

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

FUJI FOODS PRODUCTS, INC.

and

Case 21-CA-095997

NANCY SANDRA GONZALEZ, an Individual

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 (General Counsel) files this Answering Brief to the Respondent's Exceptions to the Decision and Recommended Order (ALJD) of Administrative Law Judge Jeffrey Wedekind (ALJ Wedekind).

ALJ Wedekind correctly found that Fuji Food Products, Inc. (Respondent) engaged in unfair labor practices by (1) since December 28, 2012, seeking, through a state court, to compel individual arbitration of the class-action wage and hour lawsuit filed by Charging Party Nancy Sandra Gonzalez (Gonzalez), pursuant to the mandatory arbitration provisions of the Confidential Information and Inventions Agreement (CIIA) Gonzalez had been required to sign as a condition of employment with Respondent; and (2) since at least January 2, 2013, maintaining provisions in the CIIA requiring employees to submit all employment-related disputes, including those arising under federal statutes, to final and binding arbitration – in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).

This case, the facts of which are undisputed, presents solely issues of law related to the decision of the National Labor Relations Board (Board) in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enforcement granted in part, reversed in part, 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. Thus, contrary to Respondent's assertions, the instant case is controlled by the Board's decision in *D. R. Horton, supra*.

Procedural Background

On March 24, 2014, the General Counsel, Respondent, and Gonzalez jointly submitted a Stipulation of Facts, Motion to Submit Case on Stipulation, and Motion to Forgo Submission of Short Position Statements (Stipulation) to ALJ Wedekind. Following ALJ Wedekind's March 25, 2014 Order Granting the Joint Motion, Approving Stipulation, and Setting Time for Filing Briefs, briefs were filed on April 29, 2014. Following the July 15, 2014 issuance of ALJ Wedekind's decision, Respondent filed its Exceptions to the ALJD on August 12, 2014. The Executive Secretary of the NLRB granted the extension of time requested by the General Counsel for the filing of an answering brief and/or cross exceptions.

II. Statement of Facts

On or about July 10, 2009, Respondent initially hired Gonzalez to work in its Sante Fe Springs, CA facility as a Logistic Warehouse Assistant. (ALJD p. 1, Stip. par. 5).¹ On that date, Gonzalez was required, as a condition of employment, to sign the CIIA. (*Id.*, Stip. par. 5, Exhibit 5). Among other things, the CIIA set forth that Gonzalez agreed, "as a condition of" and "in consideration for" Fuji's offer of employment, to resolve "all disputes relating to all aspects of the employer/employee relationship, . . . including, but not limited to . . . claims for wrongful discharge . . . [and] claims for violation of any federal . . . statute," by "final, conclusive and binding" arbitration. The CIIA did not, however, specifically address whether the disputes could be arbitrated on a class or collective basis.

¹ References to ALJ Wedekind's July 15, 2014 decision will be referred to as "ALJD," followed by the page number and line numbers referenced. References to the stipulated record are set forth as follows: "Stip." refers to the Stipulation of Facts and will be followed by the relevant paragraph number(s). Exhibits to the Stipulation of Facts, which make up the remainder of the Stipulated Record, are identified as Exhibits, followed by the Exhibit number.

The relevant portions of the CIIA are as follows:

FUJI FOOD PRODUCTS, INC.
CONFIDENTIAL INFORMATION AND INVENTIONS AGREEMENT

As a condition of my employment with Fuji Food Products, Inc., its subsidiaries, affiliates, successors, or assigns (together, the "Company"), and in consideration of my employment with the Company and my receipt of the compensation now and hereafter paid to me by [the] Company, I agree to the following:

.....

