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

LESLIE'S POOLMART, INC.

and Case 21-CA-102332

KEITH CUNNINGHAM, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

TO RESPONDENT'S EXCEPTIONS

Submitted by: Alice J. Garfield
Counsel for the General Counsel

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, General Counsel files this answering brief to Respondent's exceptions to the decision (ALJD) of Administrative Law Judge Lisa L. Thompson (ALJ), which issued on January 17, 2014.[1] The ALJ correctly found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by: 1) maintaining and enforcing a mandatory and binding arbitration agreement that requires employees to resolve employment-related disputes exclusively through individual arbitration proceedings and, though not expressly, but in practice, relinquish their rights to resolve such disputes through collective or class action; and, 2) seeking to enforce its unlawful arbitration agreement by filing a motion in federal District Court to compel arbitration of the Charging Party's claims and dismiss his collective or claims. (ALJD 9:1-10).

The instant case is controlled by the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012). In *D. R. Horton v. NLRB*, 737 F. 3d 344 (5th Cir. 2013), 2013 WL 6231617, the Court of Appeal for the Fifth Circuit rejected the Board's decision; however it has not been

[1] The ALJ granted the parties' joint motion to submit the instant case entirely on their stipulation of facts. In this answering brief, the stipulation of facts will be referred to as Stip. and any reference to an exhibit attached to the Stip. will be referred to as Exhibit followed by its number.

overruled by the U.S. Supreme Court. Accordingly the ALJ properly applied Board precedent in the instant case and her decision should be affirmed in its entirety. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). Moreover, Respondent's exceptions to the ALJD and arguments in support thereof raise no points which were not previously considered and rejected by the ALJ.

II. FACTS

Respondent sells pool and spa chemicals and supplies from its many retail stores as well as from its Internet website and catalogues. (Stip. at p.3 and Exh. 5 at p. 2). The Charging Party, Keith Cunningham, (occasionally referred to as CP herein) worked as a retail employee for Respondent from about September 2011 through September 2012. (Stip. Exh. 7). At all material times, Respondent has required its new employees, including CP, to execute the Agreement as part of its hiring process and as a condition of employment. (Stip. at p. 3).

On about February 13, 2013, following his separation from employment, CP filed a class and collective action complaint in Los Angeles County Superior Court, alleging *inter alia*, various wage and hour violations. (Stip. Exh. 5). Thereafter, Respondent successfully removed the underlying lawsuit to federal court. (Stip. Exh. 8). And, since at least April 1, 2013 has sought to enforce the provisions of the Agreement, which requires employees to resolve certain disputes arising out of their employment with Respondent exclusively through arbitration, by filing a Motion to Compel Arbitration and Memorandum of Points and Authorities in Support Thereof (Stip. Exh. 6) with the United States District Court for the Central District of California (District Court). While the Agreement, on its face, does not specifically limit employees' claims to individual arbitration (as opposed to class or representative claims), in its Motion to Compel Arbitration and Memorandum of Points and Authorities in Support Thereof (Motion to Compel) Respondent asserts that, under the Agreement, CP's claims must be made individually. (Stip. at pp. 5-6).

On about June 25, 2013, by Order of the District Court, Respondent's Motion to Compel was granted in part and denied in part. It was denied insofar as it sought to prevent CP from pursuing a representative claim under the Private Attorney General Act of 2004 (PAGA)(Cal. Labor Code §2699)[2] in arbitration. Respondent's Motion to Compel was granted insofar as the Order required that the individual claims proceed to arbitration and dismissed all class-wide claims. (Stip. at p. 4; Stip. Exh. 7).

III. ARGUMENT

A. Respondent's *Noel Canning* Argument Lacks Merit

In its exceptions, Respondent argues that this proceeding should be stayed pending the United States Supreme Court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281) and that *Noel Canning* invalidated the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *rev'd*, 737 F. 3d 344 (5th Cir. 2013).

In *Noel Canning,* three judges of the D.C. Circuit Court of Appeal held that former Members Griffin and Block, then-current Board members serving with Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess.[3] On January 13, 2014, the United States Supreme Court heard oral argument in *Noel Canning* and its decision should be forthcoming. Practically speaking, it is unlikely that the Board will decide the instant case before the Court's decision.

