

FILED

SEP 02 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289681
(Spokane County Superior Court No. 09-2-01770-5)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ANJELIA NEUSON,

Plaintiff-Petitioner,

v.

MACY'S DEPARTMENT STORES, INC.,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

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Macy's Department Stores, Inc.

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I. INTRODUCTION

Appellant Anjelia Neuson (“Neuson”) is a former employee of Respondent Macy’s Department Stores, Inc., (“Macy’s”) who agreed to resolve any claims or controversies arising out of her employment through binding arbitration under Macy’s early dispute resolution program - Solutions InSTORE (“SIS” or the “Program”). The Program provides a standardized framework for current or former employees to escalate their workplace concerns through a series of steps, deciding at the conclusion of each step if they are satisfied with the outcome. The final step in the process is binding arbitration.

Macy’s did not mandate participation in the arbitration portion of the Program, but instead gave its employees two opportunities to opt out. Because of a change in work location, Neuson was actually given *three* opportunities to opt out of arbitration. As Macy’s illustrated through the substantial evidence presented in the court below, Neuson failed to exercise her right to opt out of arbitration on any of the three opportunities she was given, and is, thus, now bound to seek resolution of her claims in the arbitral forum.

In her appeal, Neuson has asked this Court to overturn the Trial Court’s ruling granting Macy’s Motion Compel Arbitration. Neuson requested relief on the grounds that the Trial Court improperly made

determinations of contested issues of fact and credibility and improperly found Macy's was entitled to a presumption of mailing. Neuson's recitation of the events, as well as the evidence she submitted below, is confusing and, at times, inaccurate. When accurately and clearly recounted, the facts and law are equally supportive of the Trial Court's decision. In this brief, Macy's sets forth an accurate and clear presentation of the evidence and applicable law.

Contrary to Neuson's allegations, the Trial Court did not improperly make credibility determinations. The court correctly found that the evidence submitted by Macy's was sufficient to establish an enforceable agreement to arbitrate between Macy's and Neuson, and that the agreement was not substantively or procedurally unconscionable. The court's ruling acknowledged that Neuson's speculative and conclusory evidence was not sufficient under Washington law to refute Macy's evidence and thus, the Trial Court properly granted the motion.

II. ISSUE PRESENTED

Whether the Trial Court properly found the parties entered into an agreement to arbitrate Neuson's employment disputes based on the evidence presented below.

III. STATEMENT OF THE CASE

A. The Factual Evidence Before the Trial Court.

1. Macy's Instituted Its Four-Step Dispute Resolution Program in 2003, and Rather Than Mandate Participation, Gave Employees the Opportunity to Opt Out of the Arbitration Portion.

In 2003, Macy's, Inc.¹ developed and implemented a four-step early dispute resolution program for its employees called Solutions InSTORE, which went into effect on January 1, 2004. CP-200, 203. Macy's is bound by any decision made at each step of the process, even unfavorable ones. CP-200. However, if the employee is not satisfied with a decision at any step, she can appeal the issue to the next step of the Program. CP-200.

The first two steps of the Program entail resolution of disputes at the local or regional level. CP-201, 218. First, the employee directs her concerns to her supervisor or other member of local management. CP-201, 218. If not satisfied with the outcome at Step 1, the employee may seek review by the Senior Human Resources executive for her region or district. CP-201, 218. At Step 2, the matter is referred to an investigator not involved in the underlying decision. CP-201, 218.

¹ Macy's Inc. is the parent company of Macy's Retail Holdings, Inc. which is in turn the parent company of Macy's Department Stores, Inc. ("Macy's"), the Respondent in this matter. CP-199.

The third step is available to employees who are unhappy with the Step 2 decision and whose complaint involves legally protected rights. CP-201. At Step 3, if the dispute involves claims related to layoffs, harassment, discrimination, reduction in force, or other alleged statutory violations, a trained professional investigates the issue thoroughly and objectively. CP-219. Other disputes, including those over final warnings and terminations, may be submitted to a Peer Review Panel at the employee's option. CP-219. In either case, the local management is not involved in the decision at this step. CP-201, 219.

Following the first three steps that attempt to resolve a dispute internally, the final step involves arbitration administered by the American Arbitration Association ("AAA"). CP-200-202, 220. While Steps 1 through 3 are available to all employees, arbitration is a voluntary choice for the employee. CP-201, 220. Employees who do not wish to be bound simply complete a one page form declining arbitration and mail it back to the SIS Office in Ohio within the prescribed time limits. CP-201, 220.

The employee's choice to stay in or opt out of arbitration is confidential. CP-201. No one in the employee's immediate reporting structure is aware of the employee's decision about whether to opt out. CP-201. Employees in Washington who wish to decline arbitration, like employees in other states, mail their opt-out forms to the SIS post office

box in Ohio. CP-201. No one in an employee's local workplace has access to this information. CP-201. Only a select few company employees have access to an employee's decision. CP-201.

An employee's decision has no effect on her employment. CP-201. The Program strictly prohibits retaliation against employees who use, or opt out of, the SIS Program. CP-201-202.

With limited exceptions not pertinent here, SIS provides that all employment-related legal disputes, controversies or claims arising out of, or relating to, a participant's employment or cessation of employment shall be settled exclusively by final and binding arbitration administered by the AAA. CP-202, 220-222.

Once an employee has agreed to arbitration, neither the employee nor the Company can file a civil lawsuit in court relating to such claims. CP-222. Thus, if an employee files a lawsuit in court to resolve claims subject to arbitration, the Program provides that the court shall dismiss the lawsuit and send the claims to arbitration. CP-222. The Program is governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. CP-233.

2. The Program Terms.

The SIS Program has numerous features designed to ensure that employees are treated fairly at every step of the Program, including arbitration:

- **The Employee is In Control.** At each step of the program, only the employee has the right to proceed to the next step, with the result that the employee who obtains a favorable result at any of the first three steps can bind Macy's to that result simply by declining the next step. CP-200, 218-219.
- **Minimal or No Fees or Costs to the Employee.** An employee initiating arbitration pays a filing fee of one day's pay or \$125, whichever is less. The Company pays the other arbitration costs, except for incidentals like photocopying and producing evidence. CP-202, 231.
- **Macy's Reimburses the Employee's Attorney (or the Employee) for Advice On and Prosecution of Claims.** If the employee consults with an attorney for the arbitration, Macy's reimburses legal fees up to \$2,500 over each continuously rolling 12-month period—no matter what the outcome. If the employee is not represented by an attorney, Macy's will reimburse the employee for incidental costs up to \$500 for each 12-month rolling period the matter is at issue. CP-202, 232.
- **The Employee Decides Whether Lawyers Are Involved.** If the employee decides not to have an attorney present at the arbitration, the company likewise appears without counsel. CP-202, 225.

