

1 DAVID A. ROSENFELD, Bar No. 058163
2 WEINBERG, ROGER & ROSENFELD
3 A Professional Corporation
4 1001 Marina Village Parkway, Suite 200
5 Alameda, California 94501
6 Telephone (510) 337-1001
7 Fax (510) 337-1023
8 E-Mail: drosenfeld@unioncounsel.net

9 Attorneys for Charging Party, UNITED FOOD AND
10 COMMERCIAL WORKERS INTERNATIONAL UNION

11 UNITED STATES OF AMERICA

12 NATIONAL LABOR RELATIONS BOARD

13 UNITED FOOD AND COMMERCIAL
14 WORKERS INTERNATIONAL UNION,

No. 31-CA-077074 & 31-CA-080734

15 Charging Party,

**CHARGING PARTY'S BRIEF IN
SUPPORT OF CROSS-EXCEPTIONS
TO DECISION OF ADMINISTRATIVE
LAW JUDGE**

16 And

17 FRESH & EASY NEIGHBORHOOD
18 MARKET,

19 Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF AUTHORITIES

I.	INTRODUCTION	1
II.	THE <i>LUTHERAN HERITAGE VILLAGE-LIVONIA</i> RULE SHOULD BE OVERRULED	1
III.	THE RULE IS IMPERMISSIBLE BECAUSE IT RESTRICTS LAWFUL USE OF CUSTOMER NAMES FOR SEEKING CUSTOMER SUPPORT IN ANY DISPUTE OVER WORKING CONDITIONS	5
IV.	THE REMEDY	8
V.	A BROAD ORDER AGAINST FRESH & EASY IS A NECESSARY PART OF ANY REMEDY.....	9
VI.	CONCLUSION.....	12

1 **TABLE OF AUTHORITIES**

2 **Federal Cases**

3 *Compuware Corp. v. NLRB*,
4 134 F.3d 1285 (6th Cir. 1998)7

5 *Eastex, Inc. v. NLRB*,
6 437 U.S. 556 (1987).....7

7 *Fresh & Easy Neighborhood Market, Inc.*,
8 468 F.App'x 1 (D.C. Cir. Mar. 5, 2012) (unpublished), that same Court
9 summarily10

10 *George A. Hormel & Co. v. NLRB*,
11 962 F.2d 1061 (D.C. Cir. 1992)8

12 *Golden State Bottling Co. v. NLRB*,,
13 414 U.S. 160 (1973).....11

14 *National Labor Relations Board v. Fresh & Easy Neighborhood Market, Inc.*,,
15 Case No. 2:11-cv-10070-CBM11