10. Arbitration and Equitable Relief

10.1 Arbitration.

EXCEPT AS PROVIDED IN SECTION 10.2 BELOW, I AGREE THAT ANY DISPUTE OR CONTROVERSY ARISING OUT OF, RELATING TO, OR CONCERNING ANY INTERPRETATION, CONSTRUCTION, PERFORMANCE OR BREACH OF THIS AGREEMENT, SHALL BE SETTLED BY ARBITRATION TO BE HELD IN LOS ANGELES COUNTY, CALIFORNIA, IN ACCORDANCE WITH THE RULES THEN IN EFFECT OF JAMS. THE ARBITRATOR MAY GRANT INJUNCTIONS OR OTHER RELIEF IN SUCH DISPUTE OR CONTROVERSY. THE DECISION OF THE ARBITRATOR SHALL BE FINAL, CONCLUSIVE AND BINDING ON THE PARTIES TO THE ARBITRATION. JUDGMENT MAY BE ENTERED ON THE ARBITRATOR'S DECISION IN ANY COURT HAVING JURISDICTION. THE COMPANY AND I SHALL EACH PAY ONE-HALF OF THE COSTS AND EXPENSES OF SUCH ARBITRATION AND EACH OF US SHALL SEPARATELY PAY OUR COUNSEL FEES AND EXPENSES.

THIS ARBITRATION CLAUSE CONSTITUTES WAIVER OF EMPLOYEE'S RIGHT TO A JURY TRIAL AND RELATES TO THE RESOLUTION OF ALL DISPUTES RELATING TO ALL ASPECTS OF THE EMPLOYER/ EMPLOYEE RELATIONSHIP (EXCEPT AS PROVIDED IN SECTION 10.2 BELOW), INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING CLAIMS:

I. ANY AND ALL CLAIMS FOR WRONGFUL DISCHARGE OF EMPLOYMENT; BREACH OF CONTRACT, BOTH EXPRESS AND IMPLIED; BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING, BOTH EXPRESS AND IMPLIED; NEGLIGENT OR INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS; NEGLIGENT OR INTENTIONAL MISREPRESENTATION; NEGLIGENT OR INTENTIONAL INTERFERENCE WITH CONTRACT OR PROSPECTIVE ECONOMIC ADVANTAGE; AND DEFAMATION;

II. ANY AND ALL CLAIMS FOR VIOLATION OF ANY FEDERAL, STATE OR MUNICIPAL STATUTE, INCLUDING, BUT NOT LIMITED TO, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE CIVIL RIGHTS ACT OF 1991, THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE FAIR LABOR STANDARDS ACT, THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT, AND LABOR CODE SECTION 201, ET. SEQ.;

III. ANY AND ALL CLAIMS ARISING OUT OF ANY OTHER LAWS AND REGULATIONS RELATING TO EMPLOYMENT OR EMPLOYMENT DISCRIMINATION.

10.2 Equitable Remedies

I AGREE THAT IT WOULD BE IMPOSSIBLE OR INADEQUATE TO MEASURE AND CALCULATE THE COMPANY'S DAMAGES FROM ANY BREACH OF THE COVENANTS SET FORTH IN SECTIONS 2, 3, 4, 5, AND 8 HEREIN. ACCORDINGLY, I AGREE THAT IF I BREACH ANY OF SUCH SECTIONS, THE COMPANY WILL HAVE AVAILABLE, IN ADDITION TO ANY OTHER RIGHT OR REMEDY AVAILABLE, THE RIGHT TO OBTAIN AN INJUNCTION FROM A COURT OF COMPETENT JURISDICTION RESTRAINING SUCH BREACH OR THREATENED BREACH AND TO SPECIFIC PERFORMANCE OF ANY SUCH PROVISION OF THIS AGREEMENT. I FURTHER AGREE THAT NO BOND OR OTHER SECURITY SHALL BE REQUIRED IN OBTAINING SUCH EQUITABLE RELIEF AND I HEREBY CONSENT TO THE ISSUANCE OF SUCH INJUNCTION AND TO THE ORDERING OF SPECIFIC PERFORMANCE.

10.3 Consideration

I UNDERSTAND THAT EACH PARTY'S PROMISE TO RESOLVE CLAIMS BY ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THIS AGREEMENT, RATHER THAN THROUGH THE COURTS, IS CONSIDERATION FOR THE OTHER PARTY'S LIKE PROMISE. I FURTHER UNDERSTAND THAT I AM OFFERED EMPLOYMENT IN CONSIDERATION OF MY PROMISE TO ARBITRATE CLAIMS.