- **Governing Rules.** The arbitration is administered for the most part under the AAA employment arbitration rules. Any exceptions to the AAA rules are noted in the Plan Document. CP-202, 220.
- **Mutuality.** If an employee elects arbitration, the Company then has to resolve any employment-related disputes it has with the employee by arbitration as well. CP-202, 221-222.
- **Selection of Arbitrators.** Both Macy's and the employee participate in the selection process. A panel of AAA arbitrators is selected and each party may alternately strike an arbitrator until one remains, and the parties have the option of agreeing to strike the final arbitrator and obtain a new panel. CP-224.
- **Discovery.** Discovery is permitted and includes voluntary initial document disclosures similar to those required by the federal rules of civil procedure for all non-privileged documents relied upon for claims and defenses; this is a continuing obligation. The parties are also allowed 20 interrogatories (each of which may also contain a request for production of related documents) and 3 depositions. The Program also allows the arbitrator the discretion to allow additional discovery if the requisite standard is met. CP-202, 225-226.

- **No Curtailment of Ultimate Relief or Limitations Periods.** The arbitrator has the same power and authority as a judge to grant any ultimate relief under any applicable law, including attorneys' fees and costs. The statutes of limitation that apply to court claims apply equally to the arbitration procedure, and are not curtailed in any way by the Program. CP-202, 223, 232.

This Program was rolled out to all Macy's-related entities in the fall of 2003. CP-203. Macy's Department Stores, Inc., the corporate entity for which Neuson worked, was one such affiliated entity. CP-195.

3. Macy's Had Numerous Measures To Ensure Employees Made An Informed Choice Regarding Voluntary Participation In the Arbitration Program in Fall 2003.

Macy's hired Neuson July 21, 1994, as a sales associate at the Silverdale, Washington, Bon Marche store which was part of the unincorporated Northwest division of Federated Department Stores, Inc., now known as Macy's, Inc. CP-195. Neuson was a Macy's employee in the late summer/early fall of 2003, when the company began advising employees of the new Program. CP-195, 203. Each division, including the Northwest division in which Neuson worked, was required to set up small group meetings with their employees; all employees were required to attend one such meeting. CP-195, 203. At these meetings, employees received a letter from Terry Lundgren, the Chairman, President and CEO

of Macy's, and the Early Dispute Resolution brochure, which summarized the terms of the program. CP-203, 237-248, 250. A company representative was present at each meeting to explain the Program, answer questions, and inform employees of future mailings they would be receiving. CP-203. The employees viewed a video designed specifically to rollout the Program. CP-203, 252-259. Each store received posters to place in areas frequented by employees that explained the program's 4-step process. CP-204, 261.

a. Macy's Mailing Process.

Then, in late September 2003, the Plan Document for the Program, an "Early Dispute Resolution Program Election Form" ("Election Form"), and a pre-addressed postage paid return envelope addressed to the SIS Office in Ohio were mailed to all employees of Macy's (including its subsidiaries and affiliates) at their address of record maintained in the company files. CP-204-205, 214-235, 263, 265. This is the same address used for all benefit related mailings such as health care elections, retirement plan elections and so on. CP-204. If an employee wanted to be excluded from the Step 4 - Arbitration phase of the Program, she simply filled out and returned the Election Form with a postmark no later than October 31, 2003 in the pre-addressed, postage paid envelope provided.

CP-204-205. Macy's business records reflect these materials were mailed to Neuson in September 2003. CP-205, 267.

In mailing the SIS materials, Macy's used the same procedure that it used for all mass mailings. CP-471. Specifically, multiple steps were taken during the printing and envelope preparation process to ensure that any errors in the process were caught and corrected and further, that each individual who was supposed to receive the mailings did in fact receive the mailings. CP-470. The company assigned a mail production team to prepare the packets for mailing. CP-468. There were over 110,000 packets mailed in 2003 alone. CP-204, 468.

Macy's mailing process started with the printing of an Election Form for each employee; each Election Form had a sequence number, starting with 1 and going up from there. CP-468. The election forms were printed using Xerox printers and typically 2,500 pieces were printed at one time. CP-468. The Xerox printer used had the ability to determine exactly what was printed and delivered to the output bin. CP-468. If any problem occurred during the printing of a batch of the election forms, for example, a paper jam, the Xerox machine is able to detect which pages were not printed or were not printed properly and self correct. CP-468-469.

Once all of the election forms were printed, they were separated into stacks of approximately 2,500 and given to Machine Operators in sequential order for folding and insertion into the window envelopes. CP-469. Generally, each Machine Operator was given three stacks at a time for the folding and insertion process. CP-469.

The Machine Operator followed the same process for each stack of 2,500 election forms. CP-469. He or she would take a stack of election forms and feed them through a PF 300 Sheet Feeder and then into a Bell & Howell Inserter. CP-469. The Machine Operator utilized a Production Control sheet that he/she updated each time he or she finished processing a stack of election forms. CP-469. This sheet detailed the Operator's name, the name of the job, the date, the starting and ending sequence numbers of the election forms in the stack just processed and the total number of election forms processed. CP-469. Upon completion, the Machine Operator would confirm the total number of pieces processed in the stack with what he or she was given. CP-469.

The PF 300 Sheet Feeder has a built in counter. CP-469. As a dual balancing tool, the Machine Operators also used the counter on the PF 300 Sheet Feeder to validate that the total pieces processed matched the number of election forms in the stack as determined by the starting and

ending sequence numbers printed on the election forms at the end of each stack. CP-469.

The Bell & Howell Inserter had a counter built into the Pitney Bowes R150 Postage Machine which was attached to the end of the Bell & Howell Inserter. CP-469. The Machine Operator also used this counter to balance to the sequence numbers. CP-469. If the balancing numbers did not match, the Machine Operator would notify his or her supervisor or Manager. CP-469. At that point, the entire stack would be “held” and would be reviewed to determine and correct the error. CP-469.

The PF 300 Sheet Feeders have a detection feature that automatically stops the feeder if multiple sheets of paper are commingled together. CP-469. This detection setting is calibrated daily. CP-469-70. Similarly, the Bell & Howell Inserters have detection settings built into the component that pulls the paper onto the machine insertion track. CP-470. These settings are used to detect a missed piece and an occurrence if the inserter pulls multiple pages. CP-470. This setting is also calibrated daily. CP-470. These detection features ensured that only one election form was placed with the other documents which were included in these mailings and then folded and stuffed into an envelope. CP-470.