16 *Republic Aviation v. NLRB*,
17 324 U.S. 793 (1945).....3

18 *Sierra Publ'g Co. v. NLRB*,
19 889 F.2d 210 (9th Cir.1989)7

20 **NLRB Cases**

21 *2 Sisters*,
22 357 NLRB No. 168 (2011)11

23 *Allied Aviation Serv. Co.*,
24 248 NLRB 229 (1980)7

25 *Ark Las Vegas Rest. Corp.*,
26 343 NLRB 1281 (2004)1

27 *Cincinnati Suburban Press*,
28 289 NLRB 966 (1988)7

29 *Costco Wholesale Corp.*,
30 359 NLRB No. 106 (2012)6

31 *DirecTV*
32 359 NLRB No. 54 (2013)5

33 *Double D Construction Group, Inc.*,
34 339 NLRB 303 (2003)3

1	<i>Emarco, Inc.,</i>	
2	284 NLRB 832 (1987)	7
3	<i>Firestone Tire & Rubber Co.,</i>	
4	238 NLRB 1323 (1978)	8
5	<i>Fresh & Easy Neighborhood Market,</i>	
6	356 NLRB No. 85 (2011)	9, 10
7	<i>Fresh & Easy Neighborhood Market, Inc.,</i>	
8	356 NLRB No. 90 (2011)	9, 10
9	<i>Fresh & Easy,</i>	
10	358 NLRB No. 65 (2011)	7, 9
11	<i>Handicabs, Inc.,</i>	
12	318 NLRB. 890 (1995)	7
13	<i>Lafayette Park Hotel,</i>	
14	326 NLRB 824 (1998)	1, 3
15	<i>Lutheran Heritage Village-Livonia,</i>	
16	343 NLRB 646 (2004)	1, 2, 5, 12
17	<i>MasTec Advanced Techs.,</i>	
18	357 NLRB No. 17 (2011)	8
19	<i>Norris/O'Bannon,</i>	
20	307 NLRB 1236 (1992)	4
21	<i>Paceco,</i>	
22	237 NLRB 299 (1978)	4
23	<i>Sacramento Union,</i>	
24	291 NLRB 540 (1988)	8
25		
26	<u>State Statutes</u>	
27	CCP §1013	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

I. INTRODUCTION

As this case illustrates, it is time for the Board to overrule *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

There are two aspects of the rule in question before the Board in these cross-exceptions. The first aspect is whether the disputed rule can be read by any employee or some employees to prevent them from disclosing employee information. The second aspect is whether it can also be interpreted to prevent the employees from disclosing customer information which would be useful or relevant to a campaign to seek customer support for a dispute over wages and working conditions.

II. THE LUTHERAN HERITAGE VILLAGE-LIVONIA RULE SHOULD BE OVERRULED

The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine for determining when employer maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB 824 (1998). *See also Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) (any ambiguity in a rule that restricts concerted activity can be construed against the employer).

The Board’s application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that some employees may be able to read the rule as not reaching Section 7 activity allows Fresh & Easy to restrict the Section 7 rights of those who can reasonably read the rule as reaching Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest in such activity. They may assert their right to “refrain from such activity.” But those who choose to engage in such protected activity have their conduct chilled if not prohibited. The Board’s rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity.

///

1 In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

2 Where, as here, the rule does not refer to Section 7 activity, we will not
3 conclude that a reasonable employee would read the rule to apply to such
4 activity simply because the rule *could* be interpreted that way. To take a
5 different analytical approach would require the Board to find a violation
6 whenever the rule could be conceivably be read to cover Section 7 activity,
7 even though that reading is unreasonable. We decline to take that
8 approach.

6 *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

7 This doctrine has created confusion and uncertainty in the application of rules. Moreover,
8 it is an illogical statement. If the “rule could be interpreted that way [to prohibit section 7
9 activity],” the rule should be unlawful. We are not suggesting that if that “reading is
10 unreasonable” it should violate the Act. Only if the rule can be reasonably read to interfere with
11 Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is
12 ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity,
13 it should be unlawful.

14 The Board’s prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity
15 against the employer. This has been the consistent application in many areas of law including the
16 Board’s application of employer-created rules. After all, the employer has control over what it
17 says, and it can implement language which is not vague or ambiguous. Only the employer
18 benefits from chilling and restricting Section 7 activity.

19 A worker is not at fault if the employer makes a statement which is ambiguous and could
20 affect or chill Section 7 rights. The employer statement should be construed against the
21 employer. Where there is any reasonable interpretation of the rule that could interfere with
22 Section 7 activity, the rule should be deemed unlawful.

23 *Lutheran Heritage Village-Livonia* has become a rule by which the Board ignores the
24 illegal yet reasonable interpretation as long as there is a reasonable interpretation that is not
25 unlawful. The Board has turned the law on its head. Even though some employees may
26 reasonably interpret a rule to interfere with their Section 7 rights, the fact that others may not
27 interpret the rule to interfere with section 7 rights will govern. Those few have the right to engage
in protected concerted activity. Even 2 have that right even though the rest may not care.