Gonzalez worked for Respondent as a Logistic Warehouse Assistant for about 3 months, until her employment ended on or about October 14, 2009. (ALJD p. 1, Stip. par. 6(a)).

The following year, Gonzalez re-applied to work for Respondent, and was re-hired, on or about October 6, 2010, again as a Logistic Warehouse Assistant. (*Id.*). As of October 2010, Respondent no longer required newly-hired employees to sign the CIIA, and, instead, had begun using a document entitled Employment Agreement (*Id.*, Stip. par. 7). In connection with her rehire, as a condition of employment, Respondent required Gonzalez to execute the Employment Agreement. (ALJD p. 1, Stip. par. 6(a), Exhibit 6). The Employment Agreement does not

incorporate the CIIA by reference,² and, unlike the CIIA, it does not include a mandatory arbitration provision. (ALJD p. 1, Exhibit 6, Section E.10).

After being hired the second time, Gonzalez worked for Respondent for about 9 months, and her employment with Respondent ended on or about July 28, 2011. (ALJD p. 2: 6-7, Stip. par. 6(c)).

About 11 months later, on or about June 28, 2012, Gonzalez filed a putative class-action lawsuit in the Los Angeles Superior Court -- *Nancy Sandra Gonzalez v. Fuji Food Products, Inc.*, Case Number BC487352 (Class Action Lawsuit) -- on behalf of herself and other similarly situated current and former employees³ of Respondent, alleging, among other claims, wage-and-hour violations under the California Labor Code. (ALJD p. 2: 7-11, Stip. Ex. 8(a), Exhibit 7).

Thereafter, Gonzalez proposed that the parties agree to resolve the claims of the Class Action Lawsuit through class arbitration. (ALJD p. 2:13, Stip. par. 9(a), Exhibit 10). On December 21, 2012, Respondent declined to do so, and then, on or about December 28, 2012, filed a Motion to Compel Arbitration, Dismiss Class Action Claims, and Stay Proceedings Pending Arbitration (Motion to Compel). (ALJD p. 2: 13-20, Stip. par. 9(a)-(b), Exhibits 10-11). The Motion to Compel relied upon the mandatory arbitration provision of the CIIA. By its Motion to Compel, Respondent sought to enforce the CIIA, signed by Gonzalez in 2009, so as to, *inter alia*, compel Gonzalez to submit the claims of the Class Action Lawsuit to individual (non-class) arbitration. (ALJD p. 2: 14-20, Stip. par. 9(b), Exhibit 11). On January 25, 2013, Gonzalez

² "This Agreement contains the entire agreement between you and the Company concerning its subject matter. It takes priority over all previous similar agreements. This Agreement shall be effective on the date you sign it below..."

³ On or about August 22, 2013, Gonzalez filed a motion seeking leave to amend the Class Action Lawsuit to include the following former employees of Respondent as additional class representatives: Maria Jimenez, Dailyn Pacheco, and Anselmo Zamora. On or about October 24, 2013, Respondent filed an opposition to this motion. As of March 24, 2014, Gonzalez' motion to amend was pending.

responded by filing an opposition to Respondent's Motion to Compel, and as of March 24, 2014, the matter remained pending.⁴ (ALJD p. 2: 22-25, Stip. Par. 9(d), Exhibit 12).

On January 7, 2013, Gonzalez filed the unfair labor practice charge in this matter, and then filed an amended charge, which was served on July 2, 2013. (ALJD p. 2: 27-33, Stip. par. 2(a)). Upon this charge, the Regional Director for Region 21 issued a Complaint and Notice of Hearing against Respondent on July 8, 2013. (*Id.*)

Included among the stipulated facts contained within the stipulated record submitted to ALJ Wedekind on March 24, 2014, were the following: as of March 24, 2014, of Respondent's then-current employees, there were approximately three who were hired on or before October 6, 2010, and who had been required to sign the CIIA, but had not signed the Employment Agreement. (ALJD 2: 1-4, Stip. par. 7(b)-(c)). As of March 24, 2014, Respondent had not rescinded the CIIA with respect to these employees. (ALJD 2: 1-4, Stip. par. 7(d)).

