UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON DC

SECURITAS SECURITY USA, INC.,

and

Cases 31-CA-072179
31-CA-088081

CHARLES DUNAWAY, an Individual,

and

Cases 31-CA-072180
31-CA-088082

WALTER LINARES, an Individual.

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8 as amended, Counsel for the General Counsel (GC) submits this Answering Brief in Opposition to Respondent's Exceptions to the Decision of the Administrative Law Judge.[1] The GC hereby respectfully requests that the National Labor Relations Board (the "Board") deny all of Respondent's exceptions.

I. PROCEDURAL HISTORY

The Honorable Gerald D. Wacknov (ALJ) issued his decision on November 8, 2013 based on a stipulated record submitted by the parties through a Joint Motion to Transfer Proceedings to the Division of Judges and Stipulation of Issues Presented on June 14, 2013 (Motion to Transfer). The underlying Complaint alleges that Securitas Security USA, Inc., (Respondent or Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining two types of arbitration dispute resolution agreements (arbitration agreements) and by enforcing one of the arbitration agreements in state court litigation. The ALJ found that Respondent violated Section 8(a)(1) as alleged. In so finding, and as alleged and argued by the GC, the ALJ also concluded that both arbitration agreements (the current arbitration agreement and the new hire

[1] Because the facts of this case have been thoroughly covered by the GC's post hearing brief in this case, as well as by Charging Parties' and Respondent's various briefs, as otherwise noted, they will not be repeated herein.

agreement[2]) contained language that employees would reasonably believe would prevent them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1). On December 16, 2013, Respondent filed Exceptions to the ALJ's decision.

II ARGUMENT AND ANALYSIS

a. Respondent's Arguments in Support of Exceptions Asserting that *D.R. Horton's* Precedent Is No Longer Binding on the Board and that the FAA Requires that the Arbitration Agreements in this Case Be Found Lawful and Enforced as Written, Including Class Action Waivers, Lack Merit. (Exceptions 4, 6 Through 9, 28, and 42)

At the outset, Respondent argues that because some federal courts, including the Fifth Circuit Court of Appeals[3], in addition to one NLRB administrative law judge, have disagreed with the decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (*D.R. Horton)* as precedent, the Board should reconsider and overrule such decision. Thus, Respondent contends that the ALJ's reliance on *D.R. Horton* was erroneous. However, missing from Respondent's argument is the fact that *D.R. Horton* has not been reversed by the U.S. Supreme Court. As *D.R. Horton* has not been overturned by the U.S. Supreme Court, the ALJ properly relied on it as the controlling Board authority in this matter in reaching his findings and conclusions. The interpretation and enforcement of

[2] The current arbitration agreement refers to that distributed by Respondent on June 14, 2011 to employees who were employed by Respondent as of that date. The new hire agreement refers to that distributed by Respondent on June 14, 2011 to newly hired employees after June 14, 2001.

[3] *D.R. Horton Inc., v. NLRB*, Case No. 12-60031 (5th Cir. Dec. 3, 2013)

the substantive rights protected by the National Labor Relations Act (Act or NLRA) is, in the first instance, accorded to the Board—not to the federal courts—and it is the Board's decision in *D.R. Horton* that binds the ALJ's determination here. See *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963). Respondent's arguments in support of its exceptions herein cannot escape well-settled law that the Board's administrative law judges are required to follow established Board precedent that the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984); *Los Angeles New Hosp.*, 244 NLRB 960, 962 n.4 (1979), *enforced* 640 F.2d 1017 (9th Cir. 1981). Therefore, the ALJ's conclusion that Board's *D.R. Horton* is the controlling law for this case was proper.

Second, Respondent cites several arguments, again relying on non-Board cases, for its proposition that "there is no doubt that the FAA (Federal Arbitration Act) overrides the NLRA" in support of its claim that the arbitration agreements in this case be found lawful and enforced as written, including its class action waivers. However, these arguments lack merit in that the Board has determined that *D.R. Horton* does not present a conflict between the FAA and the Act. As the Board explained in *D.R. Horton*: "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." 357 NLRB No. 184, slip. op. at 12. This is because Section 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in

part" for the same reasons any contract may be invalidated, including if it is unlawful or contrary to public policy. *Id.*, slip. op. at 11. As both arbitration agreements are inconsistent with the NLRA, as found by the ALJ herein, they are not enforceable under the FAA. Consequently, the ALJ properly found that Respondent's non-Board citations presented no issues pertaining to the interrelation between the NLRA and the FAA.

