IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SOLARCITY CORPORATION,	)
Petitioner,	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent.	)

PETITION FOR REVIEW

Petitioner SolarCity Corporation petitions this Court under Federal Rule of Appellate Procedure 15(a) for review of the Decision and Order of the National Labor Relations Board entered on December 22, 2015 in NLRB Case No. 32-CA-128085. A copy of the Board's Decision and Order, reported at 363 NLRB No. 83, is attached.

This Court has jurisdiction because the Board's decision is a final order within the meaning of 29 U.S.C. § 160(f) of the National Labor Relations Act, and the Petitioner is an aggrieved party. Venue properly lies in this Court under 29 U.S.C. § 160(f) because Petitioner maintains offices and transacts business within the geographical boundaries of this circuit.

Because the Board's Decision and Order is contrary to law, Petitioner respectfully requests that the Court grant the petition, review the Board's Decision and Order, and set it aside.

Respectfully submitted,

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Date: December 31, 2015

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, a true and correct date-stamped copy of the foregoing Petition for Review, with attachment, was served by electronic mail and overnight mail on the following:

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I hereby certify that on December 31, 2015, a true and correct date-stamped copy of the foregoing Petition for Review, with attachment, was served by electronic mail and overnight mail on the following:

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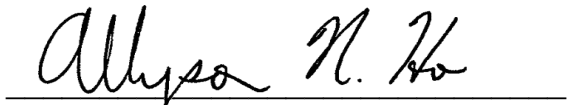

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SolarCity Corporation *and* Anita Beth Irving. Case 32–CA–128085

December 22, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On March 31, 2015, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions and to adopt his recommended Order as modified and set forth in full below.

In *D. R. Horton, Inc.*, the Board held that an employer violates the National Labor Relations Act "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against their employer *in any forum, arbitral or judicial*."[1] The principal issue we decide in this case is whether the Respondent's maintenance and enforcement of an arbitration policy that forecloses access to court and that requires employees to individually arbitrate employment-related claims is lawful—notwithstanding the Board's holding in *D. R. Horton, Inc*.—because the policy permits employees to file claims with administrative agencies, which may then choose to pursue a judicial remedy on behalf of employees as a group. As we explain below, access to administrative agencies is not the equivalent of access to a judicial forum where employees themselves may seek to litigate their claims on a joint, class, or collective basis. We thus find, consistent with *D. R. Horton* and with *Murphy Oil USA*, *Inc.,*[2] which reaffirmed the principles of *D. R. Horton*, that the Respondent's maintenance and enforcement of its individual arbitration requirement unlawfully infringed on employees' right to engage in concerted legal activity for mutual aid and protection under Section 7 of the Act.

I.

The Respondent is located in San Mateo, California, where it is engaged in the business of providing solar energy services. Since at least November 2013, the Respondent has maintained an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (the Agreement). The Agreement, and a Revised Agreement promulgated in March 2014 (the Agreements), state that they are applicable to "California Employees Only," and inform employees that they are bound to them as a condition of employment. The Agreements require, in relevant part, that "any dispute arising out of or related to Employee's employment" be resolved "by an arbitrator through final and binding arbitration and not by court or jury trial," and that employees are bound by a "**Class Action Waiver**" that prohibits disputes from being "brought, heard or arbitrated as a class or collective action. . . ." (Emphasis in original.)[3] The Agreements also contain an exception, however, that permits employees to file claims with certain administrative agencies, including the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL), and the Board.

Charging Party Amy Beth Irving was hired by the Respondent in November 2012 and, as a required condition of employment, signed the Agreement. On December 24, 2013, Irving filed a class-action complaint against the Respondent in the San Mateo County Superior Court, alleging wage and hour violations of the California Labor Code. On April 1, 2014, the Respondent sought enforcement of the Agreement by filing a petition in the court to compel arbitration of her wage/hour claims on an individual basis. Based on a charge and an amended charge filed by Irving on May 5 and June 14, 2014, respectively, the General Counsel issued a complaint, later amended, alleging that the Respondent violated Section 8(a)(1) by maintaining and enforcing the Agreements. The judge found the violations, applying *D. R. Horton* and *Murphy Oil USA*. We affirm.[4]

[1] 357 NLRB No. 184, slip op. at 1 (2012) (emphasis added), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

[2] 361 NLRB No. 72 (2014), enf. denied in relevant part in relevant part No. 14-60800, 2015 WL 6457613, ___ F.3d ___ (5th Cir. Oct. 26, 2015)..

[3] The list of employment claims covered by the Agreements is extensive. The relevant provisions of the Agreements are quoted at length in the judge's decision.

[4] The Respondent argues that the maintenance allegations of the complaint are time-barred by Sec. 10 (b) because the initial charge was filed and served more than 6 months after Irving signed and became subject to the Agreement. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful Agreement during the 6-month period preceding the filing of the initial charge. 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 Sec. 10 (b). See *PJ Cheese, Inc.,* 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and

II.

A. The 8(a)(1) Waiver of Class and Collective Litigation in all Forums

The Board explained in *D. R. Horton* that the right to engage in collective action to redress workplace wrongs is a "core substantive right" protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. 357 NLRB No. 184, slip op. at 2, 10. This protection has long been held to encompass the right of employees to join together to improve their terms and conditions of employment through litigation.[5] Accordingly, an employer violates Section 8(a)(1) by compelling employees, as a condition of employment, to waive their right to "collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." Id., slip op. at 12. The Board made clear that an employer may lawfully maintain an arbitration agreement that requires arbitral proceedings to be conducted individually, but only "[s]o long as the employer leaves open a judicial forum for class and collective claims . . . ." Id.

In *Murphy Oil*, supra, the Board reexamined and affirmed its holding in *D. R. Horton,* supra. The Board explained that agreements that prohibit class or collective litigation in "*all* forums, arbitral and judicial," completely deny employees access to class, collective, or group procedure that was otherwise available to them, thereby restraining them from engaging in Section 7 activity. *Murphy Oil*, supra, slip op. at 18. Applying its established framework for analyzing workplace rules,[6] the Board found that the arbitration agreement there violated Section 8(a)(1) because it expressly prohibited employees from concertedly pursuing employment-related claims in all forums. Id., slip op. 13, 18.

We reach the same conclusion here. As set forth above, both Agreements require all employment-related disputes to be resolved by arbitration and not "by way of court" action. The Agreements further include, in prominent bold lettering, a "Class Action Waiver" stating that no dispute "shall be brought, heard or arbitrated as a class, collective . . . action . . . ." The Agreements thus make clear to employees that they are limited to only one forum (arbitration) and they must pursue their claims individually. Under *D. R. Horton* and *Murphy Oil*, then, the Agreements are plainly unlawful.[7]

The Respondent argues, however, that notwithstanding the mandatory arbitration provision and class-action waiver, the Agreements are lawful because, unlike the ones in *D. R. Horton* and *Murphy Oil*, employees are permitted under the Agreements to file employment claims or charges with Federal administrative agencies such as the EEOC, the NLRB, and the DOL. It therefore contends that because such agencies "can prosecute [an employee's] claim against the employer and seek a remedy on behalf of all affected employees," the Agreements provide "an adequate substitute for class or collective action litigation brought by the employees." We reject this argument. Contrary to the Respondent, the exception in the Agreements that permits the filing of claims or charges with administrative agencies does not satisfy the requirement of an alternative judicial forum for the pursuit of joint, class, or collective claims.

First, there is a wide range of employment-related claims—common-law claims, for example—that are not within the purview of any administrative agency. For such claims, resort to an administrative agency is meaningless: the agency has no authority to pursue employees' collective claims on their behalf in a judicial forum or anywhere else.

Second, even if the administrative agency has the authority to pursue employees' claims, it typically also has the discretion to decline to do so (whether for lack of resources, a different view of the legal merits, or some other reason), or to do so only on the agency's terms. Access to the agency, in short, is not access to a forum for adjudication of employee claims. Employees cannot control whether the agency will pursue their claims, much less when, where, and how they will be pursued—

Cellular Sales of Missouri, LLC, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

[5] See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978) (holding that Sec. 7 protects employees' efforts to improve working conditions "through resort to administrative and judicial forums").

[6] See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004).

