

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

DIOSELIN GRAY, an Individual

Charging Party,

and

SELECT TEMPORARIES, LLC,

Respondent.

Case No. 31-CA-157821

EMPLOYER'S REPLY IN FURTHER SUPPORT OF EXCEPTIONS

TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Candice T. Zee

czee@seyfarth.com

Jeffrey Berman

jberman@seyfarth.com

Daniel Whang

dwhang@seyfarth.com

SEYFARTH SHAW LLP

2029 Century Park East, Suite 3500

Los Angeles, California 90067-3021

Telephone: (310) 277-7200

Fax: (310) 201-5219

Timothy Hix

thix@seyfarth.com

SEYFARTH SHAW LLP

333 South Hope Street, Suite 3900

Los Angeles, CA 90071-1406

Telephone: (213) 270-9622

Facsimile: (310) 282-6970

Counsel for Select Temporaries, LLC

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I. INTRODUCTION

Respondent Select Temporaries, LLC (“Respondent” or “Select”) submits this Reply Brief in Further Support of Its Exceptions to the Decision of the Administrative Law Judge (“ALJ”). Respondent reiterates all of the arguments set forth in its opening brief in support of its exceptions in addition to the arguments set forth below.

Respondent takes issue with the General Counsel’s arguments in support of the ALJ’s decision. The General Counsel argues that Respondent seeks to preclude the Charging Party Dioselin Gray (“Gray” or “Charging Party”) from enforcing her employment rights, patently overlooking that this proceeding is brought by Gray herself, thereby demonstrating that Respondent’s arbitration policy does not interfere with Gray’s Section 7 right to engage in concerted activity.

The General Counsel’s remaining arguments also miss the mark, and the Board should reverse the ALJ’s decision and dismiss the Complaint. The General Counsel seeks to distinguish Respondent’s reliance on Supreme Court case law by ignoring the broad principles applying the FAA to all federal statutes merely because those cases did not involve the National Labor Relations Act (“NLRA” or the “Act”). He plainly ignores the fact that Congress has not unambiguously excepted the NLRA from arbitration under the FAA, as mandated by those cases, and ignores the broad principles favoring the enforcement of agreements to arbitrate.

In addition, the ALJ’s finding that Respondent’s February 2015 petition to compel arbitration satisfies the requirement of an unlawful motive despite the absence of a class-action waiver is also erroneous. The cases that the ALJ and the General Counsel now rely upon to support their finding that Respondent harbored an unlawful motive in filing a petition to compel arbitration were not even decided by the Board until 5 months after Respondent filed its petition. In other words, Respondent could not have had an unlawful motive that fell within the *Bill*

Johnson's Restaurants exception if the Board had not yet determined that enforcing MAAs without class action waivers was unlawful. As a result, the ALJ's remedial order should be overturned as erroneous. Respondent was properly exercising its First Amendment rights.

As discussed in Respondent's opening brief, the NLRB's unsupported and controversial decisions in *D.R. Horton*, 357 NLRB No. 184 (2012) and its successor *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), were wrongly decided. These decisions misapprehend the procedural nature of class actions, misstate the scope and reach of the National Labor Relations Act ("Act" or "NLRA"), and misread the United States Supreme Court mandates regarding the enforcement of arbitration agreements and specifically class action waivers. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*"); *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010) ("*Stolt-Nielsen*"). Since *D.R. Horton* issued, the Supreme Court has reaffirmed that the FAA requires that arbitration agreements be enforced according to their terms. See *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) ("*CompuCredit*"). The NLRA is silent on the issue of arbitral class waivers, and thus, arbitral class waiver agreements between employers and employees that regulate procedures within the forum must be enforced according to their terms under the FAA, as required by *CompuCredit*. Given the Board's failure to give appropriate deference to the FAA, *D.R. Horton* and its successor *Murphy Oil* have been rejected by the vast majority of federal and state courts that have considered them.

Given the inconsistency between the U.S. Supreme Court's FAA decisions and *D.R. Horton*, including *CompuCredit*, decided after *D.R. Horton*, it is clear that the Respondent's Agreement is consistent with the FAA and is not a violation of Sections 7 and 8(a)(1) of the Act. For all of these reasons, and those that follow, Respondent requests that the Board reverse the ALJ's Decision and dismiss the Complaint in its entirety.

II. ARGUMENT IN FURTHER SUPPORT OF EXCEPTIONS

A. The General Counsel's And ALJ's Position That The MAAs Are Unlawful And Evidence Of An Unlawful Motive Despite The Absence Of Class-Action Waivers Is Incorrect—The Cases Cited In Support of Their Position Were Decided After Respondent Filed Its Petition To Compel Arbitration

The General Counsel's and ALJ's position that the MAAs are unlawful and support a finding of an unlawful motive despite the absence of class-action waivers is erroneous because the cases finding such agreements unlawful were not decided until *after* Respondent filed its petition to compel arbitration. In his Answering Brief, the General Counsel cites to three cases also cited by the ALJ to support the notion that “[t]he Board has repeatedly held that an arbitration agreement is unlawful if, despite its silence regarding class or collective actions, the employer has used the agreement to preclude employees from pursuing class or collective employment-related claims in any form.” (Answering Brief at p. 10.) All three of the Board cases cited by the ALJ and the General Counsel, however, were decided *after* Select filed its petition to compel arbitration.

