

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

CHARLES DUNAWAY and

WALTER LINARES,

Charging Parties,

v.

SECURITAS SECURITY SERVICES USA,
INC.,

Respondent.

Case Nos. 31-CA-072179 and
31-CA-072180

Case Nos. 31-CA-088081 and
31-CA-088082

RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE WACKNOV'S DECISION

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SECURITAS SECURITY SERVICES
USA, INC.

Date: December 16, 2013

Pursuant to the National Labor Relations Board's Rules and Regulations, including 29 C.F.R. § 102.46, Securitas Security Services USA, Inc. ("Securitas" or "Respondent") respectfully files the following exceptions to the Administrative Law Judge's Decision ("Decision") issued by Administrative Law Judge ("ALJ") Gerald A. Wacknov on November 8, 2013.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
1	2:22-24	The ALJ's finding that one of the principal issues in this case is whether Securitas violated the Act by including language in both agreements that employees reasonably could believe bar or restrict their right to file charges with the Board.
2	4:22	<p>The ALJ's finding regarding Paragraph 1 of both Agreements.</p> <p>The ALJ omitted the following relevant language at the end of Paragraph 1:</p> <p style="padding-left: 40px;">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.nlr.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).</p>
3	7:29-32	The ALJ's finding that the parties stipulated that Securitas has continued and is continuing to distribute the agreement to all new hires to the present date.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
4	7:31-32	The ALJ's finding that both the Current Employee Agreement and the New Hire Agreement are invalid and currently remain in effect.
5	7:33-35	The ALJ's finding that the charges are not time-barred with regard to either agreement.
6	7:38-40	The ALJ's conclusion that <i>D.R. Horton</i> is the controlling Board decision in this matter.
7	7:42	The ALJ's conclusion that he was required to follow <i>D.R. Horton</i> unless that precedent was reversed by the Supreme Court.
8	7:48-49	The ALJ's conclusion that the Supreme Court's decisions in <i>CompuCredit Corp. v. Greenwood</i> and <i>American Express Co. v. Italian Colors Restaurant</i> do not establish precedent that effectively overrules <i>D.R. Horton</i> .
9	7:48-49	The ALJ's conclusion that the decisions in <i>CompuCredit</i> and <i>American Express</i> do not present issues pertaining to the interrelationship between the NLRA and the Federal Arbitration Act.
10	8:1-4	The ALJ's finding that the New Hire Agreement is unlawful because it compels employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
11	8:18-21	The ALJ's finding that the Current Employee Agreement is a mandatory condition of employment because it is effective immediately, before the employee has made any decision out of arbitration.
12	8:18-20	The ALJ's finding that, under the Current Employee Agreement, the decision-making process itself is a mandatory condition of employment because it is required of employees and is not simply a ministerial, relatively inconsequential matter.
13	8:23-26	The ALJ's finding that, under the Current Employee Agreement, employees are required, as a condition of employment, to make a decision under time-sensitive constraints regarding class action rights they possess under the NLRA, and whether they want to preserve them so they may take advantage of them in the future, or forfeit them in favor of arbitration.
14	8:28-30	The ALJ's finding that, under the Current Employee Agreement, whichever alternative employees choose impacts their employment relationship with Securitas for the remainder of their employment.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
15	8:30-33	The ALJ's finding that Securitas recognizes that the employee is confronted with a difficult dilemma under the Current Employee Agreement, which is reflected in the opt-out provision, as the employee is told that he or she has the right to consult with counsel of the employee's choice concerning the agreement.
16	8, fn. 2	The ALJ's finding that, under the Current Employee Agreement, the employee is in the vulnerable position of being required to make what is clearly a "flip of the coin" decision.
17	8, fn. 2	The ALJ's finding that the choice made by an employee under the Current Employee Agreement is no different than being required to decide whether he or she may exercise the right to seek union representation in the future.
18	8:33-35	The ALJ's finding that the employee's understanding that default arbitration is Securitas's dispute resolution preference of choice makes the opt-out decision under the Current Employee Agreement even more formidable.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
19	8:35-39	The ALJ's finding that, under the Current Employee Agreement, the employee may be legitimately concerned that such matters as promotions, wage increases, and 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 opt-out process in contravention of Securitas's clear arbitration preference.
20	8, fn. 3	The ALJ's finding that recognizing that an employee could have a legitimate concern about the opt-out in the Current Employee Agreement, Securitas inserted language in that provision purportedly to lessen the employee's apprehension, stating that an employee who opts out will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to the agreement.
