them as exempt employees under the Fair Labor Standards Act.[5] The letter went on to state it constituted formal notice of a request to commence the arbitration process under paragraph 3 of the arbitration agreement. By letter of the same date, Celler advised Respondent his firm was also representing five other named employees.[6] By letter of February 21, Celler notified Respondent he was similarly representing employee Mario Cabrera and a class of similarly situated current and former "Superintendents" Respondent employed on a national basis.[7]

By letter of March 14, Michael Tricarloo, Respondent's counsel, replied to Celler's February 13 letter concerning the five-named employees.[8] Citing the language in paragraph 6 barring arbitration of collective claims, he denied the February 13 letter constituted effective notice of intent to initiate arbitration. For the same reason, Ticarloo, by letter of March 20, denied the validity of Cabrera's notice of intent.[9]

Analysis and Conclusions

Preliminarily, in reaching my conclusions about the legality of the provisions in question, I do not rely on the Region's initial determination or the contrary result of the General Counsel's Office of Appeals.[10] Further, I will not consider as dispositive Memorandum GC-10-06, cited in the Respondent's brief (at 5). The Board has repeatedly held that policies set out in the General Counsel's Casehandling Manual are not binding on the Board (or the General Counsel, for that matter). *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 553 fn. 4 (2007); see also *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996) . The same logic applies to other internal pronouncements the General Counsel issues.

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3 E. Exh. 1.

4 All dates hereinafter occurred in 2008 unless otherwise stated.

5 Jt. Exh. 4.

6 Jt. Exh. 5.

7 Jt. Exh. 6.

8 Jt. Exh. 8.

9 Jt. Exh. 10.

10 See E. Exhs. 3 & 2, respectively.

I. Does the mandatory arbitration agreement violate Section 8(a)(1) by unlawfully prohibiting employees from engaging in protected concerted activities?

Section 7 of the Act, as amended, 29 U.S.C. § 157, provides in relevant part that employees have the right to engage in concerted activities for their "mutual aid or protection." The Supreme Court has held that this "mutual aid or protection" clause encompasses employees acting together to better their working conditions through resort to administrative and judicial forums. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–567 (1978). In *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1536 (11th Cir. 1987), the Circuit Court cited *Eastex* for the proposition that Section 7 is liberally construed to protect a broad range of employees concerns. Filing a class action lawsuit constitutes protected activity unless done with malice or in bad faith. *Harco Trucking, LLC*, 344 NLRB 478 (2005); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005).

The crux of the matter here is the efficacy of a mandatory arbitration provision that restricts employees' from joining arbitration claims or collectively seeking recourse outside of arbitration. The General Counsel does not contend arbitration agreements are per se unlawful (GC br. at 12).

Indeed, decisions of the Supreme Court in recent years reflect a strong sentiment favoring arbitration as a means of dispute resolution. A leading case in the employment area is *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Therein, the Court held an Age Discrimination in Employment Act (ADEA) claim can be subject to compulsory arbitration. The Court reviewed the Federal Arbitration Act (FAA), originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code, concluding its provisions manifest a "'liberal federal policy favoring arbitration agreements.' *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)." Id. at 25 (footnote omitted).

The Court went on to state (Id. at 26) (citations omitted):

> Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . [T]he burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims . . . . "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

The Court noted an individual ADEA claimant subject to an arbitration agreement was still free to file a charge with the Equal Employment Opportunity Commission, even though barred from instituting private judicial action.

In *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009), the Court held the *Gilmer* Court's interpretation of the ADEA fully applied in the collective-bargaining context so that a provision in a collective-bargaining agreement requiring union members to arbitrate ADEA

claims was enforceable as a matter of federal law.

The Eleventh Circuit Court of Appeals has also expressed judicial support for the use of arbitration in the employment arena. See *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("[C]ompulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statues, including employment-discrimination statutes"); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002) ("[A]rbitration agreements encompassing claims brought under federal employment discrimination statutes have also received near universal approval").

