

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO, CALIFORNIA

INTER-COAST INTERNATIONAL
TRAINING, INC. dba INTERCOAST
COLLEGES

and

Case 31-CA-131805

IRMA MALDONADO, an Individual

RESPONDENT'S BRIEF IN SUPPORT OF
THE DENIAL OF ANY RELIEF ON THIS COMPLAINT

To: The Honorable Lisa D. Thompson
Administrative Law Judge
National Labor Relations Board
901 Market Street, Ste. 300
San Francisco, CA 94103

Submitted By:

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I. INTRODUCTION

Counsel for Respondent Inter-Coast International Training, Inc. (doing business as Inter-coast Colleges ("Respondent") and Counsel for General Counsel of the NLRB ("GC"), collectively referred to as the Parties, unopposed by Charging Party, have executed a Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts to the Division of Administrative Judges in the captioned case. Pursuant to Section 102.35(a)(2) of the NLRB's Rules and Regulations, Respondent's Counsel timely submitted its short statement of position on the issues presented by this Stipulation. Respondent now formally submits its Brief in support of a ruling that the instant Charge should be dismissed, rejected, and no relief should be awarded based upon this Charge.

A. THE INSTANT CHARGE WAS UNTIMELY AND WAS TIME BARRED WHEN FIRST FILED.

The instant Charge was first filed on June 30, 2014. However, the suspect conduct was the filing of a Petition to Compel Binding Arbitration, which was filed on May 31, 2012 and decided by the Trial Court on June 12, 2012; an appeal of the Order Denying the Petition to Compel Binding Arbitration was filed on June 15, 2012. The Court of Appeal Ruling was issued on August 21, 2013; a Remittitur was issued on October 23, 2013.

The Decision of the Court of Appeal was essentially that the Petition to Compel Binding Arbitration was premature since the Trial Court would not have jurisdiction over the Putative Class Members to consider binding arbitration until the Class was Certified. (A copy of the Decision is attached hereto as Exhibit "A").

There is no reasonable interpretation of this Charge other than to state that it was predicated upon the 2012 attempt to enforce the Binding Arbitration Agreement in the Nguyen v. Inter-Coast Lawsuit, pending as LASC Case No. BC 461 585.

As such, the instant charge is not timely and is time barred by the six month rule in Section 10(b) of the Act.

However, in a very obvious bootstrapping argument, Petitioner claims that another pleading, filed after the Court of Appeal clearly stated that all issues regarding the Binding Arbitration Agreement would be moot until the Class was Certified, is somehow an act which is subject to this Charge. Petitioner now claims that a Motion to Dismiss/Strike Class Allegations was the exact same action as a Petition to Compel Binding Arbitration. That Motion was filed on January 29, 2014, but was never heard by the Court. That Motion was withdrawn and instead, the Motion for Class Certification was heard on September 21, 2015. It was only after September 21, 2015 that the issue of a

Petition to Compel Binding Arbitration could be revisited. That Motion does mention, in one minor point, the existence of an binding arbitration agreement, but does not, in any way, shape, or form, attempt to enforce the binding arbitration agreement in a way which could support the instant charge.

There is nothing about a Motion to Dismiss/Strike, which by Law of the Case could not enforce binding arbitration, filed on January 29, 2014, but never heard, which could be a basis for a violation of the Act.

This charge is time barred and was untimely when it was filed. All relief should be denied on this separate ground.

II. RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) OF THE ACT.

Respondent did not violate Section 8(a)(1) of the Act. Respondent did not maintain and even attempt to enforce an arbitration agreement within the Section 10(b) period.

While there was an Addendum to its Employee Manual which allowed employees to "opt in" or "opt out" to such an arbitration arrangement, such an arbitration arrangement was not "mandatory" and was not "a condition of employment." Some employees signed the agreement; some did not.

