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 REPLY BRIEF IN SUPPORT OF EXCEPTIONS

William J. Emanuel
LITTLER MENDELSON, P.C.
2049 Century Park East, Suite 500
Los Angeles, CA 90067
Telephone: (310) 553-0308

Elizabeth D. Parry
LITTLER MENDELSON, P.C.
1255 Treat Boulevard, Suite 600
Walnut Creek, CA 94597
Telephone: (925) 927-4542

Counsel for
SECURITAS SECURITY SERVICES USA, INC.

Date: February 4, 2014

I. Introduction

In their Answering Briefs, Counsel for the General Counsel and the Charging Parties fail to refute the arguments by Securitas arguments establishing that both of its arbitration agreements are lawful and enforceable. Both briefs completely ignore relevant federal and Supreme Court case law requiring arbitration agreements, including class action waivers, to be enforced as written and urge the Board to elevate the National Labor Relations Act over the Federal Arbitration Act's strong federal policy favoring arbitration. Nothing in Securitas' arbitration agreements violates the NLRA. Accordingly, the Board should find the agreements lawful, including the class action waivers. The relevant case law, and the undisputed stipulated facts, demonstrate that the ALJ's decision must be reversed.

II. Relevant Federal and Supreme Court Precedent Requires the Arbitration Agreements to be Enforced as Written.

The federal and Supreme Court case law requires the arbitration agreements in this case to be enforced as written. The Administrative Law Judge applied the Board's precedent in *D.R. Horton, Inc.* 357 NLRB No. 184 (2012), to find that the class action waivers contained in the arbitration agreements prohibited employees' protected collective activity. That precedent has been expressly vacated by the 5th Circuit, superseded by subsequent U.S. Supreme Court cases, and rejected by at least 40 courts, including three other federal appellate courts.[1] The General Counsel asserts that the ALJ must follow Board precedent absent a Supreme Court reversal of that decision, even in the face of contrary circuit court decisions. Brief at p.3 citing *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Under *Waco, D.R. Horton* is not applicable to this case because the Supreme Court has specifically found arbitration agreements containing class action

[1] See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and Appendix A to Respondent's Brief in Support of Exceptions.

waivers to be enforceable under the FAA when the other federal statute remains silent on arbitration. The NLRA contains no express language regarding class actions or arbitration. In addition, although the Board instructs ALJ's to follow Board precedent, even in the face of contrary circuit court precedent, *Waco* specifically acknowledges the ability of the Board to vary that precedent. Given the overwhelming contrary federal and Supreme Court precedent, the Board should reconsider and overrule its decision in *D.R. Horton.*

Both briefs completely ignore the current U.S. Supreme Court precedent, which clearly permits class action waivers in arbitration agreements. In *AT&T Mobility v. Concepcion*, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of the agreement on the availability of class-wide arbitration. *AT & T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). The Court concluded that the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms, including provisions that waive the right to pursue class-wide relief. *Concepcion*, 113 S.Ct. at 1748.

The Supreme Court reiterated that the FAA establishes a liberal federal policy favoring arbitration agreements in *CompuCredit. CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012). That policy "requires courts to enforce agreements to arbitrate according to their terms." *Id.* The Court emphasized that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* (Citations omitted). The Court also relied on an employment case under the federal Age Discrimination in Employment Act, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Id.* at 669-71. Clearly, the Supreme Court intended the FAA to prevail in the context of labor and employment statutes.

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies. *CompuCredit*, 132 S.Ct. at 669. To meet this burden, a "Congressional command" must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *Id.* at 670-73. The Court held that if a federal statute "is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673. Similarly, in *Italian Colors,* the Court found that claims must be arbitrated under a federal statute "unless the FAA's mandate has been overridden by a contrary congressional command." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013).

The General Counsel and Charging Parties ignore that no "contrary Congressional command" exists in the NLRA requiring the Board to invalidate lawful arbitration agreements that contain class action waivers. *D.R. Horton, Inc. v. NLRB*, slip op. at 21-24. Given the silence of the NLRA, and the Supreme Court's broad reading of the FAA, the Board must find Securitas' arbitration agreements lawful as written, including the class action waivers.

