

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

NIJJAR REALTY, INC
d/b/a PAMA MANAGEMENT

And

Case 21-CA-092054

GERARDO HARO,
An Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Submitted by:
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I. Introduction

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent's exceptions to the December 4, 2013 decision (ALJD) of Administrative Law Judge William N. Cates (ALJ Cates). ALJ Cates correctly found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining mandatory arbitration provisions requiring employees to waive the right to maintain class or collective actions in all forums, judicial or arbitral; and by enforcing these arbitration provisions by asserting them in a petition to compel Charging Party Gerardo Haro¹ (Charging Party or Haro) to submit his class-action wage and hour litigation against Nijjar Realty, Inc. d/b/a Pama Management (Respondent) to individual arbitration.

The instant case is controlled by the Board's decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), 737 F.3d 433 (5th Cir. 2013). Following the Fifth Circuit's December 3, 2013 decision, partially enforcing, and partially declining to enforce, the Board's decision in *D. R. Horton*, it remains valid precedent, until such time as the United States Supreme Court overturns the Board's decision, or the Board overrules its decision in a subsequent case.

II. Facts

On August 24, 2011, Haro applied for employment with Respondent's property management company, completing an application form and other documents provided (translated into Spanish) to him by professional employer organization (PEO) Workforce. (ALJD 2: 30-31;

¹ Charging Party's correct full name is Gerardo Haro Guadarrama.

Rx. 11, p. 8-12²). Haro, who testified through a Spanish translator, can read some English, and began speaking English at age 30. (Tr. 7, 20; ALJD 3: 33-34). Haro began working for Respondent as a maintenance worker on September 1, 2011. (ALJD 3: 5-7). Initially Haro worked out of Respondent's Ontario office, and later was transferred to the San Bernardino office. (ALJD 3: 7-8).

On the morning of December 29, 2011, when Haro and approximately 18-20 other maintenance department employees reported for work at Respondent's San Bernardino office, they were required by supervisors Rocio Chavez (Chavez) and Alejandro Montiel (Montiel)³ to execute new employment documents, including an application for employment and related documents. (ALJD 3: 17-21). Included in these documents, all of which bore the name of PEO Emplicity, was a Comprehensive Agreement and Applicant's Statement and Agreement (Applicant's Statement). (ALJD 4: 1-6:27).

Montiel and Chavez told the employees that they had to sign the documents, or else they wouldn't be paid. (ALJD 3: 20-21). When Haro asked what kind of documents these were, Montiel and Chavez only explained that they were from Respondent's El Monte office. (ALJD 3: 23-24). Haro understood that he had to sign these documents as a condition of his employment. (ALJD 3: 36-37). Feeling pressured to quickly sign the documents and get to work, Haro signed the documents, including the Comprehensive Agreement and Applicant's Statement, which were provided only in English. (ALJD 3: 23-24). Unclear on what he was signing, Haro wrote a question mark, not his signature, on the signature line of the Applicant's Statement (ALJD 3: 28-

² References to the ALJD include citations to the page and line number. References to the record are as follows: References to joint exhibits are identified as "Jx", followed by the exhibit number and page number within the exhibit. References to General Counsel's and Respondent's exhibits are similarly noted, identified, respectively, as "GCx" and "Rx." References to the hearing transcript are designated as "Tr.," followed by the relevant transcript page number(s).

³ As ALJ Cates noted, supervisory status is not at issue in this case. Chavez (from the record it appears that Chavez, not Chanez, as noted in the ALJD, is the correct spelling of this person's name, Tr. 36) was in charge of Respondent's San Bernardino operations and Montiel supervised the maintenance workers. (ALJD 3:13-15, fn 5).

29). After signing the documents, Haro placed them on Montiel's desk and left to begin his work assignments for the day. (ALJD 3: 27-28).