There was not a "mandatory arbitration agreement,"

"not a condition of employment" and therefore, the allegation that NLRB's prior decision in D.R. Horton applies is inopposite. The provisions of the arbitration agreement are "elective". The arbitration agreement was not "part" of the employee manual or handbook. Respondent relies upon Ninth Circuit and Other Circuit decisions which disagree with the NLRB's position regarding mandatory arbitration agreements, along with the relevant U.S. Supreme Court decisions which also allow enforcement of mandatory arbitration agreements.

In particular, the United States Supreme Court has held that class arbitration waivers are enforceable. AT & T Mobility LLC v. Concepcion (2011) 131 S.Ct. 1740. In addition, in Oxford Health v. Sutter (June 10, 2013), 133 S.Ct. 2064, the U.S. Supreme Court upheld an arbitrator's decision that interpreted a garden variety arbitration agreement as allowing for class arbitration. The question the Supreme Court faced in Oxford Health was whether the arbitrator had exceeded his authority in allowing class arbitration.

In American Express v. Italian Colors Restaurant (decided June 20, 2013), 133 S.Ct. 2304, the U.S. Supreme Court reaffirmed the importance of the Court's Decision in AT & T Mobility, supra, that class action waivers are indeed enforceable.

In Owen v. Bristol Care (8th Cir. 2013)

702 F.3d 1050, the Court of Appeal for the 8th Circuit expressly held that a class action waiver of claims under the Fair Labor Standards Act was enforceable despite the ruling of the NLRB in D.R. Horton.

In Richards v. Ernst & Young LLP (9th Cir. 2013) 744 F.3d 1072, three employees brought wage and hour claims against their employer, the Ninth Circuit expressly rejected D.R. Horton and stated: ". . . the only court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in D.R. Horton because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies underlying the Federal Arbitration Act."

California Courts have analyzed arguments that the NLRA prevents enforcement of class action waivers and rejected them. See, e.g., Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal. 4th 348, 373 ["We thus conclude, in light of the FAA's liberal federal policy favoring arbitration, that sections 7 and 8 of the NLRA do not represent a contrary congressional command overriding the FAA's mandate."]; Nelsen v. Legacy Partners Residential, Inc. (2012) 207 Cal.App.4th 1115, 1132-35 (refusing to follow D.R. Horton, Inc.)

Respondent understands that the NLRB has an opinion on this issue and has refused to consider the

United State Supreme Court Opinions above and refuses to consider the Ninth Circuit, Eighth Circuit, DC Circuits, and majority of Federal Circuits which do not support the DR Horton Ruling(s). It may well be that the only way for Respondent to have an impartial and fair ruling on this issue is with the Ninth Circuit or DC Circuit on its Appeal of the instant Ruling. However, the Ruling in H.R. Horton is wrong, is contrary to most Circuit Rulings, and, in addition, the instant Charge is time-barred, a matter which is factual and not based upon the DR Horton Decision(s).

III. THE REMEDIES SOUGHT IN THE AMENDED COMPLAINT ARE NOT APPROPRIATE.

The Amended Complaint is also untimely, and is time-barred for the reasons set forth in Section I above.

The request for litigation expenses arising from a State Court Proceeding is without any precedent. The Motion to Strike Class Allegations was never heard by the Court, and was withdrawn in lieu of a Motion for Class Certification heard on September 23, 2015. The issue of binding arbitration was not a major issue either on the Motion to Strike or Class Certification, because the Court of Appeal ruled in August, 2013, that binding arbitration was irrelevant and moot until the Court granted Class Certification, an event which did not occur until September 23, 2015. Furthermore, Mr. Nguyen has no standing to pursue attorneys' fees and costs outside of the Nguyen Litigation,

and is not a complaining or charging party in this proceeding. Respondent exercised its due process rights regarding binding arbitration in 2012 and 2013, and the Motion to Strike Class Allegations was based primarily upon issues completely unrelated to the arbitration agreement -- reimbursement of expenses regarding a withdrawn motion which does not bear on any material issue in this proceeding would not be warranted or proper. Mr. Nguyen has not intervened in this action and has not sought any remedies in this action.