When the envelopes were stuffed and sealed, they dropped into a mail bin. CP-470. After all of the election forms in the stack were

finished being folded and stuffed, the mail bin was brought to another location where the envelopes were then sorted for mailing by zip codes into regions of the country. CP-470.

The packets were weighed to determine the proper postage which was paid to the U.S. Postal Service via a pre-paid postage account. CP-470. At the time they were stuffed, the envelopes were already affixed with the proper postage. CP-470. The packets were tallied and picked up by the U.S. Postal Service. CP-470. The mail is picked up daily by the U.S. Postal Service at the facility processing the mailing. CP-470.

b. SIS Confirmation of Mailing Process.

As a final check for the 2003 mailing, an employee from the Solutions InSTORE office was present while these mailings were being processed. CP-475. The employee was tasked with double-checking the sequence numbers at the start and end of each stack of election forms to confirm that the sequence was as it should be. CP-475-476.

The employee also had the list from the Solutions InSTORE office of approximately 160 executives that were marked as needing to have their election forms pulled from this mailing. CP-475. Each name was identified by its sequence number. CP-475. For each executive on the list, the employee identified the specific stack where the election form to that individual should have been found and she went through that stack

sequentially until she reached the particular sequence number. CP-475. She then confirmed that that election form matched the executive identified as having that sequence number and she then removed that election form from the stack. CP-475. For each of the approximately 160 election forms that were pulled, the sequence number on the master mailing list matched with an election form with the same sequence number in the stack, and the sequence number on the election form correctly matched the name of the executive assigned that number on the master mailing list. CP-475-476.

c. Neuson Received SIS Materials in 2003, and Admittedly Received Other Macy's Mailings At the Same Address.

The SIS Office compiled and maintained a list of each employee's name and address for whom an election form was generated in the 2003 mailing. CP-205. Neuson was included in the list as someone to whom the fall 2003 mailing was sent. CP-205. Her address for the mailing is listed as: 5725 Wisteria Lane NE, Bremerton, WA 98311. CP-205, 267. This mailing was not returned as undeliverable. CP-205.

Macy's records indicate that it sent numerous other mailings to Neuson during this time to the same address including benefits documents, 401(k) papers and checks, and tax information. None of those documents were returned as undeliverable. CP-460-461, 464-465, 471. Notably,

Neuson admits receiving mailings from Macy's but not the SIS materials. CP-520.

4. Neuson Did Not Return Her Election Form In Fall 2003.

Macy's does not have record that Neuson returned an opt-out Election Form in the fall of 2003. CP-205-206.

The Election Form mailed to employees in the fall of 2003 informed employees that if they returned the Form, they would receive a confirming letter indicating their election. CP-206, 263. If employees did not receive such a confirmation by December 29, 2003, the Form instructed the employee to contact the SIS Office. CP-206.

These letters were sent on December 19, 2003 to everyone who opted out of the Program in the fall of 2003. CP-206, 271. Neuson was not sent a confirming letter as she had not returned an Election Form. CP-206.

In addition, employees who did not opt out of arbitration were sent a different mailing in January 2004 to confirm the employee's participation in the Program. CP-206. Thus, to employees who did not return their Election Form by opting out of arbitration, Macy's sent a document in January 2004 entitled "You're in Good Company" welcoming them to all four steps of the Program. CP-206, 273. A copy of this brochure was sent to Neuson. CP-207, 278.

5. Neuson Did Not Opt Out of The Arbitration Portion of the Program During Her Second Opportunity in Fall 2004, Nor Did She Challenge Her Inclusion In the Program.

About a year after the initial rollout of the SIS Program, Macy's gave employees a second opportunity to decline arbitration. CP-207. If an employee had already exercised her right to reject arbitration, that decision was respected and the employee was not sent a second mailing. CP-207. Between October 8 and October 12, 2004, Macy's mailed the following documents to employees who had NOT opted out during the previous fall: 1) a "We've Got You Covered" brochure, 2) an "Opening the Door to More Information" newsletter, 3) a new Election Form with a postmark deadline of November 15, 2004, and 4) a pre-addressed postage-paid return envelope. CP-207, 265, 280-295. This package of documents was mailed to Neuson. CP-208, 297.

Macy's used the same mailing procedure for this mailing as it had for the 2003 mailing – utilizing the same series of checks and balances - including review by a member of the SIS team to check the validity and accuracy of the printings through the withdrawal of the election forms for 160 selected executives. CP-468-471, 474-476. Neuson was on the compiled list of employees to whom the mailing was sent. CP-208, 297.

As with the previous opt-out form, the Fall 2004 form told employees that if they opted out of arbitration, they would receive a

confirming letter no later than December 29, 2004. CP-208, 295. If an employee who intended to opt out did not receive a confirming letter, she was told to contact the SIS office. CP-208. As she did not opt out, this confirmation letter was not mailed to Neuson. CP-208.

The SIS Office logged any communications about the rollout – telephone calls, letters, email, and the like into a spreadsheet. CP-209. Over 1,000 employees called the SIS Office during the rollout of the Program. CP-209. Neuson was not one of them. CP-209.

6. Macy's Has No Record of Neuson Returning an Election Form Opting Out of Arbitration.

The Office of Solutions InSTORE has regular procedures for processing Election Forms. CP-205. Each Election Form is date-stamped when it is opened. CP-205. The form is reviewed for completeness and then loaded into the PeopleSoft Human Resource System. CP-205. This System is used by the Office of Solutions InSTORE to record opt out status. CP-205. Hard copies of Election Forms are maintained in filing cabinets by social security number. CP-206.

The SIS office reviewed the PeopleSoft Human Resource System to determine if Neuson had returned an Election Form. CP-205, 208. According to the system, Neuson never returned an opt-out form during either the first or second opt out period. CP-205, 208. Likewise, the hard copy files also do not contain an Election Form for Plaintiff Neuson. CP-

206, 208. Accordingly, Neuson did not opt out of Step 4-Arbitration. CP-205-206, 208.

7. Neuson Received the Unique Option of a Third Opt Out Opportunity in October 2006.

On September 4, 2006, Neuson left her employment at the Silverdale, Washington, Macy's store. CP-195, 209. One month later, she began working at the Northtown Macy's store in Spokane, Washington. CP-195, 209. As a new employee at the store, Neuson was required to complete new employee paperwork. CP-195, 209. This paperwork included information about the Program. CP-195-196, 209-210.