Respondent's additional argument that finding both arbitration agreements at issue herein unlawful would compel class arbitration absent agreement of the parties, thus running afoul of the Supreme Court's decision in *AT&T Mobility v. Concepcion,* 131 S.Ct. 1740 (2011), is misplaced. This is so because adherence to *D.R. Horton* does not *compel* class arbitration, as Respondent is free to limit its arbitration program to individual arbitration, so long as employees remain free to exercise their Section 7 right to engage in collective legal activity in court and are not compelled to only act individually. Any such policy would be entirely permissible under the FAA and would not run afoul of *AT&T.* Notably, while *AT&T* makes it clear that bilateral arbitration is *favored* under the FAA, it does not suggest that it is *compelled.* Indeed, in a related case, the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 130 S.Ct. 1758, 1774-75 (2010) makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA. Thus, any claimed infringement on the FAA by protecting employees' Section 7 rights in these circumstances is entirely illusory.

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employer cannot force employees to forego that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the NLRA, without offending those inherent in the FAA. Put another way, requiring an employer to adhere to the NLRA is consistent with the FAA.

Finally, as the Board in *D.R. Horton* made clear, even if, contrary to the foregoing, there were an irreconcilable conflict between the NLRA and the FAA, "the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute." 357 NLRB No. 184, slip. op. at 12, n. 26.[4] For the reasons stated here, and for those iterated by the Board in *D.R. Horton*, finding Respondent's Arbitration Agreements unlawful under the Act will not pose a conflict with the FAA as the ALJ properly concluded herein. Respondent's arguments in support of these exceptions should be rejected.

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[4] While the FAA was reenacted and codified as Title 9 of the United States Code in 1947, the legislative history and the Supreme Court make clear that the relevant date of enactment is in 1925. See, e.g., H.R. Rep. No. 80-251 (1947), reprinted in 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing law); H.R. Rep. No. 80-255 (1947), reprinted in 1947 U.S.C.C.A.N. 1515 (same); *Compucredit Corp. v. Greenwood*, ____ U.S. ____, 132 S.Ct. 665, 668, 2012 WL 43514 (January 10, 2012) ("the Federal Arbitration Act (FAA), enacted in 1925"); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1745, 1751 ("[t]he FAA was enacted in 1925," "class arbitration was not even envisioned by Congress when it passed the FAA in 1925"); *Vaden v. Discover Bank*, 556 U.S. 49, 58, 129 S.Ct. 1262, 1271 (2009) ("[i]n 1925, Congress enacted the FAA"). The relevant date of enactment for the NLRA is 1935.

b. Respondent's Arguments in Support of Exceptions that the Rules Enabling Act Requires that the Arbitration Agreements Be Found Lawful and Be Enforced as Written, Lack Merit. (Exception 8)

In claiming that the arbitration agreements are lawful, Respondent argues that "the right to bring class action claims is not a substantive right, but rather is a procedural right governed by Rule 23 of the Federal Rules of Civil Procedure..." and that in accordance with the Rules Enabling Act (REA) [28 U.S.C. Section 2072(b)], "Rule 23 cannot be interpreted as providing a substantive or statutory right to participate in class actions under the [NLRA]." However, Respondent's arguments fail to acknowledge the fact that the right to participate in collective action is founded in Section 7 of the NLRA, not through the REA. Respondent has purposefully ignored the Board's central holding in *D.R. Horton* that the right of employees under the NLRA to bring class and collective claims is itself a *substantive* right. This being the case, the REA cannot be interpreted to forbid the Section 7 right to engage in protected-concerted activity manifested by way of a class action. Further, Respondent's arguments erroneously presume that only federal courts will be hearing cases absent arbitration. However, workplace disputes are also brought under state law. e.g. *Gentry v. Superior Court*, 42 Cal.4th 443 (2007); *Iskanian v. CLS Transportation*, 142 Cal.Rptr.3d 372 (2012); *Franco v. Arakelian Enterprises, Inc.*, 211 Cal.App.4th 314 (2012). In such circumstances,

the REA would more emphatically not apply. As such, Respondent's reliance on the REA in misguided.