Ms. Maldonado has not incurred any expenses in the Nguyen action and has never been a party to the Nguyen action.

There is no other relief which would be proper as to either Ms. Maldonado, who has never, ever participated in this action, and even submitted a request to withdraw this Charge which was ignored by Petitioner.

IV. CONCLUSION

The instant Charge should be dismissed as untimely and without merit on all issues raised by the Joint Stipulation.

Dated: February 16, 2015.

/s/ Neil C. Evans

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Filed 8/21/13 Nguyen v. Inter-Coast International Training CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANTHONY NGUYEN,

Plaintiff and Respondent,

v.

INTER-COAST INTERNATIONAL
TRAINING, INC.,

Defendant and Appellant.

B241938

(Los Angeles County
Super. Ct. No. BC461585)

APPEAL from an order of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Fine, Boggs & Perkins, John P. Boggs, David J. Reese, and Ian G. Robertson for Defendant and Appellant.

Acquitas Law Group, Ronald H. Bac, and Joseph Cho for Plaintiff and Respondent.

In this putative class action, some putative class members have signed an arbitration agreement with defendant, but the majority, including the prospective lead plaintiff, have not. Before the class certification motion was heard, defendant moved to compel arbitration and stay this litigation. The prospective lead plaintiff objected on several grounds, including the lack of personal jurisdiction over the putative class members who, until a class is certified, are not parties to this litigation. After the court denied the motion on this and other grounds, defendant appealed. Finding no error, we affirm.

BACKGROUND

In May 2011, the prospective lead plaintiff, Anthony Nguyen, filed a putative class action complaint for alleged wage and hour violations against his former employer, defendant Inter-Coast International Training, Inc. (Inter-Coast). The complaint “sought to establish a class of all non-exempt employees employed by Defendant for the four years prior to the filing of his Complaint.”

After the complaint was filed, Inter-Coast entered into an arbitration agreement with its current employees.¹ It is undisputed that Inter-Coast has no arbitration agreement with Nguyen and a majority of the putative class members. Based on the briefs and record on appeal, it appears that the putative class is comprised of 220 individuals, 59 of whom have signed an arbitration agreement.

When Nguyen requested employment information concerning several putative class members, Inter-Coast moved to compel arbitration and stay this litigation.

¹ The arbitration agreement stated in relevant part: “I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another . . . arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise . . . shall be submitted to and determined exclusively by binding arbitration. . . . I agree that the arbitration and this agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act.”

Although Nguyen and a majority of the putative class members did not sign an arbitration agreement, Inter-Coast stated in its moving papers that “Plaintiff ANTHONY NGUYEN and a significant portion of the putative class members in this case agreed to arbitrate any employment-related disputes they had or would have with their employer, INTER-COAST INTERNATIONAL TRAINING, INC. Accordingly, the Court should now order these persons to honor their agreements and arbitrate their claims.”

In opposition, Nguyen informed the court that he did not sign an arbitration agreement and that until a class is certified, he is the only plaintiff before the court: “The only two parties to this litigation are Plaintiff Anthony Nguyen and Defendant Inter-Coast Colleges, and Defendant has not submitted a written agreement between these parties to arbitrate. Without this agreement, the Court has no authority to compel arbitration[.]” Nguyen further asserted that “[p]utative class members are not party to a class action until the class has been certified. See Sky Sports, Inc. v. Superior Court, 201 Cal.App.4th 1363, 1369 (2011); see also Lee v. Southern California University [for] Professional Studies, 148 Cal.App.4th 782, 786 (2007). As the Court knows, this class has not been certified. Until the class is certified, Defendant’s agreements with the putative class members to arbitrate cannot be enforced in this action. The Court should therefore deny the Petition.”