New Macy's employees are given a copy of the current Solutions InSTORE Early Dispute Resolution Brochure. CP-196, 209-210, 308-341. This brochure explains the Program and also informs employees that they have the choice to opt out of Step 4-Arbitration by completing the Election Form that is enclosed within the brochure within 30 days of hire. CP-196, 209-210, 308-341, 346. The brochure distributed in the fall of 2006 contained a complete copy of the Plan Document. CP-209-210.

Neuson received her third opportunity to opt out of the Solutions InSTORE program when she signed a Solutions InSTORE Acknowledgement form along with her other on-line paperwork on October 4, 2006. CP-196, 210, 343-344. The acknowledgement signed by Neuson states as follows:

I have received a copy of the Federated Department Stores' Solutions InSTORE brochure and understand that I have 30 days from my date of hire to review the information and postmark my form to the Office of Solutions InSTORE if I elect to decline the benefits of Step 4 of the program, Arbitration.

CP-196, 210, 343-344.

To e-sign the acknowledgment, Neuson had to affix her social security number, date of birth and zip code to verify she was the person completing the document. CP-490-491. Neuson e-signed the Solutions InSTORE New Hire Online Acknowledgement on October 4, 2006. CP-343-344, 490-491. Neuson also completed a series of eight other documents online at the same time that she completed the SIS Acknowledgement. She also completed at least two documents in hard copy on October 4, 2006 – both of which required her to verify under oath the accuracy of the document she was signing. CP-423-424, 426-457.

Some of the documents completed by Neuson on October 4, 2006, required her to input personal information known only to her – her bank account information for the direct deposit of her paycheck and her husband's name and date of birth on the form for discount eligibility. The W-4 she completed was used to calculate deductions from her paycheck for tax purposes. CP-423-424, 426-457, 491-492, 496-499.

Although Neuson had the opportunity to review the SIS Brochure in the privacy of her own home, consider the program and decline Step 4—Arbitration within 30 days of her employment, she never submitted the opt-out form to corporate headquarters in Ohio. CP-210.

B. Procedural History in the Trial Court.

1. Neuson's Action.

Neuson filed her lawsuit in Spokane County Superior Court on April 22, 2009, alleging various claims of retaliation, disability discrimination and wrongful discharge, related to her employment with Macy's. CP-1-7.

2. Macy's Motion.

Macy's counsel discussed the issue of arbitration with Neuson's attorney. CP-16-17. The parties, however, were unable to reach a consensus on the issue. CP-16-17. Thus, on October 5, 2009, Macy's filed its Motion to Compel Arbitration and Dismiss, or in the Alternative, Stay Civil Proceedings along with supporting evidence. CP-16-380. Neuson filed her opposition and declarations of herself and a former co-worker on October 26, 2009. CP-381-408. Macy's filed its Reply brief on November 2, 2009 with additional declarations and evidentiary support opposing Neuson's arguments. CP-409-478. Neuson then filed her

Second Affidavit on November 5, 2009 – the day before oral argument on the motion. CP-479-488.

The Court below heard oral arguments on November 6, 2009. At the conclusion of argument, the Court asked the parties to submit limited supplemental briefing with any additional evidentiary support. Macy's filed its Supplemental Briefing on December 17, 2009 along with additional declaratory evidence. CP-558-568, 489-508. Neuson filed her opposition on January 15, 2010 with her Third Affidavit. CP-509-529. Macy's was allowed to file a reply to Neuson's opposition on January 22, 2010. CP-530-536. The Court granted Macy's Motion on March 25, 2010. CP-537-541.

This appeal followed on April 21, 2010. CP-542-548. An amended notice of appeal was filed on April 23, 2010. CP-549-557.

IV. ARGUMENT

A. Summary of Argument.

The Trial Court properly found that Macy's established that Macy's and Neuson entered into an enforceable agreement to resolve any disputes arising out of Neuson's employment through binding arbitration. The Trial Court's conclusion that Neuson failed to exercise her right to opt out of the Program, despite the three opportunities Macy's gave her, was supported by the substantial evidence adduced below by Macy's.

The Trial Court did not improperly make credibility determinations in ruling, but instead found that Neuson's evidence was not sufficient to challenge Macy's evidence or to raise any questions as to whether Neuson was given ample opportunity to opt out of arbitration. The Trial Court also properly found that the detailed evidence Macy's provided for its mailing process was sufficient to warrant a presumption of mailing.

Macy's respectfully submits that the Trial Court's ruling should be affirmed in its entirety.

B. Standard of Review.

A Trial Court's decision to compel a party to arbitration is reviewed *de novo* by the appellate courts. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302; 103 P.3d 753, 759 (2004). "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." 153 Wn.2d at 302.

C. Macy's Presented Sufficient Evidence For the Court To Find An Agreement To Arbitrate Existed.

Neuson does not challenge the content of the arbitration agreement as unconscionable nor does she allege that there was insufficient consideration for the agreement. She argues simply that she was never notified of her opportunity to opt out, and as such, she did not agree to be bound by the agreement to arbitrate.

Neuson goes to amazing lengths in her brief. For instance, Neuson argues that while she received numerous mailings to her address of record – including tax documents, checks for withdrawals from her 401(k) account and benefits information – she did not receive any of the three mailings by Macy’s related to the Program that were sent to the *exact same address during the same period of time*. She argues that despite her admitted signature on documents attested to under oath, she was not in the Spokane Macy’s on the day those documents were signed and specifically did not complete any documents on line – including the Solutions InSTORE Acknowledgement.

Neuson’s allegations are too incredible for belief. The Trial Court did not have to resort to making credibility determinations to grant Macy’s motion. Neuson, as the discussion below illustrates, gave the Trial Court everything it needed to find in favor of Macy’s.

1. Neuson Accepted Macy’s Offer to Arbitrate.

In determining whether the parties agreed to arbitrate, courts look to the law of the state where the agreement was entered. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895 (2001). The Washington state courts have held that determining whether the parties have entered into a valid contract is to be decided through use of the context rule which was enunciated in *Berg v. Hudesman*, 115 Wn.2d 657, 667-667 (1990); *Tjart*,

107 Wn. App. at 895. The context rule provides that deducing whether two parties have agreed to a contract – to arbitrate in this case – involves “determining the intent of the contracting parties by viewing the contract as a whole, including the subject matter and objective of the contract, all circumstances surrounding its formation, the subsequent acts and conduct of the parties, statements made by the parties in preliminary negotiations, and usage of trade or course of dealings.” 107 Wn.App. at 895 (internal citations omitted).