[7] 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 and fn. 2 (2015). But what our colleague ignores is that the Act does "creat[e] a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." Id., slip op. at 16–17. The Respondent's Agreements are just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, supra, 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,* 361 NLRB No. 72, slip op. at 18; *Bristol Farms*, 363 NLRB No. 45, 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*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

all matters that employees do control when they are free to exercise their Section 7 right to bring their own group claims to court.[8]

Finally, even with respect to claims that do fall within the authority of an administrative agency and which the agency does choose to pursue, a typical administrative agency is simply not a "judicial forum" in the sense contemplated by *D. R. Horton,* supra. Unlike a court, administrative agencies like the EEOC and DOL cannot *adjudicate* employment-related claims.[9]

That access to an administrative agency is not the equivalent of access to a court is easily demonstrated with respect to the Fair Labor Standards Act wage and hour claims asserted in *D. R. Horton* and *Murphy Oil*. The Wage and Hour Division (WHD) of the U.S. Department of Labor has authority to bring such claims on behalf of employees in court—if it so chooses—but the agency is not a judicial or quasi-judicial forum that adjudicates allegations of wage and hour violations. Rather, it investigates such allegations (as its resources permit) and, if it is unable to resolve them through voluntary compliance, the DOL's sole recourse for obtaining a remedy is to commence court litigation, which it does in just a small fraction of cases.[10] Where DOL does file suit, the right of employees to bring their own enforcement action is terminated—it is the agency, not the employees, which controls the litigation.[11]

The EEOC provides another example of how the Agreements' administrative agency exception fails to leave unrestricted an adjudicative forum for employees who seek to pursue their employment claims in concert with other employees. When an employee files an employment discrimination charge with that agency, the agency decides whether it will litigate the claim and whether it will do so on an individual or collective basis. The Agreements, however, read in the context of EEOC procedure, effectively deprive employees of the right to pursue collective claims in court. For, if the EEOC decides not to litigate the claim underlying an employee's charge, as it does with respect to over 99 percent of filed charges, it issues a Notice of Right to Sue (right-to-sue letter) and, under the terms of the Agreements, the employee's claims become subject to the Agreements as expressly stated therein. That is, the employee must proceed by way of individual arbitration and is prohibited by the Agreements from asserting his or her claim collectively, either in arbitration or in court. If the EEOC decides to litigate the matter, but on an individual basis, the claim still cannot be asserted collectively in any forum. The EEOC undertakes litigation in a small percentage of the charges submitted to it, and an even smaller percentage on a class or group basis.[12]

As these examples illustrate, filing a charge with an administrative agency is not an adequate substitute for filing a lawsuit asserting a joint, class, or collective claim—either as a practical matter or for the purposes of *D. R. Horton*, which sought to preserve employees' statutory right to engage in concerted legal activity to the fullest extent consistent with the Federal policy favoring arbitration.

We necessarily disagree, then, with the interpretation of *D. R. Horton* adopted by the U.S. Court of Appeals for the Eighth Circuit in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013). There, the court enforced a mandatory arbitration agreement in an employee's private action under the Fair Labor Standards Act.[13] It distinguished *D. R. Horton*, observing that the Board had

> limited its holding to arbitration agreements barring *all* protected concerted action. . . . . In contrast, the [arbitration agreement at issue] does not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor . . ., the Equal Employment Opportunity Commission, the NLRB, or

[8] Regardless of whether an agency chooses to bring a claim on behalf of employees, the employees' collective pursuit of their claims is protected concerted activity under Sec. 7 of the Act. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566; cf. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962) ("[T]he reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."). That an agency might ultimately vindicate employees' underlying legal claims does not mean that there has been no restraint of or interference with the employees' exercise of Sec. 7 rights.

[9] Although the NLRB, a quasi-judicial agency, can adjudicate claims, its jurisdiction is limited to addressing unfair labor practices under the National Labor Relations Act. See Sec. 10(c), 29 U.S.C. § 160. Thus, even if the Agreements permitted the filing of claims with the NLRB, that would leave intact the unlawful restrictions as to all non-NLRA claims. (As explained below, however, the Agreements fail effectively to except the filing of NLRB charges from their general prohibition of pursuing work-related claims outside of arbitration.)

[10] According to a Government Accountability Office report, in fiscal year 2012 "WHD conducted investigations or conciliations in response to about 20,000 FLSA complaints and the DOL's Office of the Solicitor filed about 200 lawsuits to enforce the FLSA on behalf of workers." U.S. Gov't Accountability Off., GAO-14-69, Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance (2013) (available at http://gao./assets/660/659772.pdf), at 4.

[11] Fair Labor Standards Act, Sec. 16(c), 29 U.S.C. § 216(c).

[12] The EEOC's Fiscal Year 2014 Performance Accountability Report states that it received 88,778 charges alleging discrimination in fiscal year 2014. It filed 133 merits lawsuits that year, including 105 individual suits, 11 nonsystemic class suits, and 17 systemic suits. See http://www.eeoc.gov/eeoc/plan/index.cfm.

[13] The Board was not a party, nor did it participate in the litigation.

> any similar administrative body. . . . Further, nothing in the [arbitration agreement] precludes any of these agencies from investigating and, if necessary, filing suit on behalf of a class of employees.

702 F.3d at 1053 (emphasis in original).[14] But *D. R. Horton* did not hold that mandatory arbitration agreements are lawful simply because they permit *some* concerted legal activity.[15]

As the Board made clear in *D. R. Horton*, employers are "free to insist" that employees arbitrate their employment claims and do so individually, but only "[s]o long as [they leave] open a judicial forum for class and collective claims" to be pursued. 357 NLRB No. 184, slip op. at 12. Permitting access to an administrative agency does not satisfy this requirement, for all the reasons we have explained.

Here, the Respondent's limited exception in its Agreements that permits claims or charges to be filed with administrative agencies fails to provide employees with such a forum to pursue joint, class, or collective claims. Accordingly, by maintaining the Agreements, and enforcing the Agreement through its petition in State court to compel the Charging Party to individually arbitrate her wage claims, the Respondent violated Section 8(a)(1).[16]

B. The 8(a)(1) Prohibition Against Filing NLRB Charges

The judge additionally found that the Agreements independently violated Section 8(a)(1) by interfering with employees' right to file charges with the Board. Noting the broad scope of both Agreements requiring that "all" or "any disputes" be "resolved by an arbitrator," the judge found that employees would reasonably interpret the Agreements as prohibiting the filing of charges with the Board. Relying on the same administrative agency exception discussed above, the Respondent and our dissenting colleague argue that no such violation can be found because the Agreements permit employees to file charges with the Board. We disagree and affirm the judge.

The original Agreement states in relevant part 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. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board . . . ." The Revised Agreement states in relevant part that:

> this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute . . . or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board.

We analyze the legal issue here under the *Lutheran Heritage* test to determine whether a reasonable employee would construe the Agreements to prohibit the filing of Board charges, raising the prospect that the employee would be chilled from doing so. *Lutheran Heritage*, supra, 343 NLRB at 647. Preserving and protecting access to the Board is a fundamental goal of the Act, as reflected in Section 8(a)(4), which makes it unlawful to discharge or discriminate against employees for coming to the Board. In the Supreme Court's words, Congress

[14] The *Owen* arbitration agreement recited that the employee did "not waiv[e] [the] right to file a complaint with the U.S. Equal Employment Opportunity Commission . . . or any other federal, state or local agency designated to investigate complaints of harassment, discrimination, other statutory violations, or similar claims." 702 F.3d at 1051.

[15] Notably, the *D. R. Horton* Board rejected the argument that the mandatory arbitration agreement there did not impair Sec. 7 rights "because employees can still discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims." 357 NLRB No. 184, slip op. at 6. The Board explained that

> [I]f the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities. For example, if an employer refrains from interfering with concerted protests short of a strike, that does not entitle the employer to compel employees, as a condition of their employment, to waive the right to strike.

Id. (emphasis in original; footnote omitted). The exception to this rule is where an employer forecloses employees from pursuing joint, class, or collective claims in court, but *permits* them to do so in arbitration. This is because—as the Federal Arbitration Act and the Supreme Court's decisions applying that statute make clear—arbitration must be treated as the equivalent of a judicial forum. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[16] In accord with our decision in *Murphy Oil,* supra, slip op. at 20–21, we affirm the judge's 8(a)(1) finding that the State court petition to compel individual arbitration had an "objective that was illegal under federal law" within the meaning of fn. 5 of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983). Therefore, we reject the Respondent's argument that its court petition was protected by the First Amendment. See *Countrywide Financial Corp*., 362 NLRB No. 165, slip op. at 5 (2015) ("the Supreme Court held in footnote 5 of *Bill Johnson's* that court proceedings having an objective that is illegal under Federal law enjoy no First Amendment protection and may be condemned by the Board as an unfair labor practice").

sought "complete freedom" for employees to file charges with the Board, to participate in a Board investigation, or to testify at a Board proceeding. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972).[17]

In examining the Agreements here, we must be guided by the clear policies of the Act. We also recognize—as the Board has done before—that "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint." *Ingram Book Co*., 315 NLRB 515, 516 fn. 2 (1994). With this principle in mind, the Board routinely has found insufficient language in workplace rules purporting to except, or "save," employees' legal rights from restrictions on their conduct.[18] This is so even where such exceptions referred to the "NLRA" or "the National Labor Relations Act."[19] 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. *McDonnell Douglas*, supra, 240 NLRB at 802; *Chrysler*, supra, 227 NLRB at 1259.