c. Respondent's Arguments in Support of Exceptions that if *D.R. Horton* is not Overruled, it Should not Be Applied to Voluntary Arbitration Agreements Such as the Current Arbitration Agreement in this Case, Lack Merit. (Exceptions 4, 11 through 27, 29 through 31, 33 through 39 and 41)

Respondent contends that the *D.R. Horton* decision is limited to arbitration agreements imposed as a mandatory condition of employment. Accordingly, because arbitration under the current agreement is purportedly "voluntary," in that it contains an opt-out provision, Respondent argues it is therefore not a mandatory condition of employment, and should be found to be lawful. However, as noted by the ALJ, this argument does not overcome the current arbitration agreement's unlawful interference with employees' Section 7 right to file and participate in collective and class litigation, or change the clear applicability of *D.R. Horton* to the current arbitration agreement. Consequently, the ALJ properly concluded that the current arbitration agreement is unlawful under *Dr. Horton*.

As properly analyzed by the ALJ, giving employees a limited opportunity to opt-out of the current arbitration agreement during their first 30 days of employment does not adequately protect employees' Section 7 rights. Respondent's current arbitration agreement cannot be "voluntary" where it is imposed on employees as a condition of employment except if employees affirmatively act to opt out immediately on

commencing their employment.[5] Indeed, as properly noted by the ALJ, the language of the current arbitration agreement itself demonstrates that the agreement binds employees even in the absence of their acknowledgment thereof.[6] Moreover, the current arbitration agreement imposes a waiver at a time when employees are unlikely to have any awareness of employment issues that may be resolved most effectively by collective legal action, or of any other employees' efforts to act concertedly to redress issues of common concern. And, perhaps most significantly, the current arbitration agreement imposes a waiver in circumstances where employees have no notice of their Section 7 right to engage in class and collective legal activity or that a prohibition of such activity violates Section 8(a)(1) of the Act.

As to the employees who do not opt-out upon commencing their employment, as discussed by the ALJ, the current arbitration agreement unlawfully interferes with their Section 7 right to engage in collective legal activity by establishing an irrevocable waiver of their *future* Section 7 rights. In analogous circumstances, the Board has found unlawful and unenforceable agreements that condition employment on the employee's waiver of prospective Section 7 rights, concluding that "future rights of employees as

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[5] Cf., e.g., *Williams v. Securitas Sec. Servs.*, 2011 WL 2713741, at *2 (E.D. Pa. 2011) ("[the employer] intends to bind its employees unless they opt out by calling a phone number deeply embedded in the "agreement" within 30 days even though the employee never signs the document. Quite simply, this Agreement stands the concept of fair dealing on its head").

[6] Section 8 of the Current Employee Arbitration Agreement states in relevant part: "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."

well as the rights of the public may not be traded away in this manner." *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (finding unlawful a separation agreement prohibiting the departing employee from engaging in union and other protected activities for a 1-year period); *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (finding unlawful an employer's conditioning reinstatement on the employee's refraining from future concerted activities and unfair labor charges, in addition to requesting withdrawal of pending charges); *See also 24 Hour Fitness USA, Inc.*, JD (SF)-51-12, 2012 WL 5495007 (November 6, 2012) (The Administrative Law Judge found that employer's arbitration program, even with opt-out provision, violated Section 8(a)(1) of the Act); *Mastec Services Co.*, JD(NY)-25-13, 2013 WL 2409181 (June 3, 2013) (same)

Similarly, as the ALJ found, the requirement here that employees affirmatively preserve their Section 7 rights by opting *out* of the current arbitration agreement is clearly an unlawful burdening of the employees' right to engage in collective litigation. Just as it would be unlawful for an employer to require employees to affirmatively preserve their Section 7 rights to discuss terms and conditions of employment amongst themselves, to strike, or to engage in other union or concerted activities, an employer cannot be permitted to restrict the right to engage in collective and class legal actions

unless employees affirmatively preserve that right.[7] By placing the burden on employees to take immediate steps in order to retain their Section 7 rights, or lose them forever, Respondent necessarily interferes with its employees' exercise of those statutory rights.