When Macy’s rolled out the Program, it took great pains to ensure that the details of the program were conveyed to all employees. Each store held mandatory, small group meetings in early September 2003 to discuss the Program with employees and distribute introductory materials, including the Early Dispute Resolution brochure. CP-203, CP-237-259. Each employee later received a mailing at their home address that contained the SIS Plan Document, which explained the terms of the program, and an Election Form. CP-204-205, 214-235, 263-265. Employees who did not wish to be covered by arbitration simply had to complete the one page Election Form and return it in the postage paid envelope included in the packet. 204-205, 263.

When Neuson did not return the opt-out Election Form, she received a mailing welcoming her to the Program. CP-206-207, 273-278.

Neuson never challenged that she had chosen to be a participant in Step 4-Arbitration. CP-209. Macy's then provided all employees, including Neuson, a second opportunity to opt out of the arbitration portion of the Program. CP-207, 265, 280-295. Once again, despite receiving materials explaining that she could opt out of arbitration, and additional materials related to the program including a new Election Form and return envelope, Neuson did not opt out. CP-205-208, 265, 280-297. Macy's reasonably relied on Neuson's actions to indicate that she wanted to participate in the arbitration portion of the Program.

In short, by choosing not to return the opt-out Election Forms, and by not contesting the confirmatory communications, Neuson manifested consent to participate in the provisions of the Program compelling that any employment dispute be arbitrated. Neuson's silence binds her to arbitrate her claims. Restatement 2d Contracts, §19 (1981) (the "manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act"). Washington courts have recognized the failure to speak or reject an agreement can constitute acceptance when there is a duty to speak. *American Aviation, Inc. v. Hinds*, 1 Wn. App. 959, 961 (1970) (acceptance can be implied from conduct); *Goodman v. Darden, Doman & Stafford Assoc.*, 100 Wn.2d 476, 481-482 (1983) (existence of an agreement may be shown by surrounding circumstances).

Silence constitutes an agreement in those instances where “relations between the parties have been such as to justify the offeror in expecting a reply, or where the offeree has come under a duty to communicate either a rejection or acceptance.” *Swingle v. Myerson*, 19 Ariz. App. 607, 609; 509 P.2d 738, 740 (Ariz. Ct. App. 1973) (citing *American Aviation*). The relationship between Macy’s and Neuson as employer-employee justifies Macy’s expectation of a reply. Neuson had a duty to speak, and is bound by her silence.

Unlike most other employees, Neuson had another chance to reject arbitration when she left her employment in Silverdale and became reemployed in Spokane 30 days later. The Plan Document is clear that if an employee experiences a break in service with Macy’s that is 60 days or less, that employee “will be automatically reinstated with the Associate’s original election to be covered or removed from coverage.” CP-220. Even though not required to do so, Macy’s gave Neuson a third opportunity to decline arbitration when she began employment in Spokane. If Neuson opted out at this juncture, Macy’s would have honored her decision.

In October 2006, Neuson acknowledged in writing her awareness of the Program and her knowledge that she had 30 days from the date of hire to opt-out of the Program if she did not wish to participate in

arbitration. CP-196, 210, 343-344. Still, Neuson declined to opt out of arbitration. CP-210.

When an employee has notice of an arbitration agreement and a meaningful opportunity to opt out and then fails to do so, she has assented. In other words, failure to opt out results in a contract to arbitrate. *Circuit City Stores, Inc., v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (court held employee “assented to the [arbitration agreement] by failing to exercise his right to opt out of the program”); *Circuit City Stores, Inc., v. Ahmed*, 283 F. 3d 1198, 1199-1200 (9th Cir. 2002) (arbitration agreement enforceable because employee failed to opt out). Had Neuson wanted to opt out of Macy’s Step 4, she had ample opportunity to do so. But, she chose not to do so; instead, she accepted the agreement to arbitrate and now, she must abide by her contract.

2. Macy’s is Entitled to A Presumption of Mailing as to the SIS Program Materials.

Neuson challenges Macy’s evidence of the roll out of the Program by alleging that she received none of the mailings. Washington, however, has long recognized the difficulty a corporation has in attesting to the mailing of one specific piece of mail among thousands that are commonly sent in the course of business. The law has accommodated this corporate reality by creating a “presumption of mailing” when specific criteria are met. If evidence sufficient to establish the presumption is adduced, the

“law presumes that ‘the mails proceed in due course and that the letter is received by the person to whom it is addressed.’” *Scheeler v. Employment Security Dept.*, 122 Wn. App. 484, 489 (2004); citing *Automat Co. v. Yakima County*, 6 Wn. App. 991, 995(1972). In order to secure the presumption of mailing, Macy’s must show a custom with respect to mailing and that the custom was followed in the case at hand. *Id.* Washington courts have held that the evidence used to meet this standard may be in the form of “business records establishing the mailing, evidence of a course of business regarding mailing, or third party testimony witnessing the mailing.” *Olson v. The Bon, Inc.*, 144 Wn. App. 627, 634 (2008).

Macy’s has more than met the required standard. In her brief, Neuson challenges the presumption of mailing by arguing that Robert Noeth, Macy’s Vice President of Employee Relations, Solutions InSTORE, attested to an office custom for mailing but that he did not have the ability to attest to the compliance with that custom. She argued that Macy’s submitted no evidence of an employee with knowledge of the process at the time the mailing was accomplished. Later in her briefing, she argued that Noeth could not attest to the office custom. (Neuson Brf., pp. 16, 22)

In his position, however, Noeth is responsible for the “management and administration of Macy’s Solutions InSTORE Early Dispute Resolution Program” and the supervision of the “employees whose sole job is administering the program.” CP-200. In his declaration, Noeth identified various company documents explaining the Program. CP-200-203. He also set out the portion of the lists that were used for the 2003 and 2004 mailings to show that the Neuson was on each list for the three mailings in 2003 and 2004 and to establish to what address the Neuson mailings were sent. CP-205, 207-208, 267, 278, 297. As Noeth is the custodian of the records identified in his declaration, he is competent to attest to their contents and authenticity on that basis. CP-199-200.

Noeth, in his capacity as the head of the Office of Solutions InSTORE, also provided other relevant evidence from Macy’s business records to bolster the company’s arguments. He attested that for the 2003 mailing, at least 10% of the recipients opted out of the Program – approximately 11,000 people - further proof that the mailings in fact were sent and received. CP-204-205.

In addition, Neuson ignores two additional key pieces of Macy’s evidence – the Declaration of Tom Schneider, the Director of Media Services for Macy’s Credit and Customer Services, Inc., a division of Macy’s that is responsible for all of the company’s mailing operations;

and the Declaration of Lisa Gick, the executive in charge of the Office of Solutions InSTORE in 2003 and 2004. CP-467-477. Both Gick and Schneider were employed in 2003 and 2004 in positions directly involved in mailing the SIS materials. CP-467-468, 474.

