

**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 BRIEF
IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

James M. Gilbert, Esq.
3309 Robbins Road #102
Springfield, IL 62704
Phone: (217)391-5198
Fax: (217)391-5199
Email: jgilbert@gilbert-legal.com

Law Offices of Darren D. Daniels
Darren D. Daniels, Esq.
235 E. Broadway, Suite 1140
Long Beach, CA 90802
Phone: (562)983-1259
Fax: (562)683-2643
Email: darrendaniels@dddllaw.com

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

I.

STATEMENT OF THE CASE

On April 1, 2016, Charging Party, Nesked Palacios (“Charging Party”), filed an unfair labor practice charge against Buy-Low Market, Inc. (“Respondent”) alleging that it required all of its non-exempt employees to execute a mandatory Mutual Arbitration Agreement (“Arbitration Agreement”) which purportedly prohibits class action litigation or class arbitration in violation of Section 8(a)(1) of the National Labor Relations Act (“NLRA”). Charging Party filed a purported class action in Los Angeles County Superior Court on July 21, 2015 against Respondent which was subject to a motion to compel arbitration and dismiss class claims which was granted on May 2, 2016. Charging Party is collaterally estopped from re-litigation this issue through the NLRB and filed his charge after the statute of limitations expired. In addition, the Arbitration Agreement is not a mandatory condition of employment and the General Counsel has failed to introduce any evidence to the contrary. Furthermore, the Arbitration Agreement does not violate the NLRA, particularly as it does not contain any class waiver language and specifically allows for claims with the NLRB. Finally, the requested remedies are inappropriate, unwarranted and beyond the jurisdiction of the NLRB.

II.

ISSUES PRESENTED

The following issues are presented herein: (1) Is Charging Party collaterally estopped from bringing this action? (2) Has the General Counsel

established that the Arbitration Agreement a mandatory condition of employment?

(4) Does the Arbitration Agreement violate the NLRA? (5) Are the requested remedies warranted and within the jurisdiction of the NLRB?

III.

FACTS

Charging Party voluntarily signed the Arbitration Agreement with Respondent on August 17, 2010. (See Mutual Arbitration Agreement dated 8/17/2010, Exhibit 4).

The General Counsel offered no evidence that the Arbitration Agreement was mandatory or a condition of employment. (See Stipulation of Facts). In fact, Charging Party took the position in connection with the arbitration motion in Superior Court that he did not remember signing the Arbitration Agreement, did not recall discussing it with anyone and purportedly does not understand what it says because he does not speak English. (See Declaration of Nesked Palacios at ¶¶ 8, 10, Exhibit 15).¹ The Charge Against Employer was signed by Charging Party's counsel rather than the Charging Party so the statements therein cannot constitute any kind of evidence. (See Charge Against Employer, Exhibit 1).

Charging Party's employment was terminated by Respondent on June 28, 2013. (See Stipulation of Facts at ¶ 6).

¹ While the reliance by the General Counsel or Charging Party on this declaration would constitute hearsay, Respondent can rely on admissions made by Charging Party in the declaration because an opposing party's statements and admissions do not constitute hearsay. (See Rules 801-802 of the Federal Rules of Evidence).

The General Counsel offered no evidence regarding the use of the Arbitration Agreement as to any other employees, whether anyone else signed the Arbitration Agreement after August 17, 2010, whether Respondent currently utilizes the Arbitration Agreement or what time period it was in effect. (See Stipulation of Facts). It was the General Counsel's burden to establish such facts.

IV.

CHARGING PARTY IS BARRED FROM RE-LITIGATING THE ISSUE OF WHETHER HE CAN PROCEED ON CLASS CLAIMS IN COURT

Charging Party has already litigated the issue of whether he may proceed in the Los Angeles Superior Court on a class basis and is barred from re-litigating this issue due to collateral estoppel and res judicata. (Charging Party's Exceptions No. 11).

“Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties.” (Clark v. Bear Stearns & Co., Inc. (9th Cir.1992) 966 F.2d 1318, 1320). Collateral estoppel bars “successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,” even if the issue recurs in the context of a different claim. (New Hampshire v. Maine (2001) 532 U. S. 742, 748-749). “Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.” (Montana v. United States (1979) 440 U.S. 147, 153). As a result, the principles of collateral estoppel and res judicata preclude the attempt here to re-litigate

through the NLRB. (See Answer to Complaint at pgs. 4-5, affirmative defense number fourteen, Exhibit 3).

The attempt to re-litigate the issue of whether Charging Party can proceed in court on a class basis amounts to nothing more than forum shopping. Charging Party did not obtain a favorable ruling in the Superior Court, so he now asks the NLRB to re-decide the issue and provide him with a different ruling, thereby undermining the purpose of the legal system. As the United States Supreme Court has recognized:

“Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” [internal citations omitted] (Montana, *supra*, 440 U.S. at 153–154).

The Administrative Law Judge disregarded this legal argument because the Board was not a party to the court action. Nesked Palacios filed the charge in this case. (See Charge Against Employer, Exhibit 1). The Complaint names Nesked Palacios as the Charging Party and does not identify the Board as a “party”. While the General Counsel’s office prosecuted the claim on the Charging Party’s behalf, how can the Board be considered a party to the unfair labor practice charge. The Board is the decision-maker, performing a quasi-judicial determination of whether there was a violation of law. How can one party to a case also be the judge in the same case? Nesked Palacios has no standing to re-litigate this issue and, therefore, the Charge itself is void.

A. Collateral estoppel bars the requested relief

“Collateral estoppel applies to a question, issue, or fact when four conditions are met: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.” (Oyeniran v. Holder (9th Cir. 2012) 672 F.3d 800, 806 (citing Montana, supra, 440 U.S. at 153-54; Clark, supra, 966 F.2d at 1320).

The same issue was at stake in the Superior Court proceeding - whether the arbitration agreement was enforceable and arbitration of Charging Party’s individual claims and dismissal of his purported class claims were compelled. (See Stipulation of Facts at ¶¶ 8-10). The General Counsel has alleged here that such actions violated the NLRA. (See Complaint and Notice of Hearing ¶¶ 4-5, Exhibit 2). Charging Party expressly argued before the Superior Court that dismissal of his class claims would violate the NLRA based upon the NLRB’s opinion in D.R. Horton, Inc. (2012) 357 NLRB No. 184. (See Plaintiff’s Opposition to Defendants’ Motion to Compel Arbitration at pgs. 11-12, Exhibit 14). The Superior Court rejected Charging Party’s arguments and granted Respondent’s motion to compel arbitration and struck the class allegations. (See Court’s Ruling and Order, Exhibit 9). Charging Party had a full and fair opportunity to litigate that issue and it was necessary to a determination of the merits of the motion.

B. Res judicata bars the requested relief

The dismissal of Charging Party's class claims resulted in the "death knell" of such claims. Under this exception to general appeal principles in California courts, the death knell exception "provides that an order which allows a plaintiff to pursue individual claims, but prevents the plaintiff from maintaining the claims as a class action, ... is immediately appealable because it 'effectively r[ings] the death knell for the class claims.'" (Aleman v. Airtouch Cellular (2012) 209 Cal.App.4th 556, 585; see also Franco v. Athens Disposal Co., Inc. (2009) 171 Cal.App.4th 1277, 1288 (court holding that order finding class arbitration waiver enforceable and directing the plaintiff to arbitrate claims individually was appealable because it "was the 'death knell' of class litigation through arbitration")). The dismissal of the class claims results in a "defacto final judgment for absent plaintiffs". (See In re Baycol Cases I and II (2011) 51 Cal.4th 751, 759).

Here, the Superior Court ruling was issued between these parties on May 2, 2016. (See Court's Ruling and Order, Exhibit 9). Charging Party did not appeal that Order. (See Stipulation of Facts at ¶ 14). The time to file an appeal has passed. (See Rule 8.104 of the California Rules of Court. Therefore, a final judgment has occurred as to Charging Party's class claims and he cannot bring those claims against Respondent. The NLRB has no jurisdiction or authority to undo a final judgment.

