STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| PREMIERE RASPBERRIES, LLC dba DUTRA FARMS | ) | Case No. 2016-CE-010-SAL |
| Respondent, | ) | |
| and | ) | |
| ENOCH CRUZ, | ) | 42 ALRB No. 4 |
| Charging Party, | ) | (November 18, 2016) |

**DECISION AND ORDER**

On August 8, 2016, Administrative Law Judge William L. Schmidt (the ALJ) issued the attached decision in the above-captioned case concluding that an arbitration agreement maintained by Respondent Premiere Raspberries, LLC dba Dutra Farms (Respondent) violated Labor Code section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) because the agreement reasonably could be understood by employees to be restrictive of their right to file unfair labor practice charges with the Agricultural Labor Relations Board (Board or ALRB), and to chill employees' rights under ALRA section 1152[1] However, the ALJ concluded that there was no violation with respect to

[1] On the same date, the ALJ issued his decision in the related companion case (*T.T Miyasaka, Inc.*, Case No. 2016-CE-011-SAL). The Board's decision with respect to that case is found at 42 ALRB No. 5.

Respondent’s maintenance and attempted enforcement of the class or collective action waiver contained in the arbitration agreement. The ALJ reasoned that the Board was bound by the California Supreme Court’s opinion in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, where the court found a similar class action waiver was enforceable under the Federal Arbitration Act and did not violate Section 7 of the National Labor Relations Act (29 U.S.C. § 157).

The Board has considered the ALJ’s decision and the record in light of the exceptions and briefs and has decided to affirm the ALJ’s rulings, findings, and conclusions in full, and to issue the attached order.

## **ORDER**

The Board adopts the recommended order of the administrative law judge as stated in the August 8, 2016 Decision of the ALJ and orders that the Respondent Premiere Raspberries, LLC dba Dutra Farms, its officers, agents, successors, and assigns, shall take the actions set forth in the order.

DATED: November 18, 2016

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

# CASE SUMMARY

**PREMIERE RASPBERRIES, LLC DBA DUTRA FARMS**

Case No. 2016-CE-010-SAL

42 ALRB No. 4

Enoch Cruz,
Charging Party

**Administrative Law Judge (ALJ) Decision**

In this case the General Counsel's complaint alleged that Respondent violated section 1153(a) of the Agricultural Labor Relations Act (ALRA) by maintaining a mandatory arbitration policy that required its employees to enter into an arbitration agreement that: 1) prohibited them from filing an unfair labor practice charge with the Agricultural Labor Relations Board (Board); and 2) required employees to waive any right they might have to pursue a class or collective action in any forum, arbitral or judicial, in order to resolve their employment disputes with the Respondent.

The Administrative Law Judge (ALJ) found, based on the analytical framework established in *Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646, that Respondent violated section 1153(a) of the ALRA because its employees would reasonably construe the language of its arbitration policy and arbitration agreements as prohibiting their filing of unfair labor practice charges with the Board, an employee activity protected by section 1152. However, the ALJ concluded on the basis of the majority opinion of the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, that section 1152 does not protect the right of employees to pursue class or collective legal actions to resolve employment disputes with the Respondent. For that reason, Respondent did not violate section 1153(a) as alleged with respect to such waivers.

The ALJ ordered Respondent to amend its arbitration policy and agreement to provide specifically that employees have the right to file unfair labor practice charges with the Board and to utilize other services that agency provides.

**Board Decision and Order**

The Board affirmed the ALJ's rulings, findings, and conclusions in full, and adopted his recommended order.

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This Case Summary is furnished for information only, and is not the official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

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|---|---|---|
| PREMIER RASPBERRIES, LLC DBA DUTRA FARMS | ) | |
| Respondent, | ) | |
| and | ) | **Case No. 2016-CE-010-SAL**[1] |
| ENOCH CRUZ | ) | |
| Charging Party. | ) | |

*Julia Montgomery, General Counsel, Michael I. Marsh and Jimmy Macias, Attys.*, for the ALRB General Counsel.

*Ana Toledo, Atty.*, Noland, Hamerly, Etienne, Hoss, for the Respondent.

*Edgar Aguilasocho, Atty.*, Martinez, Aguilasocho, Lynch, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, ADMINISTRATIVE LAW JUDGE: I heard this case at Salinas, California, on May 3, 2016, pursuant to a notice of hearing issued by the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) on March 22, 2016.

Enoch Cruz (Cruz or Charging Party) initiated this case of first impression before the ALRB by filing an unfair labor practice charge on January 29, 2016. Cruz' charge challenges the arbitration policy and an

[1] The transcript of the hearing in this proceeding reflects an erroneous case number on the cover page. It is hereby corrected to reflect the proper case number shown above.

implementing agreement he had to sign in order to work at Premiere Raspberries LLC dba Dutra Farms (Premiere, Respondent, or Employer). His unfair labor practice charge claims that Premiere's arbitration policy and arbitration agreement violates the Agricultural Labor Relation Act (ALRA or Act) because it requires agricultural to waive their right to file or participate in legal actions on a class or collective basis, and because it can be reasonably construed by employees as a prohibition against filing charges with the Agricultural Labor Relations Board (ALRB). He also charges that Premiere violated the Act by acting to enforce its work-compulsory arbitration agreement against him and other unspecified employees in the Santa Cruz County Superior Court.

On March 3, 2016, the Salinas Regional Director issued the original complaint on behalf of the then Acting General Counsel alleging that Premiere violated, and continues to violate, Labor Code section 1153(a) by maintaining and enforcing its arbitration policy.[2] Respondent filed a timely answer on March 14, 2016, denying that it engaged in the unfair labor practices alleged. Thereafter, on April 7, 2016, the Salinas Regional Director issued an amended complaint on behalf of the General Counsel. This amended complaint (hereafter the "complaint") became the operative pleading of the General Counsel's office. Premiere filed a timely answer to the complaint in which it continued to deny that it had engaged in the unfair labor practices alleged.

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[2] The Agricultural Labor Relation Act has been codified in Sections 1140 through 1166.3 as a part of the broader California Labor Code. Here the various provision of that statute are identified by the ALRA designation. ALRA § 1153(a) defines an agricultural employer's interference with, restraint, or coercion of an agricultural employee in the exercise of the rights guaranteed by ALRA § 1152 as an unfair labor practice. In pertinent part, ALRA § 1152 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Based on the case record and the post-hearing briefs, three issues emerged for resolution: 1) whether the General Counsel's complaint is supported by a charge timely-filed under the provisions of ALRA § 1160.2;[3] 2) if so, whether Respondent Premiere's mandatory arbitration policy and its standard arbitration agreement violate ALRA § 1153(a) because employees could reasonably construe them as precluding workers from seeking remedial action by filing charges before the ALRB; and 3) whether Respondent Premiere's arbitration policy and standard arbitration agreement violate ALRA § 1153(a) by requiring workers, as a condition of employment, to waive their right to engage in concerted activity protected by ALRA § 1152 by pursuing class or collective claims in any forum, arbitral or judicial. Having carefully considered the record in this matter, including the demeanor of the witnesses while testifying, and the briefs filed on behalf of the General Counsel, Charging Party, and Respondent, I find the complaint is supported by a timely-filed charge, and that Respondent violated the Act as alleged in the complaint's first cause of action but not the second based on the findings and conclusions below.

