



**OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.**

Attorneys at Law

Preston Commons West
8117 Preston Road, Suite 500
Dallas, TX 75225
Telephone: 214.987.3800
Facsimile: 214.987.3927
www.ogletreedeakins.com

Ron Chapman, Jr.
214.369.9216
ron.chapman@ogletreedeakins.com

*Board Certified – Labor and Employment Law
Texas Board of Legal Specialization*

May 16, 2013

Mr. Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130-3408

RE: *D.R. Horton, Inc. v. NLRB*, Case No. **12-60031**
Citation of supplemental authorities pursuant to Rule 28(j) of the Federal Rules
of Appellate Procedure

Dear Mr. Cayce:

D.R. Horton, Inc. submits this letter under Fed. R. App. P. 28(j) and 5th Cir. R. 28.4.

In *NLRB v. New Vista Nursing & Rehab.*, Case No. 11-3440 (3d Cir. May 16, 2013), the Third Circuit Court of Appeals held that Craig Becker's recess appointment to the NLRB was invalid under the Recess Appointments Clause of the U.S. Constitution. (*See* Rule 28(j) Letter dated Jan. 29, 2013)

In *Nat'l Ass'n of Mfrs. v. NLRB*, --- F.3d ---, 2013 WL 1876234, at *5 - *9 (D.C. Cir. May 7, 2013), the D.C. Circuit Court of Appeals held that the NLRA does not allow the NLRB to treat an employer's failure to post a notice informing employees of their rights under the NLRA as an unfair labor practice. This holding is relevant to D.R. Horton's argument that the NLRB similarly lacks authority to require employment arbitration agreements to notify employees of their right to file charges with the NLRB. (Reply at pp. 26-27)

Three more courts have refused to follow the NLRB's decision in *D.R. Horton*. *See Teimouri v. Macy's, Inc.*, 2013 WL 2006815 (Cal. Ct. App. May 14, 2013) ("We agree with the courts that have rejected the NLRB's analysis in *D.R. Horton*."); *Walthour v. Chipio Windshield Repair, LLC*, 2013 WL 1932655 (N.D. Ga. Feb. 27, 2013); *Strozier v. E*Trade Fin. Corp.*, Case 1:12-cv-00330-AT (N.D. Ga. Feb. 27, 2013), ECF No. 29.

Additionally, in *Brown v. Citicorp Credit Servs., Inc.*, 2013 WL 1760267, at *2 (D. Idaho Apr. 24, 2013), the court concluded the defendant-employer had a substantial case for relief from the court's earlier decision to follow *D.R. Horton* due to the intervening decisions in *Owen v.*

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Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013) and *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013).

Respectfully submitted,

s/Ron Chapman, Jr.

Ron Chapman, Jr.

cc: Counsel of record (by the Court's electronic filing system)

RCjr/slm

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