In his Declaration, Schneider outlined the process Macy's follows for all mass mailings, i.e., establishing the company's custom and practice for mass mailings. CP-468-471. He stated that the 2003 and 2004 SIS mailings followed the custom and practice for this type of mailing. CP-471. Schneider was in charge of overseeing the mailing of these materials in 2003 and 2004. CP-467-468.

Schneider attested to the specifics of Macy's mailing custom and how it was followed for the 2003 and 2004 SIS mailings:

- a production team was assigned to accomplish the 2003 and 2004 SIS mailings. CP-468.
- there were a series of checks and balances used to ensure that everyone who was supposed to receive a packet on the SIS Program materials was in fact mailed a packet. CP-468-471.
- the mailing addresses were printed on the cover letters and folded so that they showed through the window on the envelope. CP-468.

- the Election Forms that were printed during this process were folded and stuffed into the envelopes with the other materials, and then sealed. CP-468-470.
- the envelopes were weighed to determine the proper postage which was already affixed to each envelope at the time they were stuffed; postage was paid through a pre-paid account. CP-470.
- after being stuffed, the envelopes were taken to an area for sorting by zip code, tallied and picked up by the U.S. Postal Service. CP-470.

The Office of Solutions InSTORE assigned an employee to do a random check to confirm that the Election Forms were printed and sorted properly. CP-474-475. In her Declaration, Gick explained the process used by the SIS employees to ascertain that the Election Forms were printed in the proper sequence, and confirmed that the name on the Election Form matched the assigned sequence number. CP-474-476. Gick attested that she was in charge of the Office of Solutions InSTORE at the time of the 2003 and 2004 mailings, and not only knew they occurred, but was the SIS person responsible for ensuring that the mailings were sent to every employee who was to receive one. CP-474.

The evidence submitted by Macy's is more than sufficient to meet the standard set forth by the Washington courts for a presumption of mailing. As Neuson is presumed to have received the mailed materials, and she did not opt out, she is bound to arbitrate her claim.

D. Neuson Failed to Present Evidence That Disputed There Was An Enforceable Agreement To Arbitrate.

Neuson attacks Macy's argument that an agreement was struck between the parties by denying she received any of the 2003/2004 mailings and further denying that she completed the SIS New Hire Acknowledgment in October 2006. Each will be examined in turn.

1. Neuson's Vague and Speculative Allegations Are Not Sufficient to Dispute Macy's Evidence.

Neuson alleges that the Trial Court had to make improper credibility determinations in order to find for Macy's. That is not true. Washington courts have noted that there is a difference between weighing the evidence – as occurred here – and in deciding credibility issues. *Snohomish County v. Rugg*, 115 Wn. App. 218, 228 (2002). While reasonable inferences must be drawn in favor of a non-moving party, the case law is clear that the court is not required to draw *unreasonable* inferences in favor of a non-moving party. 115 Wn. App. at 229.

A party opposing a motion must do more than merely “recite the incantation, ‘Credibility’” in the hope of overcoming a properly supported

motion. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627 (1991), *citations omitted*. Credibility is implicated only if the evidence submitted contradicts or impeaches the evidence of the movant on a material issue. *Id.* at 626; 1060. The Trial Court properly weighed the submitted evidence and found in Macy's favor.

a. Neuson's Argument That Macy's Has Not Presented a Letter With Her Name Fails To Attack Macy's Evidence.

Neuson argues that because Macy's produced no letter with her name on it, the company is not entitled to a presumption of mailing. Neuson relies on the cases of *Scheeler v. Employment Security Dept.*, 122 Wn. App. 484 (2004) and *Kaiser Aluminum & Chemical Corp. v. Dept. of Labor & Indus.*, 57 Wn. App. 886 (1990) to support her argument. The facts of both cases are easily distinguishable from those before this court.

In *Scheeler*, the court found against the Employment Security Department because there was no evidence from any person establishing that the notice in question had been mailed nor was there any evidence of the custom of the office in mailing this type of notice or whether such a custom, if it existed, was even followed. 122 Wn. App. at 489. Thus, the issue here was not whether the notice had the plaintiff's name on it, but whether the governmental department had presented sufficient evidence of its mailing practices. The *Scheeler* decision does not support Neuson's

argument that Macy's has to present a letter with her name on it to be entitled to the presumption of mailing.

The ruling in *Kaiser* similarly fails to aid Neuson in her quest. In that case, while the company presented some evidence of its mailing procedure, its declarant could not state how the letter in question got from his inbox to the post office. 57 Wn. App. at 890. Once again, this is not the situation before this Court. Tom Schneider was the individual in charge of making sure the 2003 and 2004 mailings were accomplished. CP-468. He presented extensive declaratory evidence of the printing, folding, stuffing, sealing, affixing postage and mailing required to send the SIS materials. CP-468-471. There is no missing link in Macy's evidence as there was in *Kaiser*.

What Macy's evidence does establish is that the Election Forms were printed at the time they were mailed and each employee had a specific form with a sequence number that related to them specifically. CP-468. With over 100,000 packets being sent, Macy's did not keep a copy of each specific mailing but did maintain the blank form (attached to Noeth's declaration) and the master mailing lists for those employees to whom the materials were sent. CP-263, 474. Noeth presented excerpts

from each mailing list to show that Neuson was a recipient of all three 2003 and 2004 mailings.² CP-267, 278, 297.

Additionally, Macy's submitted evidence from Alexandria Bleckert, Tom Schneider and John Gruber that the company mailed Neuson benefits materials, tax documents, and 401(k) documents and checks all to the same address as that used by the Office of Solutions InSTORE – some using the mass mailing procedures outlined by Tom Schneider. CP-460-461, 464-465, 468, 471. None of these materials were ever returned as undeliverable and Neuson admitted receiving mailings from Macy's (other than the SIS materials). CP-520. Macy's presented sufficient evidence that it mailed the SIS materials to Neuson.

b. Neuson's Declaration Testimony is Insufficient to Dispute Macy's Evidence.

