Securitas Security Services USA, Inc. *and* Charles Dunaway *and* Walter Linares. Cases 31–CA–072179, 31–CA–088081, 31–CA–072180, and 31–CA–088082

May 11, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On November 8, 2013, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Parties filed answering briefs, and the Respondent filed a reply brief. The Charging Parties also filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

Background

On June 14, 2011, the Respondent implemented two arbitration agreements (collectively, the Agreements). The Securitas USA Dispute Resolution Agreement, informally called the "New Hire Agreement," applies to employees who were hired by the Respondent in Califor-

[1] In its brief in support of exceptions, the Respondent, citing *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. August 13, 2013), affd. 816 F.3d 550 (9th Cir. 2016), argues that the Acting General Counsel was "invalidly appointed and without the power to issue a complaint in this matter under the Federal Vacancies Reform Act." The Respondent did not further elaborate on its argument, if any, regarding *Kitsap*.

For the reasons set forth below, we find no merit in the Respondent's argument that the Acting General Counsel was improperly or unlawfully "appointed." At the outset, we note that under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *SW General, Inc. v. NLRB*, 796 F.3d 67, 73 (D.C. Cir. 2015) (Solomon was qualified to serve as Acting General Counsel under the FVRA and he validly served in that capacity at the direction of the President). Thus, Solomon properly assumed the duties of Acting General Counsel and we find no merit in the Respondents' affirmative defense that the Acting General Counsel was "invalidly appointed."

Although the Respondent does not rely on *SW General*, we acknowledge that the court in *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondent did not raise that argument in this proceeding, and we find that the Respondent thereby has waived the right to do so.

Finally, on October 22, 2015, General Counsel Richard F. Griffin, Jr., issued a notice of ratification which states, in relevant part:

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. [Citation omitted.]
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.
>
> Even if the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, this ratification by the General Counsel would render moot any argument that the *SW General* holding concerning the former Acting General Counsel's authority precludes further litigation in this matter.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found. These modifications include an order that the Respondent reimburse the Charging Parties and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful enforcement of its Current Employee Agreement by moving to amend the class definition in the wage-and-hour action pending in Los Angeles County Superior Court. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). We shall also order the Respondent to notify the Los Angeles County Superior Court that it has rescinded or revised the Current Employee Agreement and to inform the court that it no longer seeks to exclude employees covered by the Current Employee Agreement from the class. Additionally, we shall substitute a new notice to conform to the Order as modified.

nia after June 14, 2011. The Securitas Security Services USA, Inc. Dispute Resolution Agreement, informally called the "Current Employee Agreement," applies to employees who were employed by the Respondent on June 14, 2011.

The New Hire Agreement "applies to any dispute arising out of or related to Employee's employment" with the Respondent "or termination of employment," and "[e]xcept as it otherwise provides," it "requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial." The New Hire Agreement further provides that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action." The New Hire Agreement also states:

> Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlrb.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).

Like the New Hire Agreement, the Current Employee Agreement also mandates that all employment-related disputes with the Respondent be resolved through arbitration; it precludes class, collective or representative arbitration; and it contains the same language quoted above regarding claims brought before an administrative agency. However, by its terms, the Current Employee Agreement does not apply to any pending class, collective or representative action against the Respondent in which any current employee is "a named party plaintiff" or has "joined as a party plaintiff." The Current Employee Agreement includes a provision under which employees may opt out by calling a toll-free number within 30 days of receiving the Current Employee Agreement, and it explains that current employees who are not currently plaintiffs in any pending class or collective action but who may wish to become plaintiffs may do so by opting out.

In June 2009, Charging Parties Charles Dunaway and Walter Linares (and a third individual) filed a wage-and-hour class action against the Respondent in Los Angeles County Superior Court. In August 2012, the Respondent filed a motion in that action to amend the class definition to exclude employees covered by the Current Employee Agreement. That motion is still pending. As far as the record indicates, the Respondent has not sought to enforce the New Employee Agreement.

Discussion

1. Applying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013),[3] the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and, in the case of the Current Employee Agreement, enforcing arbitration agreements that require employees, as a condition of employment, to waive their right to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. We affirm the judge's findings, based on the judge's application of *D. R. Horton*, supra, and on our subsequent decision in *Murphy Oil*, supra.[4]

[3] In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

In its brief in support of exceptions, the Respondent asserts that the Board's decision in *D. R. Horton* was not valid because the Board "did not have a quorum when the Board issued the decision." For the reasons set forth in *Murphy Oil,* above, slip op. at 2 fn. 16, we reject this argument. See also *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 813 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker was constitutionally valid."); *Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same).

[4] Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (emphasis in original). The Respondent's Agreements impose just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreements unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

Finally, we reject our dissenting colleague's view that the Respondent's motion to amend the class definition to exclude employees covered by the Current Employee Agreement was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a state court's jurisdiction because of federal preemption, and where "a suit . . . has an objective that is illegal under federal law." Id. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts, such as the Respondent's motion to amend the class, that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

To the extent that the Respondent contends that the complaint is time-barred by Section 10(b) because the initial unfair labor practice charges were filed and served more than 6 months after the Agreements were first implemented, we, like the judge, reject this argument.[5] The Respondent continued to maintain the unlawful Agreements during the 6-month period preceding the filing of the initial charges. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's Agreements, constitutes a continuing violation that is not time-barred by Section 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *The Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

We also reject the Respondent's and our dissenting colleague's contention that the opt-out provision of its Current Employee Agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton*. See *D. R. Horton*, supra at 2288–2289 & fn. 28. The judge rejected this contention, and we do as well for the following reasons. The Board has held that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip. op at 1, 4–5 (2015); see also *Nijjar Realty, Inc., d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 2 (2015) (rejecting the employer's assertion that the opt-out provision of its arbitration agreement made the agreement lawful); *U.S. Xpress Enterprises, Inc.,* 363 NLRB No. 46, slip op. at 1–2 (2015) (same); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015) (opt-in provision). The Board further held in *On Assignment*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration agreement not a condition of employment (or non-mandatory), an arbitration agreement precluding class or collective actions in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. Indeed, the Board there stated that "such non-mandatory agreements are contrary to the National Labor Relations Act and to fundamental principles of federal labor policy." Id., slip op. at 6.

[5] The parties stipulated that the Respondent has distributed the New Hire Agreement to employees hired by the Respondent in California after June 14, 2011, and that "affected employees" have been required to sign it. Contrary to the Respondent's argument, we find these stipulated facts sufficient to establish that the Respondent has maintained the New Hire Agreement within the 10(b) period.