Specifically, Respondent filed its petition to compel arbitration on **February 11, 2015**. The Board issued its decision in the earliest of the three cases, *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), on **August 14, 2015**—five months after Respondent filed its petition to compel arbitration. The other three cases cited by the General Counsel (two of which were cited by the ALJ)—*Haynes Building Services LLC*, 363 NLRB No. 125 (2016), *Fuji Food Products Inc.*, 363 NLRB No. 118 (2016) and *Network Capital Funding Corp.*, 363 NLRB No. 106 (2016)—were decided in 2016. Accordingly, the ALJ's findings that Respondent violated the Act in this matter are misplaced. See *Sheet Metal Workers Local 27 (E. P. Donnelly, Inc.)*, 357 NLRB No. 131, slip op. at 2 (2011) (holding that where “*the Board has previously ruled on a given matter*, and where the lawsuit is aimed at achieving a result that is incompatible with the

Board's ruling, the lawsuit falls within the 'illegal objective' exception to *Bill Johnson's*) (emphasis added) (quoting *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert.denied 507 U.S. 959 (1993)).

B. The ALJ's Remedial Order Is Inappropriate As MAAs Without Class-Action Waivers Were Not Deemed Unlawful When Respondent Filed Its Petition To Compel Arbitration; The ALJ's Ruling And Remedy Violates Respondent's First Amendment Rights

Given the fact that the Board issued its first decision finding that MAAs without a class-action waiver are unlawful in August 2015, well *after* Respondent filed its petition to compel, it follows that the ALJ's remedial order awarding, among other things, attorney's fees to Gray for fees incurred related to the petition to compel and its appeal is inappropriate and erroneous. The ALJ and the General Counsel improperly applied Board law on a retroactive basis.

While the Board may restrain litigation efforts that have an illegal objective of limiting employees' Section 7 rights, there is no authority or evidence in the instant matter that Respondent had an unlawful objective when it filed its petition to compel arbitration. In fact, it could not have had an unlawful objective, and the General Counsel has no evidence to the contrary, because the Board had not yet determined that enforcement of MAAs without class-action waivers was unlawful at the time the petition to compel was filed. Indeed the court found in favor of Respondent. There is no evidence, legal authority or finding that Respondent's petition to compel arbitration in state court or its involvement in defending its position in the appellate courts had an "unlawful motive." Put quite simply, Respondent's actions do not fall within the unlawful objective exception under *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 740-43 (1983). Given the above, the ALJ's prescribed remedy should not be retroactive to the date that Respondent filed its petition to compel individual arbitration because it was not unlawful at the time, and imposition of such a remedy is patently unjust.

Additionally, while the Board may choose to ignore circuit court precedent addressing *D.R. Horton*, and Supreme Court precedent, which it wrongly claims is not on point, the NLRB may not choose to ignore the Constitution of the United States which provides for free access to the courts and permits Respondent's motions to compel. In the absence of an unlawful motive under the NLRA, Respondent's First Amendment rights apply here.

The Board should reverse the ALJ's remedial order requiring Respondent to reimburse Gray for all reasonable expenses and legal fees, with interest, incurred in opposing Respondent's lawful petition to compel individual arbitration and any other legal actions taken by Respondent to enforce the agreements.

C. Supreme Court Precedent Is Dispositive Regarding the Strong Federal Policy Requiring Enforcement of Arbitration Agreements According to Their Terms

Supreme Court precedent is also dispositive regarding the strong federal policy requiring enforcement of arbitration agreements as written. According to the General Counsel, several landmark Supreme Court decisions, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) and *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013), have no bearing on the issue before the Board since they did not involve the rights to collective action afforded employees under the NLRA. Rather, these cases concerned antitrust claims of price fixing brought against vessel owners (*Stolt-Nielsen S.A.*), consumer contracts (*Concepcion*), violations of the Credit Repair Organization Act (*CompuCredit*) and federal antitrust statutes (*Italian Colors Rest.*). This argument totally ignores the gravamen of those decisions which are binding upon the NLRB.

The Supreme Court has established conclusively in these cases that arbitration agreements will be enforced according to their terms and that a federal statute will only be read

to trump the FAA where such federal statute plainly and unambiguously states its preclusive effect against arbitration. Nothing in the NLRB comes close, nor was so intended by Congress. Thus, contrary to the Board's position, the Supreme Court has reviewed the validity of class action waivers broadly in arbitration agreements, established a test for their validity, and has found them to be valid under circumstances where, as here, Congress has not unambiguously excepted the statute from arbitration under the FAA. The NLRA contains no such exception.