Both Agreements in the present case suffer from this vagueness, even with the provisions stating the Agreements do not extend to the filing of Board charges. As described, the Agreements state explicitly that "all" or "any disputes" must be individually arbitrated, 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 other forum. The Respondent and the dissent contend, however, that this explicit unlawful restriction is effectively nullified by later provisions in the Agreements stating that filing charges with Federal agencies such as the Board are permitted. But they overlook other language in the Agreements that creates confusion over whether such charges are permitted. The provision in the Revised Agreement, as set forth above, comes with two caveats—permitted agency and Board charges include only those that (1) are "expressly excluded from arbitration by statute," or (2) "applicable law permits [an] agency to adjudicate . . . ." Viewed from an employee's perspective, we agree with the judge that it would take "specialized legal knowledge" to determine whether employees' right to file Board charges is permitted or precluded by these caveats. Rather than drafting a provision that clearly informs employees that they have the unconditional right to file charges with the Board, the language chosen by the Respondent restrains employees from exercising this protected right out of fear that doing so would run afoul of the caveats.[20]

Contrary to the dissent, we have not contravened the *Lutheran Heritage* test by "selectively focus[ing]" on the two caveats to the exclusion of subsequent language stating that filing charges with the Board is permitted. 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. We have done exactly that by examining the language relating to the filing of charges in the Agreements in context with the language of the caveats.

We disagree with the dissent's view that this problem is "solved" by the language permitting Board charges. Presented with the unexplained caveats, employees

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[17] As the Supreme Court explained in *Scrivener*, supra:

> This complete freedom is necessary … "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses."
>
> . . . .
>
> It is also consistent with the fact that the Board does not initiate its own proceedings; implementation is dependent "upon the initiative of individual persons."

405 U.S. at 122 (citations omitted). See also *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

[18] *Hoot Winc, LLC*, 363 NLRB No. 2 (2015) (arbitration agreement excluding "any dispute that cannot be arbitrated as a matter of law" found to have unlawfully restricted access to the Board*); Ford Motor Co*., 315 NLRB 609, 610 (1994) (exception for solicitation and distribution that are "legally protected" found insufficient to validate employer's rule); *Ingram Book Co*., supra (overbroad no-distribution rule not "saved" by handbook proviso that employer would "abide by the applicable state or federal law" in the event of a conflict); and *Westinghouse Electric Corp.,* 240 NLRB 905, 916–917(1979) (rule prohibiting solicitation and distribution found unlawful, notwithstanding the clause "except where permitted by law"), enfd. in relevant part 612 F.2d 1072 (8th Cir. 1979).

[19] *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 17 (2011) (multiple handbook disclaimers preserving "rights under the National Labor Relations Act" and "your NLRA rights" found insufficient to validate employer's rules); *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (waiver of legal rights concerning wage claims which excluded those claims "permitted by federal or state law including but not limited to the National Labor Relations Act" did not insulate the waiver provision from 8(a)(1) finding); *McDonnell Douglas Corp*., 240 NLRB 794, 802–803 (1979) (exclusion of distributions "protected by Section 7 of the National Labor Relations Act" was insufficient to validate employer's overbroad no-distribution rule); *Chrysler Corp*., 227 NLRB 1256, 1258–1259 (1977) (an exception for activities "protected by the National Labor Relations Act" did not, on its face, provide a reasonable employee with enough information to validate employer's overbroad no-solicitation and no-distribution rules), enf. denied on other grounds 595 F.2d 364 (6th Cir. 1979).

[20] Nor does the agency exception provision in the original Agreement make clear that filing Board charges is exempt from the requirement that all disputes be individually arbitrated. The caveat there—"but only to the extent applicable law permits access to such agency"—could not reasonably be understood by employees as having no effect on their right to file Board charges.

would reasonably construe the Agreements to adversely affect their right to file Board charges. And contrary to the dissent, Board law is settled that ambiguous workplace rules that would reasonably be read by employees to have a coercive meaning are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights, instead of waiting until that chill is manifest and requiring the Board to undertake the task of dispelling it. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d (D.C. Cir. 1999); see also *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011) (prohibition on unauthorized disclosure of information from an "employee's personal file" unlawfully ambiguous because it could be read to prohibit protected discussion of wages and other employment terms, and "employees should not have to decide at their peril what information is not lawfully subject to such a prohibition"), enfd. in relevant part *Hyundai America Shipping Agency, Inc., v. NLRB*, No. 11-1351, __F.3d__(D.C. Cir. 2015). Here, the two caveats pertain to the filing of agency and Board charges. An employee would reasonably conclude that this language—which the dissent does not dispute is problematic—means something coercive or it would not have been included.

Moreover, even if an employee could divine that he still could invoke the Board's processes, an inherent ambiguity in the Agreements suggests that he must do so individually, and not in concert with other employees. The Revised Agreement's "class, collective or representative action" waiver requires the individual to "waive any right to pursue or participate in any dispute on behalf of, or as a part of, any class, collective or representative action, except to the extent such waiver is expressly prohibited by Law." This broad language clearly encompasses filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective concern.

It would be unclear to the reader (especially to a reader without specialized legal knowledge) whether and to what extent the subsequent language creating an exception for filing charges with Federal agencies modifies the previous broad prohibition on pursuing any form of collective or representative activity, especially since the exception on its face uses a singular pronoun—"me"—when clarifying whose rights to file a charge with the Board are being preserved. This ambiguity would lead a reasonable employee to wonder whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus serves as another reason to affirm the judge's finding that the Agreements unlawfully prohibit filing 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 No. 59, slip op. at 6 (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 freedom" that Congress sought. In our view, the Agreements here fail in this fundamental respect.

ORDER

The National Labor Relations Board orders that the Respondent, SolarCity Corporation, San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration program that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration program that requires 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 to 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 program in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration program does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration program in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised program.

(c) Notify the Superior Court of the State of California in Case No. CIV 525975 that it has rescinded or revised the mandatory arbitration program upon which it based its motion to dismiss Anita Beth Irving's collective lawsuit and to compel individual arbitration of her claim and inform the court that it no longer opposes the lawsuit on the basis of the arbitration program.

(d) In the manner set forth in the judge's decision, reimburse Anita Beth Irving and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss the collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its San Mateo, California facility copies of the attached notice marked "Appendix A," and at all other California facilities where the unlawful arbitration program is or has been in effect, copies of the attached notice marked "Appendix B."[21] Copies of the notices, on forms provided by the Regional Director for Region 32, 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, notices shall be distributed electronically, such as by email, posting on an intranet or an 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 marked "Appendix A" to all current employees and former employees employed by the Respondent at its San Mateo, California facility at any time since November 6, 2013. If the Respondent has gone out of business or closed any facilities in California other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current and former employees employed by the Respondent at those California facilities at any time since November 6, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32 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. December 22, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, the Respondent and its employees entered into an Agreement providing for the arbitration of non-NLRA employment-related claims and waiving the right to pursue such claims through class or collective actions. The Agreement specifically excludes from its scope the filing of charges with the National Labor Relations Board (the NLRB or the Board). One employee, Charging Party Amy Beth Irving, signed a copy of the original version of the Agreement, and later she filed a class-action lawsuit against the Respondent in State court alleging California labor law violations. In reliance on the Agreement, the Respondent filed a State court motion to compel arbitration.

Relying on the majority opinion in *Murphy Oil,*[1] my colleagues find that the Respondent violated Section 8(a)(1) of the Act by entering into the Agreement with the Charging Party, and by entering into a revised version with other employees,[2] because (i) each Agreement contained class-action waivers, and (ii) each Agreement, according to my colleagues, would be interpreted by employees to restrict the right to file charges with the Board. My colleagues also find that the Respondent violated the Act when it filed a motion to compel arbitration in Irving's State court lawsuit in reliance on the original

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

[1] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14-60800, 2015 WL 6457613, ___ F.3d ___ (5th Cir. Oct. 26, 2015).