## FINDINGS OF FACT

## I. JURISDICTION

Premiere, a California limited liability company (LLC) that maintains its principal place of business at Watsonville, California, grows, harvests, and packs raspberries and blackberries at various locations throughout California's Santa Cruz County. Premiere employed Charging Party Cruz along with about 800 other agricultural employees during the

[3] ALRA § 1160.2 provides in relevant part that: "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board."

2015 season. (Tr. 31)[4] Premiere sells and ships a portion of its raspberry harvests directly to locations throughout the United States as well as Canada and Japan. In addition, it purchases farm equipment parts and other supplies used in its agricultural operations directly from vendors located in the states of Illinois, Nevada, and Washington. (Tr. 91-92)

Based on the foregoing, I find that Premiere engaged in agriculture as an agricultural employer at all relevant times within the meaning of Section 1140.4(a) and (c) of the Act, employing Cruz and others, as agricultural employees within the meaning of Section 1140.4(b) to perform portions of its agricultural operations. For these reasons, I further find that the ALRB has jurisdiction to hear and resolve the dispute presented pursuant to Section 1160, et seq., of the Act.

Furthermore, based on Premiere's direct involvement in international and interstate commerce on a scale unquestionably well beyond any *de minimis* amount, I find that the Federal Arbitration Act (FAA) applicable to the consideration of its arbitration agreements at issue here. 9 U.S.C. §§ 1-16.

## II. The Alleged Unfair Labor Practices

In this and a companion case, T. T. Miyasaka, Inc., 2016-CE-011-SAL, which I also issue today, the ALRB's General Counsel alleges that two Northern California agricultural employers violated Section 1153(a) by maintaining and enforcing, as a condition of employment, a mandatory

[4] Tr. references the hearing transcript page number. Exh. preceded by GC, Res., CP, or Jt., references the number of an exhibit identified and offered on behalf of the General Counsel, Respondent, Charging Party, or jointly by all parties to the proceeding, respectively, or that is a part of the record in this case by way of ALRA Rule 20280. Br. preceded by GC, R., or CP references a post-hearing brief filed by the General Counsel, Respondent, or Charging Party, respectively. Both Respondent and the Charging Party received adverse subpoena rulings but elected to exclude the associated documents and rulings from the record in accord with Board Regulation 20250(h).

arbitration policy that: 1) would lead their employees to reasonably believe that their workers cannot file and pursue unfair labor practice charges concerning employment disputes with Respondent before the ALRB; and 2) requires as a condition of employment that the same workers waive their right to file "class or representative claims" (class actions) in any forum relating to any employment dispute.

Based on the findings of fact and conclusions of law below, I find the complaint supported by a timely-filed charge, sustain the General Counsel's claim that Premiere's workers could reasonably conclude that under its arbitration policy they cannot pursue remedial action for work place disputes at the ALRB, and dismiss the General Counsel's class action waiver allegation based on binding California case precedent.

**A. Relevant Facts**

No evidence shows that Premiere maintained an arbitration policy or requirement prior to the 2015 growing/ harvesting season. But beginning in approximately June 2015, and continuing thereafter, Premiere established a mandatory requirement that its workers agree that they would resort exclusively to individual private arbitration as a means of resolving almost all of their employment related disputes whether they arose before, during, or after their employment and regardless of whether their claims were based on contract or statutory protections, save for two limited instances of no relevance here and likely to be of little benefit to the typical employee.

By the time it began recalling former employees and hiring new workers for the 2015 season, the company began applying a comprehensive arbitration policy set forth in its employee manual. The key elements of the policy pertinent here state in both the English and Spanish versions that:

1. All claims, disputes and controversies arising out of, relating to or in any way associated with an employee's employment by the Company or the termination of that employment shall be submitted to final and binding arbitration.

2. The Company and employee, voluntarily and with full understanding, waive any and all rights to have any such arbitrable claims or disputes heard or adjudicated in any other type of forum, including without limitation, the right to a trial in court. Examples of such disputes or claims, which must be resolved through arbitration, rather than a court proceeding, include, but are not limited to, wage, hour and benefit claims; contract claims; claims for wrongful termination; defamation; discrimination and harassment, and any other claim that is related with federal or state statutes or other claim, of whatever type related to employment. Workers' compensation and unemployment benefits claims are excluded from this agreement.

3. To the extent permitted by law, Employees waiver any right to file any class or representative claims addressing wages or other terms or conditions of employment in any forum.

[Jt. Exh. F]

Consistent with this policy Premiere also prepared a standard form arbitration agreement (in both English and Spanish) and required its new employees (and those who may have been carried over or who otherwise previously started to work that season) to sign the arbitration agreement at the start of the 2015 season along with other employment documents, such as the ordinary W-4 and I-9 forms, before starting to work. The arbitration agreement that Premiere compelled its employees to sign contains the following key provisions set forth after the introductory preamble:

1. The Company and I agree that all claims, disputes and controversies arising out of, relating to or in any way associated with my employment by the Company or the termination of that employment, including those arising before and after signing this Agreement, shall be submitted to final and binding arbitration pursuant to the terms of this Agreement.

2. To the extent permitted by law, the Company and I, voluntarily and with full understanding waive any and all of our rights to have any arbitrable claims or disputes that we have, be heard or adjudicated in any other type of forum, including without limitation, each party's right to a trial in a court. Some examples of such disputes or claims which must be resolved through arbitration, instead of a court proceeding, include, but not limited to, wage, hour and benefit claims; contract claims; tort claims; claims for wrongful termination; defamation; discrimination and harassment, and any other similar state or federal statute or any other employment-related claim of any sort. This agreement excludes workers' compensation and unemployment benefits claims.

3. To the extent permitted by law, the Company and I agree to waive any right to file any class or representative claims related to wages or other terms or conditions of employment in any forum.