In support of his position that the NLRA disallows class action waivers in arbitration agreements, the General Counsel contends that the Supreme Court "makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA." GC Answering Brief at p. 4 citing *Stolt-Nielsen S.A. v. Animal Feeds Intl. Corp.,* 559 U.S. 662, 130 S.Ct. 1758, 1774-1775 (2010). The General Counsel misstates the underlying premise of *Stolt-Nielsen.* As a backdrop, the Supreme Court again emphasized that courts were obligated to enforce arbitration agreements according to their terms. Since the parties' arbitration agreement was silent on class

arbitration, the Court found that class arbitration could not be inferred and refused to compel class-wide arbitration.

In *Italian Colors,* the Supreme Court directly addressed the applicability of *Stolt-Nielson* to class action waivers. The Court concluded that nothing in *Stolt-Nielson* required the rejection of class action waivers in arbitration agreements. *Italian Colors,* 133 S.Ct. 2304 at 2309. Therefore, *Stolt-Nielson* actually supports the argument of Securitas that Supreme Court precedent requires the Board to uphold arbitration agreements as written.

III. The Rules Enabling Act Prohibits Creating a Substantive NLRA Right Out of a Procedural Rule Governing Class Actions.

Nothing in the NLRA creates a substantive right to bring class action claims. As discussed above, the NLRA is completely silent on arbitration or class action lawsuits. The right to bring class claims is not a substantive right protected by the NLRA, but a procedural right governed by Rule 23 of the Federal Rules of Civil Procedure. 29 U.S.C. §§ 201 *et seq.* Under the Rules Enabling Act, Congress emphasized that procedural rules "shall not abridge, enlarge or modify any substantive rights." 28 U.S.C. §2072(b); *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). As the Fifth Circuit succinctly stated, "The use of class action procedures...is not a substantive right." *D.R. Horton, Inc. v. NLRB,* slip op. at p. 16. Thus, Rule 23 cannot be interpreted as providing a substantive statutory right to participate in class actions under the NLRA. *Id.* Such an interpretation would constitute an enlargement of the rights enumerated in the NLRA to engage in protected, concerted activity.

The General Counsel attempts to minimize the importance of the Rules Enabling Act by asserting that it would not apply to workplace disputes brought under state law. However, the

Supreme Court has already resolved this issue. In *Concepcion,* the Court ruled that states cannot enforce laws that condition the enforceability of arbitration contracts on the enforceability of class-wide arbitration. *Concepcion*, 113 S.Ct. 1740.

The General Counsel also cites *Iskanian v. CLS Transportation,* 142 Cal.Rptr.3d 372 (2012), to illustrate an example of permissible state law claims. The *Iskanian* court recognized that states cannot require a procedure that is inconsistent with the FAA. In fact, *Iskanian* rejected *D. R. Horton* because it identified no "congressional command" in the NLRA prohibiting enforcement of an arbitration agreement. The Court reasoned that *D.R. Horton's* holding "elevates the NLRB's interpretation of the NLRA over section 2 of the FAA. This holding does not withstand scrutiny in light of *Concepcion* and *CompuCredit*." *Id.* at 381. Nothing in the cases cited by the General Counsel, or the plain language of the NLRA, create a substantive right to bring class wide claims. Accordingly, under the Rules Enabling Act, the Board cannot expand the NLRA to provide a substantive right to participate in class actions.

IV. The Board Must Defer to Court Decisions Finding that the Norris LaGuardia Act Does Not Override the Federal Arbitration Act.

The Charging Parties again spend much time in their Answering Brief examining the legislature history and purposes of the Norris LaGuardia Act. In a two line footnote, the Fifth Circuit quickly rejected this argument. The Court found that Norris LaGuardia clearly falls outside the Board's interpretive area of expertise. *D.R. Horton v. NLRB,* slip op. at 24 n. 10. Similarly, the Ninth Circuit found that "Congress. . . did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act." *Richards v. Ernst & Young, LLP,* 734 F.3d 871, slip op. at 3 (9th Cir. 2013). Courts consistently find that nothing in Norris LaGuardia prohibits class action waivers in arbitration agreements.

Since that statute falls outside the Board's area of expertise, the Board must defer to the courts' interpretation.

