JD(ATL)–06–14
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SF MARKETS, LLC d/b/a
SPROUTS FARMERS MARKET

and **Case 21–CA–099065**

LAURA CHRISTENSEN, an Individual

and **Case 21–CA–104677**

JANA MESTANEK, an Individual

Ami Silverman, Esq.,
for the General Counsel.
Daniel B. Pasternak, Esq. (Squire Sanders (US) LLP),
for the Respondent.
John Glugoski, Esq. (Righetti Glugoski, P.C.),
for Charging Party Christensen.
Alison M. Miceli, Esq. (Aegis Law Firm, PC),
for Charging Party Mestanek.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This case is before me on an order consolidating cases, consolidated complaint, and notice of hearing issued on July 31, 2013 (the complaint). The General Counsel alleges that SF Markets, LLC d/b/a Sprouts Farmers Market (the Respondent) committed various violations of Section 8(a)(1) of the National Labor Relations Act (the Act) in connection with the mutual binding arbitration agreements (MAAs) that it has required as a condition of hiring and continued employment.

On December 12, 2013, the parties filed a joint motion to submit the case on stipulation, stipulation of facts, and request to forgo submission of short position statements. They requested that, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, I approve in full their stipulation of facts (along with attached exhibits), grant their request to waive a hearing in this consolidated proceeding, and issue a decision.

The joint motion and stipulation of facts were made without prejudice to any objection that any party might have as to the materiality or relevance of any stipulated facts. The Respondent did not waive any objections or defenses, including any affirmative defenses and avoidances that it asserted in its first amended answer to the complaint.

On December 23, 2013, I issued an order granting the motion and setting January 27, 2014, as the due date for the parties' briefs.

On January 6, 2014, the Respondent filed a motion to dismiss, and the Respondent and the General Counsel later filed briefs, all of which I have considered.

Stipulated Issues

(1) Should the Respondent's maintenance of its MAAs as a condition of employment and continued employment be held to violate employees' Section 7 rights pursuant to *D.R. Horton, Inc.* (*Horton*), 357 NLRB No. 184 (2012), enfd. in part, denied in part 737 F.3d 344(5th Cir. 2013)? The answer to this question is pivotal to deciding all of the allegations in this case.

(2) Did the Respondent unlawfully file a petition to compel arbitration in Orange County Superior Court, on December 17, 2012, and a motion to compel arbitration in Los Angeles County Superior Court, on April 22, 2013, to enforce its MAA with Jana Mestanek, so as to preclude her from pursuing, on a class or collective-action basis, wage-hour claims under California law that she filed in Los Angeles Superior Court on November 7, 2012?

(3) Did the Respondent, through Managers Frank Lopez and Don Robertson, unlawfully tell Laura Christensen, on about January 18, 2013, that if she did not sign the acknowledgement of the California team member handbook supplement, and thereby agree to the terms of a revised MAA, she would be considered to have resigned her employment?

(4) Did the Respondent unlawfully terminate Christensen's employment on January 30, 2013, based on her refusal to sign the acknowledgement described above?

In the joint motion, the Respondent also requested that I consider several issues, including:

(1) Whether the complaint is barred, in whole in part, because (a) the Board lacked a quorum at the time it issued its decision in *Horton*; (b) the consolidated complaint was issued on the authority of a regional director appointed to that position by a Board that lacked a quorum at the time of her appointment; and/or (c) the complaint was issued pursuant to a delegation of authority from the Acting General Counsel who was appointed to that position in violation of the Vacancies Reform Act, 5 U.S.C.§ 3345 et seq., and who therefore lacked authority to so delegate.

The Board has addressed these issues, and I will discuss them in the analysis and conclusions section. I simply state here that I recognize the Respondent's need to raise them before me in order to preserve them on the record should the Board or the courts later consider this case.

(2) Whether requiring the Respondent to withdraw its motion to compel arbitration violates its Constitutional right to seek redress.

(3) Whether the Board possesses the authority to order the Respondent to reimburse Mestanek for all reasonable litigation expenses directly related to opposing the Respondent's efforts to enforce its MAA with her.

My role is not to interpret the United States Constitution as a first-level judge, or to define the Board's authority to issue appropriate remedies for *Horton* violations. Therefore, I find it beyond my jurisdiction to decide these questions, both of which relate to the remedy that the General Counsel requests. I note that the Respondent has cited no precedent directly on point on either subject.

(4) Whether any issues regarding its motion to compel should be dismissed on mootness grounds.

