

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 EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION UNDER SECTION 102.46 (a)

1. The Decision of the ALJ was incorrect as a matter of fact and law, as the alleged violation (Petition to Compel Binding Arbitration) occurred outside of the 10(b) period. There was no continuing violation, and the Complaint does not so allege. The Complaint alleges single violations comprising two events: 1. Filing of a Petition to Compel Binding Arbitration, and 2. Filing of a Motion to Strike Class Allegations. The alleged Motion to Strike Class Allegations was not an action to enforce the alleged Binding Arbitration Agreement. The alleged single violation by a Motion to Strike Class Allegation, was not an attempt to enforce the Binding Arbitration Agreement, and challenged

the class allegations based upon non-arbitration related issues, such as lack of commonality, lack of numerosity, and lack of representative status. These issues were not enforcement of the Arbitration Agreement, establishing that the events alleged in the Complaint were time barred by the Complaint filed on June 30, 2014, and amended on September 5, 2014, more than six months after the ruling by the Court of Appeal affirming the Denial of the Petition to Compel Binding Arbitration.

2. The ALJ erred by finding that the Binding Arbitration Agreement was a mandatory term of employment. While an original Declaration of Geeta Brown may have supported that conclusion, a more recent, supplemental Declaration of Geeta Brown made it clear that it was NOT mandatory and that there were multiple employees who did not sign and no action was taken against them for their refusal to sign.

3. The ALJ erred by finding that even if voluntary, the Binding Arbitration Agreement violated the Act. The case authority relied upon, On Assignment Staffing Services, 362 NLRB No. 189 (2015) is limited to its facts, and does not stand for the proposition that all voluntary Binding Arbitration Agreements are in violation of the Act.

4. The ALJ erred by finding that the Motion to Strike Class Allegations was an unlawful enforcement of the arbitration agreement. The ALJ wrongfully interpreted the Motion to Strike as an attempt to enforce the Arbitration

Agreement, which is both factually and legally unsupported by the record, law, or logic.

5. Based upon 1-4, the Conclusions of Law set forth on page 8 of the Decision, the Remedy, set forth at pages 8 -9, and the Order, on page 9-10, along with the Appendix, Notice to Employees, OF THE DECISION, are all without foundation in law or fact, and are excepted to for the reasons stated above, and in the attached Brief.

Dated at Los Angeles, California this 5th day of May, 2016.

/s/ Neil C. Evans

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BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE'S DECISION UNDER SECTION 102.46(a)

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 at 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.

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 enforce within the Section 10(b) period an arbitration agreement. 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.)

The filing of a Motion to Strike Class Allegations was not, and could not reasonably be interpreted as, an attempt to enforce the arbitration agreement. In fact, prior to the filing of that Motion, the Court of Appeal had already established the law of the case in supporting a denial of a much earlier Petition to Compel Arbitration that any such attempt to enforce the arbitration agreement would have to wait until after the Class was Certified. Here, the class was not Certified until October, 2015. The Motion to Strike was primarily based upon issues of lack of numerosity, lack of commonality, and lack of representative status of the

sole Plaintiff, Anthony Nguyen, who had serious statute of limitations restrictions to his standing/status.

There is a statute of limitations bar to the pursuit of the instant charges.

Respondent disagrees with the factual and legal contentions set forth in Petitioner's Short Statement of Position, and intends to establish that on every legal and factual ground, the instant charges should be dismissed as untimely and without legal or factual merit. The absence of any direct evidence as to the position of any employee or charging party speaks volumes for the lack of credibility of the charges in this case.

Dated at Los Angeles, California this 5th day of May, 2016.

/s/ Neil C. Evans

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Re: Inter-Coast International Training, Inc.
(doing business as "Intercoast Colleges")

Case No: 31-CA-131805 CERTIFICATE
OF SERVICE

I hereby certify that I served the attached
copy of the RESPONDENT'S
EXCEPTIONS TO ALJ'S DECISION;
BRIEF IN SUPPORT on the parties listed
below on the 5TH day of MAY, 2016.

VIA E-FILE The Honorable Lisa D.
Thompson Chief Administrative Law
Judge Division of Judges, Branch Office
901 Market Street, Suite 300 San
Francisco, CA 94103-1735,

TO EXECUTIVE SECRETARY, GARY
SHINNERS, 1015 HALF STREET,
WASHINGTON D.C. 20570 VIA:

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VIA E-MAIL To: Steven Wyllie,
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DA TED: 5/5/16 _____/s/s_____
Neil C. Evans