

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WINDSOR SACRAMENTO ESTATES, LLC
d/b/a WINDSOR CARE CENTER OF
SACRAMENTO

and

Case 20-CA-196183

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 2015

COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE
TO ORDER TO SHOW CAUSE

The Complaint in this matter issued October 31, 2018. The sole allegation of the Complaint alleges that Windsor Sacramento Estates, LLC d/b/a Windsor Care Center of Sacramento (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an Alternative Dispute Resolution Policy (ADR Policy) that would reasonably be understood by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the National Labor Relations Board (the Board).

On June 25, 2019, the Board issued a Notice to Show Cause why summary judgment should not be granted in the instant case. Counsel for the General Counsel submits that the Complaint should be dismissed as a matter of law for the reasons outlined in its February 13, 2019 Motion for Summary Judgment. Additionally, in support of said Motion, Counsel for the General Counsel submits the following:

1. No hearing is necessary to establish the Employer's business justifications for maintaining the ADR Policy. Under *The Boeing Company*, 365 NLRB No. 154, slip op. (2017), an employer's business justifications for maintaining a rule should be considered only if the rule, when reasonably interpreted, would prohibit or interfere with the exercise of rights

protected by the Act. Here, Respondent's ADR Policy would not be reasonably interpreted to prohibit or restrict employees from pursuing Board charges, because the policy itself includes a clause explicitly stating that it does not preclude employees from filing Board charges. Since the ADR Policy, when reasonably interpreted according to its plain language, does not prohibit or interfere with the exercise of rights protected by the Act, the Employer's business justifications for the policy are irrelevant under *Boeing*.

2. An employee's hypothetical inability to read the ADR Policy's savings clause because the employee cannot read English is not a valid basis for finding the policy unlawful. Indeed, if an employee is unable to read the ADR Policy's savings clause because the employee cannot read English, then the employee would also not be able to read the portions of the ADR Policy that the Charging Party contends would be interpreted to prohibit or restrict employees from filing or pursuing unfair labor practice charges with the Board.
3. Several of the Charging Party's arguments are wholly irrelevant to whether the ADR Policy would be reasonably interpreted to prohibit or restrict employees from filing or pursuing unfair labor practice charges with the Board, including: the ADR Policy would prohibit a union from bringing a claim before a state court or agency; the Federal Arbitration Act does not apply to the ADR Policy; California Private Attorney General Act claims are not subject to mandatory arbitration; the ADR Policy is unconscionable because Respondent agrees to bear the arbitrator's fee and expenses; the ADR Policy forces employees to arbitrate claims they do not wish to resolve. As these arguments have no bearing whatsoever on whether employees would reasonably interpret the ADR Policy to prohibit or restrict them from pursuing Board charges, the Board should not consider these arguments when deciding the merits of the summary judgment motions.

4. The Regional Director's issuance of the Complaint on October 31, 2018 and Counsel for the General Counsel's position that the Complaint should be dismissed are not irreconcilable. Nor are they inappropriate. The Board has yet to decide the lawfulness of mandatory arbitration language under the standard articulated in *The Boeing Company*, above, which substantially changed the test for analyzing the lawfulness of facially-neutral rules. Prior to *Boeing*, under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board routinely found mandatory arbitration policies similar to the ADR Policy to be unlawful by construing all purported ambiguities against the drafter-employer. *See, e.g. SolarCity Corp.*, 363 NLRB No. 83, slip op. at 6 (2015); *Bloomington's, Inc.*, 363 NLRB No. 172 slip op. at 4-5 (2016); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 2-3 (2016); *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 (2016). However, *Boeing* rejected *Lutheran Heritage's* approach of construing ambiguities in this manner, noting that the approach effectively declared any policy that *could* be read to prohibit Section 7 activity as unlawful, regardless of whether employees reasonably *would* read it that way. *Boeing*, above, at fn. 43. Indeed, *Boeing* specifically reproached declaring policies unlawful "solely because they were ambiguous in some respect." *Boeing*, above, at 2. Accordingly, it was appropriate for the Regional Director to issue Complaint based upon the Board's prior decisions, which have not been expressly overruled, finding policies similar to the ADR Policy to be unlawful, while arguing that the Complaint allegation should now be analyzed under *Boeing* and dismissed under the new *Boeing* standard. Certainly, if the *Boeing* standard applies to this case, the General Counsel's position, as set forth in its Motion for Summary Judgment, is that the ADR Policy's ambiguities would not

be reasonably understood by employees to prohibit or restrict them from filing or pursuing unfair labor practice charges with the Board.

DATED AT San Francisco, California, this 9th day of July, 2019.

Respectfully submitted,

/s/ Tracy Clark

Tracy Clark
Counsel for the General Counsel
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-
1735