2. The judge also found that the Agreements independently violated Section 8(a)(1) by interfering with employees' right to file unfair labor practice charges with the Board. We agree, for the following reasons.[6]

The Board applies its *Lutheran Heritage Village-Livonia*[7] test to determine whether employees would reasonably believe that arbitration policies interfere with their ability to file a Board charge or otherwise access the Board's processes. See also *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4 (2015). In making that determination, the Board recognizes that "[r]ank-and-file employees . . . cannot be expected to have the expertise to examine company rules from a legal standpoint." Id., slip op. at 5, quoting *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994). As a result, the Board has found insufficient language in workplace rules purporting to except, or "save," employees' legal rights from restrictions on their conduct. See *SolarCity Corp*., supra, slip op. at 5 & fn. 18, and cases cited therein. This is so even where such exceptions referred to the "NLRA" or "the National Labor Relations Act." See id. at 5 & fn. 19 (and cases cited

[6] The Respondent argues that the judge's finding that the Agreements bar or restrict employees' right to file charges with the Board is beyond the scope of the stipulated issues and that the corresponding charge was withdrawn by the Charging Parties. We disagree, and find that the judge properly considered this allegation. Two charges were filed on March 23, 2012, alleging that the Respondent violated Sec. 8(a)(1) and (4) by maintaining a policy that interferes with employees' access to the Board. Although the 8(a)(4) allegation was subsequently withdrawn, the 8(a)(1) allegation remained active, as the Regional Director's letter to the Respondent, notifying it of the withdrawal, made clear. Indeed, the October 26, 2012 complaint alleged that the Respondent's Agreements were unlawful for two reasons, first because the Agreements "require employees to arbitrate all employment-related claims and forgo any rights they have to resolution . . . by collective or class action," and second because "employees would reasonably conclude [the Agreements] preclude them from filing unfair labor practice charges with the . . . Board." Although the parties thereafter stipulated that one of the issues to be decided by the judge was whether the Respondent violated Sec. 8(a)(1) by maintaining the Agreements, that language is broad enough to encompass both theories of violation alleged in the complaint. Further, the General Counsel's statement of position in the joint motion to transfer proceedings to the Division of Judges and stipulation of issues presented clearly stated and presented arguments supporting both of the theories alleged in the complaint, as did the General Counsel's posthearing brief to the judge. Moreover, the Respondent responded to this assertion in its posthearing brief, arguing that the Agreements expressly preserved employees' rights to file charges with the Board. In these circumstances, we find that the issue of whether employees would reasonably believe that the Agreements bar or restrict their right to file charges with the Board was fully and fairly litigated, and we reject the Respondent's due process exception.

[7] 343 NLRB 646 (2004).

We note our dissenting colleague's view that the standard set forth in *Lutheran Heritage* should be changed. We disagree with that view for the reasons stated in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 2–6 (2016).

therein). See also *ISS Facility Services*, 363 NLRB No. 160, slip op. at 2 (2016); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 2–3 (2016). "The rationale underlying these decisions is that, absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights." *SolarCity*, supra, slip op. at 5.

The Agreements suffer from this vagueness, even with the provisions purporting to preserve employees' right to file charges with the Board.[8] The Agreements specifically apply to "any dispute arising out of or related to" an employee's employment, and the Agreements state that they "**require[] all such disputes to be resolved only by an arbitrator through final and binding arbitration**" (bold as in original). The Agreements further announce that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action ('Class Action Waiver')," thereby conveying to employees that, as a condition of employment, they must forfeit their substantive Section 7 right to act collectively in pursuing an employment dispute in any forum. The Respondent and our dissenting colleague assert that employees would not reasonably construe the Agreements to interfere with an employee's right to file charges with the Board because the Agreements specifically state that claims may be brought before an administrative agency, including "claims or charges" brought before the Board. We disagree that this language saves the policy.

This argument disregards the confusing language in the Agreements stating that the filing of Board charges is permitted "only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." In *SolarCity*, the Board found that a virtually identical caveat could not reasonably be understood by employees as having no effect on their right to file Board charges. See 363 NLRB No. 83, slip op. at 5 fn. 20. See also *ISS Facility Services*, 363 NLRB No. 160, slip op. at 2–3 (2016). This confusing and ambiguous statement—especially when read in conjunction with the Agreement's previous sentences emphasizing that arbitration applies to "any dispute" and requires "all such disputes to be resolved only by an arbitrator"—would reasonably cause employees to be confused as to whether they retained the statutory right to file charges with and otherwise access the Board's processes. "[A]ny ambiguity in the rule must be construed against the Respondent as the promulgator of the rule." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Accord *SolarCity*, supra, slip op. at 6. Therefore, we find that employees would reasonably understand the vague, unexplained language of the Agreements to be coercive and would be restrained in exercising their Section 7 right to file charges with the Board out of fear that doing so would run afoul of the vague caveat discussed above.[9]

Moreover, we find that even if employees could determine from the Agreements that they could invoke the Board's processes, other language in the Agreements states that they must do it individually and not in concert with other employees. The Agreements' "Class Action Waiver" provides that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action." As in *SolarCity*, this broad language clearly encompasses filing an unfair labor practice charge with the Board when that charge purports to address a group or collective concern. 363 NLRB No. 83, slip op. at 6. See also *ISS Facility*, supra, 363 NLRB No. 160, slip op. at 3. And it would be unclear to the reader, especially one without specialized legal knowledge, whether and to what extent the Agreement's exception for filing charges with administrative agencies modifies the broad prohibition on pursuing any form of collective or representative activity, particularly since the Agreements' exception for filing charges with the Board does not clarify that such charges may be filed on an individual or collective basis. This ambiguity would lead reasonable employees to question whether they may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus constitutes another way in which the Agreements unlawfully interfere with employees' right to file charges with the Board.

Finally, our finding that the Agreements are unlawful effectuates the Congressional policy of vigorously safeguarding access to the Board's processes. As explained, the Board and the courts have long recognized that "filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7." *Mesker Door, Inc.,* 357 NLRB 591, 596 (2011). For this reason, the Board must take care to ensure that employer rules do not chill employees from filing charges with the Board and instead are clear that employees retain the "complete

[8] The sentences highlighted by the Respondent and our dissenting colleague are included in paragraph one of both Agreements, set forth above in the *Background* section of this decision.

[9] As indicated in *Lutheran Heritage*, supra, 343 NLRB at 647, workplace rules like the Agreements here are to be "read as a whole" in construing their legality. Contrary to the dissent's argument, we have done exactly that by examining the language relating to the filing of charges in context with the remaining language in the Agreements.

freedom" that Congress intended them to enjoy.[10] In our view, the Agreements here fail in this fundamental respect.