The Respondent does not address this in either its motion to dismiss or its brief. Accordingly, I consider it to have been withdrawn.

Facts

Based on the stipulated facts and documents, the thoughtful posttrial briefs that the General Counsel and the Respondent filed, and the Respondent's motion to dismiss, I find the following.

Pertinent Stipulated Facts

At all times material, the Respondent has been a Delaware limited liability company with a principal office located in Phoenix, Arizona, and has operated retail stores in various States, including locations in Irvine, Seal Beach, Tustin, and Yorba Linda, California. The Respondent has admitted Board jurisdiction as alleged in the complaint, and I so find.

At all times material, Frank Lopez has held the position of regional human resources manager, and Don Robertson has held the position of store manager, and both have been Section 2(11) supervisors, and the Respondent's agents.

Since at least January 1, 2012, the Respondent has required that employees agree to MAAs as a condition of employment. Since about January 2013, the Respondent has required employees at its California retail stores, including the locations listed above, as a condition of

employment or continued employment, to agree to be bound by a revised MAA[1] The revised MAA requires that the Respondent and employees resolve employment-related disputes, except for certain specifically excluded claims, through individual arbitration proceedings, and to waive any rights that they may have to resolve covered disputes through collective and/or class action. Additionally, the Respondent has required employees at its California stores, including the locations listed above, to execute an "acknowledgment of receipt of California team member handbook supplement" (handbook supplement),[2] which incorporates by reference said MAA.

Jana Mestanek

On about January 23, 2012, the Respondent hired Mestanek to work at its Yorba Linda store and, as a condition of employment, required her to sign an MAA that required in relevant part:[3]

> The Employee agrees and acknowledges that the Company and Employee will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the Company and Employee agree that any claim, dispute, and/or controversy that either the Employee may have against the Company . . . or the Company may have against the Employee, arising from, related to, or having any relationship or connection whatsoever with my seeking employment by, or other association with the Company, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, and following the procedures of the applicable state arbitration act, if any.
>
> To the extent permitted by applicable law, the arbitration procedures stated below shall constitute the sole and exclusive method for the resolution of *any claim* between the Company and Employee arising out of "or related to" the employment relationship. *The parties hereto EXPRESSLY WAIVE their rights. if any, to have such a matter heard by a court or a jury*. By waiving such rights, the parties are not waiving any remedy or relief due them under applicable law.
>
> **Included Claims**
>
> Included within the scope of this agreement are all disputes, whether they be based on the state employment statutes, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation, equitable law, or otherwise, with the exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims brought pursuant to state workers compensation statutes, or as otherwise required by state or federal law.

[1] Jt. Exh. 29. Jt. Exh. 7 is the version in effect in January 2012. None of the parties contend that any differences in the language of the two versions dictate a different outcome under *Horton*.

[2] Jt. Exh. 30.

[3] Jt. Exh. 7.

Excluded Claims

> *Nothing herein shall prevent, prohibit, or discourage an employee from filing a charge with or participating in an investigation of the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), or any other state or federal agency* (although if such a claim is pursued following the exhaustion of such remedies, that claim would be subject to these provisions). Nothing in this Agreement is intended to interfere with the Employee's rights under the National Labor Relations Act . . . . [Emphases in original]

On November 7, 2012, Mestanek filed a class-action complaint in Los Angeles County Superior Court, alleging that the Respondent had committed various violations of California wage and hour laws. [4]

On December 17, 2012, the Respondent filed a petition in Orange County Superior Court to compel arbitration.[5] Subsequently, the following occurred.

In Los Angeles County Superior Court

In response to Mestanek's complaint, the Respondent, on April 22, 2013, filed a notice of motion, a motion to compel arbitration and stay proceedings, a supporting declaration, and a request for judicial notice.[6]

On May 13, 2013, Mestanek filed a memorandum of points and authorities in opposition to the Respondent's motion to compel arbitration.[7]

On May 20, 2013, the Respondent filed a reply to Mestanek's opposition to its motion to compel arbitration and stay a proceedings, a declaration in support thereof, and evidentiary objections to Mestanek's evidence in opposition to the motion to compel arbitration and stay proceedings.[8]

On June 7, 2013, the Los Angeles County Superior Court granted in relevant part the Respondent's motion to compel arbitration, ordering Mestanek to arbitrate, on an individual, nonclass basis, the claims alleged in her complaint, and denying her motion to stay proceedings pending resolution of the appeal of the Board's *Horton* decision.[9] The court declined to find *Horton* "persuasive authority," as Mestanek had argued.[10]

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4 Jt. Exh. 8. On December 14, 2012, she amended the complaint to include the Respondent as a named defendant. Jt. Exh. 9.