At the hearing below, the trial court acknowledged its lack of “jurisdiction over people who are not in court. Until or unless the class is certified, I don’t have anybody here [who signed an arbitration agreement].” According to the written order and reporter’s transcript, the court denied the motion for the following reasons: (1) because there was no evidence that Nguyen had signed an arbitration agreement, there was no basis to enforce the agreement against him; (2) until a class is certified, the court lacks personal jurisdiction over the putative class members; (3) even assuming Nguyen had signed an arbitration agreement, Inter-Coast had waived its right to compel arbitration by actively litigating the matter for over a year without seeking to enforce the agreement until two months before trial; and (4) Inter-Coast had failed to comply with Code of Civil

Procedure section 1281.2,² which requires the party seeking to compel arbitration to plead and prove that a demand for arbitration had been made and refused.

Inter-Coast timely appealed from the order denying the motion to compel arbitration and stay this litigation.

DISCUSSION

Although Inter-Coast raises numerous issues in its opening brief, we find one issue to be dispositive: whether the motion to compel arbitration and stay this litigation prior to certification of the class was premature because (1) the court lacked personal jurisdiction over the putative class members who signed an arbitration agreement, and (2) until a class is certified, the prospective lead plaintiff could amend the class definition to exclude those who signed an arbitration agreement, which would render the motion to compel arbitration moot.

Where, as here, the relevant facts are undisputed, we resolve the issue as a question of law and therefore consider it *de novo*. (*Lee v. Southern California University for Professional Studies, supra*, 148 Cal.App.4th at p. 785 (*Lee*).

I. Relevant Cases

The two cases most helpful to our analysis are *Lee, supra*, 148 Cal.App.4th 782, and *Sky Sports, Inc. v. Superior Court, supra*, 201 Cal.App.4th 1363 (*Sky Sports*).

The plaintiff in *Lee*, a former law school student, filed a putative class action complaint against the defendant university for alleged violations of the Consumers Legal

² Code of Civil Procedure section 1281.2 provides in relevant part: “On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement.”

Remedies Act (Civ. Code, § 1750 et seq.) and Business and Professions Code section 17200. Some of the putative class members, but not Lee, had signed an arbitration agreement that the university sought to enforce by bringing a motion to compel arbitration prior to certification of the class. The trial court denied the motion to compel arbitration and the appellate court affirmed.

Because the putative class members who had signed an arbitration agreement were not yet parties to the litigation, the appellate court concluded the motion to compel arbitration was properly denied as premature. The appellate court explained that “no grounds exist for compelling arbitration when the only plaintiff currently before the court never agreed to arbitrate her claims. The question of whether she is an adequate class representative for those who did, and all other matters pertaining to whether the action is appropriate for class treatment, are issues for the trial court to decide when Lee moves to certify the class.” (*Lee, supra*, 148 Cal.App.4th at p. 784.) “Lee has not, as of yet, brought a motion to certify any class. It is quite possible that when she does so, she will seek to narrow the definition of the class to law students only, none of whom signed arbitration agreements, according to [the university’s] own evidence. She is certainly entitled to do that—[the university] offers no authority for the proposition that a plaintiff is bound by a preliminary class definition set forth in the complaint. It is also possible (and this court takes no position on this) that however Lee defines the class, any motion for class certification will be denied for other reasons. We cannot know this, of course, because there has, as of yet, been no such motion. Lee is the only plaintiff before the court at the moment, and she is not bound by an arbitration agreement; therefore she cannot be compelled to arbitrate.” (*Id.* at pp. 786-787, fn. omitted.)

