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August 15, 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 submits this letter under Fed. R. App. P. 28(j) and 5th Cir. R. 28.4.

In *Sutherland v. Ernst & Young LLP*, --- F.3d ----, 2013 WL 4033844 (2d Cir. Aug. 9, 2013), the Second Circuit rejected the NLRB's *D.R. Horton* decision. The court (1) held the FLSA does not include a "contrary congressional command" that bars enforcement of a class-action waiver in an arbitration agreement, and (2) explained that the NLRB's decision was not entitled to deference because it construed the FAA and "may have been decided . . . without a proper quorum." 2013 WL 4033844, at *4-5 & n.8; *see also Ranieri v. Citigroup, Inc.*, Case No. 11-5213-cv, 2013 U.S. App. LEXIS 16765 (2d Cir. Aug. 12, 2013) (following and applying *Sutherland*).

Notably, the NLRB relied on the district court decisions in *Sutherland* and *Ranieri*, both of which have now been reversed. (R. at 556 n.23)

Additionally, the Fourth Circuit held the President's appointments to the NLRB on January 4, 2012, were invalid under the Constitution's Recess Appointments Clause. *N.L.R.B. v. Enterprise Leasing Co. Southeast, LLC*, --- F.3d ----, 2013 WL 3722388, at *1, *20-48 (4th Cir. July 17, 2013).

The Massachusetts Supreme Court enforced a mandatory individual arbitration agreement, finding its class action waiver did not render it invalid. *Feeney v. Dell Inc.*, --- N.E.2d ----, 2013 WL 3929051, at *1 (Mass. Aug. 1, 2013).

August 15, 2013
Page 2

Finally, yet another district court rejected the NLRB's *D.R. Horton* decision. *Morris v. Ernst & Young LLP*, 2013 WL 3460052, at *10 (N.D. Cal. July 9, 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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