5 Jt. Exh. 10.

6 Jt. Exhs. 21–23.

7 Jt. Exh. 24.

8 Jt. Exhs. 25–27.

9 Jt. Exh. 28.

10 Id. at 20.

In Orange County Superior Court

On February 4, 2013, Mestanek filed an opposition to compel arbitration, and a supporting declaration.[11] On February 6, 2013, Mestanek filed a notice of motion and motion to abate action, and a declaration in support thereof.[12] On February 21, 2013, the Respondent filed an opposition to that motion.[13] Mestanek filed a reply thereto on February 27, 2013.[14]

On February 6, 2013, the Respondent filed a request for judicial notice, and a motion to abate.[15] On February 27, 2013, Mestanek filed a reply thereto, along with a supporting declaration.[16] Also on February 27, 2013, the Respondent filed a response to Mestanek's opposition to compel arbitration.[17] On April 22, 2013, the Respondent filed an opposition in response to Mestanek's motion to abate.[18]

On March 6, 2013, the Orange County Superior Court issued a tentative ruling granting Mestanek's motion to abate action and staying the Respondent's petition to compel arbitration.[19]

Laura Christensen

On about January 16, 2013, the Respondent presented certain employees, including Christensen, at its Tustin store, with a revised MAA and acknowledgement of receipt of the handbook supplement.[20] The agreement provided, in relevant part:[21]

> The Company and Employee agree that, except as specifically provided in this Agreement, any claim, complaint, grievance, cause of action, and/or controversy (collectively referred to as a "Dispute") that the Employee may have against the Company . . . or that the Company may have against the Employee, that arises from, relates to, or has any relationship or connection whatsoever with the Employee's employment with the Company, shall be submitted to and determined exclusively by final, binding, private arbitration pursuant to the terms of this Agreement, the Federal Arbitration Act, and all other applicable state and federal law.
>
> To the extent permitted by applicable law, the arbitration procedures in this Agreement shall constitute the sole and exclusive method for the resolution of *any of the Arbitrable Claims discussed below. The Company and the Employee*

[11] Jt. Exhs. 11, 12.
[12] Jt. Exhs. 15, 16.
[13] Jt. Exh. 17.
[14] Jt. Exh. 18.
[15] Jt. Exhs. 14–15.
[16] Jt. Exhs. 18–19.
[17] Jt. Exh. 13.
[18] Jt. Exh. 17.
[19] Jt. Exh. 20.
[20] Jt. Exh. 30.
[21] Jt. Exh. 29.

EXPRESSLY WAIVE their rights, if any, to have such claims heard by a court or a jury. By waiving such rights, however, neither the Company nor the Employee are waiving any remedy or relief that may be due to either of them under applicable law . . . .

Included Claims

To the fullest extent permitted by Jaw, any Dispute between the Employee . . . and the Company. . . that arise out of, relate in any manner, or have any relationship whatsoever to the employment or the termination of employment of Employee, including, without limitation, any Dispute arising out of or related to this Agreement ("*Arbitrable Claims*"), shall be resolved by final and binding arbitration . . . .

Excluded Claims

Nothing herein shall prevent, prohibit or discourage an employee from filing a charge with, or participating in an investigation by, the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), any state or local fair employment practices or civil rights agency (including, but not limited to, the California Department of Fair Employment and Housing and the California Labor Commissioner, and similar agencies in other states, or any other administrative agency or governmental body possessing jurisdiction over employment-related claims (although if such a claim is pursued following the exhaustion of such administrative remedies, that claim would be subject to these provisions). Nothing in this Agreement is intended to interfere with the Employee's rights to act collectively for mutual aid and protection under the National Labor Relations Act . . . .

Waiver of Class, Collective, and Representative Action Claims

Except as otherwise required under applicable law, the Company and Employee expressly intend and agree that (1) class action, collective action, and representative action procedures shall not be asserted, nor will they apply, in any arbitration proceeding pursuant to this Agreement; (2) neither the Company nor the Employee will assert any class action, collective action, or representative action claims against the other in arbitration or otherwise; and (3) the Company and the Employee shall only submit their own respective, individual claims in arbitration and will not seek to represent the interests of any other person . . . . [Emphases in original]

On about January 18, 2013, Managers Lopez, by telephone, and Robertson, in person, told Christensen that she would be considered to have resigned if she did not sign the acknowledgment of receipt of the handbook supplement.