1 The *Lutheran Heritage Village-Livonia* application created an interpretation of employer
2 rules to be applied from the employer perspective rather than from the view of a worker. Where
3 the worker could read any reasonable interpretation into the rule that would prohibit Section 7
4 activity, it is overbroad as to that worker or a group of workers. The fact that some workers
5 might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact
6 that at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus
7 the rule would chill those activities.

8 We quote at length the dissent and ask this Board to return to the view of the dissent:

9 In *Lafayette Park Hotel*, supra at 825, the Board recognized that
10 determining the lawfulness of an employer's work rules requires balancing
11 competing interests. The Board thus relied upon the Supreme Court's
12 view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798
13 (1945), that the inquiry involves “working out an adjustment between the
14 undisputed right of self-organization assured to employees under the
15 Wagner Act and the equally undisputed right of employers to maintain
16 discipline in their establishments.” 326 NLRB at 825. While purporting to
17 apply the Board's test in *Lafayette Park Hotel*, the majority loses sight of
18 this fundamental precept. Ignoring the employees' side of the balance, the
19 majority concludes that the rules challenged here are lawful solely because
20 it finds that they are clearly intended to maintain order in the workplace
21 and avoid employer liability. The majority's incomplete analysis belies the
22 objective nature of the appropriate inquiry: “whether the rules would
23 reasonably tend to chill employees in the exercise of their Section 7 rights.”

24 Our colleagues properly acknowledge that even if a “rule does not
25 explicitly restrict activity protected by Section 7,” it will still violate
26 Section 8(a)(1) if—among other, alternative possibilities—“employees
27 would reasonably construe the language to prohibit Section 7 activity.” On
this point, of course, the established test does not require that the *only*
reasonable interpretation of the rule is that it prohibits Section 7 activity.
To the extent that the majority implies otherwise, it errs. Such an approach
would permit Section 7 rights to be chilled, as long as an employer's rule
could reasonably be read as lawful. This is not how the Board applies
Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB
303, 304 (2003) (“The test of whether a statement is unlawful is whether
the words could reasonably be construed as coercive, whether or not that is
the only reasonable construction”).⁴

 The majority asserts that it has considered the employees' side of the
balance, in that it has found that the purpose behind the Respondent's
rules—to maintain order and protect itself from liability—is so clear that it
will be apparent to employees and thus could not reasonably be
misunderstood as interfering with Section 7 activity. Although the
Respondent's assertedly pure motive in creating such rules may be crystal
clear to our colleagues, it may not be as obvious to the Respondent's
employees, especially in light of the other unlawful rules maintained by the
Respondent. Rather, for reasons explained below, we find that the
challenged rules are facially ambiguous. The Board construes such

1 ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236,
2 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

3 *Id.* at 650.

4 This problem and the need to overrule *Lutheran Heritage Village-Livonia* are illustrated
5 here.

6 The ALJ failed to find the following language unlawful:

7 Keep customer and employee information secure. Information must be
8 used fairly, lawfully, and only for the purpose for which it was obtained.

9 The ALJ correctly recognized that this language was within the context of other language
10 concerning confidentiality and data protection. The language, of course, emphasized the need to
11 keep that information confidential and not to use the information for any purpose that would harm
12 any employer interest.

13 The ALJ then went on to conclude that “there is nothing in the Confidential and Data
14 Protection section that defines what type of information or data is subject to the confidentiality
15 safe guards.” (ALJD p. 4:14-15). That lack of specificity is the precise error in applying *Lutheran*
16 *Heritage Village-Livonia*. The employee must speculate as to what information is contained
17 within the rule. The employee who wants to disclose the information would necessarily read the
18 language as a prohibition.