III. ARGUMENT

A. The Underlying Board Charge Was Timely Filed

Respondent argues that Gonzalez' Board charge was not timely filed on January 7, 2013, asserting that the 6 month statute of limitations began when Gonzalez signed the CIIA on July 10, 2009. To the contrary, the relevant reference point was December 21, 2012, the date Respondent filed its Motion to Compel, relying upon the CIIA, enforcing and continuing to maintain it. In his decision, ALJ Wedekind correctly rejected Respondent's argument, setting

⁴ In addition to the Class Action Suit, Gonzalez also filed a separate, non-class action, discrimination lawsuit against Respondent - *Nancy Sandra Gonzalez v. Fuji Food Products, Inc.*, Case No. BC487714. In that case, Respondent also filed a motion to compel arbitration, which relied upon the Agreement. This motion was denied by the Honorable Michael Johnson of Los Angeles Superior Court on September 20, 2013. As set forth in Exhibit 13, Judge Johnson determined that the Employment Agreement superseded the CIIA, rendering its terms unenforceable. (Stip. par 9(e), Exhibit 13).

forth a well-reasoned argument, concluding that Gonzalez would have had no reason or basis to file a charge regarding the CIIA until Respondent filed its Motion to Compel, so her charge, filed less than one month thereafter, was timely filed.⁵ (ALJD p. 5:23-6:2)

In support of this conclusion, ALJ Wedekind noted that under well-established precedent, Respondent's maintenance and enforcement of the CIIA (which Gonzalez was required to execute as a condition of hire) constituted a continuing violation for purposes of tolling the Section 10(b) statute of limitations; and, furthermore, the limitations period does not begin to run until a party has clear and unequivocal notice, either actual or constructive, of a violation (case citations omitted) (ALJD p. 4: 25-6:8).

B. *DR Horton* Remains Valid Board Precedent, Does Not Conflict with the FAA or Related Supreme Court Precedent, and is Applicable in this Case

ALJ Wedekind correctly concluded that, contrary to the Respondent's assertions, following the Fifth Circuit's December 3, 2013 decision, the Board's decision in *D. R. Horton, supra*, is, and will remain, valid Board law until such time as the United States Supreme Court, or the Board itself, expressly overrules it.⁶ See *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (Board's administrative law judges are bound to follow Board precedent that the Supreme Court of the United States has not reversed); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enf'd.*, 640 F.2d 1017 (9th Cir. 1981) (same). (ALJD p. 3: 21-35).

Furthermore, contrary to Respondent's assertions, the Board's continued reliance on *D.R. Horton, supra* does not conflict with the Federal Arbitration Act (FAA), or recent U.S. Supreme

⁵ It should also be noted that by having failed to rescind the CIIA as to any of its current employees who were hired on or before October 6, 2010, Respondent has continued to maintain the CIIA as to no fewer than three of its current (as of March 24, 2014) employees. (Stip. Par. 7(b)-(d)).

⁶ Even assuming arguendo that the California Supreme Court's decision in *Iskanian v. CLS Trans. Los Angeles, LLC*, ___ Cal.4th ___ (June 23, 2014) is at all relevant to the facts of this case, it is not binding upon the Board.

Court authority interpreting the FAA. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). The Board has acknowledged that the provisions of the FAA evince a “liberal policy favoring arbitration agreements,” so long as such agreements do not preclude employees from exercising their substantive rights under Section 7 of the Act, which rights include the filing and pursuit of class-action claims as a form of protected concerted activity. *D.R. Horton, supra*, slip op. at p.8. The Board acknowledged the interplay between the FAA and the Act, and reasoned that the ruling in *D.R. Horton* was consistent with Supreme Court precedent which found the FAA inapplicable when an arbitration agreement precluded employees from exercising a substantive right.