Later that day, when Haro returned to the office at the end of his work day, Respondent's secretary informed him that he had failed to sign or complete portions of the new employment documents. (ALJD 3: 29-31). Haro completed these portions of the documents, which she had marked for him using Post-it notes. (ALJD 3: 31). Neither the secretary, nor anyone else affiliated with Respondent pointed out or explained the 'opt-out' checkbox in paragraph 4 of the Comprehensive Agreement to Haro. (ALJD 3: 39-41). Haro's employment with Respondent ended when he quit in January 2012. (Tr. 31; Jx. 3, pp. 46, 48).

The Comprehensive Agreement provides, in relevant part:

Employee, Emplicity and Company, agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee's employment, including but not limited to the termination of Employee's employment and Employee's compensation. Employee specifically waives and relinquishes his/her right to bring a claim against Emplicity and/or Company, in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent Employee in a lawsuit against Emplicity or Company in a court of law...Employee, Emplicity, and Company agree that any claim, dispute, and/or controversy that Employee may have against Emplicity (or its owners, directors, officers, managers, employees, or agents), or Company (or its owners, directors, officers, managers, employees, or agents)...shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act... Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board...or as may otherwise be required by state or federal law...This agreement is not intended to interfere with Employee's rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act.

This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class or representative action. I further understand and acknowledge that the terms of this Agreement include a waiver of any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative, or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis unless I check this box. []

...

The Applicant's Statement and Agreement provides, in pertinent part:

I further agree and acknowledge that Emplicity, the Worksite Employer, and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Emplicity, the Worksite Employer, and I agree that any claim, dispute, and/or controversy that either I may have against Emplicity or the Worksite Employer (or their owners, directors, officers, managers, employees, agents, and parties affiliated with their employee benefit and health plans) . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act.

- - -

Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise, with [the] exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board . . . or as otherwise required by state or federal law...

Respondent continued hiring employees after December 29, 2011, and continued requiring new employees to execute the Comprehensive Agreement and Applicant's Statement until Respondent's business relationship with Emplicity ended in December 2012. (Tr. 115-116; ALJD 7: 16-18). After its business relationship with Emplicity ended, Respondent made no

effort to rescind any of the Emplicity documents, agreements, and waivers signed by its employees. (Tr. 73, 115, 117-18).

On June 29, 2012, on behalf of himself and others similarly situated, Haro filed a class action wage and hour lawsuit in Los Angeles County Superior Court (Case No. BC 487199) against Respondent, alleging that Respondent violated various sections of the California Labor Code⁴, and seeking compensation for unpaid wages and unreimbursed vehicle mileage payments, among other damages. (ALJD 6: 29-33; Jx. 2, p. 12-28).

In response to Haro's class-action lawsuit, on December 14, 2012, Respondent filed a Petition to Compel Arbitration (Petition to Compel), seeking to force Haro to submit these class claims to arbitration on an individual basis⁵. (ALJD 6: 38-41; Jx. 3). In its Petition to Compel, Respondent asserted that Haro was required to arbitrate his claims on an individual basis because he signed the Comprehensive Agreement, which contains a waiver of any right the employee would otherwise have to "bring an action on a class, collective, private attorney general, representative or other similar basis" unless the employee took the affirmative step of checking a box to exclude himself from his provision, which box Haro did not check." (Jx. 3, p. 3). Respondent further asserted in the Petition to Compel that the terms of the Applicant's Agreement provide an additional, independent, basis to require Haro to arbitrate his claims on an individual basis. (Jx. 3, p. 4-5).

On March 6, 2013, Judge Jane Johnson of the Los Angeles County Superior Court ruled on the Petition to Compel, severing and staying Haro's Private Attorney General Act (PAGA)

⁴ As noted by Respondent's exception No. 5, Haro did not assert claims arising under the Fair Labor Standards Act.

