

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 RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

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I. SOLARCITY OPPOSES REMAND TO THE ALJ BECAUSE AN EARLIER DECISION PENDING AT THE BOARD AGAINST RESPONDENT PROVIDES CAUSE TO RETAIN THIS CASE AT THE BOARD

A. Introduction

Respondent SolarCity Corporation (“Respondent” or “SolarCity”) files this Response to the Board’s Notice to Show Cause, issued on October 22, 2018, opposing remand of this proceeding to the Administrative Law Judge (“ALJ”). The grounds for Respondent’s opposition arise from the pendency of an earlier unfair labor practice proceeding against it in Case 32-CA-128085,¹ involving the identical alleged violation of the Act as in the present case – *i.e.*, that language in Respondent’s arbitration agreements interfered with employees’ access to the Board and its processes in violation of Section 8(a)(1). In fact, that earlier proceeding is presently before the Board, solely with respect to this issue, following a remand from the Fifth Circuit Court of Appeals on August 15, 2018, based upon the Board’s own motion. Moreover, the relevant language in one of the arbitration agreements in that case is the same as provisions in two arbitration agreements in the present case, and essentially the same as the language in the remaining two agreements in the instant case. As a result, judicial economy, efficient and economical use of time and resources of both the National Labor Relations Board and SolarCity, and the desirability of ensuring consistency in the results of the Board’s decisions, provide cause for this case to remain before the Board so that it will be addressed in conjunction with the earlier decision remanded from the Fifth Circuit.

B. Identical And Essentially The Same Arbitration Agreement Provisions Are At Issue In The Instant Case, 32-CA-180523, And In The Preceding Matter 32-CA-128085

In the instant Case 32-CA-180523, Respondent has excepted to the ALJ’s finding that it interfered with employees’ access to the Board and its processes in violation of Section 8(a)(1) by maintaining substantially similar language in the following four arbitration agreements required to be signed as a condition of employment:

- (1) an At-Will Employment, Confidential Information, Invention

¹ A Board Decision and Order issued in that case on December 22, 2015, and is reported at *SolarCity Corporation*, 363 NLRB No. 83.

Assignment and Arbitration Agreement (the “Arbitration Agreement”), dated “06.22.2015” in the bottom left of each page, which was required of newly hired employees working in California (“California employees”), and which Charging Party Ravi Whitworth signed on August 17, 2015. (Jt. Stip. ¶ 18; Jt. Ex. 2, p. 4; Jt. Ex. 8, p. 8 of 12);²

(2) an arbitration agreement substantially similar to the Arbitration Agreement which was required of newly hired employees working throughout the United States other than in the State of California (“Non-California Arbitration Agreement”), dated “03.04.2014” in the bottom left of each page. (Jt. Stip. ¶ 19; Jt. Ex. 9);

(3) a revised version of the Non-California Arbitration Agreement, dated “05.16.2016” in the bottom left of each page (“May 2016 Non-California Arbitration Agreement”), which remained substantially similar to the Arbitration Agreement, and which was required of newly hired employees working in the United States, except newly hired California employees. (Jt. Stip. ¶ 20; Jt. Ex. 10); and

(4) a revised version of the Arbitration Agreement, which was implemented on or about September 22, 2016 (“September 2016 Arbitration Agreement”), which is substantially similar to the Arbitration Agreement, and which was required of all newly hired employees throughout the United States, including newly hired California employees. (Jt. Stip. ¶ 21; Jt. Ex. 11)

These four arbitration agreements are referred to as “the Agreements for Arbitration.”

Each of the Agreements for Arbitration contains substantially similar relevant

² A Joint Motion to Submit Case on Stipulation and Joint Stipulation of Facts, including supporting Joint Exhibits (“Joint Motion”), was entered into by all parties, and granted by an amended order of Associate Chief Administrative Law Judge Gerald M. Etchingham on June 14, 2017. The Joint Stipulation of Facts, contained in the “STATEMENT OF FACTS” section of the Joint Motion, is referred to herein as “Jt. Stip. ¶ _.” The Joint Exhibits included in the Joint Motion are indicated as “Jt. Ex. _.”

