**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**Washington, D.C.**

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

# COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Submitted by:

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## I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, General Counsel files this answering brief to Respondent's exceptions to the decision of Administrative Law Judge Ira Sandron (ALJD), which issued on February 18, 2014. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by maintaining, as a condition of employment and continued employment, mandatory arbitration agreements (Agreements) prohibiting employees from pursuing collective or class lawsuits and arbitrations; and by filing petitions in State court to compel arbitration and/or enforce its Agreement with an employee and to preclude her from pursuing, on a collective or class basis, wage-and-hour disputes with Respondent. The ALJ further correctly found that Respondent also violated Section 8(a)(1) of the Act by telling an employee, in essence, that if she did not agree to the terms of an Agreement that precluded her from pursuing collective or class action lawsuits and arbitrations that she would be fired, and then terminating her based solely on her refusal to sign such an Agreement.[1] (ALJD 11:25-45)

The instant case is controlled by the Board's decision in *D.R. Horton*, 357 NLRB No. 184 (2012): the ALJD is based on current Board law and should be affirmed in its entirety. Moreover, many of the arguments raised by Respondent in its exceptions were previously argued in its brief to the ALJ and thereafter rejected by the ALJ in his decision.

[1] Citations to the Administrative Law Judge's Decision will referred to as "ALJD," followed by the page and line number.

## II. THE FACTS

The ALJ accepted the parties' joint motion to submit the case on stipulation, stipulation of facts, and waiver of a hearing in favor of issuing a decision based on said stipulation.[2]

### A. Jana Mestanek (Case 21-CA-104677)

Respondent operates retail grocery stores in various states, including several in Southern California. (Stip. ¶ 3) Jana Mestanek was hired by Respondent to work at its Yorba Linda, California, store on about January 23, 2012. (Stip. ¶ 8). As a condition of her employment with Respondent, Mestanek received and signed a Mutual Binding Arbitration Agreement (Agreement) on about February 4, 2012. (Stip. ¶ 8), which provided in relevant part as follows:

> *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 its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) 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 <u>any claim</u> between the Company and Employee arising out of "or related to" the employment relationship. <u>The parties hereto EXPRESSLY WAIVE their rights, if any, to have such a matter heard by a court or a jury</u>. By waiving such rights, the parties are not waiving any remedy or relief due them under applicable law.*
>
> *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*

[2] Citations to the parties' Stipulation will be referred as "Stip.," followed by the relevant paragraph and/or exhibit number.

*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.* [3] (Stip. Exh. #7; emphases in original)

On about November 7, 2012, after Mestanek ceased to work for Respondent, she filed, and subsequently amended, a class-action complaint (Complaint) in Los Angeles County Superior Court on behalf of herself and also on behalf of a class or classes of purportedly similarly-situated employees and former employees of an entity affiliated with Respondent, alleging various violations under the California Labor Code and California Industrial Welfare Commission Wage Orders, (Stip. ¶ 9(a); Exhs.#8, #9)

About December 17, 2012, Respondent filed a Petition to Compel Arbitration of the claims asserted by Mestanek in her Complaint in Orange County Superior Court (Stip. ¶ 10; Exh. #10) to which Mestanek filed an Opposition and Declaration in Support of said Opposition (Stip. ¶ 10; Exhs. #11 and 12), and Respondent then filed a Reply in support of its Petition (Stip. ¶ 10; Exh. #13). Mestanek filed a Motion to Abate Action and a Reply to Respondent's Opposition (Stip. ¶ 11; Exhs. #15 and 16) to which Respondent then filed its Opposition. (Stip. ¶ 11; Exhs. #18, 19)

On about March 6, 2013, the Orange County Superior Court issued a tentative ruling granting Mestanek's Motion to Abate described above and staying Respondent's Motion to Compel Arbitration. (Stip. ¶ 12; Exh. #20)

Thereafter, on about April 22, 2013, following the stay of the Orange County action, Respondent filed a Motion to Compel Arbitration and related documents and pleadings in Los Angeles County Superior Court in response to Mestanek's original

[3] The Agreement further provides that "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)... or any other state of federal agency." Thus, it is not alleged nor does General Counsel assert that the Agreement unlawfully precludes employees from filing or pursuing charges before the Board.

Complaint described above. (Stip. ¶ 13(a); Exhs. #21 through 23) Mestanek subsequently filed an Opposition, to which Respondent filed a Reply (Stip. ¶ 13(b)(c); Exhibs. 24-27).