Neuson submits a self-serving declaration alleging that she did not receive the mailings sent to her home and further alleging that she signed a vaguely described document in the store where she worked refusing peer review/arbitration. She bolsters her self-serving declaration statements by the testimony of a former co-worker, Roy Boholst. Neuson's efforts, once again, are not enough to challenge Macys' properly adduced evidence. The cases in this jurisdiction are clear that the courts are not required to

²Notably, Neuson has never alleged that the address used by Macy's for all three SIS mailings was inaccurate. It is reasonable to conclude that Macy's had, and used, the correct address.

consider affidavits containing unfounded assertions at face value. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13 (1986). Moreover, a nonmoving party may not rely on speculation or argumentative assertions to oppose a properly supported motion. *Id.*

Neuson's Affidavits do not meet this standard. In them, she states that she did not receive the mailed SIS materials. CP-383, 520. As noted above, however, if the presumption of mailing attaches, the court will presume that the mail proceeded normally and that the package was received by the intended recipient. *Kaiser Aluminum*, 57 Wn. App. at 889. While this is a rebuttable presumption, Neuson's self-serving comments are not sufficient to rebut the presumption that arises from Macy's proof of mailing. Neuson has not submitted any evidence to explain why she would get every mailing from Macy's except those about the SIS Program. She presents no evidence of a disruption in service nor does she produce evidence of any other difficulty with her mail. CP-381-390, 479-488, 517-529. She has failed to rebut the presumption.

Neuson's affidavits are also incompetent in that they contradict each other. In her first affidavit, Neuson alleges that she signed something after January 2004 rejecting peer review and/or arbitration during her small group meeting. She did not have a copy of the vaguely described document. CP-383-384. Yet, she stated she knew this was the date

because of an issue at the Silverdale store involving an attorney. The attorney allegedly told the group not to agree to peer review/arbitration. Neuson submitted dated documents showing this event occurred in January and February 2004. CP-382-383, 387-389.

Macy's presented evidence that the small group meetings occurred in early September 2003, before the materials were mailed in late September, and not after the turn of the year. CP-203, 507. Macy's also submitted evidence that the Election Forms were not given to the stores. CP-507. The Election Forms for the roll out of the Program were printed at the time the mailings were sent in September 2003. CP-468-469. There was no way an Election Form could have been given to Neuson in the store during the small group meeting.

In addition, the Election Forms do not mention peer review. The only effect of signing the Election Form is to reject arbitration – not peer review. CP-263, 295. Peer review is available at Step 3 of the Program and applies to all employees. CP-201.

Neuson then submitted a new affidavit stating that the meeting about the peer review/arbitration issue occurred in October 2003 and not in the first few months of 2004 as she first stated. CP-483. She also stated in this second affidavit that she “refused to sign in 2003 as accepting the SIS Program” instead of signing to reject it as initially stated. CP-483.

Neuson's affidavit evidence is insufficient to dispute the evidence submitted by Macy's. First, her testimony has changed in an effort to refute the representations of Macy's. In addition, her vague and conclusory evidence is inconsistent with the established facts – particularly in light of the fact that she does not seem to recall with any specificity what she did or when. Macy's, on the other hand, has submitted documents created at the time of the events alleged and has been consistent in the evidence presented. The court properly weighed Neuson's self-serving, vague and speculative evidence against Macy's detailed evidence supported by documents created at the time of the alleged events and found in Macy's favor.

Neuson also relies on the testimony of a former co-worker, Roy Boholst. Boholst's testimony lacks probative value. Boholst states:

After they provided information the process, they either provided a form for us to sign that we agreed with the process or they used a form indicating a refusal to we agree to this process. I can not[sic] recall which way it was handled. In any event, we were asked to sign this in a group setting and I refused to sign the document agreeing to arbitration and to my recollection, Anjelia refused to sign it. We may have signed something refusing the arbitration.

CP-392.

Affidavits are wholly improper when they assert “self-serving” or ultimate conclusions of either law or fact. *Charbonneau v. Wilbur Ellis*

Co., 9 Wn. App. 474, 477 (1973). Boholst's statements above tell the reader very little. In fact, the ultimate fact to be gleaned from the affidavits submitted by both Neuson and Boholst is that neither really remembers what they did or what they were asked to do. This is not enough to dispute Macy's detailed documentary evidence.

2. The Trial Court Did Not Make Credibility Determinations as to Neuson's Completion of Employment Records on October 4, 2006.

Neuson disputes that she received notice of her third opt out opportunity by arguing that she was not in the Spokane Northtown store on October 4, 2006. However, the Trial Court properly held that the evidence supported a finding that Neuson in fact completed new employee paperwork in the Northtown Macy's on October 4, 2006, including her SIS Acknowledgement.

The evidence of Neuson's presence in the store on October 4, 2006 is overwhelming. First, there are nine online documents completed by Neuson with a date of October 4, 2006. CP-423-457. One is an acknowledgement for the SIS Program in which she states she received the SIS brochure and understands that if she does not wish to participate in arbitration, she must mail her Election Form to the Office of Solutions InSTORE (which is located in Ohio). CP-437-438. The Election Form in

the brochure has this same information along with the exact address to which it should be mailed. CP-308-346.

Neuson completed several hard copy documents dated October 4, 2006. Two of the hard copy documents are signed under penalty of perjury. CP-491, 496-499. Neuson admittedly signed the hard copy documents. CP-480, 519-520. She simply denies that she signed them on October 4, 2006. CP-519-520.

In opposition to these many signed documents, Neuson concludes that someone at Macy's must have completed her paperwork for her. CP-518. This self-serving supposition is insufficient under Washington law. *Doe v. Dept. of Transp.*, 85 Wn. App. 143, 147 (1997) (non-moving party needs more than the "mere possibility or speculation"). Of note, Neuson fails to explain who at Macy's did this or how this person would know 1) her new bank account number which she admittedly established when she moved to Spokane and is included in her online documents, 2) how many deductions she wished to declare on her W-4, 3) the name and date of birth of her husband included on her associate discount form, and 4) other personal information on the online documents. CP-427-429, 432-433, 434-436, 451-454. Neuson also fails to explain why Macy's would forge her signature or complete her paperwork for her when it could have simply waited for her to come into the store.

Neuson's version of events is based solely on conclusory and speculative facts and arguments but little else. Her speculation is not enough to dispute several signed and dated documents – two of which were signed under oath. CP-496-499. To find in favor of Neuson would require an unreasonable inference – something the Trial Court did not have to do. Neuson must do more than show “metaphysical doubt” as to the key facts. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 430(1990).

Neuson also alleges that while the hard copy documents are completed in her handwriting, there is a change in the date by her signature on one of her forms. CP-480, 519-520. She seems to suggest that there are some irregularities with the date on the second form as well. CP-519-520. In her second affidavit, however, she states with respect to her I-9:

First, in reference to the Defense document D11096, this is a US Department of Justice form and I have been provided a copy on November 2, 2009, and I believe that that copy **does have my signature on the form**. Also, on the form is a handwritten date that appears to be “10/4/06”, although there is some unusual writing next to it. **This also appears to be in my handwriting**.