“*Arbitration*” provisions.³ Further, the Agreements for Arbitration include the following as subsection (6) in the California agreements and as subsection (5) in the Non-California ones:⁴

(6) . . . Moreover, to the extent consistent with the application of the Federal Arbitration Act,^[5] **this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute** (including, by way of example, claims that may not be arbitrated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), or under Section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”)) [*sic*];^[6] **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, the Federal Arbitration Act^[7] 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 U.S. Securities and Exchange Commission,^[8] the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board.^[9]** I similarly understand and agree that nothing in this Agreement shall prohibit or restrict me from initiating communications with, cooperating with, providing relevant information or testimony to, or otherwise assisting in an investigation conducted by one of the foregoing government agencies in relation to a possible violation

³ These provisions are found at: Section 12 of the Arbitration Agreement (Jt. Ex. 8, pp. 4 of 12 and 5 of 12); Section 9 of the Non-California Arbitration Agreement (Jt. Ex. 9, pp. 4 of 10 and 5 of 10); Section 9 of the May 2016 Non-California Arbitration Agreement (Jt. Ex. 10, pp. 4 of 10 and 5 of 10); and Section 14 of the September 2016 Arbitration Agreement (Jt. Ex. 11, pp. 6 of 13 and 7 of 13).

⁴ The version in the Arbitration Agreement and the September 2016 Arbitration Agreement is quoted. (Jt. Ex. 8, p. 6 of 12; Jt. Ex. 11, p. 7 of 13)

⁵ The version in the Non-California Arbitration Agreement and the May 2016 Non-California Arbitration Agreement here omits “to the extent consistent with the application of the Federal Arbitration Act.” (Jt. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10)

⁶ The Non-California agreements here omit “or under Section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”).” (Jt. Ex. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10)

⁷ The Non-California agreements substitute “applicable law” for “, the Federal Arbitration Act.” (Jt. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10)

⁸ The Non-California agreements omit “the U.S. Securities and Exchange Commission.” (Jt. Ex. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10)

⁹ At the end of the sentence, the September 2016 Arbitration Agreement omits “and the National Labor Relations Board,” which is a duplicative reference to the Board. (Jt. Ex. 11, p. 7 of 13)

of any applicable law, rule or regulation.¹⁰ [Emphasis added.¹¹]

(Jt. Ex. 8, p. 6 of 12; Jt. Ex. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10; Jt. Ex. 11, p. 7 of 13)

In the earlier Case 32-CA-128085, the Board decided that two arbitration agreements, applicable only to California employees of SolarCity, interfered with employees' right to file charges with the Board. *SolarCity Corporation*, 363 NLRB No. 83, slip op. p. 4. While the older of these two agreements contains an earlier version of the provision,¹² the more recent one promulgated in March 2014 contains the following same, or essentially the same, language as the Agreements for Arbitration:

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.

SolarCity Corporation, 363 NLRB No. 83, slip op. p. 4. As indicated above, the language is the same as that contained in the Non-California Agreements, and essentially the same as the language in the California Agreements, in the present Case 32-CA-180523.

C. The Legal Issues Remaining To Be Addressed In Cases 32-CA-180523 and 32-CA-128085 Are The Same

With respect to the instant Case 32-CA-180523, SolarCity's Brief in Support of Exceptions to Administrative Law Judge's Decision, filed on October 27, 2017, indicates as the first question presented to the Board: "1. Whether the ALJ erred in finding that Respondent

¹⁰ This entire sentence does not appear in the Non-California agreements. (Jt. Ex. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10)

¹¹ The emphasized portions match the language of the most recent arbitration agreement in Case 32-CA-128085 quoted below from the 2015 Board decision.

¹² This agreement, in effect since at least November 2013 and entitled "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (*SolarCity Corporation*, 363 NLRB No. 83, slip op. p. 1), provides in relevant part:

'[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'

Id. at 363 NLRB No. 83, slip op. p. 4.

violated Section 8(a)(1) of the Act by interfering with employees' access to the Board and its processes by maintaining substantially similar language in four arbitration agreements with employees providing for arbitration of employment disputes? [Exceptions 3-40]" As the other two issues raised by Respondent's Exceptions were rendered moot when the Board issued its decision in *Boeing Company*,¹³ it only remains for the Board's new test adopted in *Boeing Company* to be applied to the initial question.

