

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOLARCITY CORP.,

and

Case 32-CA-180523

RAVI WHITWORTH, an Individual.

**RESPONDENT SOLARCITY CORPORATION'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Respondent SolarCity Corporation (“Respondent” or “SolarCity”) hereby files these Exceptions to the Decision and to the recommended Order included therein (collectively referred to as the “ALJD”), issued by the Administrative Law Judge (“ALJ”) in this matter on September 8, 2017.¹

1. **Page 1, Lines 1-2:** The statement that ALJ Eleanor Laws approved the Joint Motion and Stipulation of Facts.

2. **Page 1, Line 3:** The statement that the General Counsel issued the complaint on November 29, 2017.

3. **Page 2, Lines 1-2:** The statement that “the issue addressed in this decision is whether the arbitration agreements interfere with employees’ access to the Board and its processes.”

4. **Page 2, Lines 1-2:** The failure to state that the issues addressed are the two expressly agreed-upon issues set forth in the Joint Motion.

5. **Page 2, Line 20:** The finding that “[a]t all times between January 21, 2016 and September 21, 2016,” Respondent required newly hired employees in the State of California to sign the California Arbitration Agreement as a condition of employment.

6. **Page 2, Line 24 and fn. 1:** The ALJ’s statement that her findings and conclusions are based not solely on the evidence specifically cited, but rather on her review and consideration of the entire record.

7. **Page 2, Line 26:** The finding that “[a]t all times between January 21, 2016 and May 15, 2016,” Respondent required newly hired employees working in the United States other than in the State of California to sign the Non-California Arbitration Agreement as a condition of employment.

8. **Page 2, Lines 30-32:** The finding that the Non-California Arbitration Agreement was revised “in May 2016.”

¹ Page and line numbers refer to the ALJD.

9. **Page 3, Lines 1-7:** The failure to find that the “*Arbitration*” section of the Arbitration Agreement, the Non-California Arbitration Agreement, the May 2016 Non-California Arbitration Agreement, and the September 2016 Arbitration Agreement contain a substantially similar first paragraph indicating, in relevant part:

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 under the Federal Arbitration Act, 9 U.S.C. § et seq. (the “Federal Arbitration Act”), 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 and in accordance with the Federal Arbitration Act.

10. **Page 3, Lines 1-2 and 39:** The finding of omitted language between subsections (5) and (6) of the “Scope of Agreement” section of all the arbitration agreements.

11. **Page 4, Lines 21-24:** The ALJ’s reliance on the standard set forth in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), and further reliance upon *U-Haul Company of California*, 347 NLRB 375, 377 (2006) enf’d. 255 Fed. Appx. 527 (D.C. Cir. 2007), and *D.R. Horton*, 357 NLRB 2277 (2012) enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).²

12. **Page 4, Lines 21-29, 33-35, and 37-41:** The ALJ’s failure, in determining whether Respondent’s arbitration agreements violate Section 8(a)(1) by restricting access to filing a charge with the Board, to apply the balancing test espoused by then-Member Miscimarra in his dissent in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. p. 9 (2016).

13. **Page 4, Lines 29-31:** The ALJ’s statement that “[t]he issue in the instant case is whether employees would reasonably construe the arbitration agreements to prohibit activity protected by Section 7.”

14. **Page 4, Lines 37-38:** The ALJ’s finding and conclusion that “[r]ather, the inquiry is whether a reasonable employee would read the rule as prohibiting Section 7 activity,” and

² The ALJ did not include a citation for *D.R. Horton*, but the case citation has been included here for the Board’s convenience.

reliance upon *Lutheran Heritage*.

15. **Page 4, Lines 39-41:** The ALJ's finding that "ambiguities are construed against [a rule's] promulgator," and reliance upon *Lutheran Heritage*, *Lafayette Park Hotel*, 326 NLRB 824, 828, and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007).

16.. **Page 4, Line 45 – Page 5, Line 2:** The ALJ's failure to find that the phrase "except as otherwise provided herein" contained in the first paragraph of the "*Arbitration*" section of the four arbitration agreements, which immediately precedes subsection (1) of section "*A. Scope of Arbitration Agreement*," indicates from the outset that the agreement to arbitrate any disputes is subject to exceptions provided in the four arbitration agreements.

17. **Page 4, Line 45 - Page 5, Line 2:** The ALJ's finding that the wording of the first sentence of section A.(1) of the *Scope of the Agreement* provisions is clear and means that "all employment disputes, without limitation, must be arbitrated."

18. **Page 5, Lines 1-2:** The ALJ's finding that: "The wording of this provision is clear – all employment disputes, without limitation, must be arbitrated."

19. **Page 5, Lines 2-3:** The ALJ's finding that: "Clearly, disputes that would fall within the Board's purview are encompassed by this introductory phrase."

20. **Page 5, Lines 12-15:** The ALJ's finding that: "Again, certain disputes that would fall within the Board's purview, such as a collective complaint about compensation or a collective complaint about discrimination for engaging in activity protected by Section 7, are clearly encompassed by the language of this section. [Footnote omitted.]"

21. **Page 5, Lines 17-20:** The ALJ's finding and conclusion that: "Considering that ambiguities must be construed against the Respondent as the arbitration agreements' drafter, I resolve the conflict between the language requiring arbitration of all employment disputes 'without limitation' and the carve-out provisions detailed above and analyzed below, in the Charging Party's favor."