ORDER

The National Labor Relations Board orders that the Respondent, Securitas Security Services USA, Inc., Westlake Village, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining mandatory arbitration agreements (the New Hire Agreement and Current Employee Agreement) that employees reasonably would believe bar or restrict the right to file charges with the National Labor Relations Board.

(b) Maintaining and, in the case of the Current Employee Agreement, enforcing mandatory arbitration agreements that require employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreements in all their forms, or revise them in all their forms to make clear to employees that the arbitration agreements do not constitute waivers of their right to maintain employment-related joint, class, or collective actions in all forums and that the agreements do not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the unlawful arbitration agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the relevant revised agreement.

(c) Notify the Superior Court of the State of California, County of Los Angeles in Case No. BC-4-16555 that it has rescinded or revised the mandatory arbitration agreement upon which it based its motion to amend the class definition to exclude employees subject to the Current Employee Agreement, and inform the court that it no longer seeks to amend the class definition based on the Current Employee Agreement.

(d) In the manner set forth in this decision, reimburse Charles Dunaway, Walter Linares, Sandra Blacksher and any other plaintiffs in Case No. BC-4-16555 for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to amend the class definition.

(e) Within 14 days after service by the Region, post at all its California facilities copies of the attached notice marked "Appendix."[11] Copies of the notices, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2011, and to any employees against whom the Respondent has enforced its Current Employee Agreement since July 9, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 11, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, the Respondent and its employees entered into the New Hire Agreement and Current Employee Agreement (together, the "Agreements"), which provide

[10] *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

for the arbitration of non-NLRA employment-related claims, and under which employees waive the right to pursue such claims through class or collective actions. The Agreements specifically exclude from their scope the filing of charges with the National Labor Relations Board (NLRB or Board).

Relying on the majority opinion in *Murphy Oil*,[1] my colleagues find that the Respondent violated Section 8(a)(1) of the Act by maintaining the Agreements and enforcing the Current Employee Agreement because they contain class-action waivers. Relying on *Lutheran Heritage Village-Livonia*[2] and *SolarCity*,[3] my colleagues additionally find the Agreements unlawful on the basis that employees would reasonably believe they interfere with their right to file charges with the Board. For the reasons set forth below, I respectfully dissent.[4]

1. The class-action waivers are not unlawful, and neither was the enforcement of the waiver in the Current Employee Agreement. I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[5] However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,[6] that class-waiver agreements violate the NLRA even when they contain an opt-out provision.

In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[7] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[8] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[9]

[1] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

[2] 343 NLRB 646 (2004).

[3] *Solar City Corp*., 363 NLRB No. 83 (2015).

[4] In analyzing whether an arbitration agreement is unlawfully overbroad with respect to whether employees may file Board charges, the Board has applied the first prong of the *Lutheran Heritage* standard, i.e., whether "employees would reasonably construe the language [of the agreement] to prohibit Section 7 activity." 343 NLRB at 647. See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (following *Lutheran Heritage*, supra), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). As I explained in my partial dissenting opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016), I would replace the prong one "reasonably construe" *Lutheran Heritage* standard with a balancing analysis under which a facially neutral rule, policy or handbook provision would be deemed unlawful only if legitimate justifications associated with the rule are outweighed by an adverse impact on Sec. 7 activity. But even under the *Lutheran Heritage* "reasonably construe" standard, I believe the Agreements should be found lawful.

[5] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, the Agreements expressly state that "an Employee will not be retaliated against, disciplined or threatened with discipline as a result of exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum . . . ." There is no allegation here that the Respondent has retaliated against any employee for engaging in protected concerted activity in connection with any class or collective action.

[6] 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

[7] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[8] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[9] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F. Supp. 3d 71

(iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);[10] and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management,* 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities. Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreements were lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to enforce the Current Employee Agreement by amending the class definition to exclude employees covered by that agreement. That the Respondent's motion was reasonably based is supported by court decisions that have enforced similar agreements.[11] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[12] I also believe that any Board finding of a violation based on the Respondent's well-founded state court motion to amend the class definition would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Parties and other plaintiffs in the class action for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. The Agreements do not interfere with NLRB charge filing. Nor do I agree that the Agreements violate Section 8(a)(1) by interfering with the filing of Board charges or their resolution by the Board. In my view, any reasonable construction of the Agreements reveals that it excludes the filing of NLRB charges from its scope. Although the Agreements state that they apply to "any" employment-related disputes that employees may have with the Respondent, they also explicitly inform employees that they retain the right to file charges with the NLRB.[13]

I agree that an employment agreement may constitute unlawful interference with NLRA-protected rights to the extent that it purports to limit the right of employees to file charges with the Board.[14] However, the Agreements do not limit this right. The Fifth Circuit reached precisely the same conclusion based on similar facts in *Murphy Oil USA, Inc. v. NLRB*, above. Although the court agreed that the employer's original arbitration agreement violated NLRA Section 8(a)(1) because it broadly required arbitration of "any claims" with no language that permitted the filing of NLRB charges, 808 F.3d at 1019, the court held lawful a revised agreement that stated: "[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]," id. at 1019–1020 (alterations in original). Based on this provision, the court held that, reading the agreement "as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing

(S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[10] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[11] See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[12] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1021.

[13] The Agreements state: "Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." Astonishingly, although the judge quoted the first of these two sentences in his decision, he omitted the second sentence, which was dispositive of the issue before him—i.e., whether the Agreements interfere with the right to file charges with the Board.

[14] See, e.g., *GameStop Corp.*, 363 NLRB No. 89, slip op. at 4–7 (2015) (Member Miscimarra, concurring in part and dissenting in part); *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

of Board charges when the agreement says the opposite." Id. at 1020.

