

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

BUY-LOW MARKET, INC.

and

Case 21-CA-173346

NESKED PALACIOS, an Individual

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, General Counsel files this answering brief to Respondent's exceptions to the decision of Administrative Law Judge Armita Baman Tracy (ALJ), which issued on February 3, 2017.¹ In her decision (ALJD), the ALJ correctly found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by: 1) maintaining and enforcing a mandatory and binding arbitration agreement that requires employees to resolve employment-related disputes exclusively through individual arbitration proceedings and, though not expressly, but in practice, relinquish their rights to resolve such disputes through collective or class action; and, 2) seeking to enforce its unlawful arbitration agreement by filing a motion to compel arbitration and dismiss the charging party's class claims in State Superior Court.² (ALJD 3:30-45; 4: 1-2).

¹ The ALJ granted the parties' joint motion to submit the instant case entirely on their stipulation of facts. In this answering brief, the stipulation of facts will be referred to as Stip. and any reference to an exhibit attached to the Stip. will be referred to as Exh. followed by its number. Citations to the ALJ's decision will appear as ALJD followed by the page number and numerical lines.

² On May 2, 2016, Judge Kenneth R. Freeman of the Superior Court of the State of California, County of Los Angeles, issued a Ruling and Order wherein he granted Respondent's motion to compel arbitration, struck the class allegations and declined to enforce the class claims in arbitration. Charging Party did not appeal this Ruling and Order.

The instant case is controlled by the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (*Murphy Oil*), enf. denied 808 F.3d 1013 (5th Cir. 2015).³ In *D. R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), 2013 WL 6231617, the Court of Appeals for the Fifth Circuit rejected the Board's decision; however it has not been overruled by the U.S. Supreme Court. Accordingly the ALJ properly applied Board precedent in the instant case and her decision should be affirmed in its entirety. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). Moreover, Respondent's exceptions to the ALJD and arguments in support thereof raise no points which were not previously considered and rejected by the ALJ.⁴ Therefore, counsel for the General Counsel (GC) urges the Board to adopt and affirm the ALJ's decision (ALJD) in this matter.

II. THE ISSUE PRESENTED

Whether Respondent's maintenance of, and efforts to enforce, the Agreement interfered with Charging Party's Section 7 right to engage in collective action in violation of Section 8(a)(1) of the National Labor Relations Act.

III. FACTS

Respondent operates retail grocery stores located throughout southern California. (ALJD 2:11). Charging Party was an employee of Respondent for several years, during which time he signed the Agreement, which is dated August 17, 2010, and was kept in Palacios' personnel file. (ALJD 2:23-28). The Agreement contains a mutual agreement that both Respondent and the signatory employee (in the singular), in this case Palacios, will resolve disputes arising out of

³ Preliminarily, General Counsel notes that there is now a split in the circuit courts regarding the legality of class action waivers in arbitration agreements under the National Labor Relations Act, with the Ninth and Seventh Circuits agreeing with the Board's position as enunciated in *Horton* and *Murphy Oil*. See, *Lewis v. Epic-Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016).

⁴ Inasmuch as Respondent's exceptions present only issues or arguments which were previously considered by the ALJ, and discussed in prior Board cases addressing the statutory pitfalls of mandatory individual arbitration, this answering brief endeavors to be relatively succinct.

employment with Respondent exclusively through arbitration, with purported exceptions for certain administrative claims that Palacios may pursue, such as filing with the Board. (Exh. 4).

The Agreement is in English that is complicated and legalistic. Palacios' native language is Spanish. He is unable to understand or speak English—let alone read a complicated agreement.⁵ (Exh. 9, 15). Further the record fails to establish that Respondent translated or explained the Agreement to Palacios before Respondent gave it to him to sign. So, too, the record fails to establish that Respondent gave Palacios the opportunity to seek an independent opinion or translation of the Agreement before he signed it.⁶ On June 18, 2013, Respondent terminated Palacios' employment. (ALJD 2:28).

On July 21, 2015, Palacios filed a class action lawsuit against Respondent in the Los Angeles County Superior Court (State Court) alleging, *inter alia*, various wage and hour violations. (ALJD 3:30-34; Stip. at 2; Exh. 5). Thereafter, in a letter dated September 25, 2015, to Charging Party's counsel, Respondent's counsel, demanded that Palacios dismiss his class action and submit to individual arbitration. (ALJD 3:35-38; Stip. at 3; Exh. 6). Respondent's demand was based entirely on the Agreement. On December 11, 2015, after Palacios rejected Respondent's demand (Exh. 7), Respondent filed a motion to compel arbitration of Palacios' individual claims and dismiss the class claims in State Court. (ALJD 3:39-41; Stip. at 3; Exh. 8).