[2] After Irving signed the original version of the Agreement, some changes were incorporated into a revised version (hereinafter the "Revised Agreement") that the Respondent entered into with some employees. In this opinion, the two versions collectively are referred to as the "Agreements."

Agreement. For the reasons set forth below, I respectfully dissent.

1. *The "Class Action" Waiver in the Agreements is not Unlawful, nor is it Unlawful to Enforce the Agreements*. 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.[3] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, 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."[4] 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;[5] (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;[6] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] 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.[8]

Because I believe the Respondent's original Arbitration Agreement was lawful under the NLRA, I would

[3] 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). There is no allegation that the Respondent has retaliated against any employee for engaging in protected concerted activity in connection with any class or collective action, and the Revised Agreement makes explicit that employees will not be subjected to any type of work-related retaliation if they engage in protected concerted activity in relation to a class-action claim. Thus, the Revised Agreement states that employees will not be retaliated against for exercising their "rights under Section 7 of the National Labor Relations Act by filing or participating in a class, collective or representative action in any forum."

[4] *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).

[5] 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, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *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.").

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613, ___ F.3d ___ (5th Cir. Oct. 26, 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, 2015 WL 1433219 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F.Supp.3d 1072, 2015 WL 1738152 (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).

[7] 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).

[8] Because I disagree with the Board's decisions in *Murphy Oil,* above and *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), enf. denied in pert. part 737 F.3d 344, 362 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits on employees' behalf. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

find it was similarly lawful for the Respondent to file a motion in State court seeking to enforce the Agreement. The reasonable basis of the Respondent's motion is supported by the overwhelming majority of court decisions that have enforced similar agreements.[9] 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."[10] I also believe that any Board finding of a violation based on the Respondent's meritorious State court motion to compel arbitration 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 Party and any other plaintiffs 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 the Filing of Charges with the Board*. Nor do I agree that the original or revised Arbitration Agreements violate Section 8(a)(1) by interfering with the filing of Board charges or their resolution by the Board.[11] In my view, any reasonable construction of the Agreements reveals that they exclude the filing of NLRB charges from their scope. The Agreements state that they apply to "any" or "all" disputes that employees have with their employer, but these statements are qualified in a manner that makes clear they are subject to certain exceptions.[12] The Agreements then explicitly inform employees that they retain the right to file charges with the NLRB.[13] In addition, the Agreements list eight specific Federal statutes that fall within the Agreements' scope. The NLRA is not included in that list.[14]

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. However, the Respondent's 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, id. at 4–5, 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 5. 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 of Board charges when the agreement says the opposite."[15]

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

[10] *Murphy Oil USA v. NLRB,* above at fn. 6.

[11] In analyzing whether an arbitration policy is unlawfully overbroad with respect to whether employees may file Board charges, the Board has applied the first prong of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), i.e., whether "employees would reasonably construe the language [of the policy] to prohibit Section 7 activity." See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (quoting *Lutheran Heritage*, supra), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). As I explained in my partial dissenting opinion in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), enfd. mem. No. 14-3284, 2015 WL 6161477 (2d Cir. Oct. 21, 2015), I would reexamine this standard in an appropriate future case, but here, even under the *Lutheran Heritage* standard, I believe these Agreements should be found lawful.

[12] Thus, the Original Agreement includes the clause "[e]xcept as [the agreement] otherwise provides," and the Revised Agreement states "except as otherwise provided herein."

[13] The Original Agreement 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 National Labor Relations Board (www.nlrb.gov)." The Revised Agreement states: "[T]his Agreement does not prohibit me from pursuing . . . claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board."

[14] We deal here with Agreements that *both* omit the NLRA from the list of statutes coming within the scope of the Agreements *and* inform employees that they retain the right to file charges with the Board. Therefore, I do not reach or pass on whether or to what extent an agreement may lawfully provide for the arbitration of NLRA claims without unlawfully interfering with the right to file Board charges.

[15] Id. The Board majority in *Murphy Oil* stated that, not only did the employer's agreements waive class-type proceedings in court, "one could argue that the Agreement prohibits individual employees from filing administrative claims to begin with, since such a claim could be construed as having 'commence[d]' a class action in the event that the agency decides to seek classwide relief. And the Agreement certainly prohibits two or more employees from filing a joint claim in 'any . . . forum,' including an administrative agency." *Murphy Oil*, above, slip

Notwithstanding express language to the contrary, my colleagues find the Agreements *prohibit* filing charges with the Board. They purport to apply prong one of *Lutheran Heritage*—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 provision in an employee handbook 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. *Lutheran Heritage*, 343 NLRB at 646–647. Yet my colleagues base their finding on what they deem to be ambiguities in the Agreements. As I explain below, the Agreements are not ambiguous—but even if they were, mere ambiguity is not enough under *Lutheran Heritage* to condemn a rule as unlawful.[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 NLRB. Indeed, in the instant case, the Agreements state that (i) claims may be brought before an administrative agency, and such claims "*include claims or charges brought before . . . the National Labor Relations Board*" (Original Agreement; emphasis added), and (ii) employees are *not* prohibited "from pursuing . . . claims with . . . federal administrative bodies or agencies," and "permitted agency claims *include filing a charge or complaint with . . . the National Labor Relations Board*" (Revised Agreement; emphasis added). Nonetheless, the majority finds this language, which specifically permits Board charge-filing, is 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.[17] However, the relevant provisions in the Agreements merely require the ability to read and understand the English language.[18] 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; and my colleagues—though armed with good intentions—devise an implausible interpretation that, in my view, could *only* be advocated or adopted by lawyers.

I do not believe the Agreements give rise to ambiguities that warrant a finding that they unlawfully interfere with an employee's right to file charges with the Board. Here, my colleagues rely on two purported ambiguities, neither of which is sufficient, in my view, to establish a violation of Section 8(a)(1).

First, my colleagues selectively focus on two clauses in the Revised Agreement, italicized below, that prompt them to conclude that the right to file Board charges would be understood only by someone with "specialized legal knowledge":

> [T]his Agreement does not prohibit me from pursuing claims *that are expressly excluded from arbitration by statute* . . . or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer related laws, but only if, and to the extent, *applicable law permits such agency or administrative body to adjudicate the applicable claim* notwithstanding the existence of an enforceable arbitration agreement. <u>Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board</u>.[19]

op. at 18. As noted in the text, the Fifth Circuit rejected this interpretation as unreasonable.

[16] 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 Sec. 7 activity, among other possible interpretations, regardless whether employees reasonably *would* read it that way.

[17] 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 Sec. 7 protects to understand what the exception allows. Here, the language in the Agreements 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 cited by my colleagues that did involve 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.

[18] Although the Agreements list statutes and refer to some concepts with which some employees may be unfamiliar, this is not materially different from many concepts expressed in collective-bargaining agreements that are routinely deemed enforceable by the Board and the courts, even if they 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).

[19] Emphasis added.

This much about my colleagues' position is true: the Revised Agreement does contain the italicized language set forth above, and many employees would not know whether NLRB charge-filing is "expressly excluded from arbitration by statute" or whether the NLRA "permits" the Board to adjudicate NLRA claims "notwithstanding the existence of an enforceable arbitration agreement."[20] However, the majority ignores the very next sentence, underlined in the above quotation, stating that "[s]uch permitted agency claims *include filing a charge or complaint with . . . the National Labor Relations Board*" (emphasis added). Problem solved. 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." *Lutheran Heritage*, 343 NLRB at 646. No legal knowledge, specialized or otherwise, is required to understand that the above-quoted paragraph protects "filing a charge or complaint with . . . the National Labor Relations Board." This is precisely what the Revised Agreement states.[21]

Second, even though the Agreements expressly state employees retain the right to "file a charge or complaint with the National Labor Relations Board," my colleagues make a three-stage argument[22] that the class-action waiver in the Agreements creates "an inherent ambiguity" because (i) the Agreements state that employees "waive any right to pursue or participate in any dispute on behalf of . . . any class, collective or representative action, except to the extent such waiver is expressly prohibited by Law," (ii) an NLRB charge sometimes "purports to speak to a group or collective concern," and (iii) the Agreements' class-action waiver would interfere with the right to file these types of Board charges, and specialized legal knowledge is required to understand that interference with the filing of charges that speak to group or collective concerns is "expressly prohibited by Law." 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 concern." Here as well, specialized legal knowledge is not required to understand what the Agreements mean. Rather, 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 prerequisite to Board review of unfair labor practice issues.[23] 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.[24] 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 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).