21	9:8-12	The ALJ's finding that the fact that an employee who opts out under the Current Employee Agreement cannot later change the decision places a severe restriction on the right to engage in concerted activity guaranteed by Section 7 of the Act.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
22	9:14-20	The ALJ's finding that Securitas has arbitrarily established two classes of employees—(1) those who have opted out of arbitration in favor of class action under the Current Employee Agreement and (2) those who have not opted out under that agreement or were not given an option to opt out under the New Hire Agreement.
23	9:17-20	The ALJ's finding that the employees who have not opted out are an impediment to the very purpose of concerted activity—the strategic and economic strength in numbers.
24	9:18-20	The ALJ's finding that Securitas is depriving the employees who opted out of the right to the collective assistance of employees who did not opt in ever-increasing numbers because new hires have not been able to opt out.
25	9:20-24	The ALJ's finding that whether or not employees who are subject to the Current Employee Agreement were given a legitimate opt-out option does not negate the fact that employees who opted out are precluded from engaging in class action litigation with all other employees.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
26	9: 23-25	The ALJ's finding that employees who opted out under the Current Employee Agreement are, by design, being increasingly marginalized by Securitas's unlawful conduct in maintaining the New Hire Agreement and enforcing the Current Employee Agreement.
27	9:26-27	The ALJ's conclusion that on the basis of the foregoing, the Current Employee Agreement is unlawful.
28	9, fn. 4	The ALJ's conclusion that numerous federal cases where courts did not invalidate agreements with opt-out provisions, including the Ninth Circuit decision in <i>Davis v. O'Melveny & Meyers</i> , are inapposite because they do not address the validity of opt-out provisions in relation to employee rights under the NLRA.
29	9:27-30	The ALJ's finding that without overtly precluding class action lawsuits by mandate, Securitas is attempting to make such concerted activity among its employees as exacting as possible.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
30	9:30-34 10:1-3	The ALJ's finding that the requirement that employees must make a difficult, 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 Securitas, places a significant and unnecessary burden on all employees, whichever alternative they may choose.
31	10:1-3	The ALJ's finding that 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
32	10:5-8	The ALJ's conclusion that the Current Employee Agreement is intended to restrain and limit the exercise of Section 7 rights and Securitas is applying it by attempting to restrict the class action lawsuit filed by the Charging Parties; and it is therefore unlawful under <i>Lutheran Heritage Village-Livonia</i> .
33	10:8-10	The ALJ's conclusion that the cases cited by the Board in <i>D.R. Horton</i> 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.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
34	10:12-15	The ALJ's finding that the stipulated record shows that 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, and therefore the opt-out provision is illusory.
35	10:20-24	The ALJ's finding that employees who are subject to the Current Employee Agreement were told that it was effective immediately.
36	10:24-27	The ALJ's finding that it is reasonable to presume that the employees would not even be aware of the opt-out option, and would reasonably believe that the Current Employee Agreement was imposed on them effective immediately, as well as on the new hires, as a mandatory condition of employment.
37	10:29-37	The ALJ's finding that the fact that approximately 1,393 employees in California opted out of the coverage of the Current Employee Agreement, and approximately 12,787 employees, or about 90 percent of the workforce, did not opt out, is of little value in assessing the merits of Securitas's argument, because employees were only required to sign for receipt of the document, and were not required to acknowledge that they read, understood, or agreed to it.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
38	10:39-43	The ALJ's conclusion that the holding in <i>D.R. Horton</i> is directly applicable to the Current Employee Agreement, and that agreement is unlawful, solely because Securitas did not make any attempt to ensure that employees were cognizant of the fact that it is anything but a mandatory arbitration agreement; and by this conduct, Securitas has violated, and is violating, Section 8(a)(1) of the Act.
39	11:1-5	The ALJ's conclusion that Securitas'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.
40	11:7-24	The ALJ's conclusion that employees would construe the language of the agreements 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 practices with the Board; and therefore it is unlawful in violation of Section 8(a)(1) of the Act.
41	11:32	The ALJ's conclusion that Securitas violated Section 8(a)(1) of the Act as alleged.
42	11:37	The ALJ's finding that the Respondent has engaged in certain unfair labor practices.