V. The Current Employee Agreement is a Lawful Voluntary Agreement.

The Current Employee Agreement was completely voluntary and not presented to employees as a condition of employment. In *D.R. Horton*, the Board repeatedly stated that its opinion only addressed the lawfulness of "mandatory" class waivers, "imposed upon" employees and "required" by employers "as a condition of employment." *D.R. Horton,* slip op. at p. 1. The General Counsel and Charging Parties contend that the Current Employee Agreement was not voluntary because it gives employees a limited opportunity to opt out of the agreement during their first 30 days of employment. The General Counsel also asserts that employees must publicly self-identify themselves to opt out.

The Current Employee Agreement was not presented to employees as a condition of employment. On its face, Paragraph 8 specifically gives employees 30 days to opt out. The Agreement states, "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." (Exhibit D). An employee presented with the opportunity to opt out of an arbitration agreement is "free not to arbitrate." *Michalski v. Circuit City Stores, Inc.,* 177 F.3d 634, 636 (7th Cir. 1999). Another ALJ recognized the voluntariness provided by an opt-out provision. In *Bloomingdale's, Inc.,* Case 31-CA-071281 (June 25, 2013), the ALJ noted that "life is full of deadlines," and that there was nothing onerous about a 30-day opt-out provision, which was not an "insubstantial or unjustifiable period of time." He also relied on the fact that employees could opt out "remotely and impersonally." *Id.* at p. 9.

The record evidence also establishes that the Securitas employees could opt out in a remote and impersonal manner by simply calling a toll-free telephone number. (Stipulation §5).[2] Therefore, supervisors and managers would not know whether employees chose to opt out. Moreover, paragraph 8 of the agreement contained a provision assuring employees that no retaliation would occur as a result of opting out. (Exhibit C). The uncontroverted record evidence establishes that approximately ten percent of Securitas' California workforce, or about 1,400 employees, exercised the right to opt out of the agreement. (Stipulation §5). Thus, no objective evidence supports the ALJ's conclusion that the Agreement was not voluntary.

VI. In Accordance with Board Precedent, the Arbitration Agreements at Issue in This Case Are Lawful Because They Excluded NLRB Proceedings.

Securitas' arbitration agreements specifically exclude Board procedures from the agreement to arbitrate claims. Despite these provisions, the General Counsel cited several Board cases to support his conclusion that the arbitration policies in this case were broad enough for employees to reasonably conclude that they are precluded from filing NLRB charges. However, the cases cited by the General Counsel actually establish the enforceability of these agreements. The arbitration agreement in *Bill's Electric* required the employee to bear the employer's litigation costs for enforcing the arbitration agreement if he or she first pursued relief at the Board. *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007). In *U-Haul Co. of California,* the Board found an arbitration agreement unlawful because the terms of the contract did not specifically exclude NLRB proceedings from the arbitration of disputes. *U-Haul Co. of California,* 347 NLRB 375, 377 (2006) enf. 255 F. Appx. 527 (D.C. Cir. 2007). Similarly, the Board recently

[2]The General Counsel asserts that the ALJ correctly found that the agreement was not voluntary because employees were told it was "effective immediately." The stipulated record contains no evidence regarding conversations with employees regarding the Agreements. On its face, the Agreement states that the employee's acceptance of the agreement occurs only if the employee does not opt out within 30 days. (Stipulation Exhibit C). The ALJ apparently misread the Agreement. The final page of the Agreement only requires the employee to acknowledge receipt of the Agreement "effective immediately."

found that an arbitration agreement violated the Act when the employer failed to add NLRA claims to the list of exclusions to arbitrable claims. *Dish Network,* 358 NLRB No. 29, slip op. at 7 (2012).

The arbitration agreements in this case contain clear and unambiguous language preserving employee access to the NLRB. Paragraph 1 of both agreements expressly states that "Claims may be brought before an administrative agency . . . notwithstanding the existence of an agreement to arbitrate." Securitas specifically added NLRA claims to the list of exclusions. The next sentence indicates that "Such administrative claims include without limitation claims or charges brought before . . the National Labor Relations Board (www.nlrb.gov.)." The agreements even provide the website of the NLRB to assist employees in filing claims. (Exhibit C & D).

In addition, Paragraph 4 of the arbitration agreements purposely mentions the NLRB. That paragraph states that ". . .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 representation action in any forum..." Nothing in the agreements penalizes employees for pursuing relief at the Board. Therefore, all the record evidence establishes that the agreements lawfully informed employees that they excluded NLRA claims from the arbitration of disputes.