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[20] In fact, Sec. 10(a) of the Act specifically empowers the NLRB to adjudicate alleged unfair labor practices raised in a charge filed with the Board, notwithstanding an agreement to arbitrate such claims. Sec. 10(a) states in part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise*" (emphasis added).

[21] The Original Agreement also included a caveat, 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." However, the next sentence again made clear that "[s]uch administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board (www.nlrb.gov)."

[22] 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.

[23] *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.").

[24] 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."

Accordingly, for the reasons explained above, I respectfully dissent.

Dated, Washington, D.C. December 22, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration program that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration program that requires 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 program in all of its forms, or revise it in all of its forms to make clear that the arbitration program does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration program in all of its forms that the arbitration program has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised program.

WE WILL notify the court in which Anita Beth Irving filed her collective lawsuit that we have rescinded or revised the mandatory arbitration program upon which we based our motion to dismiss her collective lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose Anita Beth Irving's collective lawsuit on the basis of that program.

WE WILL reimburse Anita Beth Irving and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss the collective lawsuit and compel individual arbitration.

SOLARCITY CORPORATION

The Board's decision can be found at www.nlrb.gov/case/31-CA-074295 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.

APPENDIX B

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

Choose not to engage in any of these protected activities.

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WE WILL NOT maintain and/or enforce a mandatory arbitration program that requires 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 program in all of its forms, or revise it in all of its forms to make clear that the arbitration program does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration program in all of its forms that the arbitration program has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised program.

SOLARCITY CORPORATION

The Board's decision can be found at www.nlrb.gov/case/31-CA-074295 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.

David Reeves, Esq., for the General Counsel.
Nicole A. Buffalano, Esq. (Morgan, Lewis & Bockius, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case is before me on the parties' January 22, 2015 joint motion to waive the hearing and to submit case on joint stipulation of facts pursuant to Section 102.35(a)(9) of the National Labor Relations Board (the NLRB or the Board).[1] I granted the joint motion on January 26, 2015. The General Counsel and the Respondent filed timely briefs on March 2, 2015.

Stipulated Issues

The amended charge was filed on June 4, 2014,[2] and the amended complaint was issued on November 4 (Jt. Exhs. 3 and 7).[3] The parties stipulated to the following issues to be resolved:

1. Whether the Respondent's mandatory Arbitration Agreement and the Revised Arbitration Agreement executed by Charging Party Anita Beth Irving (Irving) and all other California employees as a condition of their employment violated Section 8(a)(1) of the National Labor Relations Act (the Act) under the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), because the Arbitration Agreement and/or Revised Arbitration Agreement interfere with employees' Section 7 right (of the Act) to engage in class and collective action.

2. Whether Respondent violated Section 8(a)(1) of the Act for the reasons stated in the preceding paragraph by maintaining and retaining the option, under the written terms of the Arbitration Agreement and/or Revised Arbitration Agreement to enforce the Arbitration Agreement and/or Revised Arbitration Agreement if violated, as to all of its California employees.

3. Whether Respondent violated Section 8(a)(1) of the Act by interfering with employees' access to the Board and its processes by maintaining language in paragraph 12(A) of the Arbitration Agreement and/or paragraphs 12(A)(1), (4), and (5) of the Revised Arbitration Agreement which employees could reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board.

4. Whether Respondent violated Section 8(a)(1) of the Act by seeking to enforce the Arbitration Agreement against the Charging Party by its court filings in Case No. CIV 525975.[4]

On the joint stipulation of facts submitted by the parties, the joint exhibits attached to the joint stipulation, and after considering the briefs filed by the General Counsel and the Respondent,[5] I make the following

Stipulated Facts

I. JURISDICTION

The parties stipulated that the Respondent is a Delaware corporation, with an office and place of business in San Mateo,

[1] Hereinafter, the "Stipulation."
[2] All dates are 2014, unless otherwise indicated.
[3] "Jt. Exh." is identified for joint exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief.
[4] Stipulation at 5, 6.
[5] The Charging Party elected not to file a statement of position.

California, and has been engaged in the solar energy industry. The Respondent admits, and I find that at all material times it has been an employer engage in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. STATEMENT OF STIPULATED FACTS

The parties stipulated to the following statement of facts:

1. Since at least November 6, 2013, and continuing to or about March 11, the Respondent has promulgated and maintained to its employees employed in the State of California (California employees), including the Charging Party, and has required them to execute as a condition of employment, an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (the Arbitration Agreement). The Arbitration Agreement specifically informs the Respondent's California employees that they are bound to the Arbitration Agreement as a condition of their employment with the Respondent.

2. The Charging Party was hired by the Respondent in November 2012. On November 14, 2012, the Charging Party was required to sign and thereby enter into the Arbitration Agreement as a condition of employment.

3. Since November 6, 2013,[6] and continuing to date, the Respondent has maintained the Arbitration Agreement and has the option, under the written terms of the Arbitration Agreement to enforce the Arbitration Agreement if violated, as to all of its California employees, including the Charging Party, who were hired before about March 11, 2014.

4. On or around March 11, 2014, the Respondent revised its Arbitration Agreement (Revised Arbitration Agreement). Since that time, newly hired California employees have signed and the Respondent has maintained as a condition of employment, as to those employees, the Revised Arbitration Agreement. The Revised Arbitration Agreement specifically informs the Respondent's California employees that they are bound to the Arbitration Agreement as a condition of their employment with the Respondent.

5. Since around March 11, 2014, the Respondent has maintained the Revised Arbitration Agreement and has the option, under the written terms of the Revised Arbitration Agreement to enforce the Revised Arbitration Agreement if violated, as to those employees that were hired after about March 11, 2014.

6. On or about December 24, 2013, the Charging Party filed a class-action complaint against the Respondent in the Superior Court of the State of California in and for the County of San Mateo in Case No. CIV 525975, alleging State wage and hour violations (Jt. Exh. 11). On or about April 1, 2014, the Respondent sought enforcement of the Arbitration Agreement against the Charging Party by filing a Notice of Petition and Petition to Compel Arbitration on an Individual Basis and Motion to Dismiss or in the Alternative to Stay the Action Pending Arbitration in Case No. CIV 525975 (Jt. Exh. 12).

[6] Since Irving executed the Arbitration Agreement on November 14, 2012, it is clear that the Respondent has maintained the Arbitration Agreement *prior* to November 6, 2013.

III. ARBITRATION AND REVISED ARBITRATION AGREEMENTS

At all material times, the Arbitration Agreement (Jt. Exh. 10)[7] has included the following language:

> *12. Arbitration*
>
> A. This Agreement applies to any dispute arising out of or related to Employee's employment, including termination of employment, with the Company or one of its affiliates, subsidiaries or parent companies. 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. The Agreement also applies, without limitations, to disputes regarding the employment relationship, trade secrets, unfair com-petition, compensation, breaks and rest periods, termi-nation, 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).
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> . . . .
>
> D. In arbitration, the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as provided by the forum state's procedural rules applicable to court litigation as interpreted and applied by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action **("Class Action Waiver"),** or in a representative or private attorney general capacity on behalf of a class of persons or the general public. 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 on behalf of a class of persons or the general public. Although an Employee will not be retaliated against, disciplined, threatened with discipline as a result of his or her filing of or participation in a class or collective action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver

[7] The Arbitration Agreement was inadvertently marked as Jt. Exh. 9. The Arbitration Agreement is attached to the Stipulation as Jt. Exh. 10. The Revised Arbitration Agreement is at Jt. Exh. 9.

under the Federal Arbitration Act and seek dismissal of such class or collective actions or claims.

. . . .

H. 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 the Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class and/or collective action in arbitration.

At all material times, the Revised Arbitration Agreement (Jt. Exh. 9) has included the following language:

12. *Arbitration*. In consideration of my employment with the Company, its promise to arbitrate all disputes with me, and my receipt of compensation and benefits provided to me by the Company, at present and in the future, the Company and I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law, and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration, and not by way of court or jury trial, except as otherwise provided herein or to the extent prohibited by applicable law. I acknowledge that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq., and evidences a transaction involving commerce.

A. Scope of Arbitration Agreement

(1) Disputes which the Company and I agree to arbitrate include, without limitation, disputes arising out of or relating to interpretation or application of this Agreement, disputes regarding my employment with the Company or its affiliates (or termination thereof), trade secrets, unfair competition, compensation, meal and rest periods, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employ-ment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, and all other statutory and common law claims (excluding workers' compensation, state disability insurance and unemployment insurance claims) Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration.

