

BLANK ROME LLP  
HOWARD M. KNEE (SBN 55048)  
2029 Century Park East, 6<sup>th</sup> Floor  
Los Angeles, CA 90067  
(424) 239-3400  
[knee@blankrome.com](mailto:knee@blankrome.com)

CPS SECURITY SOLUTIONS, INC.  
JIM D. NEWMAN (SBN 133232)  
436 W. Walnut Street  
Gardena, CA 90248  
(310) 878-8165  
[jnewman@cpssecurity.com](mailto:jnewman@cpssecurity.com)

Attorneys for CPS SECURITY (USA), INC.

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CPS SECURITY (USA), INC.,  
a wholly owned subsidiary of  
CPS SECURITY SOLUTIONS, INC

and

DENNIS TALLMAN, an Individual

and

DONALD MIKA, an Individual

and

BERYL HARTER, an Individual

**CPS'S REPLY BRIEF**

CASE NO. 28-CA-072150

CASE NO. 28-CA-075432

CASE NO. 28-CA-075450

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## **I. ARGUMENT IN REPLY**

### **A. THE ADMINISTRATIVE LAW JUDGE'S DECISION SIGNIFICANTLY EXPANDS THE BOARD'S HOLDING IN *D.R. HORTON***

The General Counsel argues that granting CPS's Exceptions to the Decision of the Administrative Law Judge would require the Board "to narrow or overturn its holding in *D.R. Horton, Inc.*" (Opp. Br. 3:5-7). Nothing could be further from the truth. The ALJ Decision significantly expanded the Board's holding in *D.R. Horton* in at least two ways. First, in *D.R. Horton* the Board held that requiring individual arbitration as a mandatory condition of employment violates employee rights under Section 7. This case expands the holding by applying the same reasoning to arbitration agreements that **on their face** are **not mandatory** but which the ALJ concluded were, in effect, compulsory.<sup>1</sup> Second, the ALJ Decision implicitly holds that *any* individual arbitration agreement that prospectively waives the right to maintain either a class or a collective action would necessarily violate Section 7. As the General Counsel argues in its Opposition Brief, "an employer's solicitation and maintenance of such a waiver, even if on an ostensibly 'voluntary' basis, necessarily interferes with employees' exercise of their statutory rights and violates Section 8(a)(1) of the Act." (Opp. Br. 11:6-10). Stated differently, the ALJ decision expands *D.R. Horton* by holding that the public policies in favor of arbitration are subordinate to the public policies underlying Section 7. The ALJ Decision acknowledges that the appellate courts have widely disagreed with the Board's reasoning in *D.R. Horton* even in the circumstances of that case, where there was no question that the employer required its employees to **waive all rights** to engage in collective action as a condition of

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<sup>1</sup> The ALJ Decision acknowledged that the "Offer to Participate" in arbitration stated **on its face** that it "was not a condition of employment." (ALJ Dec. 8:1-3). The Decision also acknowledges that the Agreement was revocable for at least 30 days after signing (ALJ Dec. 6:1-17). Nevertheless, the ALJ concluded that the arbitration agreement and the class action waiver *was* a condition of employment, based upon "the circumstances surrounding the actual execution of these agreements." (ALJ Dec. 8:3-4). He reached this conclusion despite the fact that a state court judge had already made a contrary fact finding in private lawsuits commenced by the Charging Parties.

employment. Here the Board is not just being asked to affirm its prior precedent; it is being asked to “double down” on an already significant gamble.