VII. The Charges Regarding the New Hire Agreement Are Time Barred Under Section 10(b).

Securitas implemented both of the arbitration agreements on or about June 14, 2011. The Charging Parties filed the initial charges in this matter on January 9, 2012, approximately seven months after the agreements were implemented. The only relevant record evidence regarding the New Hire Agreement shows Securitas distributed it to certain unspecified employees in

California at some point after June 14, 2011. There is no evidence that Securitas distributed the agreement after July 9, 2011, the commencement of the 10(b) period. Without a real explanation, the General Counsel asserts that the record does not contain facts that Securitas continued to implement the New Hire Agreement after June 14, 2011, because those additional facts would have been "redundant." GC Brief at p. 18. This supposed redundancy fails to explain the ALJ's improper assumption of this distribution to avoid a dismissal of the charges. Accordingly, the New Hire Agreement charges must be dismissed because of a failure of proof in the record.

VIII. Asserting a Defense in Another Judicial Forum Did Not Violate the Act and the ALJ's Remedy Exceeds the Board's Authority.

The ALJ's decision would require Securitas to withdraw all objections filed in judicial forums regarding employees' rights to engage in class or collective actions. The General Counsel contends that the Board has authority to enjoin lawsuits that have illegal objectives under federal law. GC Brief at p. 20 citing *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 737 n.5 (1983). Given the First Amendment's protection of court access, the Supreme Court found in *Bill Johnson's* that the Board could only enjoin prosecution of a baseless lawsuit when there was an "alleged retaliatory motive" against an employee for the exercise of Section 7 protected rights and an illegal objective in filing the claim. *Id.* at 743, 737.

Nothing in the record establishes that Securitas is seeking to enforce its arbitration agreements in retaliation for employees exercising their Section 7 protected rights. Securitas has no illegal objective in filing the motion to compel arbitration. As the numerous court decisions refusing to enforce *D.R. Horton* show, Securitas has a reasonable claim that its arbitration agreements containing class action waivers remain enforceable. The Board cannot compel courts to accept its interpretation of the FAA. Therefore, Securitas had no retaliatory motive

and its reasonable actions in another forum cannot constitute an illegal objective. Accordingly, the ALJ's proposed remedy exceeds the boundaries of the Board's authority.

IX. Conclusion

Based on the foregoing, and the record as a whole, Respondent hereby requests that the Board reverse the ALJ's Decision and dismiss the charges in this case.

Dated: February 4, 2014

Respectfully Submitted,

By: William J. Emanuel

WILLIAM J. EMANUEL
ELIZABETH D. PARRY
LITTLER MENDELSON, P.C.
Counsel for Securitas Services USA, Inc.

Firmwide:125262281.2 056919.1043

AMENDED 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 February 4, 2014, I served the within document(s):

RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS

☒ 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 mamartinez@littler.com.

Ira Spiro, Esq.
Linh Hua, Esq.
Spiro Moss LLP
11377 W. Olympic Blvd., 5th Floor
Los Angeles, CA 90064-1625
Email: ira@spirolawcorp.com
Email: Jeanette@spirolawcorp.com

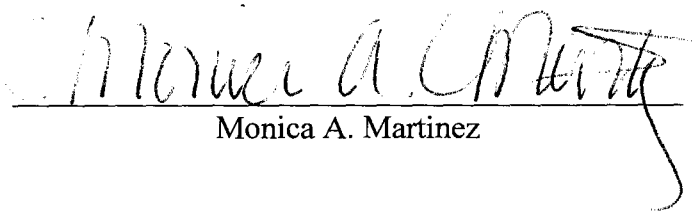
Rudy Fong-Sandoval
Region 31
National Labor Relations Board
11500 West Olympic Boulevard, Suite 600
Los Angeles, CA 90064
Email: rudy.fong-sandoval@nlrb.gov

Dennis F. Moss
15300 Ventura Boulevard, Suite 207
Sherman Oaks, CA 91403
Email: dennis@dennismosslaw.com

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 February 4, 2014, at Walnut Creek, California.



Monica A. Martinez

Firmwide:125338605.1 056919.1043