B. Maintenance and Enforcement of Agreement Denies Employees' Collective Rights

[2] PAGA gives a private citizen the right to pursue fines that would normally only be available to the state government. As a Private Attorney General, an aggrieved employee is allowed to seek civil penalties not only for violations that he personally suffered but also for violations of "other current or former employees." Cal. Lab. Code § 2699(a). Obviously PAGA provides an efficient mechanism for deterrent and enforcement of wage and hour claims.

[3] Respondent also argues that the Board's decision in *D.R. Horton* is invalid because former Member Becker, who was appointed during an intrasession recess, participated in that decision.

In *D.R. Horton, Inc.*, the Board held that an employer violates Section 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."[4] Thus, in *D.R. Horton*, the Board definitively 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."[5] *Id.*, slip op. at 1.

In the instant case, the Agreement that Charging Party was required to sign does not, on its face, prohibit collective or class action; however, this is its intent as evinced in Respondent's Motion to Compel, wherein it maintained that, "arbitration is the elected and required forum for resolving [Charging Party's] *individual claims*." Further, Respondent requested that the Court grant its motion and issue an order, "dismissing the class and representative claims. . . ." (Stip. Exh. 6 at pp. 7-8) (Emphasis supplied). In view of Respondent's Motion to Compel and the substantially favorable ruling from the U.S. District Court, Respondent has admittedly sought to enforce the Agreement in an unlawful manner.[6]

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[4] The Board in *D.R. Horton* also found that the arbitration policy at issue there violated the Act by requiring employees to submit all employment-related disputes to arbitration. The Board found that this violated Section 8(a)(1) of the Act because it would lead employees to reasonably believe that they were prohibited from filing unfair labor practices with the Board. Here, Respondent's arbitration policy expressly excludes from its coverage the filing of charges with the Board. Hence, that issue is not presented by this case.

[5] Unless overruled by the U.S. Supreme Court, the NLRB's administrative law judges are required to adhere to Board precedent. As such, the administrative law judges' intermediate reports and recommended orders in *Chesapeake Energy Corp*, 2013 NLRB LEXIS 693 (2013) and *Haynes Bldg. Serv.*, 2014 NLRB LEXIS 94 (2014) cited at length by Respondent do not reflect Board law, but merely errant interim decisions.

[6] General Counsel's prosecution is neither barred nor collaterally estopped by the June 25, 2013 Order of the District Court on Respondent's Motion to Compel. In this regard, *NLRB v. Heyman*, 541 F.2d 796(9th Cir. 1976) is not controlling upon the outcome of this case because in *Heyman* the issue before the federal court and the issue before the Board were the same, *i.e.*, the legitimacy of a collective bargaining agreement/relationship. Here, in contrast, the issues of agreement to arbitrate and the legality of that agreement under the NLRA–specifically the preclusion of collective conduct–are not the same.

So, too, Respondent's position that the instant prosecution is barred by *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) fails because its Motion to Compel has an illegal objective and is unlawful under Section 8(a)(1). *Id.*, at 737 n. 5. As such, again, principles of collateral estoppel do not preclude this prosecution. The Board can still order Respondent to: 1) move the District Court to vacate its Order compelling arbitration pursuant to an unlawful agreement; See, e.g. *Steinhoff v. Harris*, 698 F. 2d 270, 275 (6th Cir. 1983); and, 2) reimburse employees for any litigation expenses directly related to opposing Respondent's unlawful Motion to Compel (or any other legal action taken to enforce the Agreement)--in addition to traditional Board remedies.

C. NLRA Is Not Inconsistent with FAA

The instant case does not present a conflict between the Federal Arbitration Act (FAA) and the NLRA for as the Board explained in *D.R. Horton,* "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." 357 NLRB No. 184, slip op. at 12. The Board's explanation rings true because Section 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same reasons any contract may be invalidated, including if they are unlawful or contrary to public policy. *Id.*, slip op. at 11. Inasmuch as the Agreement as enforced is unlawful under the NLRA and against public policy, it should not be enforceable under the FAA.

In *D.R. Horton,* the Board also emphasized that finding an arbitration policy, which prohibits collective or class action, unlawful does not conflict with the FAA because the "intent of the FAA was to leave substantive rights undisturbed." *Id.* Thus, the Agreement, as enforced, is unlawful because it prohibits employees from exercising their Section 7 right to engage in concerted activity, a substantive right, which as the Supreme Court held in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978), includes employees "seek[ing] to improve working conditions through resort to administrative and judicial forums."

