

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

EXETER FINANCE CORP.

CASE NO.: 03-CA-158382

and

**BRADLEY GOLDSKY, an
Individual**

**RESPONDENT EXETER FINANCE CORP.'S MOTION FOR LEAVE
TO FILE A REPLY BRIEF IN FURTHER SUPPORT OF ITS
RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE WHY
SUMMARY JUDGMENT SHOULD NOT BE GRANTED**

Respondent Exeter Finance Corp. ("Exeter," the "Company," or "Respondent") respectfully submits this Motion for Leave to File a Reply Brief in Further Support of its Response to the Board's Notice to Show Cause Why Summary Judgment Should Not Be Granted. Respondent seeks leave to briefly address two points made by Counsel for the General Counsel ("CGC") in its Response to Notice to Show Cause¹ that were raised for the first time in this case. If the Board grants Exeter's Motion for Leave to File a Reply Brief, Exeter relies on the following as its reply submission:

1. In its Response, CGC attempts to expand the remedy sought beyond what was initially in the Complaint or Amended Complaint to include reimbursement for litigation expenses related to opposing Respondent's motion to compel arbitration on behalf of the 19 individuals listed on the appendix to the charge, as opposed to solely for Charging Party Bradley Goldowsky. (See CGC Response ¶ 5 n.1.) Even if the remedy of reimbursement for litigation expenses were appropriate to begin with – which, as discussed further in Plaintiff's Opening

¹ CGC's Response to Notice to Show Cause is referred to herein as CGC's "Response", and Respondent's Brief in Response to the Board's Notice to Show Cause why Summary Judgment Should not be Granted is referred to herein as Respondent's "Opening Brief."

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Brief, it is not – this further remedy sought by the CGC would be inappropriate. First, such a remedy was not included in the Complaint or Amended Complaint, and thus, CGC should be precluded from seeking such a remedy at such a late date. Second, counsel for the Charging Party and the 19 individuals listed on the appendix to the charge filed *one motion* in response to Exeter's motion to compel arbitration in *Goldowsky v. Exeter Finance Corp.*, 1:15-cv-00632 (W.D.N.Y.). Therefore, CGC seeking to expand the recovery sought in this instance is inappropriate. Lastly, although CGC argues that this issue is best left for the compliance stage of the proceeding, the Board should not wait until such time to rule, as a matter of Board law, that the Charging Party cannot recover litigation expenses for responding to a so-called "unlawful" motion when the Charging Party *consents* to the relief sought in that motion, as is the case here.

2. In its Response, CGC argues that the Board should not consider documentation and affidavits provided by Exeter in its Opening Brief. (See CGC Response ¶ 6.) According to the Board, Respondent is precluded from discussing any relevant facts because it has admitted that there "is no genuine issue of material fact in this case" and Exeter's Mutual Arbitration Agreement ("MAA") "speaks for itself." (*Id.*) But even undisputed facts must be placed in the record. Here, the limited facts that Exeter introduced in its Opening Brief consisted merely of Exeter's MAA, itself, and a brief affidavit describing the MAA's implementation and operation. These facts are necessary to put the MAA, as well as the factual circumstances surrounding the MAA's implementation and operation, before the Board. Although this case solely involves a legal issue, legal issues cannot be decided in a vacuum without reference to the underlying facts, regardless whether those facts are undisputed. It would be prejudicial to Exeter for the Board (and any reviewing appellate court) to pass judgment on the lawfulness of Exeter's MAA

without first having reviewed it and the evidence of the *undisputed* manner in which it was implemented and operates.

For all of the foregoing reasons, and the reasons stated in Exeter's Opening Brief, the Board should find that Exeter has not violated the NLRA and dismiss the Complaint against Exeter in its entirety.

New York, New York
April 8, 2016

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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Attorneys for Respondent

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

DATE: 10/10/50

TO: THE NATIONAL LABOR RELATIONS BOARD

FROM: [Name]

RE: [Case Name]

1. [Text]

2. [Text]

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CERTIFICATE OF SERVICE

I, Frank Birchfield, affirm that on the 8th day of April 2016, I caused to be served a true and correct copy of Respondent Exeter Finance Corp.'s Motion for Leave to File a Reply Brief in Further Support of Its Response to the Board's Notice to Show Cause Why Summary Judgment Should Not Be Granted upon the parties of record in compliance with the Board's Rules and Regulations, Rule 102.114(i) as follows:

by first-class U.S. Mail upon:

Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

by e-mail service upon:

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Dated: New York, New York
April 8, 2016

s/Frank Birchfield
Frank Birchfield

MR

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ORDER SECTION

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