V.

**THE ARBITRATION AGREEMENT WAS NOT A MANDATORY
CONDITION OF EMPLOYMENT**

_____The Complaint and Notice of Hearing filed by the General Counsel alleges that Charging Party was required to sign the Arbitration Agreement as a condition of employment. (See Complaint and Notice of Hearing at ¶ 4(b), Exhibit 2). However, the General Counsel failed to offer any evidence that the Arbitration Agreement was mandatory or a condition of employment. (See Stipulation of Facts). Furthermore, the Charging Party admitted in a declaration filed with the Superior Court that he can provide no testimony regarding the Arbitration Agreement as he does not recall seeing it before this litigation and claims he did not discuss arbitration at all with Respondent. (See Declaration of Nesked Palacios at ¶¶ 8, 10, Exhibit 15). Respondent did not require the signing of the Arbitration Agreement as a condition of employment. (See Answer to Complaint at ¶ 8, Exhibit 3). There is no evidence in the record to the contrary and, therefore, no basis to find that the Arbitration Agreement is mandatory or was an employer “rule”.

It is indisputable that the General Counsel carried the burden of proof to establish that an unfair labor practice occurred. Whether the Agreement was mandatory was a central issue in this case. The Administrative Law Judge completely glossed over the lack of evidence and made what amounts to nothing more than an assumption or speculation that the Agreement was mandatory.

(Charging Party's Exceptions Nos. 3-4, 8-9, 15). There was no evidence from which to form such a conclusion. This is hardly justice or fairness when the evidentiary blanks are simply filled in to make up for deficiencies in a case to reach pre-determined conclusions.

Therefore, the instant case is distinguishable from both D.R. Horton, Inc. (2012) 357 NLRB No. 184 and Murphy Oil USA Inc. (2014) 361 NLRB No. 72, as those cases involved an arbitration agreement that was a mandatory condition of employment. In fact, the NLRB in the D.R. Horton specifically excluded from its holding situations where the arbitration agreement is not a mandatory condition of employment and stated:

“Moreover, we do not reach the more difficult questions of . . . (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute, or all potential employment disputes through a non-class arbitration rather than litigation in court.” D.R. Horton I, 357 NLRB No. 184, at 13, n. 28.

Even the recent Ninth Circuit opinion in Morris v. Ernst & Young, LLP (9th Cir. 2016) 834 F.3d 975, 980, 983) deals only with a situation where the arbitration agreement was a required condition of employment.

The NLRB has held that an arbitration agreement violates the NLRA when it is required to be signed with class waiver language even though there is a procedure to opt-out of the class waiver because the agreement itself was still mandatory, had express class waiver language, had a mandatory opt-out procedure and placed a burden on employees to preserve their rights. (See On Assignment

Staffing Services, Inc., 362 NLRB No. 189 (2015). Respectfully, that case is also highly distinguishable because Charging Party was not required to sign the Arbitration Agreement here and did not have to undergo any burden to preserve his rights. He simply could have chosen to not sign the Arbitration Agreement and he would have continued on with his employment. Furthermore, there is no class waiver language in this Arbitration Agreement. It should also be noted that the Fifth Circuit refused to enforce the NLRB's rulings in D.R. Horton, Murphy Oil and On Site Staffing Services.

VI.

THE ARBITRATION AGREEMENT DOES NOT CONTAIN A CLASS ACTION WAIVER PROVISION

Nowhere in the language of the agreement does it expressly prohibit class action litigation. (See Mutual Arbitration Agreement, Exhibit 4). Therefore, the instant case is distinguishable from the NLRB cases of D.R. Horton, Inc. (2012) 357 NLRB No. 184 and Murphy Oil USA Inc. (2014) 361 NLRB No. 72, as those cases involved express waivers of class or collective actions. Furthermore, the Ninth Circuit decision in Morris also involved an express class waiver. (See Morris, supra, 834 F.3d at 980).