On January 30, 2013, Christensen refused to execute said acknowledgment, and her employment was terminated. If she received a termination notice, it is not in the record. The parties stipulate that her refusal to execute the acknowledgment was the sole basis that her employment ended.

Analysis and Conclusions

The application of *Horton* is at the core of all of the issues in this case. In *Horton,* the Board held that an employer violates Section 8(a)(1) of the Act by "requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial," because "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 slip op. at 12 (emphasis in original).

The Board further concluded that finding the MAA unlawful was "consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy" and did not "conflict with the letter or interfere with, the policies underlying the Federal Arbitration Act (FAA) [9 U.S.C. , § 1 et seq.] . . . ." Id. at 10.

The Respondents argues, on both procedural and substantive grounds, that the holding in *Horton* should not be applied.

Procedural Grounds

The Respondent contends that (a) the Board lacked a quorum at the time it issued the decision; (b) the consolidated complaint was issued on the authority of a Regional Director appointed to that position by a Board that lacked a quorum at the time of her appointment; and/or (c) the complaint was issued pursuant to a delegation of authority from the Acting General Counsel who was appointed to that position in violation of the Vacancies Reform Act, and who therefore lacked authority to so delegate.

The Respondent relies on *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), for its proposition that *Horton* was invalidly issued because the Board lacked a quorum at that time, inasmuch as Members Sharon Block and Richard Griffin were recess appointments and hence invalidly appointed. The Respondent further contends that this invalidated their appointment of the Regional Director who issued the complaint. However, the Board has rejected the position that it could not validly issue decisions when two of the three Board Members were recess appointments. See *G4S Regulated Security Solutions,* 359 NLRB No. 101, slip op. at 1 fn. 1 (2013), citing *Belgrove Post Acute Center,* 359 NLRB No. 77, slip op. at 1 fn. 1 (2013). The Board noted that other courts of appeals have reached decisions contrary to *Canning* and that "pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." Ibid.

If the Board was properly constituted, ergo it had the authority to appoint the Regional Director who issued the complaint in this matter.

Finally, the Board has explicitly held that the Acting General Counsel was properly appointed under the Vacancies Reform Act, and rejected the argument that he lacked authority to issue complaints. *Corona Regional Medical Center,* 2014 WL 101770, at 1 fn. 1 (Jan. 9, 2014), citing *Muffley v. Massey Energy Co.,* 547 F.Supp. 2d 536, 542–543 (S.D. W.Va. 2008), affd. 570 F.3d 534, 536 at fn. 1 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel).

Substantive Grounds

The Respondent argues that the Fifth Circuit Court of Appeals and other courts have rejected *Horton* to the extent that it found it to be afoul of the Act a MAA prohibiting class action. Thus, the Fifth Circuit concluded that neither the NLRA's statutory text nor its legislative history contained a congressional command against application of the FAA and that, in the absence of an inherent conflict between the FAA and the NLRA's purpose, a MAA should be enforced according to its terms. 737 F.3d at 361–363. Accordingly, the court denied enforcement of the Board's order invalidating the MAA.[22]

However, I am constrained to follow Board precedent that has not been reversed by the Supreme Court or by the Board itself. See *Pathmark Stores,* 342 NLRB 378, 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.,* 312 NLRB 602, 608 (1993).

In this regard, the Board generally applies a "nonacquiescence policy" to appellate court decisions that conflict with Board law, *D.L. Baker, Inc.,* 351 NLRB 515, 529 at fn. 42 (2007); *Arvin Industries,* 285 NLRB 753, 757 (1987), and instructs its administrative law judges to follow Board precedent, not court of appeals precedent. *Gas Spring Co.,* 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents (Prudential Insurance),* 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960), enfd. 908 F.2d 966 (4 th Cir. 1990), cert. denied 498 U.S. 1084 (1991).

The Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of that particular case. See *Manor West, Inc.,* 311 NLRB 655, 667 fn. 43 (1993), revd. 60 F.3d 1195 (6th Cir. 1995).