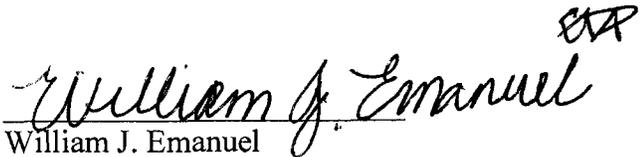
Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
43	11:37-40	The ALJ's recommendation that the Respondent be required to cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.
44	11:40-43	The ALJ's recommendation that Securitas post the attached notice, marked "appendix" pursuant to the terms of the order.
45	12:8-10	The ALJ's order that Securitas cease and desist from maintaining the mandatory arbitration agreement that requires employees to waive their right to maintain class or collective action in all forums.
46	12:12-16	The ALJ's order that Securitas cease and desist from maintaining the 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.
47	12:18-20	The ALJ's order that Securitas cease and desist from maintaining ambiguously worked [sic] arbitration agreements that would tend to inhibit the filing of unfair labor practice charges with the Board.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
48	12:21-23	The ALJ's order that Securitas cease and desist from restricting the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums.
49	12:24-26	The ALJ's order that Securitas cease and desist from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights "in any like or related manner."
50	12:31-34	The ALJ's order that Securitas rescind or revise the mandatory arbitration agreement that requires employees to waive their right to maintain class or collective action in all forums.
51	12:36-40	The ALJ's order that Securitas rescind or revise the 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.
52	12:42-46	The ALJ's order that Securitas advise all affected employees that the agreements have been rescinded or revised and employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondent.

Exception Number	Page	Securitas Excepts to the following ALJ Findings, Legal Conclusions, Recommendations and Orders:
53	13:1-2	The ALJ's order that Securitas withdraw all objections filed in judicial forums to the right of employees to engage in class or collective action.
54	13:5-15	The ALJ's order that Securitas post the attached notice, marked "appendix" pursuant to the terms of the order.
55	17-20	The ALJ's order that Securitas file with the Regional Director for Region 31 a sworn certificate of a responsible official attesting to the steps that the Respondent has taken to comply with the order.

WHEREFORE, the Employer respectfully requests that the Board reject those portions of the ALJ's Decision excepted to, and conclude, in accordance with the stipulated record evidence and relevant decisional authority, that the unfair labor practice charges against the Employer be dismissed.

Dated: December 16, 2013



 William J. Emanuel

 Elizabeth D. Parry

 LITTLER MENDELSON, P.C.

 Attorneys for Respondent

 SECURITAS SECURITY

 SERVICES USA, INC.

PROOF OF SERVICE BY MAIL AND E-MAIL

I am employed in Contra Costa County, Walnut Creek, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1255 Treat Boulevard, Suite 600, Walnut Creek, CA 94597. On December 16, 2013, I served the within document(s):

**RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE
WACKNOV'S DECISION**

- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is ccrescismith@littler.com.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 16, 2013, at Walnut Creek, California.


Cassandra Cresci-Smith

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