Similarly, in Case 32-CA-128085, the Board held in a 2-1 decision rendered under the *Lutheran Heritage* test that the two arbitration agreements interfered with employees' right to file charges with the Board. *SolarCity Corporation*, 363 NLRB No. 83, slip op. p. 4. SolarCity petitioned for review of this determination, among other issues, to the Fifth Circuit Court of Appeals. On May 29, 2018, the NLRB filed an Unopposed Motion Of The National Labor Relations Board To Remove This Case From Abeyance, Summarily Grant The Company's Petition for Review In Part And Remand To The Board The Remainder Of The Case, a true and correct copy of which is attached to this Response as Appendix A.¹⁴ On August 15, 2018, the Fifth Circuit issued an Order granting each request in the NLRB's May 29, 2018 Motion, and in particular, remanded to the Board the finding of a violation based upon the language of the two arbitration agreements interfering with employees' rights to file a charge with the Board.¹⁵ Thus, in Case 32-CA-128085, the remaining task before the Board is also to apply the *Boeing Company* standard to determine whether the arbitration agreement language interferes with the right to file an NLRB charge.

¹³ The remaining two questions presented ask whether the ALJ erred in applying the since overruled "reasonably construed" test of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and whether the Board should – as it subsequently did in *The Boeing Company*, 365 NLRB No. 154 (2017) - overrule the test established in *Lutheran Heritage*, and instead adopt another test.

¹⁴ SolarCity respectfully requests the Board take administrative notice of the NLRB's May 29, 2018 Motion in *SolarCity Corporation v. National Labor Relations Board*, Fifth Circuit Case 16-60001 (2016). See Federal Rules of Evidence, Rule 201.

¹⁵ A true and correct copy of the Fifth Circuit's August 15, 2018 Order is attached as Appendix B, and is accessible on the Board's website at <https://www.nlr.gov/case/32-CA-128085>. SolarCity respectfully requests the Board take administrative notice of this Order in *SolarCity Corporation v. National Labor Relations Board*, Fifth Circuit Case 16-60001 (2016). See Federal Rules of Evidence, Rule 201.

Furthermore, as the proceedings in both Cases 32-CA-128085 and 32-CA-182523 were conducted on stipulated records (see *SolarCity Corporation*, 363 NLRB No. 83, slip op. p. 13 [ALJ granted joint motion to waive hearing and submit the case on joint stipulation of facts] and the Joint Motion in the instant case), both cases are on the same procedural footing before the Board. As a result, the Board would rely upon each stipulated record in similarly applying the *Boeing Company* test in each case. A remand of the instant case to the Administrative Law Judge is entirely unnecessary to accomplish this task.

D. The Objectives Of Judicial Economy, Including Efficient Use Of Both NLRB Agency and SolarCity Resources And Time, As Well As Ensuring Consistency In The Results Of Board Proceedings, Compel Retaining This Case At The Board And Not Remanding It To The ALJ

The foregoing discussion demonstrates that objectives of judicial economy will be accomplished by retaining the instant case before the Board and addressing the identical alleged violation with respect to the language in SolarCity's six arbitration agreements under the new *Boeing Company* test in one determination.¹⁶ By keeping this case at the Board, along with the proceeding remanded from the Fifth Circuit, the Board will conserve not only its limited agency time and financial resources, but those of SolarCity as well. If, however, Case 32-CA-180523 is instead remanded to the ALJ, it will result in duplication of the NLRB's efforts in analyzing the arbitration agreements under the current legal standard, and will similarly increase the expense and amount of time to be expended by Respondent, which has already briefed the case once to the ALJ and filed exceptions and a supporting brief to the Board. Further, proceeding as Respondent is requesting will ensure consistency in the NLRB's determinations in these proceedings.

II. CONCLUSION

For all the foregoing reasons, Respondent SolarCity submits this case should not be remanded to the ALJ.¹⁷ Rather, instant Case 32-CA-180523 should remain at the Board in order

¹⁶ Should the Board desire the parties to submit briefs regarding the application of the *Boeing Company* standard to the language of Respondent's arbitration agreements, SolarCity is prepared to do so.

¹⁷ It is noted that Counsel for the General Counsel's Response to the Board's Notice to Show

that the issue of whether Respondent's arbitration agreements interfere with employees' access to file a charge with the Board will be economically, efficiently, and consistently resolved in one all-encompassing disposition.