The Supreme Court has upheld the enforcement of individual MAAs in various contexts, enunciating the general principal that the FAA was designed to promote arbitration. See, e.g., *AT & T Mobility LLC v. Conception,* 131 S. Ct. 1740, 1749 (2011). Moreover, the Court in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), held that a MAA signed by an employee waived his right to bring a Federal court action under the Age Discrimination in Employment Act. However, as the Board noted in *Horton*, *Gilmer* dealt with an individual claim, and the MAA therein contained no language specifically waiving class or collective claims; ergo, the Court in *Gilmer* addressed neither Section 7 nor the validity of a class-action waiver. 357 NLRB slip op. at 12. Since the Supreme Court has not specifically addressed the

[22] The court did enforce the Board's order that Sec. 8(a)(1) had been violated because an employee would reasonably interpret the MAA as prohibiting the filing of a claim with the Board, a violation not alleged here.

issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the Act, it follows that the Court has not overruled *Horton*, which remains controlling law.

Therefore, I must analyze this case under the *Horton* standards to determine whether the Respondent's MAA, and its concomitant conduct, violated Section 8(a)(1) of the Act.

The Respondent contends that if, indeed, *Horton* applies, its MAAs do not contravene *Horton*; rather, that they come under the following "exception" posited in *Horton*:

> "[N]othing in our holding here requires the Respondent or any other employer to permit, participate in, or be bound by a class-wide or collective action proceeding. . . . We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a *judicial* forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis. 357 NLRB slip op. at 16 (emphasis added).

The Respondent's argument is misplaced. As I earlier stated, the Board in *Horton* emphasized the importance of employees not being prohibited from pursuing collective legal action: "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 NLRB slip op. at 12 (emphasis in original). The "exception" to which the Respondent refers indicates that an employer may require arbitration on an individual basis *if* it does not foreclose employees from class or collective judicial recourse.

Such is not the case here. Both MAAs in question provide that the sole venue for disputes is *individual* arbitration. The MAA relating to Christensen expressly prohibits her from asserting any class or concerted action "in arbitration or otherwise," thus precluding collective action in both arbitral and judicial settings. The MAA pertinent to Mestanek contains an express waiver of the right to have an employment-related matter "heard by a court or a jury." Although that MAA is silent on the matter of class arbitration, the Respondent argued, in both Los Angeles and Orange County Superior Courts, that the language and intent of the MAA was that Mestanek could pursue only her own individual claims in arbitration,[23] and the Respondent continues to adhere to that position.

Thus, the Respondent's MAAs have barred employees from pursuing, on a collective basis, *either in court or in arbitration*, matters relating to their employment, placing them squarely within the parameters of the MAAs prohibited by *Horton*.

The fact that both MAAs specifically provide that employees may file charges with administrative agencies, including the NLRB, does not cure this defect. Rather, this obviates the

[23] See, e.g., Jt. Exh. 10 at 17–20; Jt. Exh. 21 at 19–21.

finding of a separate violation that employees could reasonable believe that the MAAs bar or restrict their right to file NLRB charges.

The Respondent further contends that its opposition to Mestanek's class-action lawsuit did not violate the Act because (1) the Respondent has a constitutional right to petition the Government for redress under Amendment I; (2) the Respondent's petition and motion to compel arbitration were "objectionably reasonable under *BE & K Constr. v. NLRB*, 536 U.S. 516 (2002); and (3) the petition and motion were not advanced for any "unlawful objective."

The Respondent cites no cases that have held lawful on any of these grounds an employer's seeking to enjoin an employee's lawsuit based on an unlawful MAA (as *Horton* dictates). I decline to be the first judge to do so.

Based on the above, I conclude that the Respondent has violated Section 8(a)(1) by maintaining MAAs that unlawfully restrict employees from engaging in collective activity through filing either class or collective lawsuits or arbitrations, as a condition of employment and continued employment. Using the analogy of fruit flowing from a poisoned tree, it follows that the Respondent also violated Section 8(a)(1) by filing motions in California Superior Court to compel Mestanek to arbitrate her wage-hour claims rather than have them heard as a class-action lawsuit, by telling Christensen that she had to agree to sign a MAA or face termination, and by terminating Christensen because she refused to do so.

CONCLUSIONS OF LAW

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

2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)((1) of the Act.

(a) Maintained, as a condition of employment and continued employment, mandatory arbitration agreements (MAAs) prohibiting employees from pursuing collective or class lawsuits and arbitrations.

(b) Filed a petition to compel arbitration in one State court, and a motion to compel arbitration in another State court, to enforce its MAA with an employee, to preclude her from pursuing, on a collective or class basis, wage-hour disputes with the Respondent.

(c) Told an employee, in essence, that if she did not agree to the terms of a MAA, which precluded her from pursuing collective or class lawsuits and arbitrations, she would be terminated.