On about June 7, 2013, the Los Angeles County Superior Court issued its Ruling and Order, granting Respondent's Motion in part and ordering Mestanek to arbitrate the claims alleged by her in her Complaint on an individual, non-class basis, and denying Mestanek's Motion to Stay proceedings, pending resolution of the appeal of the Board's decision and Order in *D.R. Horton, supra*.[4] (Stip. ¶ 14; Exh. #28)

**B. Laura Christensen (Case 21-CA-099065)**

Christensen was employed by Respondent at its Tustin, California, store, where, since about January 2013, Respondent has required employees as a condition of employment and/or continued employment, to agree to be bound by a revised form of a mutually-binding arbitration agreement (Revised Agreement). (Stip. ¶ 15) That Revised Agreement contained provisions requiring Respondent and its employees, including Christensen, to resolve employment-related disputes (except for certain specifically excluded claims) through individual arbitration proceedings, and to waive any rights they may have to resolve covered disputes through collective and/or class actions as follows.

> *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 its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) 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,*

[4] The Court severed and stayed Mestanek's claim under California's Private Attorneys General Act (PAGA).

*private arbitration pursuant to the terms of this Agreement, the Federal Arbitration Act, and all other applicable state and federal law....*

*Included Claims*

*To the fullest extent permitted by law, any Dispute between the Employee (and his/her successors and assigns) and the Company (and its officers, directors, employees, agents, successors, affiliates and assigns) 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...*[emphasis in original]

*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.* (Stip. Exh. #29)

In addition to the foregoing Revised Agreement, Respondent has also required employees at its California retail stores, as a condition or employment and/or continued employment, to execute a document entitled "Acknowledgement and Receipt of California Team Member Handbook Supplement," (Acknowledgement) (Stip. ¶ 15) , which incorporates by reference the Revised Agreement described above and provides in relevant part as follows:

> *I understand that this Handbook refers to the company's dispute resolution policy, which provides for mandatory arbitration of nearly all claims arising out of or related to your employment with the company that cannot be resolved through more informal means. I acknowledge that the mandatory arbitration component of the company's dispute resolution policy is set forth in detail in a separate document entitled Mutual Binding Arbitration Agreement, and I further acknowledge that I have been provided with a copy of that document, In the event that I have not signed a separate document agreeing to the terms of the Mutual Binding Arbitration Agreement, I hereby acknowledge and agree that my agreement to the Mutual Binding Arbitration Agreement is a term and condition of my employment, and that my continued employment with [Respondent] constitutes my acceptance of the terms and condition of that agreement.*
> (Stip. Exh. #30)

On about January 16, 2013, Respondent presented certain employees then employed at its Tustin, California, retail store, including Christensen, with the Agreement and Acknowledgment described above, and informed said employees that their agreement to the terms and conditions set forth in those documents, and their signature on the Acknowledgement, was a condition of their continued employment with Respondent. (Stip. ¶ 16)

Thereafter, on about January 18, 2013, Respondent, by its supervisor and agent, Regional Human Resources Manager Frank Lopez, told Christensen in a telephone conversation that she would be considered to have resigned her employment with Respondent if she did not sign the Acknowledgment described above. Also that same

day, January 18, 2013, Respondent, by its supervisor and agent, Store Manager Don Robertson, told Christensen in an in-person conversation at the Tustin store that she would be considered to have resigned if she did not sign the Acknowledgment described above. (Stip. ¶ 18(a),(b))

About January 30, 2013, Christensen refused to execute the Acknowledgment described above, which incorporated by reference the arbitration language contained in the Revised Agreement described above. Consequently, Christensen was either terminated for her refusal to execute these agreements, or was deemed to have voluntarily resigned her employment based on her voluntary decision not to execute said documents. (Stip. ¶ 19(a), (b), and (c)) There is no dispute that Christensen's refusal to sign the Acknowledgment and thereby accept the terms of the Agreement was the sole and exclusive reason that her employment with Respondent ended. (Stip. ¶ 19(d))

## III. ARGUMENT

### A. Respondent's Challenges to the Authority of the Board To Issue *D.R. Horton*, and the Acting General Counsel and the Regional Director To Issue the Complaint, Have No Merit

In its exceptions to the Administrative Law Judge's decision, Respondent challenges the authority of the Board, the Regional Director, and the Acting General Counsel. Specifically, Respondent makes three arguments. First, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (Jun. 24, 2013) (oral argument held Jan. 13, 2014), Respondent argues that the Board did not have a quorum when it issued *D.R. Horton*. Next, Respondent argues that the Board also did

not have a quorum when it appointed Regional Director Garcia, and, as a result, she did not have authority to issue the complaint. And finally, citing *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013), and the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345, et seq., Respondent argues that then-Acting General Counsel Solomon could not issue the complaint because Mr. Solomon was invalidly appointed. As discussed below, Respondent's arguments are simply incorrect.