Instead, Respondent filed a motion to compel arbitration, consistent with the current applicable state of California law. The California Supreme Court has held that class action waivers in arbitration agreements do not violate the NLRA. (See Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 348,

360). The Administrative Law Judge incorrectly focused on the alleged interpretation of the Agreement by the Respondent. (Charged Party's Exceptions Nos. 5-10, 14-17). Respondent simply filed a motion in California court asking that an agreement be given the legal effect that the California Supreme Court and various federal courts have determined such language has. The Iskanian decision did not even come out in California until approximately 4 years after the Charging Party signed the Agreement. How can anyone possibly state in good-faith that entering the Agreement in 2010 was an unlawful act because of an interpretation that was not given to the Agreement by the California courts until 4 years after the Agreement was signed?

As the U.S. Supreme Court held in Stolt-Nielsen S.A. v. AnimalFeeds International Corp. (2010) 559 U.S. 662, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (Id. at 684 (emphasis in original)). When an arbitration agreement is silent regarding classwide arbitration, neither party to the agreement can be forced to arbitrate claims on a classwide basis. (See id. at 666-670). The U.S. Supreme Court reasoned that:

"An implicit agreement to authorize class action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

[Citations omitted.] But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputed through class-wide arbitration We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” (Stolt-Nielsen, supra, 559 U.S. at 685-687).

The question thus becomes one of mutual intent: “consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration.” (Id. at 687 (emphasis in original)).

Here, as previously noted, the Arbitration Agreement is silent as to whether classwide arbitration is available. (See Mutual Arbitration Agreement, Exhibit 4). According, the LA County Superior Court enforced the arbitration agreement and struck the class allegations from the Complaint as there was no contractual basis for concluding that the parties agreed to class arbitration in the Arbitration Agreement. This ruling was consistent with California courts which have followed the rule set forth in Stolt-Nielsen. (See Kinecta Alternative Financial Solutions, Inc. v. Superior Ct. (2012) 205 Cal.App.4th 506, 517-519 (where an arbitration agreement makes no mention of class arbitration and does not reference disputes with other employees or groups of employees, class claims brought by the employee are not compelled into arbitration and must be dismissed); see also Nelsen v. Legacy Partners Residential, Inc. (2012) 207 Cal.App.4th 1115, 1129-1131 (holding that class arbitration was not permitted

where agreement was silent as to class arbitration and referenced only disputes between the employee and employer rather than including other employees)).

Respondent simply filed a motion in a California court that was consistent with California law in terms of how California courts interpret and apply arbitration agreements. Respondent's "interpretation" of the Arbitration Agreement is irrelevant. It is the courts who have interpreted this type of contractual language and given it legal effect.

VII.

THE ARBITRATION AGREEMENT DOES NOT PRECLUDE THE FILING OF NLRB CHARGES

The Arbitration Agreement specifically states that "[n]othing contained in this agreement shall preclude the filing of an administrative charge/complaint with . . . the National Labor Relations Board." (See Mutual Arbitration Agreement, Exhibit 4). Therefore, this case is also distinguishable from both D.R. Horton, Inc. (2012) 357 NLRB No. 184 and Murphy Oil USA Inc. (2014) 361 NLRB No. 72, as those cases each held that the arbitration agreement at issue would be reasonably interpreted by employees as precluding them from filing charges with the NLRB. By contrast, the Arbitration Agreement here specifically states that employees are permitted to file charges with the NLRB.

Furthermore, the Agreement states that such claims would only be subject to arbitration if they are removed from the agency's jurisdiction. (Exhibit 4). Therefore, an employee could not reasonably interpret this Agreement as requiring

them to arbitrate a NLRB claim. (Charged Party's Exceptions Nos. 12-13). The Administrative Law Judge's finding that the Agreement is ambiguous because of a purported conflict between a NLRB charge process and arbitration is simply incorrect. The Agreement itself says that a NLRB charge or other administrative claim would only be subject to arbitration if it is removed from the administrative body. No one could reasonably conclude that language to be ambiguous whether an employee would be required to arbitrate a NLRB charge under the Agreement.

VIII.

