

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

BUY-LOW MARKET, INC.)	Case No. 21-CA-173346
)	
and)	
)	
NESKED PALACIOS, an individual)	
)	
)	
)	
_____)	

**RESPONDENT BUY-LOW MARKET, INC.'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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**Attorneys for Respondent
BUY-LOW MARKET, INC.**

Buy-Low Market, Inc. (“Respondent”), by and through its undersigned attorney, pursuant to Section 102.46 of the Board’s Rules and Regulations, takes exception to the Decision of the Administrative Law Judge, as enumerated below. The specific grounds and authorities of the exceptions are set forth in the accompanying brief.

1. Respondent excepts to the Administrative Law Judge’s finding: “Since August 2010, Respondent implemented and maintains the Agreement. (Jt. Mt. at par. 6).” (Decision pg. 2, lines 30-33).

2. Respondent excepts to the Administrative Law Judge’s finding: “In addition, since Respondent presented Palacios with the Agreement along with his other onboarding documents, it is more likely than not, that other employees signed the Agreement at least on or after this time period. Palacios is unlikely to be the only employee who signed the Agreement and Respondent’s assertion that the General Counsel failed to present evidence of any other employee signing the Agreement is disingenuous. However, even if Palacios is the only employee at Respondent to sign the Agreement, the Agreement remains unlawful for the reasons set forth in this decision.” (Decision pg. 4, fn. 5).

3. Respondent excepts to the Administrative Law Judge’s finding: “Respondent, however, denies that signing the Agreement was a mandatory condition of employment, and that the General Counsel failed to prove as such. Respondent’s argument is without merit. Based on the exhibits submitted by the parties in the Joint Motion, it is clear that Charging Party signed the Agreement along with other on-boarding documents on or about his first day of employment with Respondent. Moreover, this Agreement does not clarify whether it is mandatory or optional. When being asked to sign the Agreement, at the start of employment, an employee would not

likely refuse to sign.” (Decision pg. 4, lines 15-22).

4. Respondent excepts to the Administrative Law Judge’s finding: “Regardless, the Board has stated that an employer violates the Act whether or not an arbitration agreement is mandatory or voluntary. The Board reasoned that even a voluntary arbitration agreement, or one that has an opt-out provision, requires employees to prospectively waive their Section 7 right which is unlawful. *On Assignment Staffing Services*, 362 NLRB No. 189 (2015). Thus, I find that Respondent imposed a mandatory rule, and as such the Agreement should be evaluated in the same manner as any workplace rule.” (Decision pg. 4, lines 21-27).

5. Respondent excepts to the Administrative Law Judge’s finding: “Mandatory arbitration agreements which bar employees from bringing joint, class, or collective actions regarding the workplace in any forum restrict employees’ substantive right established by Section 7 of the Act to improve their working conditions through administrative and judicial litigation.” (Decision pg. 5, lines 14-17).

6. Respondent excepts to the Administrative Law Judge’s finding: “Respondent cannot have it both ways—in this forum argue that class or collective action is not expressly precluded but then argue in another forum that since the Agreement does not explicitly permit such collective or class action the Charging Party may only pursue his claims individually.” (Decision pg. 5, lines 28-30).

7. Respondent excepts to the Administrative Law Judge’s finding: “Respondent, by taking the position in Charging Party’s class action claim that the Agreement does not permit class claims as it was not explicitly stated, foreclosed the possibility of pursuing collective and/or class action litigation in any other forum. Thus, contrary Respondent’s argument, the Agreement

precludes class or collective action.” (Decision pg. 5, lines 36-39).

8. Respondent excepts to the Administrative Law Judge’s finding: “Respondent’s Agreement, as a condition of employment, precludes employees from pursuing claims concerted and thus ‘amounts to a prospective waiver of a right guaranteed by the NLRA.’ *Murphy Oil*, supra, slip op. at 9 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), and *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). This preclusion infringes on employees’ Section 7 rights.” (Decision pg. 5, line 45 to pg. 6, line 2).

9. Respondent excepts to the Administrative Law Judge’s finding: “Here, Respondent implemented and maintained the Agreement as a condition of employment since August 2010. The Agreement prohibits employees from pursuing employment-related claims on a class or collective basis. Thus, I find that the Agreement was a mandatory rule imposed by Respondent as a condition of employment and precludes the right to pursue concerted legal action violating Section 8(a)(1) of the Act. See *D. R. Horton*, supra at 2280; *Murphy Oil*, supra, slip op. at 24. The Agreement requires employees to agree to pursue any dispute they have against Respondent solely through individual arbitration thereby violating Section 8(a)(1) of the Act.” (Decision pg. 6, lines 22-29).

10. Respondent excepts to the Administrative Law Judge’s finding: “By asserting the Agreement as an affirmative defense in Charging Party’s wage-and hour class action lawsuit, Respondent enforced its arbitration policy to compel Palacios to arbitrate his claim on an individual basis. Respondent’s filing of a motion to compel arbitration and dismiss class claims violated Section 8(a)(1) as it invoked an unlawful arbitration policy to reject an employee’s class action lawsuit. Respondent’s action is similar to the factual scenario found unlawful by the Board

in *Murphy Oil*. Accordingly, Respondent also violated Section 8(a)(1) when it enforced the unlawful rule.” (Decision pg. 6, lines 33-39).