19 The ALJ then goes to attempt to read the word “collect” as modifying the language to
20 suggest that it is limited to “customers’ credit information, employee social security numbers,
21 medical information and other such information which is customarily maintained in employee’s
22 personnel files.” How he got to that decision is a mystery. Employers “collect” information
23 about wages, hours, and working conditions on individual employees, which is in their personnel
24 files. Such information is also available elsewhere. Employers collect information on groups of
25 employees that is relevant to wages, hours, and working conditions. But the word “collect”
26 modifies only the first bullet point under the “Do” list in the Confidentiality and Data Protection
27 section. It is notably absent from the second bullet point, which requires employees to “[k]eep
customer and employee information secure....”

1 The ALJ offers no explanation of how he got to his conclusion or why he thinks the word
2 “collect” somehow limits the language to information which he believes is irrelevant to wages,
3 hours, and working conditions. That conclusion was not only a leap of logic, but a leap of
4 reading ability.

5 Finally, the “Don’t” bullet point is not limited. It prohibits the “[r]elease” of information
6 without a qualification.

7 The employer could solve the problem by expressly stating that this provision does not
8 apply to information about wages, hours, or working conditions. By failing to make that
9 exception clear, Fresh & Easy necessarily chills some employees in the exercise of their Section 7
10 rights.

11 **III. THE RULE IS IMPERMISSIBLE BECAUSE IT RESTRICTS LAWFUL USE OF**
12 **CUSTOMER NAMES FOR SEEKING CUSTOMER SUPPORT IN ANY DISPUTE**
13 **OVER WORKING CONDITIONS**

14 The ALJ also rejected the Union’s argument that this rule would preclude release of
15 customer information, even collected customer information for purposes of lawful protected
16 activity. *See* ALJD 4:n.2.

17 The rule is invalid because it prohibits employees from disclosing information about
18 customers. In the *DirectTV* case, the Board declined to resolve a similar question. *See* 359
19 NLRB No. 54, p. 4 n.15 (2013). Like the previous discussion, the analysis is governed by
20 *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Here, the language on its face is
21 unlawful.

22 Fresh & Easy operates grocery stores. It plainly has customer information. Employees
23 undoubtedly learn the names of regular customers. That customer information may extend to at
24 least the full names and shopping habits of customers. Most importantly, employees will know
25 the identity and names of customers, particularly regular customers.

26 The Code of Conduct, which is attached as Joint Exhibit 2, describes the importance of
27 maintaining the confidentiality of customer information:

///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

We have an important duty to our customers and our employees to respect the information we hold about them to ensure it is protected and handled responsibly. The trust of our staff and customers is very important, so we take our obligations under relevant data protection and privacy laws very seriously. We should also regard all information concerning our business as an asset, which, like other important assets, has a value and needs to be suitably protected.

p. 16 JT. Ex. 2

The same provision makes it clear that employees are prohibited from “[r]eleas[ing] information, without making sure that the person that you are providing it to is rightfully allowed to receive it....”

Fresh & Easy demands that customer information be maintained in confidence. Such information cannot be disclosed to third persons including union organizers or employees of other employers. It cannot be disclosed among employees who don’t come into that possession of that customer information.

In *Costco Wholesale Corporation*, 358 NLRB No. 106 (2012) the Board held that employees could disclose names of other employees including their address when they came into possession of that information properly. Slip opinion pages 15-16. The same should be true of customers. We are not suggesting that an employee has a right to steal a customer list. But to the extent workers know the names of customers, that information can be disclosed.

Employees have the right to approach customers and to ask them to support their right to organize. If employees want to take time off and stand in the public areas outside the store and ask for customer support, they are free to do so. Such activity is protected. They can lawfully disclose to Union supporters or employees of other employers, who may support their cause, the names of customers in order to more effectively ask for support. Indeed, approaching customers and asking for their support has long been a facet of economic pressure. Employees may disclose shopping habits to more effectively approach customers for support.

///
///

1 In *Fresh & Easy*, 358 NLRB No. 65 (2011), Fresh & Easy asked employees to distribute
2 literature to customers. It plainly had to let employees know who the customers were or they had
3 to know beforehand who customers were. In that case, the employer used customer information
4 in an effort to respond to protected concerted activity. If the employer has the right to use
5 customer information to seek support for management, it should not prohibit employees from
6 similarly using customer information.