⁵ Prior to filing this petition, citing "the arbitration agreement signed by [Haro] on December 29, 2011" (the Comprehensive Agreement was attached) Respondent demanded, by a letter dated August 31, 2012, that Haro enter into a stipulation to arbitrate his claims on an individual basis. (Jx. 3, pp. 59-62).

claims, while compelling him to submit the remaining claims to arbitration. (ALJD 6: 43-47; Rx.15). Respondent subsequently filed for arbitration in this matter, which was, at the time of the hearing, pending. (Rx 16; Tr. 50).

III. Argument

A. The Complaint is not Barred by Section 10(b) of the Act

Respondent takes exception to ALJ Cates' finding that the mandatory arbitration provisions at issue were maintained within the 10(b) period. In *Lakeside Community Hospital*, the Board rejected efforts to dismiss a complaint as untimely on the ground that the events alleged had occurred after the filing of the charge. 306 NLRB 552 (1992), *enfd.* 8 F. 3d 71 (D.C. Cir. 1993). The Board reasoned that the allegations of the complaint were of "the same class of violations as those set up in the charge," and asserting that it was not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.' 306 NLRB fn. 2 (1992)

Here, the charge language is sufficient to support the allegations of the complaint. The charge in this matter, filed on October 25, 2012, alleged, *inter alia*, "...As a condition of employment, [Respondent] required me to agree to mandatory arbitration programs which [Respondent] contends prohibit class and representative actions in court and in arbitration..." This language is sufficient to support the basis for complaint paragraph 6, the allegation regarding Respondent's subsequent enforcement of this mandatory arbitration program by its December 14, 2012 Petition to Compel⁶.

Local Lodge 1424 v. NLRB (Bryan Mfg), the case relied upon by Respondent, is completely inapposite to the facts here. 362 U.S. 411, 421 (1960). Applying the *Redd-I* factors as

⁶ The charge was filed less than 2 months before Respondent's Petition to Compel was filed, not 'many months before', as suggested by Respondent in its Brief in Support of Exceptions.

articulated in *Carney Hospital*⁷, this complaint allegation is closely related to the existing charge allegations, and, thus, is not time-barred by Section 10(b) because (1) they involve the same legal theory as the existing charge allegations, (2) are part of a chain or progression of events, and (3) the defenses raised to the charge allegations and the complaint allegations are similar, if not the same. 350 NLRB 627, 628, 630 (2007).

Contrary to Respondent's argument, the Comprehensive Agreement and Applicant's Statement Haro signed are not "inescapably grounded" on their December 29, 2011 execution. Indeed, they persisted throughout 2012, as Respondent continued to use these documents, having newly-hired employees execute these documents, until the end of its contractual relationship with Emplicity in December 2012. Even more importantly, however, Respondent relied upon these documents in its December 14, 2012 Petition to Compel, which it filed in response to the class action lawsuit filed on Haro's behalf on June 29, 2012.

Thus, Respondent relied upon these documents within the 10(b) period, not only by having employees execute them, but also by enforcing them in opposition to Haro's lawsuit. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enf'd. mem. 961 F.2d 1568 (3d Cir. 1992)

B. Haro's Class Action Lawsuit Amounts to Protected Concerted Activity

Respondent argues that Haro did not engage in protected concerted activity, almost exclusively supporting this argument with citations to cases that preceded *D. R. Horton*. Section

⁷ When applying the *Redd-I* test, as modified by *Carney Hospital*, the Board (1) considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (which prong will be satisfied if the timely and untimely allegations demonstrate similar conduct, usually during the same time period with a similar object; or there is a causal nexus between the allegations and they are part of a chain or progression of events; or they are part of an overall plan to undermine union activity) and (3) "may look" at whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Carney Hospital*, 350 NLRB 627, 628, 630 (2007).

8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. These rights include the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Concerted activity includes that which is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself,” as well as that which “seek[s] to initiate or to induce or to prepare for group action.” *Meyers Industries*, 281 NLRB 882, 885, 887 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Under *D. R. Horton*, an individual employee who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7. 357 NLRB slip op. at 4.