[Joint Exhibit B]

Other salient aspects of Premier's arbitration agreement provide that a request for arbitration must be made within the limitations period "set by state or federal law for such claims" (¶ 4); the arbitration process is to be conducted in accord with the current Employment Dispute Resolution Rules of the American Arbitration Association (¶ 6); the arbitrator is obliged to issue a written decision applying the applicable state, federal, or common laws and that contains factual findings, legal conclusions, and reasons for the award which is deemed final and binding(¶¶ 7 and 10); each party is responsible to pay its own attorney and expert witness fees and other costs of arbitration except that the arbitrator may award reasonable attorney fees if a party prevails on a statutory claim which affords the reimbursement of the prevailing party's attorney fee (¶¶ 8 and 9); Premiere pays the cost of the arbitrator and other costs "unique" to arbitration (¶ 8); and a standard savings clause providing that other aspects of the agreement

remain in effect if any term or provision is determined by a court or arbitrator to be unlawful (¶ 14).

Two of Premiere's human resources representatives, Sandra Carranza and Esmeralda Rocha, introduced the 2015 workforce to the company's arbitration policy at a series of separate orientation sessions they conducted for groups of about 30 employees at a time.[5] During these meetings, which lasted roughly an hour and a half to two hours, Carranza or Rocha also discussed food safety practices and the Employer's sexual harassment policy. In addition, the workers received a packet of employment forms to sign that included a W-4 form, an I-9 form, a health insurance election form, a workers' compensation form, and the arbitration agreement at issue.

Premiere's Controller Melchor Garcia, provided Carranza (and presumably Rocha) with an instructional guide for use during the orientation sessions entitled "Arbitration Policy Presentation Outline" Following an introductory paragraph, this outline states:

**A. What Is Arbitration?**

1. A process for resolving disputes outside of court.
2. The company pays for the process.
3. The employee and company select the arbitrator by mutual agreement. The arbitrator is usually a retired judge.

**B. What disputes are resolved through Arbitration?**

1. To the extent permitted by law. All claims, disputes and controversies relating to your employment before and after signing this agreement. For example, wage and discrimination claims under state and federal law.

[5] Carranza testified at the hearing; Rocha did not. Although Carranza conveyed the impression that she and Rocha conducted separate sessions, some of the interpreted employee testimony suggests otherwise. To the degree there is any conflict, I find it of no significance to the ultimate issues involved.

2. Not all claims are covered by this agreement: For example, claims for unemployment insurance and workers compensation are not included.

**C. Other terms of Arbitration Policy.**

1. To the extent permitted by law, employees waive any right to file any class or representative action in any forum.
2. Acceptance of employment or continuation of employment with the Company is deemed to be acceptance of this arbitration policy.
3. Procedure for initiating arbitration. - See agreement section 4.

[Joint Exhibit C]

Carranza claimed that she used Controller Garcia's outline as a checklist but did not cover all of items in the outline during any of her presentations. She emphatically asserted that she did not speak to the employees about items C-1 and 2 of the outline. In addition, she claimed that she told employees that they had to sign the W-4 form and the I-9 form but that they could sign the other forms, including the arbitration agreement, if they wanted to. I discount and discredit this self-serving assertion by Carranza to the extent that it implicitly suggests that employees in the meetings which she conducted had any option to not sign the arbitration agreement. Such an assertion is clearly inconsistent with the plain language in the outline Controller Garcia gave her stating in item C-2 that employees would be deemed to be bound to the arbitration agreement simply by continuing or accepting employment with Premiere. When Garcia testified, he made no attempt to explain away or disavow the implication that outline statement carries. Furthermore, Carranza admitted that if a worker failed to sign the arbitration agreement, she (and presumably Rocha) followed up with any such employee to obtain a signed agreement. She also acknowledged that eventually all of the workers signed an arbitration agreement. The zeal evident from Premiere's conduct in pursuing a signed agreement from every worker is confirmed by

employee testimony. Serafin Clemente and Paola Morelos, who worked as field hands for Premiere during the 2015 season, both attended an orientation session before starting their work that year and came away from those sessions with the impression that they had to sign the company's arbitration agreement in order to start working. Clemente recalled that Carranza gave him and the others a packet of "about" six forms to sign and told them that they had to sign them before beginning work. (Tr. 72-72) Morelos, who thought there were about 10 forms to sign, said that Carranza or Roca would show her with a pencil where she had to sign each form. (Tr. 79-80) Clemente, who testified in his native Mextico Alto, cannot read so the forms were read to him in Spanish, a language with which he has at least some facility. He remembered that Carranza instructed him to sign the forms where they were highlighted with a yellow marker. Clemente understood that he had "to sign everything before (he) start(ed) to work" and that if he did not, he would not be "allowed to work." (Tr. 76) Although recalled as a rebuttal witness after Clemente testified, Carranza never denied Clemente's assertion that the workers were told they had to sign the packet of forms before they could work.

Based on the foregoing, I find that a preponderance of the evidence establishes that Premiere's arbitration policy and the agreement designed to implement it became at least since the beginning of the 2015 season a mandatory condition of employment for its agricultural employees. Premiere conducted similar orientation sessions at the beginning of the 2016 season that lasted about the same length of time. Carranza facilitated some of the 2016 sessions. At these sessions, she required all workers, including those who worked in 2015, to execute a complete new set of employment forms, including the arbitration agreement.

On September 30, 2015, Cruz filed a civil class action lawsuit in the Santa Cruz County Superior Court against Premiere on behalf of himself and all others similarly situated alleging numerous violations of California's wage and hour laws. See Jt. Exh. I. On January 21, 2016, Respondent filed a Memorandum in Support of Petition to Compel Arbitration with that superior court arguing that the 2015 arbitration agreement Cruz signed should be enforced as required by the FAA. Premiere's petition also seeks dismissal of the class action allegations in Cruz' complaint based on the class action waiver in his arbitration agreement. See Jt. Exh. J. At the time of the hearing, the Court was scheduled to hear Premiere's petition to compel arbitration on June 29, 2016.

## C. Analysis and Conclusions

### *1. Introduction*

Collectively-bargained arbitration has been long utilized as a staple in the employment context to resolve contractual disputes between employees and their employer. This case does not involve a collectively-bargained arbitration agreement. Instead, it involves an arbitration agreement unilaterally devised by the employer and required of employees as a condition of employment, a totally different breed of arbitration agreement. The sweep of adhesive agreements, such as the ones involved here and in the companion case also decided today, are invariably far broader than that found in a collectively-bargained arbitration system. The latter are typically limited in their scope to the construction and application of the collective-bargaining agreement itself or, at most, the agreement and a limited number perhaps shop-floor or industry practices. I have yet to see one that included a class action waiver and it is rare to see statutory worker protections addressed unless the particular protection is somehow woven into the fabric of the collective-bargaining agreement itself.