7 It is well established that “[e]mployees have the right to engage in concerted
8 communications with third parties regarding legitimate employee concerns, such as terms and
9 conditions of employment and grievances.” *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291
10 (6th Cir. 1998) (*en banc*); citing *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 216-17 (9th Cir.1989)
11 (rule prohibiting complaint to clients unlawful). An employee’s communication with a third
12 party, including an employer’s clients or customers, “only loses its protected status if the appeal
13 does not relate to the labor practices of the employer or are maliciously false.” *Id.*, citing
14 *Handicabs, Inc.*, 318 NLRB. 890, 896 (1995), *enforced*, 95 F.3d 681, 684-85 (8th Cir.1996).

15 Because boycotting or seeking support is lawful protected activity, the employer can’t
16 discipline employees by enforcing a rule that effectively prohibits them from seeking support or
17 even engaging in boycotting. The employees don’t have to go so far. They simply have the right
18 to ask customers to support their lawful protected concerted activity. This provision will prohibit
19 such activity. ‘As a general proposition, employees do not “lose their protection under the
20 ‘mutual aid or protection’ clause [of Section 7 of the Act] when they seek to improve terms and
21 conditions of employment or otherwise improve their lot as employees through channels outside
22 the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565
23 (1987).’ *Handicabs, Inc.*, 318 NLRB 890, 896 (1995) (rule prohibiting contacting clients
24 overbroad). *See also Emarco, Inc.*, 284 NLRB 832 (1987) (discharge of workers for contacting
25 general contractor unlawful); *Allied Aviation Serv. Co.*, 248 NLRB 229 (1980) (discharge of
26 employee for writing letters to customers unlawful); *Cincinnati Suburban Press*, 289 NLRB 966,
27 968 (1988) (discharge of employee for publishing article critical of employer unlawful);

1 *Sacramento Union*, 291 NLRB 540, 542 (1988) (discharge of newspaper employees for writing
2 letter to advertisers unlawful); and *Firestone Tire & Rubber Co.*, 238 NLRB 1323, 1324 (1978).

3 Most recently, the Board found that an employer unlawfully terminated a group of
4 technicians who publicized their dispute. *MasTec Advanced Techs.*, 357 NLRB No. 17 (2011).
5 Publicizing a labor dispute, even if the publicity calls for a boycott, is protected. *George A.*
6 *Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992).

7 The Board must face this issue squarely. Employees have the right to have and use the
8 names and shopping habits and even addresses of customers for non-commercial activity,
9 including seeking their support for Union or protected concerted activity. If they have the right to
10 boycott, they cannot be prohibited from knowing or using the names of customers for that
11 purpose.

12 For these reasons, the decision of ALJ should be reversed, and the rule prohibiting
13 disclosure of information about customers should be held to be invalid.

14 IV. THE REMEDY

15 Charging Party seeks additional remedies.

16 First, the Notice should be posted by the employer for the length of time from when the
17 complaint issued until when the notice posting occurs. The posting for a mere sixty days is
18 inadequate. It will be years until a notice is posted by this employer. The employer will gain the
19 advantage of posting it years later after the employees who were subject to the unlawful rule have
20 long left. In order to discourage Respondents in Board cases from delaying, the Board should
21 change its normal practice to require the posting of a notice to be for the same length of time
22 between when the complaint issues and the notice posting begins. We suggest using the date the
23 complaint issues so as to provide a definite date. If the employer voluntarily settles before
24 complaint, the standard sixty day notice period may be appropriate.

25 Alternatively the Board should extend the Notice period to 120 or 180 days or some much
26 lengthier time. Alternatively, the Board should take the opportunity to remand this to the
27 Regional Director for determination of the length of appropriate posting.