**B. CPS’S EXCEPTIONS CHALLENGE THE ALJ’S LEGAL CONCLUSIONS, NOT HIS CREDIBILITY DETERMINATIONS**

The General Counsel argues that CPS’s Exceptions improperly attack the ALJ’s credibility findings, but that is not so. Rather, CPS challenges the factual and legal conclusions that the ALJ reached from the testimony that he credited. At the hearing, one of the Charging Parties, Beryl Harter, did not testify. Another, Dennis Tallman, testified that he felt rushed to sign the new hire paperwork and therefore signed the arbitration agreement without reading it. The third Charging Party, Donald Mika, testified that he read the agreement but did not understand its terms. Based upon this testimony, the ALJ concluded that acceptance of the arbitration agreement was a mandatory condition of employment. That conclusion contradicts the findings of Nevada state court Judge Susan Johnson, who concluded that the language of the documents the employees signed controlled the construction of those agreements. Even crediting the testimony of both Mr. Tallman and Mr. Mika, an employee’s failure to read or comprehend an arbitration agreement does not excuse non-performance. *Schoeffel v. United States*, 193 Ct. Cl. 923, 934-35 (1971) (A party’s failure to read an agreement “is really no excuse for saying that they did not know what it contained when they are not illiterate. 17 C.J.S. *Contracts* §§ 41g, 141 (1963). Any other rule would throw chaos into all contract arrangements because a party could avoid responsibility thereunder at his convenience simply by saying that he had signed the contract without reading it.”) *Accord, Northern Illinois Terrazo Co.*, 290 NLRB 36 (employer’s failure to read contract did not excuse performance).

**C. THE NLRB DOES NOT HAVE THE AUTHORITY TO ALLOCATE THE PAYMENT OF ATTORNEY’S FEES IN STATE COURT LITIGATION COMMENCED BY AN EMPLOYEE AGAINST HIS EMPLOYER, PARTICULARLY WHERE THE EMPLOYEE IS NOT A MEMBER OF A COLLECTIVE BARGAINING UNIT.**

The order compelling CPS to pay Charging Parties’ attorney fees is completely unwarranted. The allocation of attorney’s fees in the state court proceeding must be determined

by the Nevada courts, not the NLRB. Moreover, this cannot even remotely be characterized as a make-whole remedy, since there is no evidence in the record that Charging Parties ever paid their attorneys any fees – this should come as no surprise since other court pleadings (not offered by the General Counsel in this case) negate this fact.

The General Counsel argues that “to succeed on Respondent’s exceptions regarding the remedy, the Board would have to abandon its standard remedies and leave the employees who were subjected to the unfair labor practices without any identifiable remedy.” (Opp. Br. 3:2-4). But obviously, if the Board and the appellate courts agree that the maintenance of the arbitration agreements was an unfair labor practice, that finding, together with an appropriate workplace posting, would provide the affected employees with an appropriate remedy. But whether or not they would be entitled to recover their attorney’s fees in the state court proceeding would, and should, be up to the state court tribunals. Interfering in those judicial processes, especially where the litigation was initiated by the employees themselves, is bad public policy and could also violate the Eleventh Amendment to the U.S. Constitution.

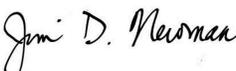
**II. CONCLUSION**

For these reasons, and the reasons set forth in CPS’s Exceptions and Opening Brief, the Board should reverse the Decision of the ALJ and hold that CPS did not violate the Act by enforcing the acceptance of the Offers to Arbitrate by the Charging Parties.

DATED: May 6, 2014

BLANK ROME LLP

CPS SECURITY SOLUTIONS, INC.

By:   
\_\_\_\_\_  
JIM D. NEWMAN  
Attorneys for CPS SECURITY (USA), INC.

**AFFIDAVIT OF SERVICE**

I hereby certify that on May 6, 2014, I filed and served via NLRB E-Filing and Electronic Mail, the following documents: **CPS'S REPLY BRIEF** on the parties in this action by serving:

**Via E-Filing**

Honorable Michael Marcionese  
Administrative Law Judge  
NLRB – Division of Judges  
401 West Peachtree Street NW  
Suite 1708  
Atlanta, GA 30308-3510

**Via Electronic Mail**

Larry A. "Tony" Smith  
National Labor Relations Board  
Region 28 – Las Vegas Resident Office  
600 Las Vegas Boulevard South  
Suite 400  
Las Vegas, NV 89101-6637  
Email: [Larry.Smith@nlrb.gov](mailto:Larry.Smith@nlrb.gov)

**Via Electronic Mail**

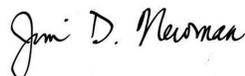
Howard M. Knee  
Blank Rome LLP  
Email: [knee@blankrome.com](mailto:knee@blankrome.com)

**By E-Mail Electronic Transmission:** I caused the documents to be sent to the person(s) at the following e-mail address [Larry.Smith@nlrb.gov](mailto:Larry.Smith@nlrb.gov) and [knee@blankrome.com](mailto:knee@blankrome.com) on May 6, 2014.

Executed on May 6, 2014, at Gardena, California.

**STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

**FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



\_\_\_\_\_  
Jim D. Newman