By contrast, the adhesive agreements imposed by unorganized employers in recent years invariably include class action waivers and expand the scope of coverage to all manner of statutory protections established at the federal, state, and local levels of government for the benefit employees over the last 80 or so years. Written employment contracts involving unrepresented employees are rare so it could be expected that the scope of arbitrable issues of a contractual nature arising in this context would be limited to often-futile attempts to prove an implied employment agreement of some sort or another. These emerging adhesive employment arbitration agreements thus serve to privatize employer-employee disputes not only about the direct employment relationship but also about a broad range of statutory protections available to employees under a variety of federal, state and local laws.

Adhesive arbitration practices became ubiquitous throughout the United States in the financial and consumer goods industries. Considerable precedent has emerged in the past four decades involving the enforceability of those perceived agreements that result largely from conditions imposed for consumers to merely have access common everyday goods and services. After the proponents of this system succeeded in resurrecting the long-dormant FAA to insure their enforceability, the adhesive employment arbitration schemes soon followed suit.

Knowledgeable critics of this trend charge that these policies, especially as applied in the work place, seek mainly to privatize a broad range of statutory worker protections and to individualize the resolution of both contractual and statutory disputes, all for the employer's benefit.[6]

[6] See Julius G. Getman, *The Supreme Court on Unions, Why Labor Law is Failing American Workers*, Cornell University Press, 2016, at Ch. 8 "The Supreme Court and Arbitration," pp 160-189.

More strident critics charge that such arrangements amount to the resurrection of the "yellow dog" contract,[7] the specific abuse of worker First Amendment associational rights thought to have been rendered judicially unenforceable by the Norris-LaGuardia Act (Norris-La Guardia) and made unlawful under the National Labor Relations Act (NLRA).[8]

### *2. The statute of limitations issue*

#### a. Argument

Premiere argues that the allegations in the General Counsel's complaint are untimely because the ALRA § 1160.2 limitations period bars the issuance of a complaint more than six months after an alleged unfair labor practice occurred. Premiere contends the time should begin to run on the limitations period on or about June 1, 2015, when Cruz signed his arbitration agreement. In that case the limitations period would have expired a month or two before he filed his January 29, 2016, ALRB charge giving rise to this proceeding. Premiere's post-hearing brief sums up its contention as follows:

> The only arbitration agreement that was signed by Charging Party was signed on June 1, 2015, more than six months before Charging Party filed the ULPs. The ULP and the Complaint allege Respondent committed an unfair labor practice charge by requiring Charging Party to sign an arbitration agreement as a condition of employment. The statute of limitations of section 1160.2 began to run on the date the agreement was signed. Consequently, the ULP and Complaint are barred by the statute of limitations.

R. Br. pp. 3-4.

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[7] See e.g., Seligman and Clark, *Corporate America's oily trick: How big business uses "yellow-dog contracts" to crush basic rights*, Salon, Nov. 7, 2014. www.salon.com

[8] See the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. Early on the NLRB held yellow-dog contracts were unlawful under the NLRA. See e.g. *Carlisle Lumber Company* (1936) 2 NLRB 248.

The General Counsel argues the complaint is supported by a timely charge as it alleges Premiere *maintained and sought to enforce* a mandatory arbitration policy in violation ALRA § 1153(a) during the limitation period and continues to do so to date. See First Amended Complaint ¶¶ 21 and 22, and 27 through 29.

**b. Analysis**

Cruz' unfair labor practice charge alleges that since June 1, 2015, "and continuing to date, (Premiere) has unlawfully required, as a condition of employment, that employees waive their right to engage in protected concerted activity by signing waivers of the right to file and participate in class actions" in violation of the Act. The charge further alleges that Premiere had recently sought court enforcement of this mandatory employment requirement.

Although it is true that Cruz apparently signed the agreement outside the section 1160.2 six-month limitations period, neither the charge nor the complaint allege on Cruz' signing of the 2015 arbitration agreement as the unfair labor practice for which a remedy is sought. It is also true that the complaint pleads the signing of the agreement as an incidental fact but the plain language of Cruz' charge, fairly read, specifies that it is the requirement imposed as a mandatory condition of employment since at least June 1, 2015, and continuing thereafter, that employees waive their right to file and participate in class actions as the problem for which he seeks a remedy. The signed arbitration agreement itself in the context of this case is merely an instrument used by Premiere to implement and enforce its arbitration policy set forth in its employee manual.

Contrary to Premiere's apparent outlook as to the scope of this dispute, I find this matter involves the lawfulness of the policy, which it perhaps adopted outside the limitations period, but which it

nonetheless continues to maintain, give effect to and defends in this case. By maintaining the vitality and enforceability of its arbitration policy during the limitations period, Premiere may be found to have violated the Act even though it required Cruz and others to sign on to binding agreements outside the limitations period. *Ruline Nursery Co. v. ALRB* (1985) 169 Cal App. 3d 247, 266, quoting from *Julius Goldman's Egg City*, 6 ALRB No. 61, at p. 5, and citing *Machinists Local v. Labor Board* (1960) 362 U.S. 411, 416, the seminal case on this question. See also *PJ Cheese, Inc*. (2015) 362 NLRB No. 177 slip op. at 1 (defense that violation was time barred because arbitration policy was implemented and agreement signed outside limitations period rejected where it was found that the policy was maintained within the limitations period). As the evidence shows Premiere unquestionably maintained and gave effect to its arbitration policy, and sought enforcement of it, within the section 1160.2 limitation period, I conclude that Premiere's statute of limitations defense lacks merit.[9]

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[9] Premiere raises no issue over the fact that the ALRB-access aspect of the General Counsel's complaint is not mentioned in Cruz' charge so I find it unnecessary to belabor or rule on that point. But suffice it to say the General Counsel is not bound to the four corners of a charge if her investigation produces evidence of other clearly related violations. See e.g. *Nish Noroian Farms,* supra., at 736 (the final complaint need not adhere to the specific matters alleged in the charge); *Ruline,* supra at 267-268 (approving a complaint amendment at the hearing adding a closely related allegation not mentioned in the charge, citing with approval the conclusion in *NLRB v. Fant Milling* (1959) 360 U.S. 301 that "(o)nce the Board's jurisdiction has been invoked by the filing of a charge, its General Counsel is free to make full inquiry under its broad investigatory power in order to properly discharge its duty of protecting public rights.") Had Premiere raised as 1160.2 issue on this basis, I would find that the General Counsel's ALRB-access allegation is a closely related unlawful interference flowing from Premiere's arbitration policy which the General Counsel is empowered to include in the complaint.

In another component of its argument about the statute of limitations, Respondent argues that it has a constitutional right to seek enforcement of its arbitration agreement by the Santa Cruz Superior Court.[10] R Br. p. 4. However, whenever a court becomes aware that an agreement is illegal, it has a duty to refrain from entertaining an action to enforce it. See e.g. *Bill Johnson's Restaurants v. NLRB* (1983) 461 U.S. 731, at 737 fn. 5 (federal courts); *Bovard v. American Horse Enterprises* (1988) 201 Cal App 3d 832 (California courts).