CP-480 (emphasis added). Neuson, thus, admits that the date on the form was written by her. Neuson states that she does not recall if she was asked to back date this document. CP-480. The case law in this jurisdiction is

that “not recalling” something is not the same as testifying to it. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430(2002) (testimony about not recalling a specific fact made the witness incompetent for lack of personal knowledge on that issue).

Finally, in yet a *third* affidavit, Neuson comments on the date on the second form she signed under oath, and suggests it has been altered in some way. However, a review of the document in question shows no issue with the date as written. CP-498-499, 519-520. Neuson then speculates as to what could have happened to the date or why it might have been altered. CP-520. Her speculation on dates was not compelling to the Trial Court and should not be considered by this Court.

Neuson also makes much of the fact that the expiration date noted on the form for her driver’s license shows a date of 10/13/06. Neuson alleges this date could “only be an issuance date.” App. Brf., p. 27. Upon examination, the line on which this date appears is denoted as the line for “Expiration Date (*if any*).” CP-496-497. That she received a new driver’s license a few days later confirms that the listed document noted the expiration date. Again, these facts were not compelling to the Trial Court and should not be a distraction to this Court.

Neuson’s evidence includes a document entitled “Rolling 12 Month Attendance Detail” that she asserts is evidence that October 9,

2006 (not October 4, 2006) was her first day in the store. CP-390, 487-488. However, the human resources assistant who met with Neuson on October 4, 2006, Sarah Allie, explained that this document is a listing of those dates on which Neuson deviated from her work schedule and received an attendance point. CP-493. Employees who receive too many points are subject to written discipline, and if the problems continue, may be subject to termination. CP-493.

Allie's explanation is bolstered by a review of the document itself. CP-487-488. The document lists only a couple of days each month – sometimes only one day a month - not each day that Neuson, as a full time employee worked. CP-487-488. Thus, the document does not prove that her first day in the Northtown store was October 9. It simply shows that the first time she deviated from her schedule was October 9, 2006.

The “evidence” submitted by Neuson is simply speculation and conjecture containing unrealistic and unsupported leaps – without any specific facts – that fails to prove she was not in the store on October 4, 2006. As such, it was not compelling or convincing to the Trial Court. Thus, the Trial Court properly found Neuson had signed the on line SIS Acknowledgment, and her failure to return her opt out was evidence of her intent to be bound to the arbitration portion of the Program.

E. Other Issues Supporting the Trial Court's Ruling.

There were other issues with the evidence presented by Neuson below that was contradicted by her own evidence or was simply inaccurate. This, too, properly went into the court's weighing of the evidence. For example, Neuson stated in her affidavits that she did not agree to work for \$9.00 in Spokane - despite the new employee paperwork reflecting this as her agreed wage. CP-482, 518-519. She alleged that she later negotiated a higher hourly wage and Macy's failed to ever pay her the difference for the first few weeks of her employment. CP-482.

Macy's records and the documents attached to Neuson's declaration tell a slightly different story. First, Exhibit B to Neuson's second affidavit shows that as late as January 13, 2007, she was still being paid \$9.00 per hour. CP-486. Macy's also explained that Neuson was a commission shoe associate. CP-492. The \$9.00 per hour that she was paid was a draw against her commission sales. CP-492. This is consistent with the job offer checklist also submitted by Macy's. CP-430. Neuson was paid her draw rate but any additional monies she earned would have been paid in her monthly commission check. CP-492. Macy's did not fail to pay her any monies due and owing. Neuson did not refute this evidence.

In submissions to the Trial Court, Neuson alleged that her name was incorrect on the online forms and showed her unmarried name of Harris as evidence that she did not complete the online paperwork. CP-481-482. Macy's explained that when Neuson began her employment, the company had her in their files under the name Harris. CP-492. This evidence is bolstered by the fact that after Neuson began working at the Northtown store, Macy's submitted a request for name change dated October 10, 2006 – six days after she completed her paperwork and presented her driver's license with her married name. CP-492-493, 505.

Neuson has the same difficulty in her brief before this court. Neuson alleges for the first time that she left her employ with Macy's in March 2006. App. Brf., pp. 2, 10. She apparently makes this claim in an effort to overcome Macy's argument that the SIS Program refers to the initial election of employees as to arbitration if there is less than a 60 day break in service. Macy's records show that Neuson worked for the company until early September 2006 and had only a 30 day break in service before beginning her employment in Spokane. CP-195, 209. Neuson has presented no evidence that her employment ended in March 2006 or at any time before September 2006.

Neuson in her brief refers to the Request for Judicial Notice ("RJN") filed by Macy's with its Motion to Compel Arbitration. App.

Brf., pp. 29-30. The RJN requested the Trial Court take notice of other cases in which Macy's SIS Program had been enforced. Inexplicably, Neuson makes incorrect statements about what was argued in those cases. By way of example, Neuson alleges that in the *Stackhouse* and *Garcia* cases there was no allegation that the plaintiffs had not received the SIS mailings. That is just not true.

In *Stackhouse*, the Claimant denied receiving the mailings as shown in the transcript contained in the record. CP-89. In *Garcia*, there was also an argument that the mailed materials were not received. CP-108. Neuson's representations in regard to these cases, like much of her evidence and argument, is misleading and inaccurate and simply confuses the issues.

V. CONCLUSION

The Trial Court properly compelled arbitration under the Solutions InSTORE Program after considering the fully developed evidentiary record demonstrating that the Program was a term and condition of employment unless an employee exercised her limited option to opt out of the arbitration portion of the Program. As Neuson failed to submit her opt out form, despite three opportunities to do so, the Trial Court properly found she is bound to arbitrate her claims.

The Trial Court did not make credibility determinations in ruling in Macy's favor but properly weighed the evidence. The Trial Court properly held that the evidence established that the parties entered into an agreement to arbitrate Neuson's employment, and correctly granted Macy's Motion to Compel and Stay proceedings.

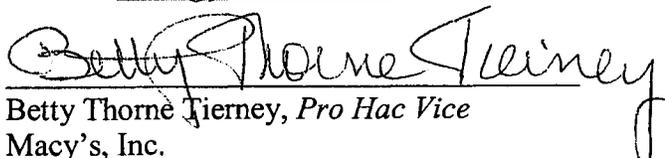
Respondent, Macy's Department Stores, Inc., respectfully requests that this Appellate Court affirm the decision of the Trial Court in its entirety.

RESPECTFULLY SUBMITTED this 1st day of September, 2010.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage pre-paid, on this day, to:

Gregory Staeheli
Attorney at Law
301 West Indiana Avenue
Spokane, WA 99205

Dated this 1st day of September, 2010, at Seattle, Washington.



Joy Bezanis