(2) By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by Law. Accordingly, no dispute by the parties hereto shall be brought, heard or arbitrated as a class, collective, representative, or private attorney general action, and no party hereto shall serve as a member of any purported class, collective, repre-sentative, or private attorney general proceeding, including without limitation pending but not certified class actions ("Class Action Waiver"). I understand and acknowledge that this Agreement affects my ability to participate in class, collective, or representative actions.

. . . .

(4) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, the Company agrees not to retaliate, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing in a class, collective or representative action in any forum.

(5) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me 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. Moreover, this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute (including, by way of example, claim under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203)); claims for workers' compensation benefits, unemployment insurance, or state or federal disability insurance; or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board. However, I expressly acknowledge and agree that such permitted agency claims do not include claims under California Labor Code Section 98 et seq. with the California Labor Commissioner or Division of Labor Standards Enforcement **("DLSE")—** such DLSE claims must be arbitrated in accordance with the provision of this Agreement.

IV. THE POSITIONS OF THE PARTIES

The General Counsel contends that the Respondent's maintenance of the Arbitration Agreement and the Revised Arbitration Agreement violates Section 8(a)(1) of the Act, consistent with *D. R. Horton, Inc.* and *Murphy Oil, USA, Inc.,* supra, in that they prohibit employees from initiating or pursuing class or collective actions in any forum. The General Counsel further asserts that the Agreements may be reasonably interpreted by employees as precluding their right to file unfair labor practices charges with the NLRB and thus tends to chill employees in the exercise of the Section 7 rights. Finally, the General Counsel argues that the Respondent further violated

Section 8(a)(1) of the Act by filing its petition to compel enforcement of the Arbitration Agreement and Revised Arbitration Agreement against the Charging Party.

The Respondent argues that *D. R. Horton* and *Murphy Oil* are incorrect as a matter of law and that I should not follow the Board's decisions. The Respondent further contends that the Arbitration Agreements explicitly allow employees to file charges with the Board and to participate in Board proceedings. Finally, the Respondent maintains that the complaint is barred by Section 10(b) of the Act because the underlying charge was filed more than 18 months after the Charging Party signed the arbitration agreement in question.

Analysis and Conclusions

A. The Respondent's 10(b) Argument

I will first address the Respondent's 10(b) argument. Section 10(b) of the Act provides that "no complaint shall be issue based upon on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board."

The Respondent contends that Section 10(b) bars the General Counsel from pursuing this complaint inasmuch as the charge was filed on May 5, 2014, more than 6 months after Irving signed the Arbitration Agreement on November 14, 2012. It is not disputed that Irving filed her charge more than 6 months after executing the Arbitration Agreement.

However, the Board has long recognized that Section 10(b) does not bar an allegation of unlawful conduct that began more than 6 months before a charge was filed but has continued within the 6-month period. More specifically, Section 10(b) does not preclude a complaint allegation based on the maintenance of a facially invalid rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier and has not been enforced, since "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enfd. in part 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries,* 331 NLRB 169, 174 fn. 7 (2000); See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

The Board recently rejected the Respondent's argument that the complaint is time barred under Section 10(b) of the Act. In *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015), the Charging Party signed a compensation schedule agreement more than 6 months before the initial unfair labor practice charge was filed and served. The Board held that "What matters, rather, is that the Respondent maintained and enforced the compensation schedule during the 10(b) period." Here, the parties stipulated that "Since at least November 6, 2013, and continuing to around March 11, 2014, the Respondent has promulgated to its employees . . . including the Charging Party . . . and has required them to sign as a condition of employment . . . the Arbitration Agreement."

I find that this time span includes the relevant 6-month period that preceded the filing of the charge on May 5, 2014. In *Cellular Sales,* 362 NLRB No. 27, slip op. at 2

> The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated. It is equally well established that an employer's enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, independently violates Section 8(a)(1). The complaint was timely in this respect, as well.

Accordingly, I find and conclude that Section 10(b) does not bar the instant complaint.

B. Whether the Respondent's Mandatory Arbitration Agreement and Revised Arbitration Agreement Violate Section 8(a)(1) of the Act

The evidence establishes that the Arbitration Agreement and Revised Arbitration Agreement require the Respondent's employees to waive any right to pursue class or collective claims pertinent to their employment, in any forum. After limiting the forum for resolution of disputes between the employee and the Respondent to arbitration, the Arbitration Agreement provides employees with the following:

> . . . there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action **("Class Action Waiver"),** or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

The Revised Arbitration Agreement states that employees,

> . . . agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class, collective, or representative action, except to the extent such waiver is expressly prohibited by Law. Accordingly, no dispute by the parties hereto shall be brought, heard or arbitrated as a class, collective, representative, or private attorney general action, and no party hereto shall serve as a member of any purported class, collective, representative, or private attorney general proceeding, including without limitation pending but not certified class actions **("Class Action Waiver")**.

By requiring that employees waive their right to pursue claims collectively in any forum, the Arbitration and Revised Arbitration agreements violate Section 8(a)(1) of the Act, pursuant to *D. R. Horton,* 357 NLRB No. 184, slip op. at 12–13. In *D. R. Horton*, the Board held that class or collective legal action on the part of employees, regardless of the particular forum involved, is a form of activity "at the core of what Congress intended to protect by adopting the broad language of Section 7," and is therefore "central to the Act's purposes." *D. R. Horton*, 357 NLRB No. 184, slip op. at p. 3. As a result, the Board held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation and employment claims in all forums, arbitral and judicial." *D. R. Horton,* 357 NLRB No. 184, slip op. at 12 (emphasis in original). Because the two arbitration agreements preclude the Respondent's employees from initiating or pursuing any class or collective claim in any forum, the Respondent's maintenance and enforcement of the Arbitration Agreement and Revised Arbitration Agreement violates Section 8(a)(1), as alleged in the complaint.

The Respondent's arguments regarding the legal infirmity of the Board's *D. R. Horton* decision must be addressed to the Board and not to the administrative law judge. It is well settled

that the Board generally applies a "nonacquiescence policy" with respect to contrary views of the Federal courts of appeal. *See D. L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). Thus, the administrative law judge is required to "apply established Board precedent which the Supreme Court has not reversed." *Pathmark Stores, Inc.*, 342 NLRB at 378 fn. 1; see also *Gas Spring Co.*, 296 NLRB 84, 97–98 (1989), enfd. 908 F.2d 966 (4th Cir. 1990); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Although Respondent contends that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), obviates the legal viability of *D. R. Horton and Murphy Oil*, the Board in *D. R. Horton* considered and distinguished that opinion given the number and scope of the contracts involved, and the conflict between the Federal Arbitration Act and State law at issue in the Supreme Court case. *D. R. Horton*, 357 NLRB No. 184, slip op. at p. 11–12, discussing *AT&T Mobility v. Concepcion*, 563 U.S. 333. In *Cellular Sales*, 362 NLRB No. 27, slip op. at 1, a case decided after *D. R. Horton* and *Murphy Oil*, the Board reaffirmed its position and agreed with the administrative law judge that the respondent violated Section 8(a)(1) of the Act "by maintaining and enforcing a mandatory and binding arbitration policy . . . that waives the rights of employees to maintain class or collective actions in all forums, whether arbitral or judicial."

The Supreme Court decisions cited by the Respondent as requiring a "contrary Congressional command" in order to forego enforcement of an otherwise valid arbitration agreement do not explicitly overrule the Board's *D. R. Horton* and *Murphy Oil* decisions. *CompuCredit Corp. v. Greenwood*, --- U.S. ---,132 S.Ct. 665, 668–669 (2012); *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---,133 S.Ct. 2304, 2309 (2013). As a result, the Respondent's argument that the arbitration policy lawfully precludes class or collective legal actions because no "contrary Con-gressional command" requires that a waiver be rejected is also appropriately addressed solely to the Board itself.[8]

The Respondent also points out that the Fifth Circuit when deciding the Petition for Review of *D. R. Horton* refused to enforce the portion of the Board's decision and order finding that an arbitration agreement which eliminated the right to initiate and pursue class or collective claims violated Section 8(a)(1). *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362. The Respondent notes that other circuits addressing the issue have held that arbitration agreements requiring the waiver of class or collection actions do not violate Section 8(a)(1). See *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bistol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Regardless of this case law, as discussed above, an administrative law judge is bound by the decisions of the Board, including *D. R. Horton*, until overturned by the Board or the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB at 378 fn. 1; *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enf. granted in part 331 F.2d 176 (8th Cir. 1964). Therefore, the Respondent's contentions based upon the decisions of the Federal courts of appeal must also be directed to the Board.