Notwithstanding express language to the contrary, my colleagues find the Agreements *prohibit* filing charges with the Board. They purport to apply prong one of the *Lutheran Heritage* test—i.e., whether a reasonable employee would construe the Agreements to prohibit charge filing—but *Lutheran Heritage* contradicts their analysis. There, the Board held that a policy, rule or employee handbook provision would be deemed unlawful when "employees would reasonably construe the language to prohibit Section 7 activity," and the Board expressly warned against "presum[ing] improper interference" with Section 7 rights and finding interference "simply because the rule *could* be interpreted" that way.[15] My colleagues base their finding on what they deem to be ambiguity in the Agreements, but the Agreements are not ambiguous. After stating that "[c]laims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate," the Agreements make clear that "[s]uch administrative claims *include* without limitation *claims or charges brought before . . . the National Labor Relations Board*" (emphasis added). In other words, "claims or charges brought before . . . the National Labor Relations Board" are included within the class of claims that "may be brought before an administrative agency." No other reasonable interpretation is possible.[16]

My colleagues pursue an analysis that prompts one to wonder whether *any* language would suffice to protect NLRB charge filing, even when an arbitration agreement expressly indicates that employees may file charges with the Board. As I have just explained, the agreement at issue here provides that claims that "may be brought before an administrative agency . . . . *include . . . claims or charges brought before . . . the National Labor Relations Board*." Nonetheless, my colleagues, relying on cases they cited in *SolarCity*,[17] find this language no more effective than generalized savings clauses that have been discounted or disregarded by the Board. In these cases, the Board has applied the sound principle that an otherwise illegal rule will not be rendered lawful based on language that would predictably be understood only by someone with specialized legal knowledge.[18] However, the Agreements' relevant provisions merely require the ability to read and understand the English language.[19] In this respect, I believe my colleagues turn precedent upside down. Every employee who reads English would understand the Agreements have no impact on NLRB charge filing, since this is precisely what the Agreements say, while my colleagues devise an implausible interpretation that, in my view, could *only* be advocated or adopted by lawyers.

Contrary to the majority, I do not believe the Agreements contain language that is vague, unexplained, or ambiguous so as to warrant a finding that the Agreements unlawfully interfere with an employee's right to file charges with the Board. Here, my colleagues advance two rationales, neither of which is sufficient, in my view, to establish a violation of Section 8(a)(1).

First, my colleagues emphasize the Agreements' language broadly stating that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action," plus other language excluding the filing of Board charges from this broadly inclusive language "but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate"—a clause they characterize as "vague" and "unexplained." But my colleagues cannot and do not dispute that *some* claims are excluded from the Agreements. After all, the Agreements state that "[*c*]l*aims may be brought before an administrative agency* . . . to the extent applicable law

[15] *Lutheran Heritage*, 343 NLRB at 646–647.

[16] Even if the Agreements were ambiguous, mere ambiguity is not enough under *Lutheran Heritage* to condemn a rule as unlawful. The word *ambiguous* means "capable of being understood in two or more possible senses or ways." http://www.merriam-webster.com/dictionary/ambiguous. Thus, a rule is ambiguous if it *could* be read to prohibit Section 7 activity, among other possible interpretations, regardless of whether employees reasonably *would* read it that way.

[17] 363 NLRB No. 83, slip op. at 5 & fn. 18.

[18] For example, in *McDonnell Douglas Corp.*, 240 NLRB 794 (1979), the Board found a facially overbroad no-distribution rule unlawful despite an exception for distribution "protected by Section 7 of the National Labor Relations Act." Id. at 802. That exception was insufficient to save the rule because an employee would need to know what distribution Section 7 protects to understand what the exception allows. Here, the Agreements' language expressly permits NLRB charge filing, and that language is self-explanatory. There is nothing else an employee needs to know to understand it. In *Hoot Winc, LLC*, 363 NLRB No. 2 (2015), the only case my colleagues cited in *SolarCity* that involved an arbitration agreement or filing charges with the Board, the Board found an exclusion for "any dispute that cannot be arbitrated as a matter of law" insufficient to inform employees that they could still file Board charges on the basis that Board charges *can* be resolved through arbitration. Id., slip op. at 1–2. And unlike here, the agreement in *Hoot Winc* did not inform employees of their right to file Board charges.

[19] Although the Agreements list statutes and refer to some concepts with which some employees may be unfamiliar, this is not materially different from many collective-bargaining agreements, which are routinely deemed enforceable by the Board and the courts even if they incorporate concepts that are expressed in "general and flexible terms," Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959), or are based on practices that may be "unknown, except in hazy form, even to the negotiators," *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 580–581 (1960).

permits access to such an agency notwithstanding the existence of an agreement to arbitrate." My colleagues' point is that many employees would not know whether the NLRB is an administrative agency access to which is permitted by "applicable law . . . notwithstanding the existence of an agreement to arbitrate." I agree.

However, the majority pays scant attention to the very next sentence, which explains that "[s]uch administrative claims"—i.e., claims that "may be brought before an administrative agency"—"*include . . . claims or charges brought before the . . . National Labor Relations Board*" (emphasis added). My colleagues' analysis, though relying on *Lutheran Heritage*, contravenes principles set forth in that decision, which stated it was improper to rely on "particular phrases in isolation" and to "presume improper interference with employee rights."[20] It simply is not true that the language of the Agreements, read as a whole, is "vague" or "unexplained." No further explanation is required to make clear that the Agreements protect bringing "claims or charges . . . before . . . the National Labor Relations Board."

Second, even though the Agreements expressly state employees retain the right to bring "claims or charges . . . before . . . the National Labor Relations Board," my colleagues make a three-stage argument[21] that the class-action waiver in the Agreements creates "an inherent ambiguity" because (i) the Agreements provide that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action," (ii) an NLRB charge sometimes "purports to speak to a group or collective action," and (iii) the Agreements' class-action waiver would interfere with the right to file these types of Board charges. The problem with this argument is its false, circular premise that the Agreements' class-action waiver can be construed to interfere with the filing of Board charges, despite other language in the Agreements that specifically addresses Board charge filing and contradicts such a construction. As noted previously, the Agreements categorically *permit* the filing of Board charges—all Board charges, including those that "purport[] to speak to a group or collective action." Here as well, only lawyers could argue for the interpretation reflected in my colleagues' three-stage "inherent ambiguity" analysis. As the Fifth Circuit stated in *Murphy Oil USA, Inc. v. NLRB,* above, "it would be unreasonable for an employee to construe the [Agreements] as prohibiting the filing of Board charges when the agreement says the opposite."

The protection afforded to Board charge filing is important because the filing of a charge is a prerequisite to Board review of unfair labor practice issues.[22] Consequently, an agreement that prohibits filing Board charges violates Section 8(a)(1) if entered into by an employer, and Section 8(b)(1)(A) if entered into by a union.[23] My colleagues and I agree that the Board should safeguard the right to file charges with the Board. In the instant case, however, the Agreements clearly state that they do not impose any restriction on the right to file Board charges. Therefore, I believe the Board cannot reasonably conclude that the Agreements unlawfully interfere with Board charge filing in violation of Section 8(a)(1).

Accordingly, as to these issues and for the reasons discussed above, I respectfully dissent.[24]

Dated, Washington, D.C. May 11, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[20] *Lutheran Heritage*, 343 NLRB at 646.