### 1. Member Becker's appointment ended on January 3, 2012, and *D.R. Horton* remains Board law

Respondent argues that the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *enf. granted in part*, 737 F.3d 344 (5th Cir. 2013), is invalid because former Board Member Becker (appointed during an intrasession recess) participated in that decision. (Exceptions Brief, pp. 10-18.) In the alternative, Respondent argues that Member Becker's appointment expired on December 30, 2011, before the Board issued the *D.R. Horton* decision on January 3, 2012. Both arguments fail.

As an initial matter, the ALJ did not err in applying *D.R. Horton* to this case. Respondent cannot dispute well-settled law that the Board's administrative law judges are required to follow established Board precedent that the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984); *Los Angeles New Hosp.*, 244 NLRB 960, 962 n.4 (1979), *enforced* 640 F.2d 1017 (9th Cir. 1981). As *D.R. Horton* has not been overturned by the Supreme Court, it is the General Counsel's position that, just as in *D.R. Horton*, Respondent's arbitration agreements require employees to forego the right to engage in concerted activity.

Moreover, Respondent's alternative argument—that Member Becker's appointment expired on December 30, 2011, leaving only one member to participate in the decision—is mistaken. (Exceptions Brief, pp. 15-16.) The two courts to look at the issue have found that Member Becker's term expired on January 3, 2012, not December 30, 2011. *See D.R. Horton*, 737 F.3d at 352; *Noel Canning*, 705 F.3d at 372-73. Accordingly, Respondent's challenges to the validity of the *D.R. Horton* decision should be rejected.

### 2. Under Section 3(d) of the Act, the General Counsel has independent authority to issue complaints

Respondent next claims that the Board lacked a quorum when it appointed Regional Director Garcia on January 6, 2012,[5] and that, at the time, it "did not have the authority under the Act to *itself* issue a complaint, much less to delegate that authority to a delegee such as a Regional Director." (Exceptions Brief, p. 19.) The Board has already rejected arguments attacking the appointments of Regional Directors, noting that the "question [of the validity of the recess appointments] remains in litigation," and until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act." *Universal Lubricants, LLC*, 359 NLRB No. 157 (July 16, 2013), slip op. 1 n.1. This argument is not, as Respondent claims, "circular." (Exceptions Brief, p. 17.) Rather, the Board is simply stating the facts: a conflict exists

[5] On the facts, Respondent is incorrect. Regional Director Garcia was appointed Regional Director on December 22, 2011, by a Board consisting of Chairman Pearce and Members Becker and Hayes; that appointment was announced on January 6, 2012.

in the circuit courts, and until the Supreme Court issues a decision in *Noel Canning*, the issue of the recess appointments "remains in litigation."[6]

Further, Respondent's argument evinces a misunderstanding of the separate functions of the Board and General Counsel. Congress separated the adjudicative and prosecutorial functions of the Board in the Taft-Hartley amendments of 1947. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118 (1987) (*UFCW*). Following those amendments, the Board retained authority to decide unfair labor practice cases. But Congress invested the authority to investigate and prosecute unfair labor practices in the new position of General Counsel. 29 U.S.C. § 153(d) (2011).

Section 3(d) of the NLRA states, among other things, that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d) (2011). In enacting this provision, "Congress intended to create an officer independent of the Board to handle prosecutions, not merely the filing of complaints." *UFCW*, 484 U.S. at 127.

Because the Board does not have authority to investigate and prosecute unfair labor practice complaints under Section 3(d) of the Act, the Board's composition cannot affect the authority of the General Counsel to do so. Indeed, the General Counsel is an independent officer appointed by the President, with the advice and consent of the

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[6] *See Belgrove Post Acute Care Ctr.*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013), noting that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. *Compare Noel Canning*, 705 F.3d at 505, 509-10 *with Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). More recently, the Eleventh Circuit found, contrary to *Noel Canning*, that a challenge to the Board's quorum "lack[ed] merit." *Ambassador Servs., Inc. v. NLRB*, 544 F.App'x. 846 (11th Cir. 2013).