For all of the foregoing reasons, I find that the Arbitration Agreement and the Revised Arbitration Agreement, by prohibiting the Respondent's employees from initiating or pursuing any class or collective claim in any forum, violate Section 8(a)(1) of the Act pursuant to the Board's decisions in *D. R. Horton*, *Murphy Oil,* and *Cellular Sales*.

C. Whether Employees could Reasonably Conclude that the Arbitration Agreement and the Revised Arbitration Agreement Prohibits or Restricts their Right to File Unfair Labor Practice Charges with the Board

The General Counsel contends that the Respondent's arbitration policy violates Section 8(a)(1) of the Act in that it may reasonably be interpreted to preclude the filing of unfair labor practices charges and would therefore, tend to chill the employees' exercise of their rights under Section 7.

The Respondent argues that the Arbitration Agreements explicitly allow employees to file charges with the NLRB and an employee would not reasonably conclude that the language in the Arbitration Agreements prohibits or restricts his or her right to file unfair labor charges with the Board.

It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB at 825. A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following (i) employees would "reasonably construe" the rule's language to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that the rules must be afforded a "reasonable" interpretation without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646. Ambiguities in work rules are construed against the party which promulgated them. See *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. 3 (2012); *Lafayette Park*, 326 NLRB at 828.

I find that employees would reasonably interpret the Respondent's Arbitration Agreement and Revised Arbitration Agreement as prohibiting them from filing unfair labor practice charges, and that the Respondent's maintenance of the agreements as a condition of employment therefore violates Section 8(a)(1). The arbitration agreements contain broad language regarding the scope of its applicability. The Arbitration Agreement states, in part:

> 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

[8] To the extent that the Respondent cites to decisions of other Board judges in support of its argument that the Board's holding in *D. R. Horton* and *Murphy Oil* is no longer tenable in light of the Supreme Court's decision in *American Express Co*., supra, such decisions are not precedential and therefore, I decline to find that *D. R. Horton* is no longer effective.

> through final and binding arbitration and not by way of court or jury trial.

The Revised Arbitration Agreement states, in part:

> I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law, and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration, and not by way of court or jury trial, except as otherwise provided herein or to the extent prohibited by applicable law.

The Board has repeatedly held that sweeping language in defining the issues subject to solely arbitral resolution is reasonably interpreted by employees to encompass and prohibit the filing of unfair labor practice charges. See *Supply Technologies, LLC*, 359 NLRB No. 28, slip op, at 1–4 (agreement requiring that employees "bring any claim of any kind," including "claims relating to my application for employment, my employment, or the termination of my employment" solely to employer's alternative dispute resolution program reasonably interpreted as prohibiting the filing of unfair labor practice charges); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 1–2 (policy requiring that employees submit "all [employment] disputes and claims" to arbitration could be reasonably interpreted to preclude the filing of charges with the Board); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006) (agreement requiring arbitration of "all disputes relating to or arising out of an employee's employment . . . or the termination of that employment," including "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" violated Section 8(a)(1)).

Thus, the provisions in the Arbitration Agreements require all employment-related disputes to be arbitrated as the exclusive means of resolution violate Section 8(a)(1) because employees would reasonably believe it waived or limited their rights to file Board charges or to access the Board's processes. See *Murphy Oil*, slip op. at 13, 19 fn. 98, 39 fn. 15.

I further find that the language in the Arbitration Agreements providing that

> . . . this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute . . . or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor. . . .

is insufficient to indicate to a reasonable employee that the agreements do not prohibit the filing of unfair labor practice charges with the Board. The language in both Agreements explicitly excludes unfair labor practice charges filed with the National Labor Relations Board from the Agreements' requirement that all employment-related claims be resolved in the context of arbitration. However, in the context of the reasonable interpretation analysis the Board has eschewed any assumption that employees have specialized legal knowledge or experience which they would bring to bear on an arbitration agreement's language. For example, in *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 2, the Board found that language limiting the employer's policy to claims "that may be lawfully [] resolve[d] by arbitration" was not susceptible to the interpretation by "most nonlawyer employees," who would be unfamiliar with the Act's limitations on compulsory arbitration, that unfair labor practice charges were thereby excluded. Similarly, in *U-Haul Co. of California*, 347 NLRB at 377–378, the Board concluded that employees without legal training could not be reasonably expected to understand that language limiting arbitration to disputes or claims "but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement." This is particularly the case in light of the Agreements' preceding language stating that arbitration applies "to any dispute arising out of or related to Employee's employment."

I note that the Board has found language explicitly referring to an employee's responsibility to "timely file any charge with the NLRB" is insufficient to clarify a broad mandatory grievance and arbitration policy such that the policy would not be reasonably interpreted to prohibit the filing of unfair labor practice charges in violation of Section 8(a)(1). *Bill's Electric, Inc*., 350 NLRB 292, 296 (2007). The Board affirmed this longstanding precedent in *Cellular Sales*, 362 NLRB No. 27, slip op. at fn. 4, stating:

> [t]he Board will find that a work rule that is required as a condition of employment, such as the arbitration policy in this case, violates Sec. 8(a)(1), if employees would reasonably believe the rule or policy interferes with their ability to file a Board charge or access to the Board's processes, *even if the rule or policy does not expressly prohibit access to the Board* (emphasis added). See *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), slip op. at 13, 19 fn. 98, 39 fn. 15*; D. R. Horton, Inc.,* 357 NLRB No. 184, slip op. at 2 fn. 2 (2011), enfd. in relevant part, 737 F.3d 344 (5th Cir. 2013); *U-Haul Co. of California,* 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007) (unpublished decision); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

For all of the foregoing reasons, I find that employees would reasonably interpret the Arbitration Agreement and the Revised Arbitration Agreement as prohibiting the filing of unfair labor practice charges, and as a result, the Respondent's maintenance of the agreements as a condition of employment violated Section 8(a)(1).

D. Whether the Maintenance and Retention of the Option to Enforce the Arbitration Agreement and/or Revised Arbitration Agreement Violates Section 8(a)(1) of the Act

The General Counsel argues that the Respondent violated Section (a)(1) of the Act by maintaining and retaining language in the Arbitration and Revised Arbitration Agreements to force compliance of the arbitration policy on the California employees. Subsumed in this issue is whether Respondent violated

Section 8(a)(1) of the Act when it petitioned to compel arbitration on an individual basis and moved to dismiss or stay the class action in court filings in Case No. CIV 525975 on or about December 24, 2013 (Jt. Exh. 12).

As noted, language in the Arbitration Agreement states, in part, that the Respondent "may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective actions or claims." The Revised Arbitration Agreement also has similar language, stating that the Respondent "may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims." On December 24, 2013, the Respondent filed its Petition to Compel Arbitration on an Individual Basis, and to Dismiss or, in the Alternative, Stay Pending Arbitration (Jt. Exh. 12).

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740–744, 748 (1983), the Supreme Court, formulating an accommodation between employee Section 7 rights and the First Amendment right of parties to petition the Government for redress of grievances, held that lawsuits motivated by a desire to retaliate against the exercise of Section 7 rights which lacked a reasonable basis in fact or law violated Section 8(a)(1) of the Act. The Supreme Court explicitly excluded from this analysis lawsuits filed with "an objective that is illegal under federal law." *Bill Johnson's Restaurants*, 461 U.S. at 737–738 fn. 5. In such cases, "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).

Subsequently, in *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 529–530 (2002), the Court invalidated the Board's rule that an unsuccessful lawsuit filed for retaliatory reasons violated the Act even if reasonably based. On remand, the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the party's motive for bringing it, so that only lawsuits which are "both objectively and subjectively baseless" are unlawful. *BE & K Construction Co.*, 351 NLRB 451, 458 (2007). However, since *BE & K Construction Co.*, the Board has repeatedly held that the Supreme Court's opinion in that case "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice." *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 3 (2011); *Plasterers Local 200 (Standard Drywall)*, 357 NLRB No. 179, slip op. at 3 fn. 7 (2011), enfd. 547 Fed. Appx. 812 (9th Cir. 2013), and 357 NLRB No. 160, slip op. at 3 (2011), enfd. 547 Fed. Appx. 809 (9th Cir. 2013); *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540 fn. 7 (2005); see also *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

As a result, lawsuits motivated by an illegal objective remain exempt from *Bill Johnson's,* and I find, as the General Counsel argues, that the Respondent violated Section 8(a)(1) of the Act by maintaining language in the Arbitration Agreement and Revised Arbitration Agreement and by enforcing such provisions when it filed its Petition to Compel Arbitration on an Individual Basis, and to Dismiss or, in the Alternative, Stay Pending Arbitration (Jt. Exh. 12).