In *Sky Sports, supra*, 201 Cal.App.4th 1363, Division Three of this district considered a related issue: whether the defendant’s failure to bring a motion to compel arbitration prior to certification of the class constituted a waiver of the right to arbitration. The answer, the court concluded, was no. The court held that prior to certification of the class, a motion to compel arbitration would have been premature because, as in *Lee*, the sole plaintiff before the court—the proposed class representative, Hogan—had not signed

an arbitration agreement. Accordingly, the court stated, if the defendant had brought a motion to compel arbitration prior to certification of the class, “the trial court would have denied the motion because Hogan was not a party to the arbitration agreement. Thus, any delay in bringing the motion to compel arbitration until the class was certified to include parties to the arbitration agreement cannot constitute a waiver by the company. Until the class was certified, the pleading requirements to move to compel arbitration under section 1281.2 were not satisfied. [Citation.]” (*Id.* at p. 1369.) The court further noted that “until Hogan brought the class certification motion, he could have narrowed the class to include only those employees who did not sign arbitration agreements.” (*Ibid.*)

II. Analysis

Despite Inter-Coast’s efforts to distinguish this case from *Lee*, we find the facts to be similar and the reasoning to be sound and equally applicable here. In both cases, (1) the arbitration agreement was signed by a portion of the putative class but not by the prospective lead plaintiff, and (2) the motion to compel arbitration was filed before the class was certified. These facts are significant for the following reasons: First, because the class was not certified when the motion to compel arbitration was heard, the court lacked personal jurisdiction over the putative class members. Second, until a class is certified, Nguyen could amend the class definition to exclude those who are parties to the arbitration agreement and, if that occurs, the putative class will not include anyone who is subject to the arbitration agreement. Third, regardless whether the class definition is amended, the class certification motion might be denied for other reasons and, if that occurs, the motion to compel arbitration will be moot.

None of the cases relied upon by Inter-Coast involved a motion to compel arbitration prior to certification of the class. The cases cited by Inter-Coast involved distinguishable situations in which: (1) personal jurisdiction over the parties to an arbitration agreement was not at issue and, therefore, the court’s authority to enforce the agreement was not at issue (e.g., *Circuit City Stores v. Adams* (2001) 532 U.S. 105; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83;

24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal.App.4th 1199); (2) the plaintiff sued two defendants, one who signed an arbitration agreement and one who did not, and the court, which had jurisdiction over both defendants, had discretion to stay the plaintiff's action against the latter while the plaintiff arbitrated its claim against the former (*Hill v. G E Power Sys.* (5th Cir. Tex. 2002) 282 F.3d 343; *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.* (2d Cir. N.Y. 1964) 339 F.2d 440 [remanded for consideration whether to grant a stay pending arbitration between plaintiff and a third party]); (3) the trial court properly stayed an action under its inherent authority to control its docket, conserve judicial resources, and provide for a just determination of the cases pending before it (*Contracting Northwest, Inc. v. Fredericksburg* (8th Cir. Iowa 1983) 713 F.2d 382, 386); and (4) the trial court properly issued a stay under section 3 of the Federal Arbitration Act of claims that were subject to arbitration (*ChampionsWorld, LLC v. United States Soccer Fed'n, Inc.* (N.D. Ill. 2007) 487 F.Supp.2d 980, 991-992).

Inter-Coast's remaining arguments—e.g., that Nguyen “attempted to actively pursue the claims of others with arbitral obligations by demanding their employee records for his case,” and “at least one putative class member [Angie Jolly] made a general appearance by arguing the merits of the case and seeking personal relief from the court”—are not persuasive.³ The request for employee records did not result in the joinder of new parties to this litigation. The submission of Jolly's declaration in opposition to the motion to compel arbitration did not constitute a request for affirmative relief that could be granted only if Jolly were a party to this litigation. (See *Pease v. San Diego* (1949) 93 Cal.App.2d 706, 710-711 [a person makes a general appearance if she asks for any relief that can be granted only upon the hypothesis that the court has jurisdiction over her person].)

³ Inter-Coast's opening brief discusses numerous issues—including waiver of the right to arbitration, class action waivers, the Federal Arbitration Act, and federal preemption—that we need not address because the order may properly be affirmed on the grounds set forth above.

Applying the analysis in *Lee* and *Sky Sports* to the facts of this case, we conclude the motion to compel arbitration and stay this litigation was properly denied as premature.

DISPOSITION

The order denying the motion to compel arbitration and stay the proceedings is affirmed. Nguyen is entitled to recover his costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.