[21] The majority presents this argument without separating it into three stages. However, I believe the majority's argument is difficult to understand without breaking it into its component parts, and it consists of the three elements set forth in the text.

[22] See *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152, 162–163 (4th Cir. 2013) ("The NLRB serves expressly reactive roles: conducting representation elections and resolving ULP charges. . . . [The Board's] processes . . . are not set in motion until a party files a representation petition or a ULP charge.").

[23] Sec. 8(a)(1) makes it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 8(b)(1)(A) makes it an unfair labor practice for any union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7."

[24] I join my colleagues in rejecting the Respondent's contentions that former Acting General Counsel Solomon was invalidly appointed and without power to issue the complaint in this case, and that the Board lacked a quorum when it issued its decision in *D. R. Horton*. I also agree with my colleagues that the issue of whether the Agreements interfere with NLRB charge filing was fully and fairly litigated.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain mandatory arbitration agreements (the New Hire Agreement and the Current Employee Agreement) that our employees reasonably would believe bar or restrict their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain or, in the case of the Current Employee Agreement, enforce mandatory arbitration agreements that require our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreements in all their forms, or revise them in all their forms to make clear that the arbitration agreements do not constitute waivers of your right to maintain employment-related joint, class, or collective actions in all forums and do not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreements in all their forms that the arbitration agreements have been rescinded or revised and, if revised, WE WILL provide them a copy of the relevant revised agreement.

WE WILL notify the court in which Walter Linares, Charles Dunaway and Sandra Blacksher filed their class action lawsuit that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to amend the class definition to exclude certain employees, and WE WILL inform the court that we no longer seek to amend the class definition to exclude such employees.

WE WILL reimburse Walter Linares, Charles Dunaway, Sandra Blacksher, and any other plaintiffs for any reasonable attorneys' fees and litigation expenses they may have incurred in opposing our motion to amend the class definition.

SECURITAS SECURITY SERVICES USA, INC.

The Board's decision can be found at www.nlrb.gov/case/31–CA–072179 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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William J. Emanuel, Esq. and *Elizabeth D. Parry, Esq. (Littler Mendelson, P.C.),* of Los Angeles, California, for the Respondent.
Dennis F. Moss, Esq., of Ventura California*, Ira Spiro, Esq.* and *Linh Hua, Esq. (Spiro Moore, LLP),* of Los Angeles, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. This matter is based on a stipulated record. The initial charges in this matter were filed on January 9, 2012. Since the submission of this matter to me on June 18, 2013, briefs have been received on about August 22, 2013, from counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel for the Charging Parties. Upon the stipulated record, and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Securitas has been a corporation with an office and place of business in Westlake Village, California. During the year ending December 31, 2012, Securitas performed services valued in excess of $50,000 in states other than California. At all material times, Securitas has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining two dispute resolution agreements; by attempting to enforce one of the agreements in state court litigation; and by including language in both agreements that employees reasonably could believe bar or restrict their right-to-file charges with the National Labor Relations Board.

B. Facts

The parties entered into the following stipulation of facts:

1. At all material times, Securitas has been a corporation with an office and place of business in Westlake Village, Califor-

nia. During the year ending December 31, 2012, Securitas performed services valued in excess of $50,000 in states other than California. At all material times, Securitas has been an employer engaged in commerce within the meaning of the National Labor Relations Act.

2. The Charging Parties in this proceeding, Charles Dunaway ("Dunaway") and Walter Linares ("Linares"), are former employees of Securitas. Dunaway was hired by Securitas on or about November 28, 2006, and his employment was terminated on or about October 15, 2008. Linares was hired by Securitas on or about July 12, 2001, and his employment was terminated on or about January 21, 2009.

3. On June 26, 2009, Dunaway and Linares, together with one other individual, filed a class action in Los Angeles County Superior Court against Securitas on behalf of certain employees and former employees of Securitas in California. This action, which is still pending, is entitled Walter Linares, Charles Dunaway, and Sandra Blacksher, etc. v. Securitas Security Services USA, Inc., Case No. BC4 16555. Dunaway and Linares were former employees of Securitas when this action was filed.

4. On or about June 14, 2011, Securitas implemented a form of agreement entitled Securitas USA Dispute Resolution Agreement, which Securitas refers to informally as the new hire agreement. This form has been distributed to employees hired by Securitas in California after June 14, 2011. It does not include an opt-out provision and the affected employees have been required to sign it.

5. On or about June 14, 2011, Securitas also implemented a form of agreement entitled Securitas Security Services USA, Inc. Dispute Resolution Agreement, which Securitas refers to informally as the current employee agreement. This form was distributed to employees who were employed by Securitas in California on June 14, 2011. The form states that employees could opt out of the coverage of the agreement by calling a toll free telephone number within 30 days after receiving it. According to the records of Securitas, approximately 1393 employees in California opted out of the coverage of the agreement, and approximately 12,787 employees in California did not opt out.

6. On January 9, 2012, Dunaway filed the unfair labor practice charge in Case 31–CA–072179 and Linares filed the charge in Case 31–CA–072180, both alleging a violation of Section 8(a)(1) of the Act. Securitas was served with copies of both these charges on about January 13, 2012. On March 23, 2012, these charges were amended to add an allegation that Section 8(a)(4) of the Act had been violated, but that allegation was withdrawn from the charges on or about August 29, 2012. Securitas was served with copies of amended charges on about March 28, 2012. On August 24, 2012, Dunaway filed the charge in Case 31–CA–088081 and Linares filed the charge in 31–CA–088082, both served on Respondent on about August 28, 2012, both alleging a violation of Section 8(a)(1) of the Act. Dunaway and Linares were former employees of Securitas when all of these charges and amendments were filed with the Board.

7. On August 21, 2012, Securitas filed a motion with the Superior Court in the class action described above to amend the class definition to exclude the employees who are subject to arbitration under the current employee agreement.

ISSUE 1: Did Securitas violate Section 8(a)(1) of the Act by maintaining two Dispute Resolution Agreements since about June 1, 2011.

ISSUE 2: Did Securitas violate Section 8(a)(1) of the Act by, since about August 21, 2012, enforcing one of its Dispute Resolution Agreements when it asserted the agreement in state court litigation brought against Securitas by Charging Parties?