Applying the Board’s reasoning in *D.R. Horton*, Haro engaged in conduct protected by Section 7 of the Act when he filed a class action lawsuit on June 29, 2012, irrespective of whether he talked to other employees about the suit, either before or after its filing. As a result, ALJ Cates was correct in concluding that Haro engaged in protected concerted activity by filing his class action lawsuit.

C. Despite the Fifth Circuit’s Decision, *D. R. Horton* Remains Controlling Board Precedent

Respondent argues that *D. R. Horton* should be overruled, citing the 5th Circuit’s December 3, 2013⁸ decision to partially deny enforcement of the Board’s decision in *D.R. Horton* as the final nail in the proverbial coffin of this “legally unsupportable” case. The Fifth Circuit’s decision is not binding upon the Board, however, so the case remains controlling Board

⁸ In its Brief in Support of Exceptions, Respondent protests ALJ Cates’ failure to address the 5th Circuit’s December 3, 2013 decision in *D.R. Horton* in his December 4, 2013 Recommended Decision and Order. Given that only one day had elapsed, not to mention the fact that the fifth circuit’s decision is not binding on the Board, this ‘omission’ is unworthy of discussion.

law and governs this case. *D. R. Horton* will remain Board law until such time as the United States Supreme Court, or the Board itself, expressly overrules this precedent. *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004).

D. Respondent's Mandatory Arbitration Program is Unlawful under *D. R. Horton*

In *D.R. Horton, Inc.*, the Board held that an employer violates Section 8(a)(1) by requiring employees "as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum." 357 NLRB slip op. at 1.

This prohibition violates Section 8(a)(1) because it restricts employees' Section 7 rights to engage in concerted action for mutual aid or protection or, alternatively, because employees would reasonably read it as restricting such activity. *Id.*, slip op. at 7.

As ALJ Cates found, Respondent's mandatory arbitration program violates Section 8(a)(1) because it interferes with Section 7 activity by precluding employees from pursuing class or collective claims in any forum, arbitral or judicial. The Comprehensive Agreement is unlawful, on its face, because it expressly requires binding arbitration, as the sole and exclusive means of resolving all employment-related disputes; as well as expressly prohibiting class or collective actions. Further, the Applicant's Statement implicitly contains the same prohibition, as it requires binding arbitration for any employment-related claims or disputes, and Respondent asserts in its Petition to Compel (in which it sought to compel Haro to submit to individual arbitration of his class claims) that it is "also fully enforceable...and...a valid and independent basis upon which to compel arbitration of Plaintiff's disputes." (Jx. 3, p. 4).

As ALJ Cates found, Respondent further violated Section 8(a)(1) by enforcing the mandatory arbitration program through its Petition to Compel, and thereby requiring individual

arbitration of class claims. Respondent's efforts to enforce the class action waiver through its Petition to Compel further interferes with employees' Section 7 right to commence and concerted prosecution of employment-related legal actions, in violation of Section 8(a)(1).

i. Respondent's Mandatory Arbitration Program Violates the Act, Whether it is Viewed as One Document or Two Separate Documents

Respondent excepts to the fact that ALJ Cates treats the Comprehensive Agreement and Applicant's Statement as inextricably intertwined, and as such, as one document. Though the General Counsel has treated these documents as separate, but related, the outcome is the same whether they are treated as one or two documents. By treating the Comprehensive Agreement and Applicant's Statement as one document, the analysis is not different, but merely simpler. By this analysis, the combined document is facially unlawful, as described above, as is its enforcement.

ii. The Opt-Out Provision Does not Render the Comprehensive Agreement Lawful

Respondent argues that the inclusion of an "opt-out provision" in the Comprehensive Agreement renders the class action waiver voluntary, and therefore lawful. Generally, the Board has frowned upon employer conduct requiring employees to prospectively waive their Section 7 right to engage in protected concerted activity. *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001). Though the Board has not yet addressed the issue of opt-out provisions in the context of mandatory arbitration programs governed by *D. R. Horton*, several of the NLRB's ALJs have already concluded that such provisions do not render class action waivers voluntary. See *24 Hour Fitness USA, Inc.*, 20-CA-035419, JD-51-12 (November 6, 2012); *Mastec Services*

Company, 16-CA-086102, JD-25-13 (June 3, 2013); *GameStop Corp.*, 20-CA-080497, JD-42-13 (August 29, 2013).