Although the Agreement does not on its face specifically limit employees' claims to individual arbitration (as opposed to class or representative claims), in its Motion to Compel

⁵ The Board should reject Respondent's challenge to Palacios' credibility based on his declaration in his civil lawsuit stating that he did not recall signing the Agreement in the civil case. (Exh.15). First, Palacios' credibility is not at issue here; and, second, it is not at all inconsistent that Palacios would not remember signing a document that he could not understand and probably didn't read.

⁶ In his Ruling and Order, the Los Angeles County Superior Court judge found that, "[T]he evidence before the Court indicates that Defendants knew that Plaintiff could not speak English, yet presented him with the arbitration agreement in English and required him to sign it (without providing a translated copy.)" (Exh. 9 at 12)(Emphasis supplied). GC requests that the Board take administrative notice of the Court's Ruling and Order.

Arbitration and Memorandum of Points and Authorities in Support Thereof (Motion to Compel) Respondent maintained that, under the Agreement, Palacios' claims must be made individually. (ALJD 5:22-32; Exh. 8 at 1, 7-8).

Palacios filed an opposition to Respondent's Motion to Compel arguing that the Agreement violated the National Labor Relations Act (the Act or NLRA), and that the Agreement was substantively and procedurally unconscionable. (Exh.14). How could there be a true meeting of the minds, argued Palacios in his opposition, if the parties clearly possessed unequal bargaining power. While the State Court judge did not disregard this argument, in his Ruling and Order,⁷ he granted Respondent's Motion to Compel Arbitration, struck the class allegations and declined to enforce the class claims in arbitration. Charging Party did not appeal the judge's May 2, 2016, Ruling and Order. (ALJD 3:42-45; 4:1-2; Stip. at 5). Charging Party, however, had filed the charge in the instant case about a month before the State Court issued its Ruling and Order. (ALJD 1; Stip at 1; Exh. 1).

IV. ARGUMENT

A. Maintenance and Enforcement of Agreement Denies Employees' Collective Rights

In *D.R. Horton, Inc.*, and thereafter in *Murphy Oil*, the Board held that an employer violates Section 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."⁸ Thus, in *D.R. Horton*, the Board definitively held that an employer violates Section 8(a)(1) by requiring employees "as

⁷ The State Court judge concluded that Palacios had, in fact, demonstrated procedural unconscionability. See, Exh. 9 at 12-13.

⁸ The Board in *D.R. Horton* also found that the arbitration policy at issue there violated the Act by requiring employees to submit all employment-related disputes to arbitration. The Board found that this violated Section 8(a)(1) of the Act because it would lead employees to reasonably believe that they were prohibited from filing unfair labor practices with the Board. Here, Respondent's arbitration policy expressly excludes from its coverage the filing of charges with the Board. Hence, that issue is not presented by this case.

a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum.”⁹ *Id.*, slip op. at 1.

In the instant case, the Agreement does not, on its face, prohibit collective or class action; however, once Respondent sought to enforce the Agreement, and have the State Court dismiss the class and representative claims, the intended reach of the Agreement and its concomitant illegality became clear. For as the ALJ specifically found:

Respondent argues that the Agreement does not expressly preclude class or collective action. I agree that the Agreement does not explicitly prohibit class or collective action. However, Respondent, in its Superior Court filings, argues that because the Agreement does not authorize class arbitration, the Charging Party may only arbitrate his claims individually and the class claims dismissed (Jt. Mt. Exh. 8). 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. In accordance with its position in the Superior Court action, Respondent moved to compel individual arbitration of Charging Party’s claims. The Act provides that employees may “join together to pursue workplace grievances, including through litigation.” *D. R. Horton*, supra at 2278. Furthermore, the Board found there is no conflict between the Act and the Federal Arbitration Act as long as “the employer leaves open a judicial forum for class and collective claims [. . .].” *Id.* at 2288. 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. (ALJD 5:22-39)(Emphasis supplied).