11. Respondent excepts to the Administrative Law Judge’s finding: “Respondent raises the doctrines of collateral estoppel and res judicata as barring Charging Party’s requested relief. Respondent argument has no merit. Significantly, the Board was not a party to Palacios’ class action complaint. The Board has consistently held that court decisions in private litigation are not binding on the Board under the doctrines of res judicata or collateral estoppel.” (Decision pg. 7, lines 13-17).

12. Respondent excepts to the Administrative Law Judge’s finding: “Respondent argues that the Agreement specifically precludes Board charges or complaints which distinguish its arbitration agreement from those found unlawful in *D. R. Horton* and *Murphy Oil*.” (Decision pg. 7, lines 27-29).

13. Respondent excepts to the Administrative Law Judge’s finding: “Respondent also indicates in the Agreement that employee disputes concerning any part of his or her employment shall be addressed in binding arbitration which creates confusion for employees as to which disputes would be handled via binding arbitration or Board charge/unfair labor practice. The Agreement is vague and leaves employees questioning and not risking violating the rule by exercising Section 7 rights. Id. Board law is settled that ambiguous rules are construed against the employer. Thus, Respondent’s claim is without merit.” (Decision pg. 7, lines 37-43).

14. Respondent excepts to the Administrative Law Judge’s finding: “Respondent’s Agreement violates Section 8(a)(1) of the Act as Respondent implemented, maintained and enforced an unlawful rule.” (Decision pg. 7, lines 45-46).

15. Respondent excepts to the Administrative Law Judge's conclusion of law: "Respondent violated Section 8(a)(1) of the Act by implementing, maintaining and enforcing a Mutual Arbitration Agreement which required employees to resolve employment-related disputes exclusively through individual arbitration and, though not expressly, but in practice, required them to relinquish any right they have to resolve such disputes through collective or class action." (Decision pg. 8, lines 5-9).

16. Respondent excepts to the Administrative Law Judge's conclusion of law: "Respondent violated Section 8(a)(1) of the Act by seeking to enforce its unlawful mutual arbitration agreement by filing a motion in Superior Court compelling individual arbitration and dismissing Charging Party's class action." (Decision pg. 8, lines 11-14).

17. Respondent excepts to the Administrative Law Judge's conclusion of law that unfair labor practices were committed by Respondent. (Decision pg. 8, line 15).

18. Respondent excepts to the Administrative Law Judge's remedy: "[T]he recommended Order requires that Respondent revise or rescind it to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums. Respondent shall notify all current and former employees since August 2010 who were required to sign the Agreement that it has been rescinded or revised, and if revised, provide them a copy of the revised Agreement." (Decision pg. 8, lines 24-29).

19. Respondent excepts to the Administrative Law Judge's remedy: "Respondent shall be required to reimburse Charging Party for any reasonable attorneys' fees and litigation expenses, with interest, to date and in the future, directly related to opposing Respondent's filing

its motion to compel arbitration of Charging Party's individual claims and dismiss the class claims in *Nesked Palacios v. Buy-Low Market, Inc., et al.*, Case No. BC-35 588838, Central Civil West Division of the Superior Court in the State of California, County of Los Angeles." (Decision pg. 8, lines 31-36).

20. Respondent excepts to the Administrative Law Judge's remedy: "Respondent shall also be required to notify the Central Civil West Division of the Superior Court in the State of California, County of Los Angeles, Case No. BC-588838, that it has rescinded or revised the Agreement upon which it based its motion to compel arbitration of Charging Party's individual claims and dismiss the class claims, and inform the Superior Court that it no longer opposes the lawsuit on the basis of the Agreement." (Decision pg. 8, lines 41-45).

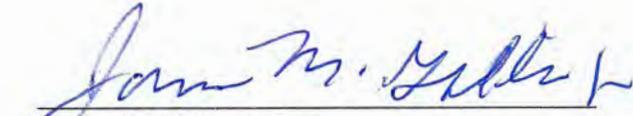
21. Respondent excepts to the Administrative Law Judge's remedy: "Respondent shall post a notice in all locations where the Agreement was in effect. See, e.g., *U-Haul of California*, supra, fn. 2; *D. R. Horton*, supra at 2289; *Murphy Oil*, supra, slip op. at 22. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010)." (Decision pg. 8, line 47 to pg. 8, line 4).

22. Respondent excepts to the Administrative Law Judge's entire proposed order due to containing improper, unwarranted and/or inapplicable remedies. (Decision pg. 9, line 10 to pg. 10, line 20).

WHEREFORE, Respondent Buy-Low Market, Inc. respectfully requests that its Exceptions to the Administrative Law Judge's February 3, 2017 Decision and Recommended

Order be sustained and that the Board should issue a different order consistent with the sustaining of such Exceptions. In addition or in alternative to such order, the Board should remand for further proceedings consistent with the Exceptions that have been sustained.

DATED: March 3, 2017


James M. Gilbert, Esq.
Attorneys for Respondent Buy-Low Market

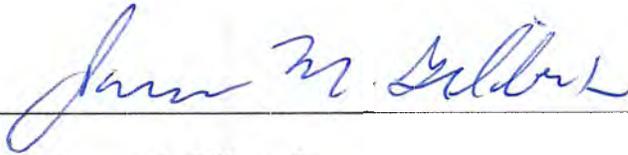
CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2017, a copy of Respondent's Exceptions to the Administrative Law Judge's Decision was served electronically via email, pursuant to the National Labor Relations Board's Rules and Regulations - Part 102, Subpart I, Section 102.114(a) [29 C.F.R. § 102.114(a)], to the following parties at the email addresses listed below:

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c/o MATERN LAW GROUP
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DATED: March 3, 2017



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