Here, the General Counsel does not seek an immediate restraint on Premiere's constitutional right of access to the courts obviously protected by the First Amendment so clearly recognized in the context of labor disputes. See *Bill Johnson's Restaurants v. NLRB* (1983) 461 U.S. 731; *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Instead, in this administrative proceeding she only places Premiere's right to do so in question which she is certainly entitled to do where, as here, she seeks to prove in an appropriate venue that the agreement is unlawful. In this context, any restraint on Premiere's constitutional right of court access would only occur to effect a remedial requirement after the entry of a final order in a judicially-reviewable administrative proceeding seeking to interdict Premiere's use the courts to enforce an unlawful agreement. The ALRB General Counsel has the right to do exactly what she seeks to do here, or in other like situations. See *Bill Johnson's* at 744 (holding that Congress empowered the NLRB in "proper" cases with the remedy to enjoin a baseless lawsuit as an unfair labor practice brought against an employee in retaliation for exercising NLRA Section 7 rights). As the General Counsel

[10] The General Counsel's plainly seeks to do just that as the remedial action the complaint seeks includes a requirement that Premiere cease and desist from pursuing its petition of compel arbitration or move to vacate any order already entered that compels arbitration under the disputed agreements.

simply seeks a remedial order applicable only after a final adjudication that Premiere has petitioned the Superior Court to enforce an unlawful agreement, I find this ancillary argument also lacks merit.

### *3. **First cause of action: the alleged prohibition against filing ALRB charges***

#### a. Argument

Although the General Counsel implicitly concedes that Premiere's arbitration policy and standard arbitration agreement do not explicitly preclude employees from filing unfair labor practice charges with the ALRB, she argues that "the present arbitration agreement implies that an employee waives his or her right to file charges with the Board." GC Br. p. 9. In support of her conclusion, she relies on a similar finding by the NLRB in *D.R. Horton, Inc*. (2012) 357 NLRB 2277 enf. granted in relevant part (5th Cir. 2013) 737 F.3d 344, and *Murphy Oil USA, Inc*. (2014) 361 NLRB No. 72, enf. granted in relevant part (5th Cir. 2015) 808 F.3d 1013. In both cases, the NLRB concluded that the employer's arbitration policies violated NLRA section 8(a)(1) because employees could reasonably read them be read as a prohibition against the filing of NLRB charges. The Fifth Circuit enforced that portion of both NLRB orders. *Horton,* 737 F.3d at 363-364; *Murphy Oil,* 808 F.3d at 1021.

Premiere argues that it never used its arbitration policy or agreements to prevent the filing of an ALRB charge by Cruz or any other employee. It asserts that the General Counsel's theory that the arbitration agreement precludes agricultural workers from filing unfair labor practice charges with the ALRB "is pure speculation unsupported by facts or reasonable inference." Premiere also argues that the language of the agreement belies the General Counsel's allegation. It points to the portion of the agreement language specifying that the company and the employee

agree to waive any right to file any class or representative claims addressing wages or other terms and conditions of employment in any forum only "to the extent permitted by law." (Jt. Exh. B, ¶ 3) Additionally, Premiere points to language in paragraph 2 of the arbitration agreement stating that "to the extent permitted by law, the Company and I … waive any and all of our rights to have any arbitrable claims or disputes that we have be heard or adjudicated in any other type of forum …." R. Br. pp 4-5.

**b. Analysis**

It is well established under NLRB case law that an employer violates NLRA § 8(a)(1) by maintaining workplace rules and policies, such as an arbitration policy, that would reasonably tend to chill employees in the exercise of their § 7 rights.[11] *Lafayette Park Hotel*, 326 NLRB 825, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). To determine whether particular rules or policies, including arbitration policies, violate § 8(a)(1), the NLRB employs the analytical framework originally set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *D.R. Horton*, supra. Under *Lutheran Heritage*, a work rule or policy is unlawful if "the rule explicitly restricts activities protected by Section 7." *Lutheran Heritage*, supra at 646. If the work rule does not explicitly restrict protected activities, it nonetheless violates § 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. As an objective test such as that found in *Lutheran Heritage* is also generally appropriate when applying ALRA § 1153(a) in similar situations, I find it appropriate to utilize that analytical framework here. See ALRA § 1148;

[11] The ALRA is patterned after the NLRA. NLRA §§ 7 and 8(a)(1) correspond to ALRA §§ 1152 and 1153(a), respectively.

see also *Karahadian Ranches, Inc. v ALRB* (1985) 38 Cal. 3d 1; *Carin v ALRB* (1984) 36 Cal. 3d 654.

Applying *Lutheran Heritage*, I find Premiere's arbitration policy does not explicitly prohibit its agricultural employees from filing charges with the ALRB. Nor is there any evidentiary support for a conclusion that Premiere's promulgated its arbitration policy or agreement in response to union activity. As Premiere's brief correctly argues that no evidence establishes that it took steps to interfere with the filing or processing of Cruz' charge in this case. But this latter argument misses a critical point.

Premiere's discerning employees could reasonably construe the language of its arbitration policy and agreement as amounting to a prohibition against the filing of ALRB charges. It is of no moment that Premiere did not intend to prohibit the filing of ALRB charges by its employees or that it made no effort to interfere with what Cruz did here. Rather, the relevant focus of an inquiry under *Lutheran Heritage* centers on whether employees could reasonably conclude by reading the terms of the arbitration policy and standard arbitration agreement that they had to invoke the employer-mandated arbitration procedures instead of the statutorily-established processes, such as those under the ALRB, to vindicate their statutory rights. If so, then the threshold for finding that Respondent's documents unlawfully chill employees in the exercise of their 1152 rights has been met.

Premiere's reliance on the vague limiting phrase "to the extent permitted by law" is insufficient to overcome the more categorical and dominate language found in paragraph 2 of its policy and the implementing agreements which detail just some of the disputes encompassed by its mandatory arbitration policy. The arbitration policy explicitly requires its employees to individually arbitrate disputes related to wages, hours,

benefits, discrimination and harassment, all of which are frequently at the core of disputes with employers that workers bring to the ALRB through the unfair labor practice charge medium. This specificity is followed immediately in the agreement with general language of an even greater sweep by including other claims cognizable under similar "state or federal statute(s)" apart from those concerning unemployment insurance or worker compensation claims. It is by no means a stretch to conclude that the use of this type of language in the arbitration policy or agreement could be reasonably construed by agricultural workers as a complete restraint on their right of access to public bodies such as the ALRB charged with enforcing their statutory rights. Such a conclusion is also reinforced by the language of paragraph 10 of the arbitration agreement that requires an arbitrator to apply the law from the court or public agency that ordinarily would have primary jurisdiction over the type of employment dispute at hand but for the arbitration agreement.