Clearly, as was the case in *D.R. Horton*, here, the concern is not with the FAA or with arbitration. The Board's rules neither evince nor are they motivated by any hostility to arbitral resolution of disputes. Importantly, the GC does not take the position here that employees cannot be required to arbitrate their work-related disputes. Indeed, the Board has canons of precedent and policy favoring arbitration of labor disputes as an integral aspect of the statutory scheme. Respondent's enforcement action, however, is cut from different cloth entirely in that it prohibits

workers from exercising their statutory rights to engage in collective legal action to protest their terms of employment. The illegality here rests not on the requirement that claims be arbitrated, but rather that such claims must be arbitrated individually. When such a requirement is insisted upon, as a condition of employment, it contravenes the essential rights granted by Section 7.

Here, just as in *D.R. Horton,* the Agreement, as enforced, requires Respondent's employees to waive their right to engage in concerted activity for mutual aid or protection in that it prohibits all class or collective action in any forum. The FAA makes clear that an arbitration agreement may be set aside on "grounds that exist at law or in equity for the revocation of any contract." 9 USC §2. Inasmuch as the Agreement, as enforced, requires employees, as a condition of employment, to waive rights guaranteed under the NLRA, Respondent has maintained an agreement that may be revoked and should not be enforced under the FAA.

1. Supreme Court Decisions Upholding Individual Arbitration Not Dispositive

Respondent's reliance on *CompuCredit v. Greenwood*, 132 S. Ct. 655 (2011) and *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013), both of which issued after *D.R. Horton*, to support its argument that the Agreement and its enforcement efforts jibe with the FAA, regardless of apparent conflict with the NLRA is misplaced. Moreover, Respondent also cites *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) to demonstrate the Supreme Court's overwhelming approval of individual arbitration agreements.

Such prior pronouncements of the Supreme Court are not necessarily indicators of Respondent's success here—particularly where two of the cases involved credit card privileges. The third case, *AT&T Mobility v. Concepcion*, involved a law enacted by the State of California, which voided waivers of class arbitration of common-law claims under consumer contracts. The Supreme Court found that the state of California's law was *preempted* by the FAA because it addressed only agreements to arbitrate, as opposed to contracts generally. 132 S. Ct. at 1745, 1746.

In *CompuCredit v. Greenwood*, the Supreme Court upheld an arbitration agreement waiving the ability to sue in court for alleged violations of the Credit Repair Organization Act (CROA), 15 U.S.C. §1657 *et seq.*, a federal statute regulating the practices of credit repair organization. The Court rejected the proposition that CROA contained a substantive right to sue—individually or as a class. The Court reaffirmed its reasoning, found in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and other cases, that an "utterly commonplace" provision in a federal statute creating a private right of action does not prohibit an enforceable agreement to arbitrate such claims. 132 S. Ct. at 670.

So, too, in *American Express Co. v. Italian Colors Restaurant,* the Court, again reaffirmed longtime reasoning, as set forth in *Mitsubishi Motors, Inc. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), and held that federal antitrust statutes do not demonstrate a congressional intention or command to preclude waiver of class action procedures; notwithstanding the Court's recognition that individual vindication of antitrust cases would be highly impractical and economically unfeasible.

Neither *CompuCredit v. Greenwood* nor *American Express Co. v. Italian Colors Restaurant* conflicts with the Board's reasoning in *D.R. Horton,* where the Board relied upon the Supreme Court's recognition in *Gilmer* and *Mitsubishi* that the FAA does not require arbitration of statutory claims where it means that a party will "forgo the substantive rights afforded by the statute." *D.R. Horton, supra,* slip op. at 9, quoting *Gilmer, supra* at 26, quoting *Mitsubishi, supra* at 628. This core principle is not disturbed by the Court's decision in *CompuCredit* or *American Express*—two cases where the Court rejected the argument that in the underlying statutes there was a substantive right to collective action.

The NLRA is quite different. In *D.R. Horton,* the Board affirmed the settled principle that a "categorical prohibition of joint, class or collective federal, state or employment law claims in

any forum directly violates *substantive rights vested in employees* [as opposed to labor organizations where perhaps rights may be waived to reach a better bargain] by Section 7 of the NLRA." *D.R. Horton, supra,* slip op. at 9. (Emphasis supplied). On that basis, the Board invalidated the arbitration agreement in *D.R. Horton.* The Board's reasoning is equally valid here and consistent with the Supreme Court's recent decisions in *CompuCredit* and *American Express.* The salient point being that the Board's issue and interest involves the protection of employees' substantive rights, under to the Act, to engage in collective action in order to vindicate their Section 7 rights, including rights which may be legal or contractual.

