

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

EXETER FINANCE CORP.

and

Case 03-CA-158382

BRADLEY GOLDOWSKY, an Individual

GENERAL COUNSEL'S RESPONSE TO NOTICE TO SHOW CAUSE

On January 12, 2016, Counsel for the General Counsel filed a Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of a Decision and Order ("Motion for Summary Judgment"). On January 20, 2016, Exeter Finance Corp. ("Respondent") filed a Response to the motion ("Response") in which it agreed that transfer of the proceedings to the Board was appropriate, and asked that the Amended Complaint and Notice of Hearing be dismissed.

On February 10, 2016, the Board issued an Order transferring these proceedings to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted or why the complaint should not be dismissed, directing that the parties respond on or before February 24, 2016. On February 18 and 19, 2016, the Board's Associate Executive Secretary extended the time for the parties' response until March 25, 2016.

Counsel for the General Counsel relies on the facts and legal arguments presented in his Motion for Summary Judgment and Memorandum of Law in support of that motion. However, for purposes of clarity and emphasis, Counsel for the General Counsel also respectfully submits the following:

1. The instant case presents a straightforward application the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015); *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013); and *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015). Respondent admits that it has maintained a Mutual Arbitration Agreement ("Agreement") with all of its employees since spring 2014, which by its terms limits resolution of most employment-related claims to individual arbitration. The Agreement provides that an employee is bound unless the employee follows a procedure to opt out of the Agreement before it takes effect 30 days after receiving it. Further, Respondent admits that it has attempted to enforce the Agreement by filing a motion to compel individual arbitration in a federal court proceeding, initiated by Charging Party Bradley Goldowsky ("Goldowsky"), by a class of employees seeking relief under the Fair Labor Standards Act. As a matter of law, Respondent's maintenance and enforcement of the Agreement is unlawful under *D. R. Horton*, *Murphy Oil*, and *On Assignment Staffing*.
2. Based on Respondent's Response, it is anticipated that Respondent will argue that *Murphy Oil*, supra, and *D. R. Horton*, supra, were wrongly decided and should not be followed because circuit courts that have considered the issues presented in those cases have disagreed with the Board's approach. In its Response, Respondent cited in support of this argument *Raniere v. Citigroup Inc.*, 533 F. App'x 11 (2d Cir. 2013) (summary order); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013); *Walthour v. Chipio Windshield Repair*,

LLC, 745 F.3d 1326 (11th Cir. 2014); and the Fifth Circuit consideration of both *D. R. Horton* and *Murphy Oil*. Such an argument would be unavailing, because it would offer no novel reason why *D. R. Horton* and *Murphy Oil* were wrongly decided. First, criticisms of *D. R. Horton* found in the Fifth Circuit's consideration of *D. R. Horton*, and in the *Sutherland, Owen, and Richards* cases, were fully addressed and rejected in *Murphy Oil*. See 361 NLRB No. 72, slip op. at 2, n.14, 6-11. Second, the Fifth Circuit's consideration of *Murphy Oil* contained no analysis of the Board's reasoning beyond what was given in its consideration of *D. R. Horton*. See 808 F.3d at 1018 (noting that court is relying on analysis provided in its consideration *D. R. Horton*). Third, *Raniere* and *Walthour* are inapposite, because they do not even address the Board's reasoning in *D. R. Horton* or *Murphy Oil*. See *Raniere*, supra (holding arbitration agreement containing waiver of right to proceed collectively under FLSA is enforceable under Federal Arbitration Act; not addressing *D. R. Horton*); *Walthour*, supra (holding provision in arbitration agreement waiving ability to bring collective FLSA action is enforceable under Federal Arbitration Act; not addressing *D. R. Horton*, although noting in passing Fifth Circuit's holding in *D. R. Horton* that NLRA does not contain contrary congressional command overriding the application of FAA). In addition, the Board has consistently rejected arguments that *D. R. Horton* and *Murphy Oil* were wrongly decided and has continued to rely on them for reasons fully stated in *Murphy Oil*. See, e.g., *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 2 (2016); *Waffle House, Inc.*, 363 NLRB No. 104, slip op. at 2 n. 1 (2016); *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84, slip op. at 1 n. 2 (2015).

3. Based on Respondent's Response, it is anticipated that Respondent will argue that *On Assignment Staffing*, supra, was wrongly decided and should not be followed because opt-out provisions such as the one under consideration here do not create a mandatory condition of employment, and because the requirement that employees act affirmatively to opt out of an arbitration agreement does not interfere with those employees' Section 7 rights. Both of these arguments were addressed and rejected by the Board in *On Assignment Staffing* itself. See 362 NLRB No. 189, slip. op. at 1, 4-9. Further, the principal holding of *On Assignment Staffing* has since been affirmed and applied by the Board numerous times. See, e.g., *AT&T Mobility Services, LLC*, 363 NLRB No. 99, slip op. at 1 (2016); *U.S. Xpress Enterprises, Inc.*, 363 NLRB No. 46, slip op. at 1-2 (2015); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015); *Nijjar Realty, d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 2 (2015).
4. Based on Respondent's Response, it is anticipated that Respondent will argue that the unfair labor practices alleged in the Amended Complaint are time-barred under the six-month statute of limitations set out in Section 10(b) of the Act, relying on *Price-Simms, Inc. d/b/a Toyota Sunnyvale*, 363 NLRB No. 52 (2015). In that case, the Board found that the respondent's maintenance and enforcement, during the six-month period prior to the filing of a charge, of an arbitration agreement that ran afoul of *Murphy Oil* and *D. R. Horton* was a violation of Section 8(a)(1). *Id.*, slip op. at 2. The Board, however, found that the promulgation of the unlawful agreement – i.e., when the employee signed it – was outside of the 10(b) period and hence dismissed the complaint's allegation as to promulgation. *Id.* Here, the Amended Complaint alleges violations only as to Respondent's maintenance and enforcement of the