I find that the Respondent's petition to compel had an unlawful objective within the meaning of *Bill Johnson's Restaurants* and its progeny, in that it constituted both an attempt to maintain and enforce a policy which was in and of itself unlawful and an effort to directly proscribe employees' protected activity. As a result, the Respondent violated Section 8(a)(1) by filing its petition to compel.

In addition, the Board has held that specific actions taken by a party in the context of litigation may have an illegal objective, and therefore violate Section 8(a)(1), even if the underlying lawsuit itself does not. In particular, the Board has held that discovery requests which seek information regarding employees' participation in union activity have an illegal objective, and therefore violate Section 8(a)(1). See *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 3 ("discovery requests" seeking the names of employees who had joined the union had an illegal objective and therefore violated Section 8(a)(1)); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000) (discovery request seeking the identities of employees who signed collective-bargaining authorizations unlawful).

I find that the Respondent's petition to compel in the instant case had an illegal objective in that it was an attempt to enforce the unlawful arbitration agreements. It is well settled, as discussed in the *Bill Johnson's* opinion, that lawsuits which attempt to enforce contract provisions and policies which violate the Act constitute independent statutory violations. *Bill Johnson's Restaurants*, 461 U.S. at 737–738 fn. 5, citing *Granite State Joint Board, Textile Workers Union Local 1029*, 187 NLRB 636, 637 (1970), enf. denied 446 F.2d 369 (1st Cir. 1971), revd. 409 U.S. 213 (1972), and *Booster Lodge No. 405*, 185 NLRB 380, 385 (1970), enfd. 459 F.2d 1143 (D.C. Cir. 1972), affd. 412 U.S. 84 (1973) (noting that the Court had "upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act"); see also *Regional Construction Corp.*, 333 NLRB 313, 319 (2001) (illegal objective in "cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act"). The Respondent's petition to compel constituted an effort to enforce the Arbitration Agreement and Revised Arbitration Agreement which, for the reasons discussed above, violates Section 8(a)(1) of the Act. The filing of the petition to compel consequently violated Section 8(a)(1).

Moreover, the petition to compel violated Section 8(a)(1) as an attempt to directly prevent employees from engaging in activity protected by Section 7. The Board has repeatedly found that lawsuits designed to prevent employees' Section 7 activity have an illegal objective, and therefore violate Section 8(a)(1). For example, in *Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 1. 13–14 (2012), the Board determined that a lawsuit alleging that employees engaged in abuse of process and malicious prosecution by filing an unfair labor practice charge and providing evidence to the Board had the illegal objective of seeking to punish and deter access to Board processes, activity protected by Section 7. See also *Manno Electric*, 321 NLRB 278 fn. 5, 295–298 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (lawsuit alleging that employees' made "false" statements in

"bad faith" to the Board had illegal objective and therefore violated Section 8(a)(1)); and *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union grievance premised upon an interpretation of its collective-bargaining agreement which would violate Section 8(e) of the Act had an illegal objective).

Here, the petition to compel, in that it sought dismissal of the employees' class or collective claims, attempted to directly interfere with employee' activity protected by Section 7. As the Board explained in *D. R. Horton*, 357 NLRB No. 184, slip op. at 3, collective efforts to address workplace grievances through arbitration and litigation constitute protected concerted activity, and thus "an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." The petition to compel in the instant case, by urging the state court to dismiss the employees' class or collective claims, sought to directly prevent them from engaging in activity protected under Section 7. The petition to compel therefore had an illegal objective, and the Respondent's filing of the petition to compel and motion to dismiss the class claims violated Section 8(a)(1) on this basis as well.[9]

For all of the foregoing reasons, I find that Respondent's Petition to Compel Arbitration on an Individual Basis, and to Dismiss or, in the Alternative, Stay Pending Arbitration had an unlawful objective and therefore violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through class or collective action.

3. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe prohibits or restricts their right to engage in protected activity and/or to file charges with the National Labor Relations Board.

4. The Respondent violated Section 8(a)(1) of the Act by filing a petition in Superior Court of the State of California in Case No. CIV 525975 to compel arbitration and dismissal of the Charging Party's collective and class claims.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[9] Inasmuch as I find that the Respondent's petition to compel had an unlawful objective, I also find, contrary to the Respondent's arguments, that this instant case does not violate the Respondent's First Amendment right to defend itself in the collective class action and should not be stayed pending the outcome of the class action litigation.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent maintained a mandatory arbitration policy, the Arbitration Agreement and the Revised Arbitration Agreement, which requires that employees waive their right to pursue class or collective action claims in any forum, whether arbitral or judicial, and may be reasonably interpreted as prohibiting or restricting employees from filing unfair labor practice charges with the National Labor Relations Board. I therefore recommend that the Respondent be ordered to rescind the arbitration agreements and to provide the employees with specific notification that the Arbitration Agreement and Revised Arbitration Agreement have been rescinded.

I shall recommend that the Respondent be ordered to alternatively revise the Arbitration Agreement and Revised Arbitration Agreement to clarify that they do not constitute a waiver in all forums of the employees' right to maintain employment-related class or collective claims, and does not restrict employees' right to file unfair labor practice charges with the National Labor Relations Board, and to notify the employees of the revised agreements, including providing the employees with a copy of the revised agreements. I will recommend that the Respondent post a notice in all locations where the Arbitration Agreement and Revised Arbitration Agreement were utilized. *D. R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 13; *U-Haul Co. of California*, 347 NLRB at 375 fn. 2; see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (DC Cir. 2007).

I shall further recommend that the Respondent notify the State Court that it has rescinded or revised the mandatory Arbitration Agreement and Revised Arbitration Agreement and to inform the court that it no longer opposes the plaintiff's claims on the basis of the arbitration agreements. This action is necessary to fully remedy the violation, because the petition to compel had an illegal objective and was therefore unlawful from its inception, and should never have been filed. *Manno Electric*, 321 NLRB at 297–298. The Board has in previous cases ordered respondents to take such specific actions to remedy the effects of having prosecuted lawsuits engendered by an illegal objective, or otherwise unlawful pursuant to *Bill Johnson's* and related cases. *Cellular Sales,* 362 NLRB No. 27 fn. 6; *Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 13–14 (respondent ordered to withdraw or seek to dismiss lawsuit filed with an illegal objective, and have default orders vacated).

Consistent with the Board's decision in *Murphy Oil* and *Cellular Sales,* 362 NLRB No. 27, slip op. at fn. 6, I shall also recommend that the Respondent reimburse the Charging Party for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful petition to compel individual arbitration in the collective action. 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 No. 8 (2010). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n makewhole 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).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[10]

ORDER

The Respondent, SolarCity Corporation, a Delaware corporation with office and principal place of business in San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreements that require employees, as a condition of employment, to waive their right to pursue class or collective claims in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding arbitration agreement that employees would reasonably believe bars or restricts employees' rights to file unfair labor practice charges with the National Labor Relations Board or to access the Board's processes.

(c) Filing a petition to enforce its Arbitration Agreement and Revised Arbitration Agreement to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with the Respondent on a class or collective basis in any forum.

(d) 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 and binding arbitration agreements in all of its forms, or revise them in all of its forms to make clear to employees that the Arbitration Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial, and that they do not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign the Arbitration Agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised Agreement.

(c) Within 14 days after service by the Region, notify the Superior Court of the State of California in Case No. CIV 525975 that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss Anita Irving's collective action and to compel individual arbitration of her claim, and inform the court that it no longer opposes the action on the basis of the arbitration agreements.

(d) In the manner set forth in this decision, reimburse Anita Irving for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's petition to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all its locations in California where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 an 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 November 6, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32, 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. March 31, 2015

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

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules 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.

[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."

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory and binding arbitration agreement that requires 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 and binding Arbitration Agreement and Revised Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreements do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign the mandatory Arbitration Agreement and the Revised Arbitration Agreement in all of its forms that the arbitration agreements have been revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which Anita Beth Irving filed her collective wage claim that we have rescinded or revised the mandatory Arbitration Agreement and Revised Arbitration Agreement upon which we based our petition to dismiss her collective wage claim and compel individual arbitration.

WE WILL inform the court that we no longer oppose Anita Beth Irving's collective claim on the basis of that agreement.

WE WILL reimburse Anita Beth Irving for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

SOLARCITY CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-128085 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.