22. **Page 5, Lines 21-23:** The ALJ's finding that: "There is simply no reason for the 'without limitation' qualifier language attributed to disputes about employment to be included in

the agreements if not to confuse the reader.”

23. **Page 5, Lines 23-24:** The ALJ’s finding and conclusion that: “Notably, the phrase ‘without limitation’ is the only qualifier that does not presuppose legal knowledge by the reader.”

24. **Page 5, Lines 24-25:** The ALJ’s finding and conclusion that: “Any exclusions to the agreements’ applicability are phrased in terms of when other laws require such exclusions.”

25. **Page 5, Lines 25-27:** The ALJ’s finding that “a reasonable employee would read the arbitration agreements to require all employment disputes to be arbitrated without limitation.”

26. **Page 5, Lines 27-28:** The ALJ’s finding that “the agreements violate the Act as alleged.”

27. **Page 5, Line 30:** The ALJ’s finding that “the all-encompassing language in the first paragraph ends the analysis.”

28. **Page 5, Lines 41-42:** The ALJ’s finding that the agreements infringe on employees’ rights to engage in Section 7 activity.

29. **Page 6, Lines 2-6:** The ALJ’s finding and conclusion that “[a] reasonable employee reading this in the context of the rest of the document is not going to know that the phrase ‘to the fullest extent permitted by law’ excuses disputes resulting in NLRB charges from mandatory binding arbitration,” and reliance upon *2 Sisters Food Group, Inc.* 357 NLRB 1816, 1822 (2011) and *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 7 (2015).³

30. **Page 6, Lines 12-14:** The ALJ’s finding and conclusion that: “Again, without specific legal knowledge of a highly complex and clearly disputed area of law, employees are not going to be able to meaningfully interpret this provision.”

31. **Page 6, Lines 14-16:** The ALJ’s finding and conclusion that “[m]oreover, the flawed carve-out provision is reasonably read, within the context of the agreement as a whole, to

³ The specific page references provided by the ALJ are mistaken, and it reasonably appears that the intended citations are 1817 in *2 Sisters*, and slip opinion pages 5-6 in *SolarCity*.

preclude Board charges seeking group or collective action and relief,” and reliance upon *Solarcity, supra*, 363 NLRB No. 83, slip op. p. 7.

32. **Page 6, Lines 6 and 16:** The ALJ’s failure to rule upon SolarCity’s request in its Brief to the ALJ that administrative notice be taken of the docket activity on SolarCity Corporation, Case 32-CA-128085, including the Fifth Circuit’s September 26, 2016 Order, which is accessible on the Board’s website at <https://www.nlr.gov/case/32-CA-128085>.

33. **Page 6, Lines 23-27:** The ALJ’s finding and conclusion that: “The only way to reconcile these two provisions is to read the agreements as permitting the filing of a charge with an administrative agency, but ultimately requiring those disputes to be resolved only through final and binding arbitration under the agreements rather than through whatever fruits filing a charge or other similar effort may bear.”

34. **Page 6, Lines 27-29:** The ALJ’s finding and conclusion that: “The same rationale holds true for Board proceedings, given that the agreements require individual arbitration of disputes over employment disputes, including those involving wages and meal/break periods.”

35. **Page 6, Lines 29-30:** The ALJ’s finding and conclusion that: “This begs the question: Why would any employee bother to file a charge?”

36. **Page 6, Lines 30-34:** The ALJ’s finding and conclusion that: “A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the agreements would be subject to individual arbitration, regardless of where or how a charge was originally filed.”

37. **Page 6, Lines 8-16 and 27-33:** The ALJ’s failure to find that Section A.(6) in the Arbitration Agreement and the September 2016 Arbitration Agreement – and Section A.(5) in the Non-California Arbitration Agreement and the May 2016 Non-California Arbitration Agreement – expressly states that filing a charge with the National Labor Relations Board is an administrative agency claim permitted under the Federal Arbitration Act in Section A.(6) - and under applicable law in Section A.(5) - and an exception to the commitment in Section A.(1) to arbitrate all employment disputes.

38. **Page 6, Lines 42-45:** The ALJ's finding and conclusion that: "Based on the foregoing, I find the General Counsel has met his burden to prove the arbitration agreements at issue violate the Act because employees would reasonably conclude the agreements prohibit or restrict their right to file unfair labor practice charges with the Board, including charges that seek to raise group or collective concerns."

39. **Page 7, Lines 6-9:** The conclusion that Respondents violated Section 8(a)(1) by interfering with employees' access to the Board and its processes by maintaining language in four arbitration agreements which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board, including charges that seek to raise group or collective concerns.

40. **Page 7, Lines 13-42; Page 8, Lines 1-33:** The Remedy and Order sections in their entirety because the Remedy and Order are based upon the ALJ's improper and unsubstantiated findings and conclusions that Respondent engaged in certain unfair labor practices affecting commerce as specified in the ALJD.

Dated: October 27, 2017

Respectfully submitted,

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By  _____
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CERTIFICATE OF SERVICE

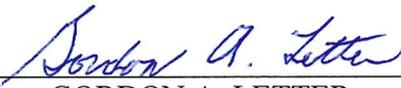
I hereby certify that, on this 27th day of October 2017, I e-filed the Respondent SolarCity Corporation's Exceptions to Administrative Law Judge's Decision with the Office of the Executive Secretary of the National Labor Relations Board on the NLRB's E-Filing system, and served a copy of this Exceptions to Administrative Law Judge's Decision by electronic mail upon the following:

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