Beginning on June 14, 2011, and continuing thereafter the new employee mandatory dispute resolution agreement entitled Securitas USA Dispute Resolution Agreement (new hire agreement) has been distributed to the Respondent's newly hired employees. They are required to sign it as a condition of employment. It is a 2 1/3 page, single spaced document. It begins as follows:

SECURITAS USA DISPUTE RESOLUTION AGREEMENT

1. This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. This Agreement applies to any dispute arising out of or related to Employee's employment with Securitas Security Services USA, Inc. or one of its affiliates, subsidiaries or parent companies ("Company) or termination of employment. Nothing contained in this Agreement shall be construed to prevent or excuse Employee from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Agreement, but not as to the enforceability, revocability or validity of the Agreement or any portion of the Agreement. The Agreement also applies, without limitation, to disputes regarding the employment relationship, any city, county, state or federal wage- hour law, trade secrets, unfair competition, compensation, breaks and rest periods, uniform maintenance, training, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non- Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an

agency notwithstanding the existence of an agreement to arbitrate.

Paragraph 4 of the agreement is as follows:

4. In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action ("Class Action Waiver"). Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought as a class, collective or representative action. Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

The agreement concludes as follows:

8. This Agreement is the full and complete agreement relating to the formal resolution of employment- related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

I HAVE READ AND I UNDERSTAND AND AGREE TO ALL OF THE TERMS CONTAINED IN THIS DISPUTE RESOLUTION AGREEMENT.

Employee Name: _____
Signature:
Date:_____

On about June 14, 2011, the Securitas Security Services USA, Inc. Dispute Resolution Agreement (current employee agreement) was distributed to all of the Respondent's then current employees (as noted, on and after that date only the new hire agreement has been distributed to the employees). The current employee agreement is a 3 1/2 page, single-spaced, document. The initial pages are identical to the new employee agreement, and the remainder of the agreement is as follows:

7. This Agreement is intended broadly to apply to all controversies hereafter arising out of or related to your employment relationship with the Company as well as an agreement to submit to arbitration any existing controversy arising from or related to your employment as is permitted under Section 2 of the Federal Arbitration Act. In some cases, claims have been made in court (non-arbitration) litigation on behalf of Company employees in which those employees desire to represent claims of other employees in class, collective or other representative actions (referred to as 'Actions"). If you are a named party plaintiff, or have joined as a party plaintiff this Agreement shall not apply to those Actions, and you may continue to participate in them without regard to this Agreement. If you have retained counsel with respect to any claim that may be subject to this agreement you should consult that counsel. You may consult private counsel with respect to any aspect of this Agreement.

This Agreement, however, shall apply to all Actions in which you are not a plaintiff or part of a certified class. The Company is aware of the following Actions in-which class or representative claims have been alleged, which generally involve employee claims for unpaid wages:

California: Michael J. Holland, David Richardson and Geraldine Evans v. Securitas Security Services USA, Inc., filed 7/18/2008, Los Angeles Superior Court Case No. BC394708; Walter Linares, Charles Dunaway and Sandra Blacksher v. Securitas Security Services USA, Inc., 6/26/2009; Los Angeles Superior Court Case No. BC432135; Christine Brisco v. Securitas Security Services USA, Inc., filed 2/18/2010, Los Angeles Superior Court Case No. BC4165555; Stephen Goodwin; William Wolff; Christopher Coffelt; Randall Der, Donna Forman v. Securitas Security Services USA, Inc., filed 9/25/2009, UISDC, Eastern District of California Case No. 2:09-. CV-02685-KJM-DAD; Forrest Huff v. Securitas Security Services USA, Inc., filed 7/12/2010, Santa Clara Superior Court Case No. 110O-CV-1 72614; Marvin Melara v. Securitas Security Services USA, Inc., filed 10/26/2010, Los Angeles Superior Court Case No. BC448078; Miguel Luna Candelas v. Securitas Security Services USA, Inc., filed 5/5/2011, Los Angeles Superior Court Case No. BC481J352.

Florida: Jean Loriston v. Securitas Security Services USA, Inc., filed 12/30/2010, UISDC, Middle District of Florida Case No. 6:10-CVO-01956-PCF-KRS; Kenisha Adams v Securitas Security Services USA, Inc., filed 5/23/2011, USDC, Middle District of Florida Case No. 1:1 1-CV-21 858- PAS-KRS

Illinois: Crystal Howard, Paul Galloway, Robert Newson and Alvan Young v. Securitas Security Services USA, Inc.; filed on 1/20/2009. USOC, Northern District of Illinois Case No. 08-C-2746; Stephanie Hawkins, Darsemia Jackson and Menja Wallace v. Securitas Security Services USA, Inc., filed 5/12/2008, USDC, Northern District of Illinois Case No. 09-C-3633

Iowa and Wisconsin: Jesse J. Molyneux and John Stellmach (WI) v. Securitas Security Services USA, Inc., filed 12/9/201 0, USDC, Southern District of Iowa Case No. 4: 10-CV-00588-JAJ-TJS

Pennsylvania: Frankie Williams and Kimberly Ord, filed 12/10/2010, USDC, Eastern District of Pennsylvania Case

No. 2:1 0-CV-071 81 -HB

If you are not a named plaintiff, have not joined as a plaintiff or are not part of a certified class in any of these Actions but would like to potentially participate in one or more of the Actions as a class member or plaintiff, you may opt out of this Agreement by following the procedure set forth in Section 9, below. By not opting out of this Agreement as set forth in Section 9 below, however, you will be giving up the right to represent others in litigation and the right to participate in any class, collective or representative action in a court of law, including the Actions enumerated above in which you are not a named plaintiff, have not joined as a plaintiff or are not part of a certified class. If you choose not to opt out of this Agreement, you will be able to arbitrate whatever individual claims you have against the Company. Whatever you decide, you will not be retaliated against, disciplined or threatened with discipline if you choose to opt out of this Agreement or choose not to opt out of this Agreement. The choice is yours.

8. You may not wish to be subject to this Agreement. If so, you may opt-out of this Agreement. If you wish to opt-out, you must call the following toll free number 877-248-2721 in order to opt-out. In order to be effective, you must call the toll free number and opt-out within 30 days of your receipt of this Agreement. An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. Should an Employee not opt out of this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company. An Employee has the right to consult with counsel of the Employee's choice concerning this Agreement.

9. It is against Company policy for any Employee to be subject to retaliation if he or she exercises his or her right to assert claims under this Agreement. If any Employee believes that he or she has been retaliated against by anyone at the Company, the Employee should immediately report this to the Human Resources Department.