Accordingly, *AT&T Mobility, CompuCredit* and *American Express v. Italian Colors* are distinguishable from the instant case because of the substantive rights granted in Section 7 of the Act.[7] Finally, Respondent makes much of NLRA's absence of a "congressional command". When it comes to private workplace agreements that unlawfully deny employees of their Section 7 rights, however, Congress's command is imbedded in the Act itself and the substantive rights it affords employees to act collectively or to initiate such collective action.

D. No Time-Bar or Other Impediment to Adjudication or Remedy

In its exceptions, Respondent renews its argument that as of April 8, 2013, when CP filed the underlying charge, the charge was time-barred under Section 10(b) because CP had signed the Agreement when he was first hired in September 2011. Additionally, Respondent again argues

[7] Respondent may also cite various federal courts' decisions that have upheld class action waivers in mandatory arbitration agreements; however, the interpretation and enforcement of the NLRA is, in the first instance, accorded to the Board—not to the federal courts. As such, little weight should be accorded to *Richards v. Ernst & Young*, No. 11-17530, 2013 U.S. App. LEXIS 17488 (9th Cir. Aug. 21, 2013) or *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012).
Parenthetically, in *Morvant*, the district court judge conceded that "the NLRB's analysis in *D.R. Horton,* makes a somewhat compelling argument that agreements that require employees to submit to individual arbitration should not be enforced as against public policy. . . ." And, in Ri*chards*, the employee-plaintiff failed to raise unenforceability under the NLRA until after the parties had briefed, and the district court had denied, Ernst & Young's motion to compel.

that CP's conduct in filing a class action wage and hour lawsuit was not concerted activity. The ALJ properly rejected both of respondent's arguments. (ALJD 5:8-32; 8:5-30).

First, as the ALJ found, there is no issue of bar under Section 10(b) of the Act to this prosecution because Respondent's conduct constitutes a classic continuing violation. An employer commits a continuing violation of the Act throughout the period that an unlawful rule is maintained. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Further, it is well settled that an agreement entered into outside the 10(b) period may be found unlawful within the 10(b) period where its provisions are unlawful on their face or enforced inside the Section 10(b) period. *Teamsters Local 293 (R.L. Lipton Distributing),* 311 NLRB 538, 539 (1993); *Whiting Milk Corp.*, 145 NLRB 1035, 1037-38 (1964), enforcement denied on other grounds, 342 F.2d 8 (1st Cir. 1965). Indeed, as the ALJ noted, the Agreement required CP to arbitrate his employment-related claims even after his termination; and, Respondent sought to enforce the Agreement in court after his separation from employment; and, has continued to insist that all new employees execute the Agreement. (ALJD 5:25-33).

Second, while it's true that when CP commenced legal action against Respondent, he was no longer employed by Respondent, he was asserting rights that inured to him while an employee. Accordingly, Respondent's assertion that CP was no longer protected by Section 7 because his employment had ceased is transparently one-sided and wrong.[8] The notion that once a worker is separated from employment alleged misconduct by his employer is no longer actionable is absurd. So, too, unlawful interference, namely the requirement that CP arbitrate such claims individually, remains actionable and subject to remedy—particularly since according to Respondent CP remained bound by the Agreement in perpetuity.

[8] Specifically, the language of the Agreement provides that "This Agreement to arbitrate shall survive the termination of my employment. . . ."

Finally, CP filed his lawsuit on behalf of himself and all persons similarly situated. (Stip. Exh. 5). Whether he then had existing class-members is immaterial. The NLRA protects employees who engage in individual action "with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB,* 330 F. 3d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglass Corp. v. NLRB,* 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his activity to be concerted. See *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

IV. CONCLUSION

In light of the above and the record as a whole, General Counsel requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the National Labor Relations Act as alleged in the complaint and issue an appropriate remedial order along with a corrected notice to employees.

Dated: 7 April 2014

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions was submitted by E-filing to the Executive Secretary of the National Labor Relations Board on April 7, 2014. The following parties were served with a copy of the same document on April 7, 2014 by electronic mail.

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Dated at Los Angeles, California,
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