In addition, an opt-out procedure's necessary requirement that employees publicly self-identify as choosing to preserve their right to engage in Section 7 activity – and do so at the highly vulnerable time when they are new employees – is itself antithetical to the representative aspect of collective action and the protection it affords employees from fear of reprisal.[8]

Respondent's argument that the opt-out opportunity it offers employees makes its policy lawful because the employees have a Section 7 right to refrain from engaging in collective legal activity was properly rejected by the ALJ. Respondent's argument ignores that irrevocable waivers of employees' prospective Section 7 rights to collective legal activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are "a continuing means

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[7] See, e.g., *D.R. Horton*, 357 NLRB No. 184, slip op. at 3: "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. After all, if the Respondent's employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected."

[8] See, e.g., *Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (2011) ("The premises of the Act . . . and our experience with labor-management relations all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right . . . .").

of thwarting the policy of the Act," *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), quoted in *D.R. Horton*, and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. Furthermore, Respondent's argument disregards the fact that concerted activity rights "are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The Act's protection of concerted activity for mutual aid and protection, as illustrated by the cases cited by the Board in *D.R. Horton*, 357 NLRB No. 184, slip op. at 4-5, recognizes that the decision whether to engage in concerted activity is not made abstractly by isolated individuals acting on their own, but instead is made as a result of concrete grievances and workplace discussions of the options available to employees. Respondent's current arbitration agreement, even if it were entered into by choice, unlawfully "sought to erect 'a dam at the source of supply' of potential, protected activity" and "thereby interfered with employees' exercise of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

Further, the essential element of the Section 7 right to refrain from engaging in collective legal activity is the protection of employee choice. Respondent's current arbitration agreement, however, unlawfully binds employees to an irrevocable waiver of their prospective Section 7 rights to engage in collective legal activity that precludes

their making choices as to any future claim. To permit Respondent to so limit its employees' rights to act collectively, in the guise of protecting employees' right to refrain from engaging in collective legal activity, would be to stand Section 7 on its head.

In any case, Respondent's current arbitration agreement does not, in fact, offer employees the choice to refrain from engaging in collective legal activity. It makes that choice for them – if employees do nothing, they irrevocably forfeit their Section 7 rights for the remainder of their tenure of employment. Respondent's current arbitration agreement merely offers employees a limited opportunity to regain the statutory rights Respondent has denied them. As discussed above, and as covered by the ALJ decision, that is not how the Act protects employees' Section 7 rights, including the right to refrain from engaging in collective activity. For all these reasons, including the ones noted by the ALJ, Respondent's opt-out procedure does not render the current arbitration agreement lawful. Therefore, the ALJ properly concluded that the holding in *D.R. Horton* is directly applicable to the current arbitration agreement in finding such agreement unlawful under Section 8(a)(1).

d. Respondent's Arguments in Support of Its Exceptions that the Language of the Agreements Does Not Restrict Employee Access to the Board, Lack Merit. (Exceptions 1, 2, 40 and 41)

Respondent argues the ALJ improperly ruled that employees would reasonably construe language in both agreements to prohibit the filing of unfair labor practice

charges because such issue was not contained in the stipulation of issues presented, which Respondent contends dictates the scope of the record. This argument should be rejected as the issue was properly identified as part of the record.

The record on which the ALJ based his decision includes the identification of the very same issue alleged to be missing by Respondent. In this regard, page 1 of the June 14, 2013 Motion to Transfer, executed by Respondent, states the following:

> If this motion is granted, the Parties agree to the following: 1. *The record in this case shall consist of:* (1) this Joint Motion to Transfer Proceedings to the Division of Judges; (2) Stipulation of Facts signed by Securitas and the General Counsel with exhibits A though D; (3) General Counsel's exhibits 1(a) through 1(mm); (4) August 29, 2012, letter from the Regional Director of Region 31 to Counsel for Securitas advising that the Section 8(a)(4) allegations in charges 31-CA-072179 and 31-CA-072180 have been withdrawn; and (5) *the Parties' short statement of position.* (emphasis added)