B. Charging Party Was Required to Execute the Agreement

As it did unsuccessfully before the ALJ, in its Exceptions, Respondent maintains that maintenance and enforcement of the Agreement was lawful because signing it was not a

⁹ Unless overruled by the U.S. Supreme Court, the NLRB’s administrative law judges are required to adhere to Board precedent. As such, the administrative law judges’ intermediate reports and recommended orders in *Chesapeake Energy Corp*, 2013 NLRB LEXIS 693 (2013) and *Haynes Bldg. Serv.*, 2014 NLRB LEXIS 94 (2014) cited at length by Respondent do not reflect Board law, but merely errant interim decisions.

mandatory condition of employment for the Charging Party. This position is disingenuous and yet another of Respondent's attempts to "have it both ways," and should be rejected. First, Respondent presented the Agreement to Charging Party with a slew of other employment documents for his signature. Neither the Agreement nor the underlying Stipulation demonstrates that Charging Party was given an option not to sign the Agreement. (ALJD 4:15-22). Second, once these binding agreements are signed and become effective, there can be no doubt that they also become conditions of employment. Thus, Respondent can preclude employees' exercise of their Section 7 rights to engage in collective legal activity (as it has done here with its Motion to Compel), and current employees can reasonably expect that they may be disciplined or face legal action if they breach the terms of the binding arbitration agreements that they signed. Simply stated, once executed the Agreement, as applied by Respondent's enforcement proceedings, results in outright forfeiture of employees' Section 7 right to choose to act concertedly in any future legal dispute with Respondent. See, *CPS Security (USA), Inc.*, 363 NLRB No. 86 at 1 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

C. Access to NLRB "Savings Clause" is Ineffective

Respondent excepts to the ALJD because the Agreement purports to exempt the filing of an administrative charge or complaint with the NLRB as well as other agencies from its exclusive terms; such exemptions or exceptions are often referred to as "savings clauses."¹⁰

¹⁰ Generally, the Board has found such "saving clauses" inadequate and ineffectual. *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), *enfd. mem.*, 255 F. App'x 527 (D.C. Cir. 2007). See also, *Allied Mechanical*, 349 NLRB 1077, fn. 1 (2007), where the Board concluded that an employer violated the Act by requiring employees to sign releases with language that was "ambiguous and self-contradictory." The first part of the *Allied Mechanical*-release waived employees' Section 7 rights to assist other employees with wage claims; however, the second part of the release purported to cancel that waiver by excluding conduct permitted by the Act. The Board held that a reasonable employee would be unlikely to understand this distinction, and found a violation. According to the Board, instead of a release that clearly informed employees of their right to assist other employees, the respondent's ambiguous language results in restraining employees from engaging in protected activity while attempting to shield itself from liability, albeit unsuccessful, by including a "savings clause."

In *SolarCity Corp.*, 363 NLRB No. 83 (2015), the employer's arbitration agreement prohibited employment disputes from being brought, heard or arbitrated as a class or collectively; however, the agreement contained an exception that permitted employees to file claims with certain administrative agencies, including the NLRB. There, the Board affirmed the judge's findings that an agreement that provided for waiver of class and collective litigation in all forums violated Section 8(a)(1) under *Horton* and *Murphy Oil*. Moving on, the Board rejected the notion that certain exceptions purportedly providing employee-access to administrative agencies saved the employer's agreement. Rather, the Board concluded that access to administrative agencies was not an adequate substitute for filing a class, or collective lawsuit—either as a practical matter or for the purposes of *Horton*, which seeks to preserve employees' rights to engage in concerted legal action fully consistent with the federal policy favoring arbitration. *Id.* slip op. at 2-4.

Further, in *SolarCity*, the Board specifically examined the agreement's particular exemption of NLRB claims from individual, mandatory arbitration. The Board applied its test from *Lutheran Heritage-Livonia*, 343 NLRB 646 (2004) to determine whether, notwithstanding the asserted exemption or "savings clause," a reasonable employee would construe such an agreement as prohibiting her from filing a Board charge. In agreeing with the judge, the Board held that the agreement was vague and confusing, which in turn, could inhibit employees from exercising Section 7 rights, including their "complete freedom" to Board access. *SolarCity* at slip op. 4, citing *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972). Additionally, the Board stated that employees do not generally possess legal skills sufficient to determine the legality of company rules—particularly when such rules involve legal concepts and convoluted language.