III. THE ALJ ERRED BY RETROACTIVELY APPLYING REMEDIES FOR GRAY AND BY DEPRIVING SELECT OF ITS DUE PROCESS RIGHTS

Since the General Counsel did not respond to Respondent's arguments regarding the improper retroactive remedies and the deprivation of Respondent's due process rights, the Board should reverse the remedies imposed on Respondent. As stated in Respondent's opening brief, the Board lacks the jurisdiction or power to require an Article III court—in this case the Los Angeles Superior Court—to reverse determinations that the court has already made. Respondent is entitled to its due process rights, especially when, as discussed above, there was no Board law at the time it filed its petition to compel arbitration holding that enforcement of an MAA without a class action waiver was unlawful.

By seeking to compel Select to withdraw its legal position regarding the enforceability of the arbitration agreement and requiring the Los Angeles Superior Court to reverse not one, but two court orders, the ALJ seeks to negate earlier court determinations regarding the enforceability of the MAAs in another forum, in this instance, an Article III court. Such a remedy is impermissible as it would essentially strip Select of its due process rights to be heard with respect to its legal arguments that the MAA is lawful and enforceable.

Requiring the Company to concede the issue of the enforceability of the MAA in cases where a court has already determined the policy to be enforceable, and during a time when the

Board had not even found such MAAs to be unlawful, the ALJ deprives Select of its due process right to be fully heard on the issue. Congress did not vest the NLRB with authority to dictate what internal procedures must govern non-NLRA claims adjudicated by courts and agencies other than the NLRB. *See, e.g., Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993) (holding that an agency does not have the power to reverse the outcome of a federal court decision through exercise of its power to adjudicate).

It is inappropriate to require Respondent to re-raise these issues with each of the courts and to concede its position regarding the enforceability of the MAAs. Nothing in the NLRA gives the Board the power to negate the authority of an Article III court. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

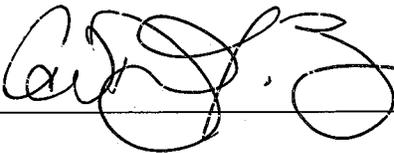
While the Board's remedial authority is broad, it is not without limits. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943) (noting a remedy is improper when it can be shown that it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA]"). A remedy that violates Respondent's First Amendment rights cannot be viewed as fairly effectuating the policies of the NLRA. The Board lacks the authority to require Respondent to petition a court to set aside a prior order because this violates Respondent's First Amendment protection against compelled speech.

IV. CONCLUSION

For all of the foregoing reasons, and as stated in Respondent's opening brief, the ALJ's Decision must be reversed. The Board should set aside its *D.R. Horton* and *Murphy Oil* decisions, reverse the ALJ's decision herein, and conform its policy regarding individual arbitration agreements to the requirements of the FAA which are not inconsistent with Section 7 of the NLRA. Accordingly, the Board should find that Respondents did not engage in an unfair

labor practice in violation of Section 8(a)(1) of the Act.

Respectfully Submitted,

By  _____

Candice T. Zee
Jeffrey Berman
Daniel Whang

SEYFARTH SHAW LLP
2029 Century Park East, Suite 3500
Los Angeles, California 90067-3021
Telephone: (310) 277-7200
Fax: (310) 201-5219

Timothy Hix
SEYFARTH SHAW LLP
333 South Flower Street, Suite 3900
Los Angeles, California 90017
Telephone: (213) 270-9622
Facsimile: (310) 282-6970

Attorneys for Counsel for Select Temporaries, LLC

CERTIFICATE OF SERVICE

I, Rebecca Garner, do hereby certify that I have caused a true and correct copy of the foregoing **EMPLOYER'S REPLY IN FURTHER SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** to be served on all parties of record in the manner listed below on this 20th day of December, 2016:

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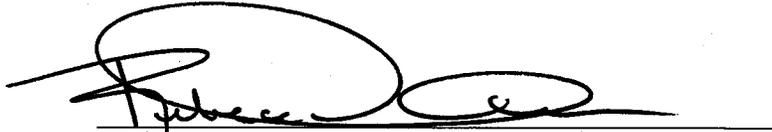
National Labor Relations Board
Division of Judges
Email: via e-filing
<https://www.nlr.gov/>

Served via facsimile and/or email upon the following:

Thomas Rimbach, Esq.
Fax: (213) 894-2778
Email: thomas.rimbach@nlrb.gov

Daniel Bass, Esq.
Fax: (310) 531-1901
Email: dbass@maternlawgroup.com

Eireann Brooks, Esq.
Fax: (805) 898-7125
Email: eireann.brooks@select.com



Rebecca Garner