Attachment 5 to the granted Motion to Transfer includes GC's statement of position where, at page 3, it identifies the issue at hand properly addressed by the ALJ, which reads: "Both Agreements Also Violate Section 8(a)(1) Because Employees Would Reasonably Construe Them To Prohibit The Filing Of Unfair Labor Practice Charges." GC's presentation of this issue in its statement of position is followed by a summary explanation supporting the merits of GC's position. Therefore, Respondent's narrow reading of the Statement of Issues contained in the Motion to Transfer is misplaced. On

these grounds, and contrary to the *Siracusa*[9] case cited by Respondent, it can hardly be said that the GC failed to identify this allegation as an additional grounds for finding the arbitration agreements unlawful. Finally, further grounds to reject Respondent's narrow reading of the Statement of the Issues is Respondent's own recognition documented in paragraph 6 of the Joint Motion that the case at hand would include issues beyond those noted in the Statement of the Issue. Paragraph 6 of the Joint Motion reads: "It is understood that by signing this Joint Motion, including Issues 1 and 2, Securitas does not waive the right to make the arguments set forth in its statement of position filed with this motion, or any other arguments." Consequently, the ALJ's inclusion and findings on the issue at hand, comported with duties assigned to him per Board Rules, Section 102.45(a) that decisions be based "upon all material issues of ... law... or discretion presented on the record."

Respondent's reference to the Regional Director's approval of the withdrawal of the Section 8(a)(4) portion in charges 31-CA-072179 and 31-CA-072180 has no bearing on the ALJ's conclusion that that mere requirement and maintenance of the agreements at issue here violates Section 8(a)(1), in the absence of any efforts to enforce the agreements. This is because the Board has made clear that an unlawful rule or policy which employees would reasonably construe to prohibit the filing of unfair labor practice charges violates Section 8(a)(1) of the Act, while employer efforts to enforce

[9] *Siracusa Moving & Storage Service Co.*, 290 NLRB 143, (1988)

such a rule or policy, or otherwise to coerce employees into refraining from exercising their Section 7 right of access to the Board, also violates Section 8(a)(4). See, e.g., *Bill's Electric, Inc.*, 350 NLRB at 296, 307 (employer's maintenance of its unlawful policy violated Section 8(a)(1); its letters to employees seeking to enforce the policy and intimidate the employees violated Section 8(a)(4)). Respondent's attempts to present this as a due process violation have been addressed at the beginning of this Section and should be rejected.

Contrary to Respondent's arguments in support of its exceptions, the ALJ properly determined both arbitration agreements were violative of Section 8(a)(1) because employees would reasonably construe the language of the agreements to prohibit the filing of unfair labor practice charges with the Board. The Board has made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge are unlawful. See, e.g., *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7-8 (2012); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007). Thus, for example, in *U-Haul Co. of California*, the Board held that an employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges, and that did not clarify that the policy did not extend to the filing of unfair labor practice charges. 347 NLRB at 377-78.

In the instant case, the language of Section 1 in both of Respondent's arbitration agreements is broad enough for employees to reasonably conclude that they are precluded from filing unfair labor practice charges with the Board. It states that the arbitration agreements apply to "*any* dispute arising out of or related to" employment, "without limitation, to disputes regarding the employment relationship," and that all such disputes are to be resolved *only* through arbitration. While Section 1 modifies the applicability of the arbitration agreements by stating that, "Claims may be brought before an administrative agency," such as those before the Board, Section 1 also states that such claims may be brought "only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." At best, the arbitration agreements are ambiguous to employees as to whether or not they are still allowed to file charges with the Board; at worst, they are intended to prohibit employees' exercise of these Section 7 rights.[10] The modifying language of Section 1 does not cure Respondent's arbitration agreements of their ambiguity because employees would not necessarily understand what "applicable law permits." Because Section 1 in both arbitration agreements remains ambiguous as to whether employees are still allowed to file Board charges, as properly found by the ALJ, both agreements violate Section 8(a)(1) of the Act. *Univ. Med. Ctr.*, 335 NLRB 1318, 1320-22 (2001), *enf.*

[10] See, e.g., *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7-8 (2012); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007).

denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003) (rules that are ambiguous and contain no context that would clarify to employees that rule does not restrict Section 7 rights are unlawful).