Agreement during the six-month period prior to the filing of the charge – neither of which Respondent has contested – not as to its promulgation of the Agreement.

Therefore, any reliance Respondent places on *Toyota Sunnyvale* would be entirely misplaced.

5. Based on Respondent's Response, it is anticipated that Respondent will argue that the General Counsel's request for relief in the form of reimbursement to Charging Party Goldowsky for any litigation expenses incurred in opposing Respondent's motion to compel arbitration is inappropriate because Goldowsky has not opposed the motion to compel and his time for doing so has passed.¹ The question of whether any such litigation expenses have been incurred is one that is appropriately resolved at the compliance stage of this proceeding. *See, e.g., Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 4 n. 5. Respondent's avowal that such expenses do not exist does not mean that the remedy sought is inappropriate as a preliminary matter. *See Murphy Oil*, 361 NLRB No. 72, slip op. at 21 (consistent with Board's usual practice in cases involving unlawful litigation, ordering respondent to reimburse plaintiffs for reasonable expenses and legal fees incurred in opposing respondent's motion to

¹ The General Counsel notes that the Amended Complaint seeks an order requiring Respondent to reimburse Goldowsky for any litigation expenses directly related to opposing Respondent's motion to compel arbitration. However, as noted in the General Counsel's Motion for Summary Judgment, Goldowsky filed the charge herein in his name and "on behalf of himself and all others similarly situated," including 19 individuals listed on an appendix to the charge. In light of this fact, and in light of the Amended Complaint having further sought "all other relief as may be just and proper to remedy the unfair labor practices alleged," the General Counsel also seeks an order requiring Respondent to reimburse all plaintiffs, including but not limited to the 19 individuals listed on the appendix to the charge, for any litigation expenses directly related to opposing Respondent's unlawful motion to compel arbitration. *See Murphy Oil*, supra, slip op. at 21. *See also Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act.").

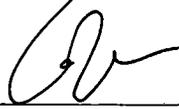
dismiss collective FLSA action and compel individual arbitration). Further, this remedy has since been consistently ordered by the Board in numerous cases involving respondents' lawsuits seeking to compel individual arbitration in violation of *D. R. Horton* and *Murphy Oil*. See, e.g., *Cowabunga, Inc.*, supra at 4; *AWG Ambassador, LLC*, 363 NLRB No. 137, slip op. at 1-2 n. 2 (2016); *UnitedHealth Group, Inc.*, 363 NLRB No. 134, slip op. at 2 n. 6 (2016).

6. Finally, on March 10, 2016, Respondent filed a motion to exceed the page limit for its brief in response to the Board's Notice to Show Cause ("Motion"). On March 11, 2016, the Board's Associate Executive Secretary granted the Motion. In the Motion, Respondent stated its intention to "attach to its Brief – and discuss in its Brief – documentation and affidavits that provide the factual support needed to fully develop [Respondent's] arguments in its Brief." (Motion, p. 2). Such attachment and discussion of factual support are inappropriate in light of Respondent's admission, in its Response, that "[t]here is no genuine issue of material fact in this case," and that "[t]he [Agreement] speaks for itself, and the sole issue in this case is a purely legal one – whether the [Agreement] violates Section 8(a)(1) of the Act." (Response, p. 3). Therefore, such additional factual materials – beyond the material facts alleged in the Amended Complaint and admitted by Respondent – that Respondent attaches to and discusses in its brief should not be considered by the Board.

For the reasons stated above, the Board should reject Respondent's request to dismiss the Amended Complaint and grant the General Counsel's Motion for Summary Judgment in its entirety.

DATED at Buffalo, New York this 25th day of March, 2016.

Respectfully submitted,



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STATEMENT OF SERVICE

I hereby certify that on March 25, 2016, I electronically filed the General Counsel's Response to Notice to Show Cause, in Case No. 03-CA-158382 using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document via electronic mail (email) to Frank Birchfield (frank.birchfield@ogletreedeakins.com), Christopher C. Murray (christopher.murray@ogletreedeakins.com), and Seth Kaufman (seth.kaufman@ogletreedeakins.com), counsel for Respondent, and Michael J. Lingle (mlingle@theemploymentattorneys.com), counsel for the Charging Party.

DATED at Buffalo, New York this 25th day of March, 2016.



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