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

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I.

THE INSTANT CASE IS DISTINGUISHABLE FROM THE D.R. HORTON AND MURPHY OIL DECISIONS

The General Counsel continues to reply upon the holding of the NLRB cases of D.R. Horton, Inc. (2012) 357 NLRB No. 184 and Murphy Oil USA Inc. (2014) 361 NLRB No. 72 while completely ignoring the distinguishing facts. Both of those cases dealt with express class waiver language in a mandatory arbitration agreement. As the General Counsel admits, the arbitration agreement signed by Charging Party, Nesked Palacios ("Charging Party"), does not contain any class waiver language. That is a huge factual distinction which the General Counsel conveniently glosses over.

Furthermore, both D.R. Horton and Murphy Oil dealt with arbitration agreements that were undisputedly mandatory conditions 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.

In this case, Buy-Low Market, Inc. ("Respondent") did not utilize a mandatory arbitration agreement and the Charging Party and General Counsel failed to

produce any evidence to the contrary.

Moreover, D.R. Horton and Murphy Oil involved arbitration agreements held to 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. (See Mutual Arbitration Agreement, Exhibit 4).

II.

THE ADMINISTRATIVE LAW JUDGE MADE INCORRECT AND UNSUPPORTED FINDINGS OF FACT AND LAW

The General Counsel suggests that the Board cannot make any determinations on Respondent's Exceptions because the Administrative Law Judge ("ALJ") already decided such issues. That would defeat the entire point of the exceptions process. Respondent is challenging the factual and legal findings made by the ALJ through the filing of its Exceptions. If the ALJ's determinations were not subject to review by the Board then there would obviously be no need of an Exceptions process.

III.

THE CHARGING PARTY AND GENERAL COUNSEL FAILED TO CARRY THEIR BURDEN OF ESTABLISHING THAT THE ARBITRATION AGREEMENT WAS MANDATORY

It was the evidentiary burden of the Charging Party and General Counsel to establish through evidence that the Arbitration Agreement was a mandatory

condition of employment. The General Counsel improperly attempts to shift this evidentiary burden to Respondent by claiming that Respondent did not prove that the Agreement was optional. The record is utterly devoid of any evidence which would establish the assertion that the Arbitration Agreement was supposedly mandatory, under any evidentiary standard.

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). Accordingly, there is no evidence that Charging Party needed or requested translation of the document. In fact, the evidence in the record is that Respondent provides translators at the store and corporate level for employees that believe they needed documents translated. (See Declaration of Fred Damavandi at ¶ 4, Exhibit 12). Furthermore, the individual who Charging Party asserts provided him with his new hire paperwork, Jamie Luna (see Palacios Decl. at ¶ 4), is someone who fluently speaks Spanish, (see Declaration of Jamie Lune at ¶¶ 2-3, Exhibit 19). Therefore, translation was available for the Arbitration Agreement if the Charging Party needed translation. The ALJ completely glossed over the lack of any 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.

Faced with a complete lack of evidence, the General Counsel puts forth a circular argument that if the Charging Party voluntarily agreed to enter into a non-mandatory arbitration agreement then the agreement would become mandatory after he agreed to it. The issue is whether he was required to enter the agreement as a condition of employment. If the agreement was not mandatory, then it could not be a condition of employment.

Further, the General Counsel completely misses the point of the holding in On Assignment Staffing Services, Inc., 362 NLRB No. 189 (2015) and CPS Security (USA), Inc., 363 NLRB No. 86 (2015). In those cases, there were mandatory arbitration agreements which contained opt-out provisions. Therefore, employees were required to enter agreements containing express class waiver language but could later opt-out of those agreements. The Board held that the act of requiring them to sign the agreements in the first place was unlawful due to the class waiver language being contained regardless of any later ability to opt-out of the agreements. Here, Charging Party was not required to sign the Arbitration Agreement at all. This is not an opt-out case. It is not enough to simply cite to holdings that have favorable end results. The facts of the case have to support the reasoning that led to those conclusions. Here, Charging Party was not required to sign any arbitration agreement, let alone one with express class waiver language. Accordingly, the reasoning of On Assignment Staffing and CPS Security does not apply as this is not an opt-out case.

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IV.

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). 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.

The cases cited by the General Counsel deal with obviously vague language in other arbitration agreements on this issue and do warrant further discussion. The language in Respondent's Arbitration Agreement is abundantly clear and suggesting that the language is vague as to whether an NLRB charge would have to be arbitrated defies logic and reason and flies directly in the face of

the plain language of the Agreement.

V.

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

Respondent has covered the collateral estoppel and res judicata issues in-depth in its supporting brief. Charging Party has no standing to re-litigate the issue of proceeding on class claims in the Superior Court case. This case was brought by the Charging Party. He is the one who filed the Charge. If he has no standing to proceed, then there is no valid Charge.

In addition, the remedy fashioned by the ALJ seeks to direct the Superior Court to allow the Charging Party to resume litigating his class claims. The Superior Court has already decided that issue and Charging Party has no standing in the Superior Court to re-litigate those claims. The Board does not have authority to confer standing in a California civil court on a plaintiff who has no standing. In addition, the Board does not have authority to confer jurisdiction on a California civil court on an issue for which is has no jurisdiction. The remedy in this case goes far beyond a finding of an unfair labor practice charge. The attempt to direct a California civil court to permit a party to proceed on extinguished claims certainly invokes issues of collateral estoppel and res judicata as to the Charging Party.

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.

VI.

THE REQUESTED REMEDIES ARE INAPPROPRIATE

The General Counsel has failed to dispute that the remedies ordered by the ALJ were improper. As discussed in Respondent's Supporting Brief, there was no evidence regarding the use of the Arbitration Agreement as to any other employees or the time period the Agreement was used or whether it is even in current use. Accordingly, there was insufficient evidence for the ALJ to order any remedies as to employees other than Charging Party. In addition, there is no valid legal procedure under California law which would permit a vacation of the Superior Court's order and Charging Party is beyond the applicable statute of limitations to re-file class claims. Therefore, he cannot renew his class claims in the Superior Court. Finally, the facts of this case fall woefully short of the standard in Bill Johnson's Restaurant, Inc. v. NLRB (1983) 461 U.S. 731 for awarding attorney's fees and costs.

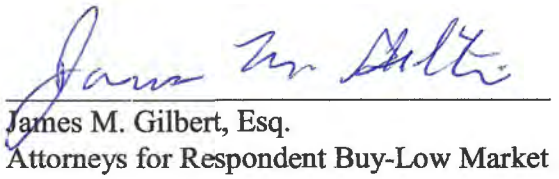
Due to the failure to address these arguments, the General Counsel has conceded that such remedies were unsupported by the record and beyond the ALJ's authority.

VII.

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: April 20, 2017



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

CERTIFICATE OF SERVICE

I hereby certify that, on April 20, 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:

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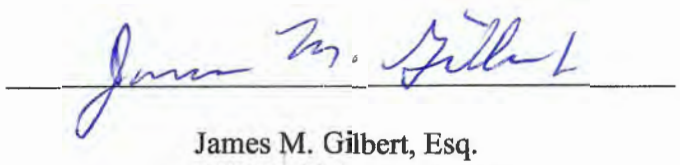
DATED: April 20, 2017



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