For the foregoing reasons, the ALJ properly found that employees would construe language in both arbitration agreements to place an ambiguous limitation and restriction on "claims" and "access" to the Board and found both agreements violative of Section 8(a)(1).

e. Respondent's Arguments in Support of Its Exceptions that Charges Relating to the New Hire Agreement Are Time Barred Under Section 10(b) of the Act, Lack Merit. (Exceptions 3, 5, 10, 31 and 36)

Respondent's argument that the ALJ improperly assumed that Securitas hired employees and distributed the new hire agreement after June 14, 2011 lacks merit in that it runs contrary to the clear language of the stipulated record. Such a narrow reading would likewise violate the ALJ's discretion granted by the Board's rules in making interpretation of facts that are not subject to reasonable dispute.

Stipulation No 4 at issue herein reads (emphasis added):

> 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.* A copy of the form is attached to this stipulation as Exhibit B. It does not include an opt-out provision and the affected employees have been required to sign it.

Based on the clear language of the above-noted Stipulation, it cannot be reasonably disputed that the intent between the GC and Respondent, as properly found by the ALJ, was to stipulate that Respondent has continued and is continuing to distribute the new hire agreement to all new hires post June-14,2011, up to the present date. Under Federal Rules of Evidence 201, adjudicative facts such as the ones at issue herein that are not subject to reasonable dispute may be given administrative notice (referred also as "official" or "judicial" notice) at any stage of the proceedings, with or without a request by one of the parties. See also *E&I Specialists*, 349 NLRB 446, 455 (2007). It would have been redundant to include additional facts that Respondent has in fact hired and distributed the new hire agreement to employees post June 14, 2011 when the stipulated language clearly states that the new hire agreement "*has been distributed to employees hired by Securitas in California after June 14, 2011.*" (Emphasis added) Further, Board's Rules Section 102.45(a), grants the ALJ the authority to issue decisions based on "upon all material issues of fact, law, *or discretion presented on the record....*" which is what the ALJ did here in properly determining the parties' intent. (Emphasis added). Consequently, the ALJ's findings and conclusions in this respect are properly supported by the stipulated record and undisputed reasonable inferences made therein.

Respondent's additional argument that Charges relating to the New Hire agreement were filed approximately seven months after the agreement was implemented and thus are time barred under Section 10(b) of the Act are likewise misplaced. First, although Charging Parties have not worked for Respondent within the 10(b) period, they remain statutory "employees" within the meaning of Section 2(3) of the Act. The Board has long held that that an "employee" is a "member[] of the working class generally," including a "former employee[] of a particular employer." *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977); *see also Waco, Inc.*, 273 NLRB 746, 747, fn. 8 (1984) (discharged employee remains a statutory employee entitled to the full protection of the Act). Second, Charging Parties' allegations are not time-barred. Section 10(b) of the Act does not bar allegations in situations where an agreement is invalid on its face and maintained or invoked within the 10(b) period. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007). Here, as properly concluded by the ALJ, because Respondent's new hire agreement is facially invalid and remains in effect, the allegations in the Charge relating to the new hire agreement are not barred by the statute of limitations under Section 10(b) of the Act.

f. Respondent's Arguments in Support of Exceptions that Asserting a Defense in Another Judicial Forum (Vis-a-Vis Respondent's August 21, 2012 Motion to Amend Its Class Definition to Exclude Employees Who Are Subject to the Current Arbitration Agreement) Did Not Violate the Act and that the Remedy

Provided by the ALJ Exceeds Board Authority, Lack Merit. (Exceptions 32, 39, and 43 Through 55)

The ALJ's conclusion and recommended remedial order were proper.