10. This Agreement is the full and complete agreement relating to the formal resolution of employment-related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

The fifth page of the agreement contains only the concluding language:

ACKNOWLEDGMENT OF RECEIPT OF THE SECURITAS SECURITY SERVICES USA, INC. DISPUTE RESOLUTION AGREEMENT

BY SIGNING BELOW, I AM ACKNOWLEDGING RECEIPT OF THE SECURITAS SECURITY SERVICES USA, INC. DISPUTE RESOLUTION AGREEMENT, EFFECTIVE IMMEDIATELY.

Employee Name:_____
Signature:
Date:_____

Witness Name:
Signature:

III. ANALYSIS AND CONCLUSIONS

The Respondent maintains the charges are time barred by Section 10(b) of the Act, having been filed more than 6 months after June 14, 2011, the date both hiring agreements were implemented. Moreover, the Respondent maintains there is no record evidence that the new hire agreement, unlike the current employee agreement, has been enforced or has even continued in existence since its implementation date. The stipulation of the parties states that the new hire agreement "has been distributed to employees hired by Securitas in California after June 14, 2011." This language is sufficient to show that the intent of the parties was to stipulate that the Respondent has continued and is continuing to distribute the agreement to all new hires to the present date. I so find. As, I find, both agreements are invalid and currently remain in effect, and, in addition, the Respondent is currently attempting to enforce the current employee agreement before the Los Angeles County Superior Court, it is clear that the charges are not time barred with regard to either agreement. *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F2d 1568 (3rd Cir. 1992); *The Guard Publishing Co.,* 351 NLRB 1110, 1110 fn. 2 (2007).

D. R. Horton, Inc., 357 NLRB 2277 (2012), is the controlling Board decision in this matter. It is currently pending review before the Fifth Circuit Court of Appeals, having been argued on February 5, 2013. While the Respondent maintains that *D. R. Horton* was wrongly decided, I am required to follow it unless reversed by the Supreme Court. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244NLRB 960, 962 fn. 4 (1979), enfd. 640 F2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1(2004). The Respondent maintains that two Supreme Court cases issued subsequent to the Board's *D. R. Horton* decision, *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013), establish precedent that effectively overrules *D. R. Horton*. I find no merit to the Respondent's contention, as the cited cases do not present issues pertaining to the interrelationship between the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).

The Board determined in *D. R. Horton* that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB 2277, 2288 (2012). The Respondent's new hire agreement does precisely that. Accordingly, it is unlawful.

The Respondent maintains that the *D. R. Horton* decision is limited to arbitration agreements imposed as a mandatory condition of employment; accordingly, because arbitration under the current employee agreement is voluntary it is therefore not a mandatory condition of employment and should be found to

be lawful. In making this argument the Respondent relies on footnote 28 of *D. R. Horton*:

> [W]e do not reach the more difficult question…of…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 non-class arbitration rather than litigation in court. *Id*. at p. 13, n 28.

The problems with the Respondent's argument are twofold. First, the current employee agreement, standing alone, is a mandatory condition of employment because, as stated on page 5, it is "effective immediately," that is, before the employee has made any decision to opt out of arbitration; and the decision-making process itself is also a mandatory condition of employment as it is required of employees and is not simply a ministerial, relatively inconsequential matter. Here, employees, as a condition of continued employment, are required to make a decision, under time-sensitive constraints, regarding certain significant class action rights they possess under the NLRA: do they want to preserve them so that they may be able to take advantage of them in the future, or forfeit them in favor of arbitration. Whichever alternative they choose impacts their employment relationship with the Respondent for the remainder of their employment, and, for those who do not opt out, precludes them from determining whether class action is more advantageous than arbitration in any given dispute.[1] That the Respondent recognizes the employee is confronted with a difficult dilemma is clearly reflected by the language in paragraph 8 of the agreement, the opt-out paragraph, as the employee is told he or she "has the right to consult with counsel of the Employee's choice concerning this Agreement."[2] Moreover, the employee's understanding that default arbitration is the Respondent's dispute resolution preference of choice makes the opt-out decision even more formidable; thus, the employee may be legitimately concerned that such matters as promotions, wage increases, and even tenure may be dependent on whether, for example, one of the candidates for promotion has stated a preference for class action status through the requisite opting out process in contravention of the Respondent's clear arbitration preference.[3]

The Respondent contends that by choosing to not opt out and thereby automatically agreeing to the default arbitration alternative, the employee is simply exercising a right under the NLRA to refrain from engaging in concerted activity. The difficulty with this argument is that if the employee does not opt out, the current employee agreement requires the employee to forego participation in all future class action lawsuits, and is irrevocable. Therefore, the employee is precluded from ever engaging in class action lawsuits for the duration of his or her employment. That the employee is permanently locked in to this decision and, periodically, or upon reflection or changed circumstances, may not change his or her mind, places a severe restriction on the right to engage in concerted activity guaranteed by Section 7 of the NLRA, and is unlawful. *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.2d 534 (6th Cir. 2004).

Since June 14, 2011, and continuing to date the Respondent has arbitrarily established two classes of employees: those who have opted out of arbitration in favor of class action and those who, by default, have not or were given no option to do so. The employees who have not opted out are an impediment to the very purpose of concerted activity—the strategic and economic strength in numbers—and the Respondent is depriving the opted out employees of the right to their collective assistance in ever increasing numbers as no new hire since June 14, 2011, has been able to opt out. Accordingly, whether or not then current employees were given a legitimate opt-out option in the current employee agreement does not negate the fact that opted out employees are precluded from engaging in class-action litigation with all other employees and, by design, are being increasingly marginalized by the Respondent's unlawful conduct in maintaining the new hire agreement and enforcing the current employee agreement.

On the basis of the foregoing I conclude that the Respondent's current employee agreement is unlawful.[4] Concerted activity, with or without the election of a union, is the keystone of the NLRA,[5] and here, without overtly precluding class-action lawsuits by mandate, the Respondent is attempting to

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[1] In contrast, a voluntary arbitration agreement which is not a mandatory condition of employment might be one which an employee initiates, and which, in order to resolve a particular dispute, the employee and employer agree upon as a mutually beneficial means of dispute resolution.

[2] The employee is in the vulnerable position of being required to decide in advance of any particular dispute which method of dispute resolution might be more advantageous—clearly a "flip of the coin" decision. In effect, as collective activity and union activity are equally protected by the NLRA, this is no different than requiring an employee to currently decide whether he or she may exercise the right to seek union representation in the future.

[3] Recognizing that this could be a legitimate concern, the Respondent has inserted language in par. 8 of the agreement, the opt-out paragraph, purportedly designed to lessen the employee's apprehension, as follows: "An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement." As a practical matter, this disclaimer of any adverse employment action is insufficient to eliminate the real concerns of an understandably skeptical employee; in fact, it may heighten such concerns or cause employees who had no such concerns to begin with to weigh the benefits of class action against the potential adverse consequences of opting out.