Senate, to whom staffs engaged in prosecution and enforcement are directly accountable. *See UFCW*, 484 U.S. at 127-28; *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). Thus, the authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from the Board, but rather directly from the text of the NLRA.

Moreover, Regional Directors issue complaints as agents of the General Counsel.[7] *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd.* 366 F.2d 776 (2d Cir. 1966). Indeed, the Regional Director is not the only person who may issue a complaint; complaints can be issued by any agent of the General Counsel. *Richardson Chem. Co.*, 222 NLRB 5, 6 (1976); *see also* 29 U.S.C. § 160(b). In these circumstances, Respondent's argument that the Regional Director could not issue the complaint because the Board did not have a quorum when it appointed her, fails.

### 3. The Acting General Counsel was properly appointed

Respondent's claim that then-Acting General Counsel Solomon did not have the authority to delegate issuance of the complaint to the Regional Director is based on the ruling of the district court in *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), *appeal docketed*, No. 13-35912 (9th Cir. Oct. 1, 2013). In *Kitsap,* the judge concluded that under the Federal Vacancies Reform Act of 1998 ("FVRA"), 5 U.S.C. § 3345, et seq., Mr. Solomon could not serve as Acting General Counsel because he had not previously served as the first assistant to that

[7] Thus, Respondent's assertion that the Regional Director could not issue the complaint as a delegee of the Board is irrelevant.

office. That holding misinterprets the requirements of the FVRA. The FVRA designates three categories of persons who can serve in an acting capacity: (1) first assistants to the vacant office, (2) any Senate-confirmed officers in the government, and (3) other qualified high-level officers or employees of the agency in which the vacancy arises. 5 U.S.C. § 3345(a)(1)-(3). Only individuals designated under the first category are required to have served as the first assistant to the vacant office. Indeed, the FVRA's legislative history makes clear that 5 U.S.C. § 3345(b)(1), which limits the circumstances in which first assistants may serve as acting officers, is inapplicable to persons designated pursuant to § 3345(a)(2)-(3). *See* 144 Cong. Rec. 27496 (1998) (Remarks of Mr. Thompson) ("Under § 3345(b)(1), the revised reference to § 3345(a)(1) means that this subsection applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).").

Here, because the President directed Mr. Solomon to perform the duties of the office of General Counsel pursuant to 5 U.S.C. § 3345(a)(3), there is no requirement that he previously have served as a first assistant. The legislative history of the FVRA clearly indicates that 5 U.S.C. § 3345(a)(3) was added to give the President the option of naming, as an alternative to a first assistant or Senate-confirmed official, "other qualified high-level agency employees to serve as acting officials." 144 Cong. Rec. 27439 (1998) (Remarks of Mr. Levin). The only requirements in the FVRA concerning this third category are that the person named must have served in the agency in which the vacancy arises for at least 90 days during the 365 days preceding the vacancy, and the person must have been paid at a rate at least equal to a GS-15. 5 U.S.C. §

3345(a)(3); *see also* 144 Cong. Rec. 27496 (1998) (Remarks of Mr. Thompson). Mr. Solomon met these requirements. Accordingly, there is no legitimate basis for challenging his authority as Acting General Counsel. *See Woodcrest Health Care Ctr.*, 360 NLRB No. 58, 2014 WL 798032, at *1 n.1 (Feb. 27, 2014).

### B. *D.R. Horton* remains the controlling law in this matter and does not conflict with the FAA or U.S. Supreme Court Precedent

Respondent argues that the Board's decision in *D.R. Horton, supra*, and the ALJ's reliance thereon, was erroneous and should be rejected, as that decision is inconsistent with the strong federal policy favoring enforcement of arbitration agreements, specifically, the principles established by the Federal Arbitration Act (FAA), which favors the enforcement of private arbitration agreements according to their terms. (Exceptions Brief p. 21-22)

The Board has in fact acknowledged that the provisions of the FAA evince a "liberal policy favoring arbitration agreements," so long as such agreements do not preclude employees from exercising their substantive rights under Section 7 of the Act, which rights include the filing and pursuit of class-action claims as a form of protected-concerted activity. *D.R. Horton, supra*, slip op. at p.8. The Board acknowledged the interplay between the FAA and the Act, and reasoned that the ruling in *D.R. Horton* was consistent with Supreme Court precedent which found the FAA inapplicable when a arbitration agreement precluded employees from exercising a substantive right. Based thereon, it is clear that the instant Agreement falls under the exception to enforcement under the FAA, inasmuch as it prohibits employees from filing collective and class actions.