The Board reached the same conclusion in *ISS Facility Services*, 363 NLRB No. 160

(2016). In that case, the employer's arbitration agreement provided for all disputes to be decided by arbitration, with exception language similar to that found in *SolarCity's* agreement. Again, the Board applied its *Lutheran Heritage*-test to determine whether a reasonable employee would construe the arbitration agreement to prohibit the filing of Board charges, and found the exception language did not pass legal muster as it was too vague.

In *Ralph's Grocery Company*, 363 NLRB No. 128 (2015), the Board once again addressed a mandatory arbitration policy that purportedly permitted employees to file NLRB-charges. There, *inter alia*, the Board held that Ralph's policy's exemption failed under the *Lutheran Heritage*-test. The Board was simply not persuaded that employees would reasonably believe they had unfettered access to the Board.

Accordingly, under Board precedent, here, the Agreement's purported "savings clause" must fail. It follows almost two full paragraphs of legal language, replete with lists of causes of action that must be arbitrated and administrative agencies--the names of which are so extensive that, at some point, the drafter of the Agreement surrendered and merely said, "and so on." Plus, to create further confusion, the purported "savings clause" does not explain to the employee that she has a right to go to the Board; rather it says that the Agreement does not preclude her from filing with certain agencies, including the Board, but it also states that "[t]hese claims must, however, be arbitrated if for any reason." So, if the average worker finishes reading such language, it is highly doubtful that she would understand her unconditional Section 7 right to invoke the Board's processes.¹¹

¹¹The Board does not assume that employees have specialized legal knowledge or experience to interpret an arbitration agreement. See, *2 Sisters Food Group*, 357 NLRB 1816 (2011)(language limiting arbitration policy not susceptible to interpretation by non-lawyers unfamiliar with the Act's limitations on compulsory arbitration). *Id.* at slip op. 2. See, also, *Supply Technologies, LLC*, 359 NLRB No. 39, slip op. at 3 (2012); *P.J. Cheese, Inc.*, 362 NLRB No. 177 at slip op. 2, fn. 6 (arbitration agreement unlawful, notwithstanding language allowing employees to file charges, because ambiguities are properly construed against drafter).

D. Collateral Estoppel and Res Judicata Not Applicable

In its exceptions, Respondent renews its argument that the GC cannot prosecute the instant case because the doctrines of collateral estoppel and res judicata bar such prosecution. The ALJ summarily rejected Respondent's argument because the Board was not a party to Charging Party's class action complaint. In this regard, 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. See *UnitedHealth Group, Inc.*, 363 NLRB No. 134 (2016); *Bloomington, Inc.*, 363 NLRB No. 172, slip op. at 4 fn. 8 (2016), citing *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. 982 F.2d 845, 850 (2d Cir. 1993), cert denied 509 U.S. 904 (1993) ("The Board adheres to the general rule that if the government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully."). (ALJD 7:10-24).¹²

In the instant case, the Board was not a party to the private State Court action between the Charging Party and Respondent. Therefore, under established Board law, it is clear that the doctrines of collateral estoppel and res judicata do not apply.

V. CONCLUSION

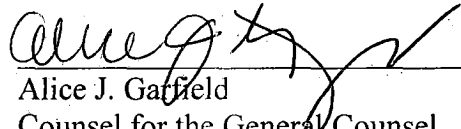
In light of the above and the record as a whole, General Counsel requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the

¹² Collateral estoppel principles do not preclude proceeding against Respondent's efforts to enforce the arbitration agreements through its motion to compel arbitration. Indeed, only two circuit court decisions *have* applied collateral estoppel principles to the Board and denied enforcement of Board orders in unfair labor practice cases that turned on the existence of a contract. Both cases involved alleged repudiation of collective bargaining agreements. In contrast with the case at bar, neither case involved broad policy questions implicating the essence of Section 7. See *Donna-Lee Sportswear*, 836 F.2d 31, 35 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976).

National Labor Relations Act as alleged in the complaint and issue an appropriate remedial order along with a notice to employees.

Dated at Los Angeles, California, this 6th day of April 2017

Respectfully submitted,



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STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Answering Brief to Respondent's Exceptions** was submitted by E-filing with the Executive Secretary of the National Labor Relations Board on April 6, 2017. The following parties were served with a copy of the same document on April 6, 2017, by electronic mail.

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