Dated: November 5, 2018

Respectfully submitted,

GORDON A. LETTER
LITTLER MENDELSON, PC

By 
GORDON A LETTER

Attorneys for Respondent
SOLARCITY CORPORATION

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Cause, received by the undersigned on Friday, November 2, 2018, indicates that Counsel for the General Counsel also opposes remand to the ALJ. Further, based upon the position of the General Counsel set forth in a brief on remand to the Board in *Prime Healthcare*, 21-CA-133781, attached to Counsel for the General Counsel's Response, the relevant provisions in all six of SolarCity's arbitration agreements addressed in Cases 32-CA-180523 and 32-CA-128085, quoted above, are lawful policies under Category 2 of the *Boeing Company* test.

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SOLARCITY CORPORATION)	
)	
Petitioner)	
)	
v.)	No. 16-60001
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
)	

UNOPPOSED MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO REMOVE THIS CASE FROM ABEYANCE, SUMMARILY GRANT THE COMPANY’S PETITION FOR REVIEW IN PART AND REMAND TO THE BOARD THE REMAINDER OF THE CASE

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court to remove this case from abeyance, summarily grant review of that portion of the Board’s Order governed by the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), and remand to the Board the remainder of the case.

1. In the Decision and Order under review, the Board found that SolarCity Corporation (“the Company”) violated the National Labor Relations Act by maintaining an agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial. *SolarCity Corp.*, 363 NLRB 83,

slip op. at 2-4 (2015). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (Jan. 13, 2017).

The Board separately found, under its analytical framework laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that the Company violated the Act by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file unfair-labor-practice charges with the Board. *SolarCity Corp.*, 363 NLRB 83, slip op. at 4-6 (2015).

2. On September 26, 2016, this Court placed this case in abeyance pending the Supreme Court's decision in *NLRB v. Murphy Oil, USA, Inc.*, No. 16-307, *Lewis v. Epic Sys. Corp.*, No. 16- 285; and *Morris v. Ernst & Young, LLP*, No. 16-300.

3. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims.¹ The Board acknowledges that under that decision, the Board's finding that the Company unlawfully maintained the Agreement is not enforceable, and the Board is willing to submit to partial summary grant of review of the relevant portion of its Order.

¹ The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP v. Morris*, No. 16-300.

4. On December 14, 2017, the Board issued *The Boeing Company*, which “overrule[d] the *Lutheran Heritage* ‘reasonably construe’ standard” and announced a new test to replace it. 365 NLRB No. 154, 2017 WL 6403495 at *2 (Dec. 14, 2017). *Boeing*’s rejection of the “reasonably construe” standard eliminates the Board’s rationale for its finding at issue here that the Company’s agreement restricts employees’ right to file unfair-labor-practice charges with the Board. The issue of whether the agreement restricts that right under *Boeing*’s framework is a question for the Board to answer in the first instance. Accordingly, the Board respectfully moves this Court to sever and remand that issue to the Board.

5. Counsel for the Company does not oppose this motion.

WHEREFORE, the Board respectfully requests that the Court remove this case from abeyance, summarily grant review of that portion of the Board’s Order governed by the Supreme Court’s decision in *Epic Systems*, and sever and remand

to the Board the remainder of the case.

Respectfully submitted,

/s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, S.E.

Washington, D.C. 20570

Dated at Washington, D.C.
this 29th day of May 2018

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SOLARCITY CORPORATION)	
)	
Petitioner)	
)	
v.)	No. 16-60001
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 611 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 29th day of May 2018

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SOLARCITY CORPORATION)	
)	
Petitioner)	
)	
v.)	No. 16-60001
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
)	

CERTIFICATE OF SERVICE

I certify that on May 29, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
this 29th day of May 2018

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60001

SOLARCITY CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent



A True Copy
Certified order issued Aug 15, 2018

John W. Coyle
Clerk, U.S. Court of Appeals, Fifth Circuit

Petition for Review of an Order of the
National Labor Relations Board

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Respondent's unopposed motion to remove this case from abeyance is GRANTED.

IT IS FURTHER ORDERED that Respondent's unopposed motion to summarily grant the petition for review, in part, is GRANTED.

IT IS FURTHER ORDERED that Respondent's unopposed motion to remand the remainder of this case to the National Labor Relations Board is GRANTED.

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of November 2018, I e-filed the Respondent SolarCity Corporation's Response to the Board's Notice to Show Cause 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 Response to the Board's Notice to Show Cause by electronic mail upon the following:

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