As I have concluded that Premiere's agricultural employees could reasonably construe the language of the used in the arbitration policy and agreement as precluding their access to the ALRB, I find that Premiere violated, and is continuing to violate, § 1153(a), as alleged. See *D. R. Horton*, supra; *Bill's Electric*, *Inc.* (2007) 350 NLRB 292, 295-296.

***4. Second cause of action*: *the class or collective action waiver***

**a. Argument**

The General Counsel and the Charging Party argue that Premiere's maintenance and attempted enforcement of the class or collective action (class action for shorthand) waiver contained in its arbitration policy and its arbitration agreements violate ALRA § 1153(a). They claim that the ALRA prohibits class action waivers and that this prohibition is not "preempted" by the FAA. ALRA §§ 1152 and 1153(a) protects worker

rights to engage in concerted activity and, they argue, that protection includes an employee's right to pursue legal actions on a class basis. As the right to engage in concerted activity is a substantive rather than a procedural right, the FAA "savings" clause precludes the enforcement of arbitration agreements that unlawfully require employees to proscriptively waive their right to engage in protected concerted activities, such as pursuing legal actions on a class basis in their employment disputes. They rely on the NLRB's decisions in *Horton* and *Murphy Oil*, supra, as well as the recently issued opinion in *Lewis v. Epic Systems Corporation* (7th Cir. May 26, 2016 No. 15-2997) ___ F3d ___. Anticipating Premiere's arguments, the General Counsel also contends that Article III, Section 3.5(c) of the California Constitution precludes the ALRB from finding that the class action protections based on ALRA § 1152 is preempted by the FAA because no court of appeals has yet made such a determination.[12]

Premiere argues that that the compulsory class action waivers contained in its arbitration policy and agreements do not violate the ALRA. It disputes the application of the NLRB's holdings in *Horton* and *Murphy Oil* to the facts of this case because: 1) the Fifth Circuit refused to enforce the class action waiver aspect of both cases; and 2) the California Supreme Court adopted the Fifth Circuit's *Horton* rationale in *Iskanian v. CLS Transportation Los Angeles*, LLC (2014) 59 Cal.4th 348, to find a similar waiver lawful under the NLRA and an arbitration agreement containing it enforceable under the FAA. In Premier's view, *Iskanian* requires the

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[12] The relevant portion of Article III, Section 3.5 of the California Constitution provides that a California administrative agency "has no power . . . (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

ALRB to conclude that class action waivers contained in its arbitration policy and agreements are lawful.

**b. Analysis**

The resolution of this important issue based on current developments is, to say the least, quite problematic. The NLRB's historic *Horton* decision begins with this paragraph that provides an apt introduction to what is at stake here:

> In this case, we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer *in any forum,* arbitral or judicial. For the reasons stated below, we find that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable. In the circumstances presented here, there is no conflict between Federal labor law and policy, on the one hand, and the FAA and its policies, on the other.

*Horton* (2012) 357 NLRB 2277. [Emphasis added; Footnotes omitted.]

It has long been held that employer-imposed individual agreements requiring employees to prospectively waive rights protected by NLRA section 7 (which includes the right to engage in concerted activities for the purpose of "mutual aid and protection") violate § 8(a)(1). See e.g. *National Licorice Co. v. NLRB*, (1940) 309 U.S. 350, 360-61. More recently, the Seventh Circuit, early on in its analysis of this issue in *Lewis*, supra, noted that "the Board has, 'from its earliest days,' held that 'employer-imposed, individual agreements that purport to restrict Section 7 rights' are unenforceable." *Lewis*, supra, slip op. at p. 4, and the cases cited there. The

Supreme Court acknowledged almost four decades ago that NLRA § 7 "protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565–566. In *Horton*, the NLRB expressly found that this principle extends to arbitration whether the arbitral system flows from collective-bargaining or is the employer's unilateral creation. *Horton*, supra at 2278-79. Going further, *Horton* concluded that as an employer imposed class or collective action waiver was unlawful under Section 8(a)(1), such arbitration agreements fell within the FAA's savings clause thereby rendering them unenforceable under that statute. *Horton* also found this conclusion reinforced by Norris-LaGuardia's prohibition against the enforcement of agreements that restrict employee concerted activities. Id. at 2276-77.

As noted, the Fifth Circuit has rejected the NLRB's conclusion in *Horton* that class or collective action waivers in employment arbitration agreements violate the NLRA, finding therefore that the FAA savings clause inapplicable. According to that court, the FAA case law pointed it in a "different direction." *Horton v. NLRB*, 737 F.3d at 357. In *Lewis*, the Seventh Circuit succinctly summarized its sister circuit's approach thusly:

> Drawing from dicta that first appeared in (*AT&T Mobility LLC v. Concepcion*), 563 U.S. at 348, and was then repeated in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), the Fifth Circuit reasoned that because class arbitration sacrifices arbitration's "principal advantage" of informality, "makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "greatly increases risks to defendants," and "is poorly suited to the higher stakes of class litigation," the "effect of requiring class arbitration procedures is to disfavor arbitration." *D.R. Horton*, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 348–52); see also *Italian Colors*, 133 S. Ct. at 2312. The Fifth Circuit suggested that because the

> FAA "embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements," *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted), any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA. See *D.R. Horton*, 737 F.3d at 360 ("Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The (FAA's) saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.").

*Lewis*, supra at slip op. at 14.

Subsequently, the NLRB signaled its nonacquiesce with the Fifth Circuit's rationale by reaffirming its position in *Murphy Oil,* supra. But before *Murphy Oil*, the California Supreme Court decided the *Iskanian* case. Iskanian, a driver for CLS Trucking who had executed an arbitration agreement with his employer that waived the right to initiate class proceedings in connection with employment disputes, filed a class action lawsuit in state court on behalf of himself and similarly situated employees claiming that the employer failed to properly compensate employees for overtime and meal and rest periods, reimburse business expenses, provide accurate and complete wage statements, or pay final wages in a timely manner. (As found above, Cruz filed a similar suit against Premiere in September 2015). In the lower courts, Iskanian argued that the California courts should not enforce the arbitration agreement on the ground that it was contrary to California public policy, was unconscionable, and was unlawful under the NLRB's *Horton* decision.

The California Supreme Court concluded in a 6-1 opinion, Justice Werdegar dissenting specifically on the class action waiver issue, that *Concepcion* compelled the enforcement of Iskanian's arbitration agreement. The majority opinion, authored by Justice Liu, concluded that *Concepcion* had effectively overruled California's restrictions on class action waivers in

both consumer arbitration agreements and employment arbitration agreements as reflected in *Discover Bank v. Superior Court (2005) 36 Cal.4th 148,* and *Gentry v. Superior Court (2007) 42 Cal.4th 443,* respectively. The majority also rejected Iskanian's claim that class action waivers are unlawful under the NLRA.