(1) *Bill Johnson's Restaurants* Supports the ALJ's Findings that Respondent's Efforts to Enforce the Current Employee Arbitration Agreement by Filing Its August 21, 2012 Motion Violate Section 8(a)(1)

Respondent's efforts to enforce the current arbitration agreement through its August 21, 2012 motion also violated Section 8(a)(1) of the Act under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983). In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." *Id.* In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000).[11] Accordingly, a footnote 5 analysis is properly

[11] See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not).

applied to Respondent's August 21, 2012, motion at issue here, despite their arising as a defense in the course of lawful employee lawsuits and/or arbitration claims.[12]

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB at 297. In particular, an illegal objective may be found for two reasons relevant to the cases presented here. The first of these is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself.[13] In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second of these is where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but instead also seeks to use the arbitrator or the court itself to directly interfere with the Section 7 activity. Thus, for example, in *Manno Electric*, the Board found that an employer cause of action attacking employee

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[12] Legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*, 305 NLRB 663 (1991), rev. denied 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

[13] *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB 380, 383 (1970), enforced in relevant part, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84 (1973).

statements made to the Board was not only preempted, but also had an illegal objective. *Manno Electric*, 321 NLRB at 297.

Here, both of these reasons apply. Respondent's August 21, 2012, motion sought to enforce the current arbitration agreement that is itself unlawful, as discussed above. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the August 21, 2012, motion is simply an attempt to enforce the underlying act.

Moreover, Respondent's August 21, 2012, motion at issue here also has an illegal objective because it was directly aimed at preventing employees' protected conduct. Indeed, the only objective of Respondent's motion was to prohibit employees from engaging in Section 7 activity, *i.e.*, bringing collective or class actions in any forum. Therefore, *Bill Johnson's Restaurants* footnote 5 further supports the ALJ's finding that Respondent's efforts to enforce its Current Employee Arbitration Agreement by filing its August 21, 2012, motion violates section 8(a)(1).

(2) The ALJ's Remedial Order Is Proper in that the Board May Seek the *Status Quo Ante* and Order That Respondent Withdraw Its August 21, 2012 Motion

The remedy recommended by the ALJ in this matter includes that Respondent withdraw its August 21, 2012 motion described above, thus returning employees to the *status quo ante*. Nothing in the remedy recommended by the ALJ would preclude Respondent from amending its motion to seek lawful collective or class arbitration

rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.[14] Thus, Respondent should be required to withdraw the motion for individual arbitration, if pending, or to move the appropriate court to vacate its order for individual arbitration, if Respondent's motion has already been granted and a motion to vacate can still be timely filed. Any such motion to vacate should be made jointly with the affected employees, if they so request.[15]

Under Board law, the remedies recommended by the ALJ are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing positions that are antithetical to the Act. Thus, in *Loehmann's Plaza,* 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have the injunction granted against the union withdrawn. In *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to

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[14] This would be consistent with the GC's long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O'Charley's Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 ("Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection").

[15] The Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See, e.g., *Baptist Memorial Hospital,* 229 NLRB 45, 46 (1977) ("[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.[16]

IV. CONCLUSION

Based on the foregoing, the ALJ properly found that both of Respondent's arbitration agreements violate Section 8(a)(1) of the Act because they are unlawful under *D.R. Horton* as they expressly prohibit the exercise of substantive rights protected by Section 7 of the Act, and because they lead employees to reasonably conclude that they are precluded from filing unfair labor practice charges or otherwise accessing the Board's processes. Because both arbitration agreements are unlawful, the ALJ likewise properly concluded that Respondent's August 21, 2012, motion to amend the class definition in Charging Party's class action lawsuit to exclude employees who are subject to the Current Employee Arbitration Agreement is itself unlawful. The GC submits, therefore, that the entirety of Respondent's Exceptions be denied.

DATED AT Los Angeles, California, this 21st day of January 2014.

Respectfully Submitted,

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[16] As those cases were based on federal-law preemption, rather than a *Bill Johnson's* "illegal objective," the timing of the preemption was considered in applying the remedy. Here, of course, there is no point of preemption and, as noted above, Respondent's August 21, 2012 motion was unlawful *ab initio*.

Re: SECURITAS SECURITY SERVICES USA, INC.
Cases: 31-31-CA-072179, 31-CA-072180, 31-CA-088081, 31-CA-088082

CERTIFICATE OF SERVICE

I hereby certify that I served the attached COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO DECISION OF THE ADMINSTRATIVE LAW JUDGE on the parties listed below on the 21ST day of January, 2014:

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