1 Any notice should be mailed to all employees who were subject to this unlawful rule.
2 Because there is a substantial turnover, employees who have left the employment of Fresh &
3 Easy should receive a notice in the mail.

4 Any mailing should include both the appropriate notice and the decision of the Board. To
5 simply receive a notice in the mail tells the employee nothing. They should get the background
6 of why the notice is being mailed by having the decision mailed to them.

7 The employer should be prohibited from mailing the notice by Fedex, a non-union
8 employer. The notice should be mailed either by the United States Postal Service or by United
9 Parcel Service, both of which are Union.

10 **V. A BROAD ORDER AGAINST FRESH & EASY IS A NECESSARY PART OF**
11 **ANY REMEDY**

12 The Board found in *Fresh & Easy Neighborhood Market*, 358 NLRB No. 65 (2011), that
13 Fresh & Easy had violated the Act. The ALJ recommended a broad order, but the Board rejected
14 it without comment.

15 The ALJ issued her decision on October 18, 2011. At the time the Administrative Law
16 Judge issued her decision in the above-referenced case, the Board had already decided two cases
17 finding that this employer had violated the Act. In *Fresh & Easy Neighborhood Market*, 356
18 NLRB No. 85 (2011) and *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90 (2011),
19 the Board found various violations of the Act.

20 In both of these cases there was management involvement from the corporate office. For
21 example, in *Fresh & Easy*, 356 NLRB No. 90, there was un-rebutted evidence that the store
22 manager had been provided the unlawful no-solicitation rule by corporate. “Hardin asked if the
23 rule was Tillinghast’s or did it come from corporate, and Tillinghast answered it was from
24 corporate.” 356 NLRB No. 90 at p. 3. Also: “Kalilimonku credibly testified that Tillinghast said
25 that he had received word from corporate about the union representatives, that they would not be
26 allowed in the store and that the employees were not allowed to talk about the union in the store
27 or with each other.” *Id.* Thus, the unlawful rule was the result of direction from corporate
headquarters.

1 In the same case, the Board rejected the claim that intervention by the corporate human
2 relations person Paula Agwu effectively repudiated the unlawful conduct. *See Id.* at p. 1 n.2. Her
3 involvement again shows that corporate offices control labor relations on the store level. Thus, in
4 summary, in that case, there was corporate control and, indeed, creation of the unlawful no-
5 solicitation rule imposed in the store.

6 In *Fresh & Easy*, 356 NLRB No. 85, the Board found that a corporate-wide rule
7 maintained by Fresh & Easy was unlawful. The ALJ also noted in the course of his decision the
8 extensive involvement of Nahal Yousefian, the employer's director of employee relations. Thus
9 again, there was direct corporate involvement in that case. Furthermore, the unlawful rule was
10 imposed company-wide.

11 At the time the ALJ decided the present case and exceptions were filed, Fresh & Easy was
12 refusing to comply with the Board's Decision and Orders. It simply thumbed its nose at the
13 Board.

14 Since then, both decisions have been summarily enforced by the District of Columbia
15 Circuit. *Fresh & Easy*, 356 NLRB No. 90, was summarily enforced in Case No. 11-1053 in the
16 Court of Appeals for the District of Columbia Circuit. Judgment in that case was filed on March
17 13, 2012. *Fresh & Easy Neighborhood Mkt., Inc.*, 459 F.App'x 1 (D.C. Cir. Mar. 13, 2012)
18 (unpublished).

19 In *Fresh & Easy Neighborhood Market, Inc.*, 468 F.App'x 1 (D.C. Cir. Mar. 5, 2012)
20 (unpublished), that same Court summarily enforced the Board's Order in *Fresh & Easy*, 356
21 NLRB No. 85, in a decision filed March 5, 2012.