Moreover, the Supreme Court has not expressly overruled *D.R. Horton*, supra. Although the Court has upheld the enforcement of individual arbitration agreements in employment-related matters, as in *Concepcion*, *supra*, the Court has not addressed or resolved the issue of exclusive arbitration over class and/or collective actions. As such, *D.R. Horton* remains the controlling law in this case.

Respondent further avers that this matter should be dismissed based on the Fifth Circuit's recent decision in *D.R. Horton v. NLRB*, 737 F.3d 344 (Dec. 3, 2013), which it asserts effectively overruled the Board's prior decision in *D.R. Horton, supra,* and is binding on the ALJ. In further support of this argument, Respondent cites several Circuit Court cases and more than a dozen federal district court cases that have declined to defer to the Board's holding in *D.R. Horton*. Based thereon, Respondent urges that the rationale of *D.R. Horton* has been "discredited," and therefore the instant complaint based thereon should be dismissed.

In his decision, the ALJ concedes that the Supreme Court has upheld the enforcement of waivers similar to those in the instant case, enunciating the general principle that the FAA was designed to promote arbitration. (ALJD 9:35-37, citing *AT&T Mobility LLC v., Concepcion*, 131 S.Ct. 1740, 1749 (2011)) The ALJ correctly notes that the Supreme Court has not specifically addressed the issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the NLRA, and therefore it follows that the Court has not overruled *D.R. Horton*, which remains the controlling law in the area that is within the unique purview of the NLRB. (ALJD 9:43 – 10:2)

### C. The ALJ properly applied the Board's Non-Acquiescence Policy

Respondent argues that the ALJ erred in "uncritically" following Board precedent, notwithstanding the evolution of the law in this area, relying on the Board's "non-acquiescence policy." (Exceptions Brief p. 33)

In his decision, the ALJ correctly noted that *D.R. Horton* had not been reversed by either the Board or the Supreme Court, and that he was constrained to follow existing Board precedent. (ALJD 18-20) Moreover, the ALJ did not "uncritically" follow said precedent, but correctly cited authority to support the Board's established non-acquiescence policy to appellate court decisions that conflict with Board law and that instruct ALJ's to follow Board precedent and not court of appeals precedent. Finally, the ALJ correctly agreed that the Board is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but may instead "respectfully regard such ruling solely as the law of that particular case." (ALJD 9:30-34, citing *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), rev'd 60 F.3d 1195 (6th Cir. 1995).

With regard to Respondent's assertion that the decision in *D.R. Horton* was wrongly decided because the Board exceeded its interpretive authority (Exceptions Brief p.34), the ALJ, as noted above, observed that the Supreme Court has not specifically addressed the issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the NLRA, and therefore it can be argued that the Board is appropriately applying the rights guaranteed under Section 7 of the Act, including the right to engage in protected concerted activities, to workplace waivers. (ALJD 9:43 – 10:2) In his decision, the ALJ correctly noted that the Board in *D.R. Horton* emphasized the importance of employees not being prohibited from pursuing collective

legal action: "[t]he 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 No 184, slip op. at 12 (emphasis in original) (ALJD 10:21-25)

### D. The ALJ did not fail to distinguish the facts of the instant case from D.R. Horton and correctly disregarded the NLRA "carve-out" provisions as irrelevant to the issues at hand

Respondent argues that the ALJ failed to recognize and distinguish certain factual characteristics of the Agreements in the instant case and those at issue in *D.R. Horton, supra*. (Exceptions Brief at p. 35) Specifically, Respondent refers to the "carve-out" language in the Agreements presented to Mestanek and Christensen, respectively, that excluded any claims brought before the Board, and asserts that such language brings the Agreements within the exceptions described in *D.R. Horton.* (Exceptions Brief at p. 36) Respondent further argues that this carve-out allows Mestanek and Christensen a judicial forum for class and collective claims in the form of NLRB or other federal or state agency claims that may be brought on behalf of them and others similarly situated. (Exceptions Brief at p. 37)