(d) Terminated an employee's employment based solely on her refusal to sign such an MAA.

REMEDY

Because I have 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.

Specifically, the Respondent shall make Laura Christensen whole for any losses, earnings, and other benefits that she suffered as a result of the unlawful discipline imposed on her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Further, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and, if it becomes applicable, shall compensate Christensen for any adverse tax consequences of receiving a lump-sum backpay award. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, SF Markets, LLC d/b/a Sprouts Farmers Market, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, as a condition of employment and continued employment, mandatory arbitration agreements (MAAs) prohibiting employees from pursuing collective or class lawsuits and arbitrations.

(b) Filing court petitions or motions to compel individual arbitration to enforce its MAAs with employees, to preclude them from pursuing, on a collective or class basis, employment-related disputes with the Respondent.

(c) Telling employees that if they do not agree to the terms of an MAA that precludes them from pursuing collective or class lawsuits and arbitrations, they will be terminated or otherwise subjected to adverse action.

(d) Terminating or otherwise taking adverse action against employees because of their refusal to sign such a MAA.

[24] 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.

(e) 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) Within 14 days from the date of the Board's Order, offer Laura Christensen full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Laura Christensen whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination of Laura Christensen, and within 3 days thereafter notify her in writing that this has been done and that the termination will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Reimburse Jana Mestanek for any litigation expenses directly related to opposing Respondent's petition and motion to compel arbitration (or any other legal action taken to enforce the arbitration agreement).

(f) Withdraw its notice of motion and motion to compel arbitration filed in Los Angeles County Superior Court; or if the court issues an adverse order/judgment against Jana Mestanek based thereon, move together with her, upon her request, to vacate the order/judgment, provided that said motion can still be timely filed.

(g) Rescind the requirement that employees enter into or sign the MAAs that are currently in effect, or sign acknowledgements relating to them, as a condition of employment, and expunge all such agreements and acknowledgements at any of the Respondent's California facilities where the Respondent has required employees to sign such agreements or acknowledgements.

(h) Rescind or revise the MAAs to make it clear that the agreements do not constitute a waiver of the employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts.

(i) Notify employees that the MAAs have been rescinded or revised to comport with subparagraph (h), and provide them with any revised agreement.

(j) Within 14 days after service by the Region, post at its facilities in Irvine, Seal Beach, Tustin, and Yorba Linda, California, and any other facilities where MAAs have been maintained as a condition of employment, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 set, 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 facility 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 December 17, 2012.

(k) Within 21 days after service by the Region, file with the Regional Director 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. February 18, 2014

Ira Sandron
Administrative Law Judge

[25] 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."

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
Choose not to engage in any of these protected activities.

WE WILL NOT maintain, as a condition of employment and continued employment, mandatory arbitration agreements (MAAs) prohibiting employees from pursuing collective or class lawsuits and arbitrations.

WE WILL NOT file court petitions or motions to compel individual arbitration to enforce our MAAs with employees, to preclude them from pursuing, on a collective or class basis, employment-related disputes with us.

WE WILL NOT tell employees that if they do not agree to the terms of a MAA, which precludes them from pursuing collective or class lawsuits and arbitrations, they will be terminated or otherwise subjected to adverse action.

WE WILL NOT terminate or otherwise take adverse action against employees because of their refusal to sign such an MAA.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Laura Christensen full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Laura Christensen whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Laura Christensen, and within 3 days thereafter notify

her in writing that this has been done and that the termination will not be used against her in any way.

WE WILL reimburse Jana Mestanek for any litigation expenses directly related to opposing our petition and motion to compel arbitration (or any other legal action taken to enforce the arbitration agreement).

WE WILL withdraw our notice of motion and motion to compel arbitration filed in Los Angeles County Superior Court; or if the court issues an adverse order/judgment against Jana Mestanek based thereon, move together with her, upon her request, to vacate the order/judgment, provided that said motion can still be timely filed.

WE WILL rescind the requirement that employees enter into or sign the MAAs that are currently in effect, or sign acknowledgements relating to them, as a condition of employment, and expunge all such agreements and acknowledgements at all of the Respondent's facilities where the Respondent has required employees to sign such agreements or acknowledgements.

WE WILL rescind or revise the MAAs to make it clear that the agreements do not constitute a waiver of the employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts.

WE WILL notify employees that the MAAs have been so rescinded or revised, and provide them with any revised agreement.

SF MARKETS, LLC D/B/A
SPROUTS FARMERS MARKET
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.