22 Thus in both cases, even though the Board had issued its Decision and Orders, Fresh &
23 Easy thumbed its nose at the Board and sought review in the District of Columbia Circuit. The
24 District of Columbia Circuit summarily denied both petitions and enforced the Board's Decisions
25 and Orders in full.

26 This refusal to comply with the Board's decision in two cases where enforcement was
27 necessary should demonstrate that this employer is an intentional and recidivist violator of the
Act. The enforcement of these two decisions was not before the Board when it, without

1 explanation, refused to adopt the broad order.

2 There is further evidence of Fresh & Easy's recidivist conduct.

3 In a pending case, 21-CA-39645, involving Fresh & Easy Neighborhood Market, Inc.,
4 Charging Party served a subpoena on Fresh & Easy, which it failed to comply with and failed to
5 file a Motion to quash. The General Counsel was then forced to initiate proceedings in the
6 District Court to compel Fresh & Easy to comply with the Subpoena. That matter is entitled
7 *National Labor Relations Board v. Fresh & Easy Neighborhood Market, Inc.*, Case No. 2:11-cv-
8 10070-CBM in the United States District Court, Central District of California. The Court heard
9 the matter and issued an order on April 4, 2012. Fresh & Easy has filed an appeal to the Ninth
10 Circuit, but Fresh & Easy does not have a stay. This litigation proves again that Fresh & Easy is
11 a willful and contemptuous violator of the Act. Even when ordered to comply with the subpoena
12 by the ALJ, the employer refuses and forces an enforcement action. It has yet to comply with the
13 Subpoena.

14 In addition, as noted above, Region 21 has issued a complaint in case number 21-CA-
15 39649. The complaint alleges the maintenance of unlawful company-wide rules. We recognize,
16 however, that no decision has been issued. The request for a broad order will be before the ALJ
17 in that case.

18 In Case Nos. 21-CA-038915 and 21-CA-038932, Region 21 has issued Complaint
19 alleging that Fresh & Easy is the successor to 2 Sisters and must remedy the Board's decision in
20 *2 Sisters*, 357 NLRB No. 168 (2011) under *Golden State Bottling Co. v. NLRB*, 414 U.S. 160
21 (1973). Fresh & Easy has resisted this remedy.

22 There is no charge where complaint issued where Fresh & Easy has entered into an
23 informal settlement. Fresh & Easy has litigated every case and lost in whole or in part every case.

24 This case is yet another example of violations of the law by this employer. It is
25 furthermore egregious because the employer is resisting on what is a clear case of over breadth.

26 ///

27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

VI. CONCLUSION

For the reasons suggested above, these exceptions should be granted. The rule in dispute should be found to be invalid because it prohibits disclosure of information about wages, hours, and working conditions. It furthermore should be found invalid because it prohibits disclosure of information about customers which could be used for lawful protected concerted activity. Finally, the Board should overrule *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for the reasons discussed above.

Furthermore, the remedies in this case should include expanded remedies as discussed above.

Dated: April 30, 2013

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /S/ DAVID A. ROSENFELD
 DAVID A. ROSENFELD
 Attorneys for Charging Party,
 UNITED FOOD AND COMMERCIAL
 WORKERS INTERNATIONAL UNION

131213/712981

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 30, 2013, I served the following documents in the manner described below:

**CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO DECISION
OF ADMINISTRATIVE LAW JUDGE**

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Joseph A. Turzi
Coleen Hanrahan
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, N.W., Suite 400
Washington, D.C. 20036
Joe.turzi@dlapiper.com
Colleen.hanrahan@dlapiper.com
Fax(202)799-5000

Nicole Buffalano
Heidi Carretero
NLRB, Region 31
11150 West Olympic Boulevard, Suite 700
Los Angeles, CA 90064-1824
(310) 235-7420 Fax
Nicole.Buffalano@nlrb.gov
Heidi.Carretero@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 30, 2013, at Alameda, California.

/s/ Katrina Shaw

Katrina Shaw