Accordingly, ALJ Wedekind correctly noted that this case, like *D.R. Horton*, is distinguishable from *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (Jan. 10, 2012); and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (June 20, 2013). As in *D.R. Horton*, the instant case is concerned with mandatory arbitration agreements in the context of individual employment agreements and the well-established substantive right of employees under the Act to engage in concerted legal action against their employer, as opposed to mandatory individual arbitration provisions contained within credit card use and acceptance agreements. (ALJD p. 3: 27-35).

C. ALJ Wedekind Correctly Concluded that the Facts Establish a Violation of Section 8(a)(1)

Contrary to Respondent’s claim, Gonzalez did not voluntarily execute the CIIA when she was hired. Not only did Respondent stipulate that it required Gonzalez to sign the CIIA as a condition of employment, but the very terms of the document set forth this requirement, as noted by ALJ Wedekind (ALJD p. 5: 17-18, Stip. par. 5, Exhibit 5).

In addition, ALJ Wedekind properly rejected Respondent's assertion that Gonzalez did not have standing to file the underlying charge, as a former employee, noting that under the Act, a charge may be filed by "any person," and that the definition of "employee" under the Act includes former employees. (ALJD p. 4: 6-23).

Respondent argues that a violation of Section 8(a)(1) cannot be established on the facts of this case because Gonzalez did not engage in 'concerted activity' by filing her Class Action Lawsuit. Respondent asserts that because Gonzalez was, initially, the only named plaintiff,⁷ she did not act for the "purpose of mutual aid or protection," or "with or on the authority of other employees," nor was she "seek[ing] 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).

Contrary to Respondent's assertions, *D. R. Horton* continues to stand for the proposition that an individual employee, by filing a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, is seeking to initiate or induce group action, and is engaged in conduct protected by Section 7. *supra*, slip op. at 4. Therefore, Gonzalez engaged in conduct protected by Section 7 of the Act when she filed her Class Action Lawsuit on June 28, 2012, irrespective of whether she talked to other employees about it, either before or after filing it. Therefore Respondent violates Section 8(a)(1) of the Act by continuing to enforce the CIIA because it acts to interfere with these protected rights.

Finally, Respondent argues that the CIIA is not facially unlawful, contrary to ALJ Wedekind's findings, asserting that employees could not reasonably understand it to interfere with their right to engage in protected concerted activities, or to file a charge with the Board. To

⁷ Significantly, ALJ Wedekind did not reach this issue because after Gonzalez amended the lawsuit to name three other former employees as class representatives, Respondent continued to maintain its Motion to Compel, seeking to compel the individual arbitration of the claims now raised by four employees on behalf of a larger class.

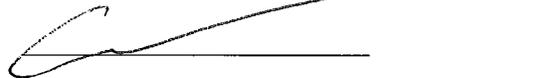
the contrary, as ALJ Wedekind succinctly concludes, the CIIA is clearly unlawful because it explicitly states that all employment disputes arising under federal law must be submitted to arbitration, but contains no exception for filing charges with the Board. Under the current Board precedent of *D.R. Horton* the maintenance of such an agreement violates Section 8(a)(1). *Supra*, 357 NLRB fn. 2 (ALJD p. 6: 12-33).

IV. Conclusion

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

Dated at Los Angeles, California, this 26th day of September, 2014

Respectfully Submitted,



Cecelia F. Valentine
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National Labor Relations Board, Region 21

Statement of Service

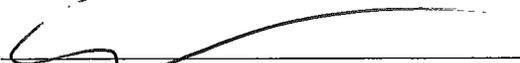
I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions to the Recommended Decision of the Administrative Law Judge was submitted for e-filing to the Office of the Executive Secretary of the National Labor Relations Board on September 26, 2014

The following parties were served with a copy of said document by electronic mail on September 26, 2014

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Dated at Los Angeles, California, this 26th day of September, 2014


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