THE ENFORCEMENT OF THE ARBITRATION AGREEMENT

DID NOT VIOLATE THE NLRA

As discussed above, this case is distinguishable from other cases because the Arbitration Agreement was not a mandatory condition of employment, there is no express class waiver language and the Agreement excludes NLRB claims.

Furthermore, the use of class action procedures is a procedural right and not a substantive right under Section 7 of the NLRA. (See Answer To Complaint at pg. 4, affirmative defense number 11, Exhibit 3). There is no legislative history of any workplace statute affording employees a substantive right to proceed collectively on statutory employment claims. (Charged Party's Exceptions Nos. 5, 8-10, 14-17).

Accordingly, and for all of the reasons above, Respondent did not violate Sections 7 or 8(a)(1) of the NLRA.

///

IX.

THE REQUESTED REMEDIES ARE INAPPROPRIATE

Even if it were determined that Respondent violated the NLRA, the requested remedies are inappropriate:

- Requested relief as to the Arbitration Agreement in general or any other employees is not warranted as there is no evidence regarding the use of the Arbitration Agreement as to any other employees, whether anyone else signed the Arbitration Agreement after August 17, 2010, whether Respondent currently utilizes the Arbitration Agreement or what time period it was in effect. (See Stipulation of Facts). There was a complete lack of evidence to give any scope or timeframe to the use of the Agreement in order for any type of remedy such as this to be issued by the Administrative Law Judge. (Charged Party's Exceptions Nos. 2, 15, 18, 21, 22).

- There is no valid basis to move the Superior Court to vacate its order as the time for filing a motion for reconsideration, a motion to vacate the order or an appeal of the dismissal of class claims have all expired. Furthermore, Charging Party is beyond the 3 year statute of limitations for filing of statutory claims and thus cannot re-file his class claims. The NLRB has no authority to order a California superior court to take jurisdiction over claims for which it has no jurisdiction. (Charged Party's Exceptions Nos. 20, 22).

- There is no basis for awarding of attorney's fees and costs under Bill Johnson's Restaurant, Inc. v. NLRB (1983) 461 U.S. 731 as: (1) Respondent

did not file a lawsuit against Charging Party, (2) California civil litigation costs and fees are governed by the prevailing party rule and so they are not recoverable on arbitration motions as there is no prevailing party in the action yet, (3) Respondent prevailed on the motion in the Superior Court, (4) the motion was made consistent with California and federal case law, and (5) the NLRB has petitioned the United States Supreme Court for review of this issue and therein has admitted that there is a split of legal authority. (Charged Party's Exceptions Nos. 19, 22)

As a result, there can be no finding that Respondent acted frivolously, maliciously or willfully violated any law. The Agreement itself has no class waiver language. Approximately 5 years after Charging Party signed the Agreement, he filed a lawsuit against Respondent in California court. The state of the applicable law in California interprets such as Agreements as not authorizing class arbitration. Respondent brought a motion consistent with applicable law on this issue and prevailed. For the NLRB, having admitted that the federal courts are split on the class action waiver issue in general, to assert that is somehow frivolous conduct by Respondent which justifies an award of attorney's fees is far beyond its authority.

X.

CONCLUSION

For all of the foregoing reasons, 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

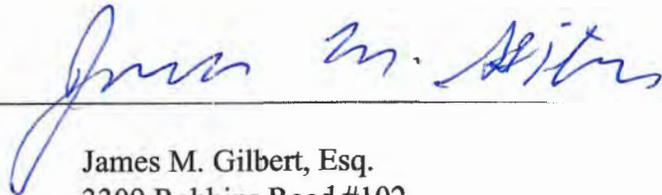
CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2017, a copy of Respondent's Brief in Support of 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:

Nesked Palacios
c/o MATERN LAW GROUP
Email: dkhalili@maternlawgroup.com
(Charging Party)

Alice Garfield, NLRB attorney, Region 21
Email: Alice.Garfield@nlrb.gov

DATED: March 3, 2017



James M. Gilbert, Esq.
3309 Robbins Road #102
Springfield, IL 62704
Phone: (217)391-5198
Email: jgilbert@gilbert-legal.com
Attorneys for Buy-Low Market, Inc.