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January 29, 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 supplemental letter under Fed. R. App. P. 28(j) and 5th Cir. R. 28.4 regarding additional new authorities.

On January 25, 2013, the D.C. Circuit held that the NLRB lacked a quorum beginning at least as early as January 4, 2012, because the President's attempted recess appointments at that time of three new members to the NLRB were invalid. *See Noel Canning v. NLRB*, --- F.3d ---, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). The Court held the vacancies did not "happen" during the Senate's recess and the President's purported appointments did not occur during that recess as required under the Constitution's recess appointments clause. *Id.* at *16 & *23; U.S. CONST. art. II, § 2, cl. 3. *Noel Canning* demonstrates that the NLRB also lacked a quorum when it issued its decision in *D.R. Horton* on January 3, 2012. (*See* Opening Br. 59-60.) At that time, the NLRB had only three purported members, one of whom was Craig Becker. However, under *Noel Canning*, Mr. Becker's recess appointment to the NLRB on March 27, 2010, also was invalid. *See* Press Release, White House, President Obama Announces Recess Appointments to Key Administrative Positions (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions> (last visited Jan. 28, 2013). Just like the situation in *Noel Canning*, the vacancy Mr. Becker filled did not arise during the Senate's recess, nor did the President appoint him during that recess. When the NLRB issued the *D.R. Horton* decision, it therefore had only two properly appointed members and no quorum to act.

January 29, 2013

Page 2

In addition, yet another court has rejected the NLRB's decision in *D.R. Horton*. See *Long v. BDP Int'l, Inc.*, 2013 WL 245002, at *15 (S.D. Tex. Jan 22, 2013) ("*Horton* contradicts Supreme Court and Fifth Circuit precedent.>").

Finally, on January 28, 2013, the petitioner in *Entergy Miss. Inc. v. N.L.R.B.*, Case No. 12-60644 (5th Cir.) filed its opening brief. That case, which also is pending before this Court, similarly challenges the NLRB's authority to act because it lacked a quorum. See Pet'r's Br. at 45-54.

Respectfully submitted,

s/Ron Chapman, Jr.

Ron Chapman, Jr.

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

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