In dealing with the NLRA issue, the *Iskanian* majority specifically endorsed the Fifth Circuit's opinion concerning the class or collective action waiver issue in *Horton,* point-by-point. It first agreed with the Fifth Circuit's conclusion that the NLRB's class action waiver rule in *Horton* was not covered by the FAA's savings clause.[13] "*Concepcion* makes clear" the *Iskanian* court said, "that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 59 Cal.4th at 372.

Next, the California Supreme Court agreed with the Fifth Circuit's conclusion that nothing in the NLRA's text or legislative history contained a congressional command prohibiting class action waivers so that it could be said that the NLRA "conflicts with and takes precedence over the FAA." Id. Both courts also rejected assertions that there was an inherent conflict between the NLRA and the FAA. The California Supreme Court twice noted with apparent approval the significance the Fifth Circuit placed in the fact that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." and, the Fifth Circuit's observation that

[13] The FAA savings clause provides that arbitration agreements "shall be . . . enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If the *Horton* and *Murphy Oil* holding that class action waivers violate the NLRA had been upheld, arbitration agreements containing such waivers would presumably become unenforceable under the FAA. *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83-84 (courts have a "duty to determine whether a contract violates federal law before enforcing it.")

even any argument that there could be about an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was last reenacted (1947) had "limited force."[14] Id. at 371-72.

The Court also found it significant that the U.S. Supreme Court has enforced class action waivers in the past even in the face of a federal statute (the Age Discrimination in Employment Act) that provides "permission" to bring class enforcement actions. *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. ___. This holding, the Court observed, "reinforces our doubt that the NLRA's general protection of concerted activity, which makes no reference to class actions, may be construed as an implied bar to a class action waiver." Id. at 373.

Regardless, the Court said its conclusion did not mean that "the NLRA imposes no limits on the enforceability of arbitration agreements." Thus, it found it notable that the Fifth Circuit had enforced the NLRB's order in *Horton* based on its finding that it "contained language that would lead employees to reasonably believe they were prohibited from filing unfair labor practice charges with the Board." Id at 374. The Court then concluded this portion of its multifaceted decision with the following:

> Moreover, the arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims. CLS points out that the agreement here is less restrictive than the one considered in *Horton*: The arbitration agreement does not prohibit employees from filing joint claims in arbitration, does not preclude the arbitrator from consolidating the claims of multiple employees, and does not prohibit the arbitrator from awarding relief to a group of employees. The agreement does not restrict the capacity of employees to "discuss their claims

[14] In *Lewis v. Epic Systems*, supra, the Seventh Circuit sharply criticized this argument noting that class or collective procedures have existed for centuries. See *Lewis* slip op., 6-8

> with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims." (*Horton I*, supra, 357 NLRB No. 184, p. 6; cf. *Italian Colors*, supra, 570 U.S. at p. ___, fn. 4 [making clear that its holding applies only to class action waivers and not to provisions barring "other forms of cost sharing"].) *We have no occasion to decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section 7*.

(Emphasis added) Id. at 374. Whatever the Court intended by this highly ambiguous language, I conclude that it does not license a trial judge to revisit *Iskanian's* treatment of the NLRB's *Horton* rule merely because Premiere's arbitration policy and standard arbitration agreement are far more onerous than one involved in the case before the Court.

In an effort to explain away the impact of *Iskanian* on the outcome here, the General Counsel advances two arguments that merit discussion. First, she argues, in effect, that *Iskanian* is obsolete because there have been numerous important developments since the California Supreme Court's 2014 *Iskanian* decision. Second, she claims that the Board cannot refuse to enforce the ALRA's protection of concerted activities on the ground that the FAA "preempts" such enforcement because there has been no decision to that effect by a court of appeals as required by Article III, Section 3.5(c) of the California constitution.

It is true that *Iskanian* issued early in the hubbub that has erupted over the NLRB's *Horton* decision. Thus, *Iskanian* issued before the NLRB responded to the Fifth Circuit's *Horton* rationale with a lengthy decision in *Murphy Oil* that signaled that agency's decision to stick with the conclusion it reached in *Horton* until eventually resolved by the U.S. Supreme Court.

And *Iskanian* issued nearly two years before the Seventh Circuit's decision in *Lewis v Epic Systems*, supra. There the Seventh Circuit, in a situation involving an arbitration agreement comparable to the one here, found the class action waiver it contained unlawful under the NLRA and unenforceable under the FAA because the concerted activity protection in NLRA § 7 meets the "criteria of the FAA's saving clause for nonenforcement." Concluding that the NLRA and FAA "work hand in glove," Chief Judge Wood's opinion in *Lewis* bluntly rejects the Fifth Circuit's rational in Horton in no uncertain terms as follows:

> There are several problems with (the Fifth Circuit's) logic. First, it makes no effort to harmonize the FAA and NLRA. *When addressing the interactions of federal statutes, courts are not supposed to go out looking for trouble: they may not "pick and choose among congressional enactments*." *Morton*, 417 U.S. at 551. Rather, they must employ a strong presumption that the statutes may both be given effect. See id. The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA. (Emphasis added)

*Lewis v Epic Systems*, (7th Cir. 2016) ___ F3d ___, slip op. at p. 14-15.

The body of criticism of the Fifth Circuit's *Horton* decision does not stop there. Review is presently pending in the Ninth Circuit of the NLRB's decision in *Country Wide Financial, et al* (2015) 362 NLRB No. 165, which applied the *Horton/Murphy Oil* rationale to find an arbitration agreement unlawful in that case. See *Countrywide Financial Corporation; Countrywide Home Loans, Inc.; and Bank of America Corporation v. National Labor Relations Board* (9th Cir.) Nos. 15-72700 and 15-73222. In that proceeding a group of labor law scholars who have written extensively in the past about the relationship of federal labor law under the Norris-LaGuardia Act and the NLRA with the FAA have filed an amicus brief (hereafter Amici Scholars) supporting the NLRB's *Horton/Murphy*

*Oil* rationale. That brief is notable for the following contention it singles out and advances based exclusively on Norris-LaGuardia:

> The plain language of Norris-LaGuardia prevents federal courts from enforcing "any . . . undertaking or promise in conflict with the public policy" that employees "shall be free from interference . . . of employers . . . in . . . concerted activities for the purpose of mutual aid or protection." 29 U.S.C. §§ 102, 103. The Supreme Court has construed the term "concerted activities for the purpose of . . . mutual aid or protection" to include seeking redress in court. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 2512 (1978).