I am not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims. On the other hand, in *Stolt-Nielsen S.A. v. Animal Feeds*, 130 S. Ct. 1758, 1773–1775 (2010), the Supreme Court emphasized the consensual nature of private dispute resolution and held "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" (emphasis in original).

In light of the above pronouncements of the Supreme Court and the Eleventh Circuit Court of Appeals, and the absence it appears of direct Board precedent, I decline to conclude that the provision in question violates Section 8(a)(1) by unlawfully prohibiting employees from engaging in protected concerted activities.

II. Does the mandatory arbitration agreement violate Section 8(a)(4) and (1) by leading employees reasonably to believe they cannot file charges with the NLRB?

In at least two cases, the Board has dealt with the issue of mandatory arbitration policies in unorganized workforces. In *U-Haul Co. of California*, 347 NLRB 375 (2006), enforcement granted, 255 Fed.Appx. 527 (D.C. Cir. 2007), rehearing en banc denied (2008), the Board addressed a mandatory arbitration policy that enumerated various types of disputes and claims and included "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations." The Board held this language unlawful under Section 8(a)(4) and (1) because employees reasonably could conclude they were precluded from filing NLRB charges. Id. at 377–378. The Board specifically rejected the respondent's argument the arbitration policy was not unlawful because the memo announcing it included the statement the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief." As the Board explained (ibid):

> The reference to a "court of law" in this part of the memo does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board. . . . Further, inasmuch as decisions of the National Labor Relations Board can be appealed to a United States court of appeals, the reference to a "court of law" does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges. While . . . it is the NLRB, and

not the individual, who presents the case to court, we believe that most nonlawyer employees would not be familiar with such intricacies of Federal court jurisdiction, and thus the language is insufficient to cure the defects in the policy.

Similarly, in *Bills Electric, Inc.*, 350 NLRB 292, 296 (2007), the Board found unlawful a mandatory arbitration provision providing that arbitration be "the exclusive method of resolution of all disputes," although it expressly stated that "this shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB, EEOC, or any State Agency." As the Board stated, after analyzing all of the factors present, "At the very least, the mandatory grievance and arbitration policy would reasonably be read by affected applicants and employees as substantially restricting, if not totally prohibiting, their access to the Board's processes." Ibid.

The ultimate test it appears, then, is determining whether nonlawyer employees would reasonably conclude they are barred or restricted from filing NLRB charges. Although the Respondent's instructions to its supervisors clarified the right of employees to access the Board's processes, such was never communicated to employees and therefore is of no operative effect. I conclude the language of the mandatory arbitration agreement, on its face, would lead employees reasonably to believe they could not file charges with the Board.

Even if I deemed the language to be ambiguous, it is well settled, as a general precept, ambiguous policies or rules that reasonably could be interpreted as violative of employee rights will be construed against the maker of the policy or rule and, even if not followed, will be found to violate the Act. *St. Francis Hotel*, 260 NLRB 1259, 1260 (1982); see also *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

Accordingly, I conclude Respondent's maintenance of the mandatory arbitration agreement violates Section 8(a)(4) and (1) of the Act.

Conclusion of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration provision that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violates Section 8(a)(4) and (1) of the Act.

Remedy

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The Respondent, D.R. Horton, Inc., Deerfield Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the mutual arbitration agreement to make it clear to employees the agreement does not in any way bar or restrict their right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at its facility at Deerfield Beach, Florida, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 3, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading **"Posted by Order of the National Labor Relations Board"** shall read **"Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."**

attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., January 3, 2011.

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William N. Cates
10 **Administrative Law Judge**

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a mandatory arbitration agreement that you reasonably could believe bars or restricts your right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights that Federal law guarantees you.

WE WILL rescind or revise the mutual arbitration agreement to make it clear the agreement does not in any way bar or restrict your right to file charges with the National Labor Relations Board.

WE WILL provide to you copies of the revised agreement, or notify you in writing we have rescinded the agreement.

D. R. HORTON, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, Florida 33602–5824
(813)228–2641, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2455