[4] The Respondent, in its brief, cites numerous non-Board Federal cases in which arbitration agreements with opt-out provisions were not invalidated. For example, in *Davis v. O'Melveny & Meyers,* 485 F.3d 1066, 1073 (9th Cir. 2007), the court found that an arbitration agreement was valid because employees had a meaningful opportunity to opt out of the arbitration provision. However, that case and the other cases cited by the Respondent do not address the validity of opt-out provisions in relation to employee's rights under the NLRA. Accordingly, the cited cases are inapposite.

[5] *D. R. Horton*, supra at 2279: "These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes."

make such class action concerted activity among its employees as exacting as possible. The requirement that employees must make a difficult, and immediate (within 30 days), and irrevocable choice between class action concerted activity or individual arbitration, and that those opting out must reassert rights they already have and must, to their possible detriment, so advise the Respondent, places a significant and unnecessary burden on all employees, whichever alternative they may choose; and, in addition, as noted, maintaining the new hire agreement in conjunction with the current employee agreement places an ever-increasing additional undue burden on employees who opt for collective action.

Clearly, the current employee agreement is intended to restrain and limit the exercise of Section 7 rights, and the Respondent is applying it by attempting to restrict the class action lawsuit filed by the Charging Parties. It is therefore unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The cases cited by the Board in *D. R. Horton* in support of its determination that mandatory arbitration agreements are unlawful are equally applicable to the current employee agreement with its "voluntary" opt-out provision.

Secondly, regarding the Respondent's contention that the arbitration alternative is "voluntary," insofar as the stipulated record shows employees are not required to read the current employee agreement; and even if they begin reading it the opt-out language does not appear until page 4. Thus, I find, any opt-out provision is illusory at best. While the new hire agreement, mandating arbitration and containing no opt-out option, requires new hires to affirm that "I have read and I understand and agree to all of the terms contained in this dispute resolution agreement," the employees who have been given the current employee agreement with the opt-out option and who must exercise it in order to preserve Section 7class action rights under the NLRA, are simply advised as follows: "By signing below, I am acknowledging receipt of the Securitas Security Services USA, Inc. dispute resolution agreement, effective immediately." While they are required to acknowledge receipt of the agreement, they are not required to read, understand, or agree to it, and are told it is "effective immediately." Accordingly, it is reasonable to presume that the employees would not even be aware of any opt-out option, and would reasonably believe that "effective immediately" the dispute resolution agreement was imposed on them, as well as the new hires,[6] as a mandatory condition of employment.[7]

The Respondent maintains the opt-out provision is not illusory, as evidenced by the fact that, according to the records of Securitas, approximately 1393 employees in California opted out of the coverage of the agreement, and approximately 12,787 employees in California, or about 90 percent of the workforce, did not opt out. These numbers are of little value in assessing the merits of Respondent's argument, as the employees were simply required to sign for the receipt of the document but were not required to acknowledge that they read, understood, or agreed to it; accordingly, the Respondent is not in a position to argue that 90 per cent of its California employees made a considered decision to forego their class action rights under the NLRA by not opting out, or even understood they had the right to do so.

Accordingly, I find that, as with the new hire agreement, the holding in *D. R. Horton* is directly applicable to the current employee agreement, and that the agreement is unlawful solely because there is no attempt made by the Respondent to ensure that employees are cognizant of the fact that it is anything but a mandatory arbitration agreement. By this conduct the Respondent has violated and is violating Section 8(a)(1) of the Act.

Moreover, consistent with the foregoing and as alleged in the complaint, I find that the Respondent's motion to the court to amend the class definition to exclude employees who are subject to the current employee agreement also violates Section 8(a)(1) of the Act. *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 737 fn. 5 (1983); *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

The General Counsel also contends that both arbitration agreements violate Section 8(a)(1) of the Act because of their ambiguity. Thus, the General Counsel maintains that employees reading the documents would reasonably construe the language to prohibit the filing of unfair labor practice charges with the Board.

Both agreements, at Section 1, supra, state that the mandatory agreement to arbitrate disputes "applies to any dispute arising out of or related to Employee's employment," and conclude with the statement that "Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." Read together, it is perfectly obvious that employees would construe the latter language to place an ambiguous limitation and restriction on "claims" and "access" to the Board, and that this language would reasonably tend to inhibit the filing of unfair labor practice charges with the Board. Accordingly, I find that this language is unlawful in violation of Section 8(a)(1) of the Act. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007); *Bill's Electric, Inc*., 350 NLRB 292, 296 (2007); *Dish Network Corp.,* 358 NLRB 174, 180–181 (2012); *University Medical Center,* 335 NLRB 1318, 1320–1322 (2001), enf. denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a) (1) of the Act as alleged.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease

[6] There is no showing that the current employees and the new hires understood that they were not being given the identical agreement.

[7] Indeed, this very agreement was found unenforceable in an FLSA class action matter in *Williams v. Securitas Security Services*, 2011 WL 2713741 (E. D. Pa. 2011), the court stating, " Quite simply, this Agreement stands the concept of fair dealing on its head and is designed to thwart employees of Securitas from participating in the lawsuit."

and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix," at all locations where the agreements have been in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

ORDER[8]

The Respondent, Securitas Security Services USA, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the mandatory arbitration agreement, effective on or about June 14, 2011, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Maintaining the arbitration agreement, effective on or about June 14, 2011, that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

(c) Maintaining ambiguously worked arbitration agreements that would tend to inhibit the filing of unfair labor practice charges with the Board.

(d) Restricting the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Rescind or revise the mandatory arbitration agreement, effective on or about June 14, 2011, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Rescind or revise the arbitration agreement, effective on or about June 14, 2011, that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

(c) Advise all affected employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the agreements have been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondent.

(d) Withdraw all objections filed in judicial forums to the right of employees to engage in class or collective action.

(e) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 8, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

WE WILL NOT maintain a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain an arbitration agreement that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

WE WILL NOT maintain arbitration agreements that employees reasonably could believe bar or restrict their right to file charges with the National Labor Relations Board.

WE WILL NOT interfere with the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums and WE WILL withdraw all objections thereto.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the aforementioned arbitration agreements to make it clear to employees that the agreements

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Ru les and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

do not constitute a waiver of their right in all forums to maintain class or collective actions and do not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreements, including providing them with a copy of the revised agreements or specific notification that the agreements have been rescinded.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-072179 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

SECURITAS SECURITY SERVICES USA, INC.