E. The Remedies Granted by ALJ Cates are Warranted, Consistent with Current Law, and Needed to Remedy the Act

Respondent argues that the remedies granted by ALJ Cates are unwarranted and unconstitutional, primarily objecting to the requirement that Respondent reimburse Haro for expenses related to its Petition to Compel. As a general matter, such a remedy is certainly consistent with the NLRB's standard "make whole" remedial scheme, for the sole purpose of returning a charging party to the status quo ante. In this case, Haro would not have had to expend these resources had Respondent not filed its unlawful Petition to Compel to enforce its unlawful mandatory arbitration program.

The General Counsel has sought, and received, in several ALJ decisions, the special remedy of litigation expenses for charging parties who had to oppose an unlawful Petition to Compel, which was filed to enforce an unlawful mandatory arbitration program. See, e.g. *JP Morgan Chase*, 02-CA-088471 and 02-CA-098118, JD-40-13 (August 21, 2013), *Covenant Care*, 21-CA-090894, JD-59-13 (December 20, 2013); *Leslie's Poolmart, Inc.*, 21-CA-102332, JD-02-14 (January 17, 2014); *Neiman Marcus*, 31-CA-074295, JD-04-14 (February 6, 2014).

Contrary to Respondent's assertions, the remedy of reimbursement of litigation expenses is permissible under *Bill Johnson's Restaurants* and *BE & K Construction Co.* 461 U.S. 737 (1983); 536 U.S. 516 (2002). This is so because litigation enforcing unlawful arbitration provisions has "an objective that is illegal under federal law." *Laundry Workers, Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985), citing *Bill Johnson's*, 461 U.S. fn. 5. See also *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 (2004). Indeed, in *BE & K*, the

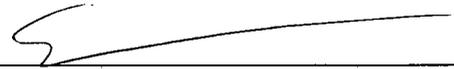
United States Supreme Court expressly did not “decide whether the Board otherwise has authority to award attorney's fees when a suit is found to violate the NLRA.” *BE & K*, supra, at 530. In *J.A. Croson Company*, the Board held that lawsuits which interfere with conduct protected by Section 7 constitute a violation of Section 8(a)(1) and stated, “In cases involving the maintenance of an unlawful lawsuit, the Board has, with court approval, usually exercised its remedial discretion to require the respondent to reimburse opposing parties for the legal fees and expenses incurred in defending themselves. We reaffirm today that this remedy is presumptively appropriate.” (footnote in original omitted) 359 NLRB No. 2, slip. op. at 10, 14 (September 28, 2012) (though after careful consideration, the Board decided in *J.A. Croson* that an award of legal fees and expenses was not required to effectuate the purposes of the Act, for reasons that are inapplicable to the instant case). There is ample support for ALJ Cates’ recommended remedy of reimbursement of Haro’s litigation and related expenses, directly related to Respondent’s Petition to Compel, with interest.

IV. Conclusion

In light of the above, and the record as a whole, General Counsel requests that the Board affirm the decision of ALJ Cates and find that Respondent violated the National Labor Relations Act as alleged in the complaint, and order the remedies recommended by the ALJ.

DATED AT Los Angeles, California, this 13th day of February, 2014.

Respectfully submitted,



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Statement of Service

I hereby certify that a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Recommended Decision of the Administrative Law Judge was submitted for E-filing to the Executive Secretary of the National Labor Relations Board on February 13, 2014

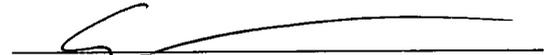
The following parties were served with a copy of said document by electronic mail on February 13, 2014

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DATED AT Los Angeles, California, this 13th day of February, 2014

Respectfully submitted,



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