Amici Scholars Br., p. 2. After reviewing the history of this 1932 statute, the Amici Scholars' brief argues that no court of appeals rejecting the NLRB's reasoning in *Horton* has fully rationalized the import of Norris-LaGuardia or "explained why it is not controlling." That brief is particularly critical of the Fifth Circuit in *Horton* for dismissing the relevance of Norris-LaGuardia in footnote 10 of its decision that tersely concludes that statute is "outside the Board's interpretative ambit" and then paying no further heed to Norris-LaGuardia at all.

No doubt I could research and locate numerous other criticisms of the Fifth Circuit's *Horton* decision but it would not alter the critical fact here that the California Supreme Court agreed with that federal appellate court's conclusion in *Iskanian* that class action waivers do not violate the NLRA and must be enforced under the FAA. It has yet to reverse course by adopting something akin to the *Lewis v. Epic Systems* rationale, or the type of independent rationale suggested by the Amici Scholars. I note that ALRA § 1148 commands the ALRB to apply NLRA precedent, as opposed to NLRB precedent as the General Counsel's brief states. Simply put, in *Iskanian* the California Supreme Court concluded that class action waivers

do not violate the NLRA. Whether I or the NLRB or the Seventh Circuit agrees or disagrees with that viewpoint is immaterial. California's highest court held just over two years ago that class action waivers are enforceable in California. That does not leave me in any position to declare that conclusion obsolete at this early stage of this developing case law.

I also find that the *Iskanian* decision fully answers the constitutional question raised by the General Counsel. *Iskanian* squarely addressed the precise precedent the General Counsel would have me apply here. While it is true that *Iskanian* is not couched in preemption terms, it concluded in unmistakable terms that the FAA commands the enforcement of adhesive arbitration agreements containing class action waivers because the defense against their enforcement based on the argument that such waivers are unlawful under the NLRA lacks merit. Even assuming that I have authority to address constitutional claims (which I highly doubt) *Iskanian*, in my judgment, fully satisfies the constitution's requirement for a decision by an appellate appeal under Article III, Section 3.5(c).

Having concluded that the California Supreme Court reached the conclusion in *Iskanian* that class action waivers in arbitration agreements are lawful under NLRA section 7 and enforceable under the FAA, I dismiss the second cause of action.

**CONCLUSIONS OF LAW**

1. The Respondent violated section 1153(a) of the Act by maintaining and enforcing an arbitration policy and arbitration agreement as a condition of employment that its employees could reasonably construe a limiting their right to file charges with the ALRB.

2. The requirement in Respondent's arbitration policy and arbitration agreements requiring its employees as a condition of employment to

arbitrate their employment related disputes with the Respondent only on an individual basis does not violate the Act.

## REMEDY

Having concluded that Premiere has violated the Act it will be required to cease and desist therefrom and take certain affirmative action specified below.

Premiere will be required to post and maintain the notice to employees attached hereto in the appropriate languages for a period of 60 days, provide access to Board agents for the purpose of reading and distributing the notice to employees, and to answer employee questions outside the presence any supervisor and managerial employee, all in the manner specified in the recommended Order below. Premiere will also be required to promptly amend its arbitration policy and every arbitration agreement executed by an employee since the inception of its policy to provide explicitly that nothing in its arbitration policy or arbitration agreement may be construed to prohibit its employees from filing charges with the Agricultural Labor Relations Board. It will also be obliged to notify all employees and former employees of this amendment and provide them a copy of it written in the same language as the original arbitration agreement signed by that employee.[15]

On these findings of fact, conclusions of law and the entire record in this matter I hereby issue the following:

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[15] I find the requirement to notify former employees of this amendment is warranted by reason of the fact that the arbitration agreement purports to cover disputes that arise after the employee's period of employment.

## ORDER

Pursuant to Labor Code section 1160.3, Respondent, Premiere Raspberries, LLC, dba Dutra Farms, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:
   (a) Maintaining or attempting to enforce an arbitration policy or an arbitration agreement that does not explicitly state that nothing in the policy is to be construed to prohibit or prevent any agricultural employee from filing an unfair labor practice charge with the Agricultural Labor Relations Board (ALRB) or otherwise having access to the services of the ALRB.

   (b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions necessary to effectuate the policies of the Act:
   (a) Immediately amend its arbitration policy and arbitration agreement form to explicitly provide that nothing in the arbitration policy or any arbitration agreement signed by an agricultural employee shall be construed as to prohibit or limit in any way access to the Agricultural Labor Relations Board (ALRB) for the purpose of filing an unfair labor practice charge or utilizing any other service provided by the ALRB.

   (b) Promptly notify by mail all current and former agricultural employees who have signed an arbitration agreement of this amendment to the arbitration policy and provide each of them a copy of the amendment made to the arbitration agreement previously signed by them.

   (c) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

   (d) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for 60 days, the period(s) and

place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order. to all current and former agricultural employees employed by Respondent who have signed an arbitration agreement at their last known addresses.

(g) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

(h) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms.

(i) Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

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**IT IS FURTHER ORDERED** that the second cause of action in the General Counsel's complaint be and hereby is dismissed.

DATED: August 8, 2016.

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William L. Schmidt
Administrative Law Judge

# NOTICE TO AGRICULTURAL EMPLOYEES

**After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by maintaining and attempting to enforce an unlawful arbitration policy and arbitration agreement you were required to sign that interfered with your rights under Section 1152 of the Act.**

The ALRB has told us to post and publish this Notice. The Agricultural Labor Rrelations Act is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

**WE WILL NOT** maintain or attempt to enforce an arbitration policy or an arbitration agreement that does not explicitly state that nothing in the policy or agreement may be construed to prohibit or prevent you from filing an unfair labor practice charge with the Agricultural Labor Relations Board (ALRB) or otherwise having access to the services of the ALRB.

**WE WILL NOT** in any like or related manner, interfere with, restrain or coerce you or your fellow employees from exercising your rights under the Act.

**WE WILL** immediately amend our arbitration policy and our arbitration agreement form to explicitly provide that nothing in the arbitration policy or any arbitration agreement signed by you may be construed as to prohibit or limit in any way your access to the Agricultural Labor Relations Board (ALRB) for the purpose of filing an unfair labor practice charge or utilizing any other service provided by the ALRB.

**WE WILL** promptly notify by mail all of our current and former agricultural employees who have signed an arbitration agreement of this amendment to our arbitration policy and all of our arbitration agreements with agricultural employees and **WE WILL** provide each of you with a copy of the amendment made to the arbitration agreement you have previously signed.

DATED:

**PREMIERE RASPBERRIES, LLC**
**DBA DUTRA FARMS**

By: ________________________________
(Representative) (Title)