However, the ALJ took great care to discuss and distinguish the Respondent's "carve-out" language from the language in *D.R. Horton*. In this regard, the ALJ correctly noted that the Agreements at issue in the instant case provide that the sole venue for disputes is *individual* arbitration, and that they effectively bar employees from pursuing, on a collective basis, *either in court or in arbitration*, matters relating to their employment, placing the Agreement in the instant case squarely within those prohibited by *D.R. Horton*. (ALJD 10:29-41(emphases in original))

Moreover, the ALJ correctly found that Respondent's "carve-out" language allowing employees to file charges with administrative agencies including the NLRB, did not cure this defect, but merely obviated the need to find a separate violation in this regard. (ALJD 10:43 – 11:2) Thus, the ALJ carefully considered the "carve-out" language and correctly concluded that it did not cure the unlawful provisions of Respondent's Agreements.

### E. The ALJ correctly found that Respondent's opposition to Mestanek's State Court Class-Action lawsuit was unlawful

Respondent argues that the ALJ erred by concluding that it violated the Act by filing its motions in State Court to compel Mestanek to pursue her claims on an individual basis. (Exceptions Brief at p. 38) In this regard, the ALJ correctly noted that Respondent cited no case authority for the proposition that it was lawful for an employer to seek to enjoin a lawsuit based on an unlawful Agreement under *D.R. Horton*. (ALJD 11:10-12) Based thereon, the ALJ correctly found that Respondent violated the Act by maintaining the unlawful Agreements, and by seeking to enforce the provisions of these unlawful Agreements by filing motions in State Court to compel Mestanek to arbitrate her claims on an individual basis. (ALJD 11:14-21) In this regard, the ALJ's "fruit of the poisoned tree" analogy is an apt one, inasmuch as Respondent's efforts to effectuate and enforce an unlawful agreement must also be unlawful, despite any quasi-Constitutional agreements urged by Respondent to the contrary.

### F. The ALJ correctly concluded, based upon the totality of the facts, that Respondent violated the Act by telling Christensen she had to sign the Agreement and/or the Acknowledgement as a condition of continued employment and by terminating Christensen to refusing to do so

Respondent argues that its threats to and termination of Christensen did not violate the Act because neither act interfered with Christensen's right to engage in protected concerted activity. (Exceptions Brief at p.44) Respondent's only apparent rationale for this argument is that *D.R. Horton*, upon which the ALJ's findings were based, is procedurally defective and wrongly decided. Inasmuch as those arguments have been dealt with *supra*, they will not be repeated here. As noted above, the ALJ correctly found that the Agreements at issue were unlawful within the dictates of *D.R. Horton*, and therefore Respondent's insistence that Christensen sign the Agreements as a condition of continued employment and Respondent's subsequent termination of Christensen for her refusal to do so must likewise be unlawful. (ALJD 11:20-21)

### G. The ALJ properly ordered appropriate remedies for Respondent's unfair labor practices

Respondent apparently takes exception to the ALJ's entire remedy, which requires Respondent to cease and desist from maintaining the Agreements; filing petitions or motions to compel arbitration to enforce the agreements; telling employees they will be terminated or otherwise subject to adverse employment decisions for failure to execute the Agreements; and terminating employees for refusal to such the Agreements; as well as ordering Respondent to offer reinstatement to Laura Christensen and make her whole for loss of earnings and benefits; reimburse Mestanek for legal expenses directly related to opposing Respondent's petition and motion to

compel arbitration or other legal actions taken to enforce the Agreements; withdraw its motions to compel arbitration and move to jointly vacate the State court's order; and rescind the Agreements; in addition to the Board's standard remedial procedures. (ALJD 12:21 -14:23) Again, Respondent's only rationale behind this exception is its underlying argument that *D.R. Horton* is a flawed decision, which exception is discussed supra. General Counsel argues that the ALJ's proposed remedies are appropriate and just to remedy the unfair labor practices of Respondent, and consistent with Board precedent in similar cases.

## IV. CONCLUSION

Based on the above and the record as a whole, General Counsel respectfully requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the act as alleged in the complaint and issue an appropriate remedial order consistent with that recommended by the Administrative Law Judge.

DATED at Los Angeles California, this 22nd day of April, 2014

Respectfully submitted:

Ami Silverman
Counsel for the General Counsel
National Labor Relations Board
Region 21

## STATEMENT OF SERVICE

I hereby certify that a copy of **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on April 22, 2014.

The following parties were served with a copy of said documents by electronic mail on April 22, 2014

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