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ATTORNEYS FOR DEFENDANTS
SPROUTS FARMERS MARKET, INC.,
D/B/A SPROUTS FARMERS MARKET,
LLC; SFM, L.L.C.; SF MARKETS, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Sprouts Farmers Market Inc. Employee Data Security Breach Litigation **This Motion Relates to All Actions**	Case No. MDL 16-02731-PHX DLR **MOTION TO STAY THIS ACTION AND FOR EXTENSION OF TIME TO FILE RESPONSIVE PLEADING (FIRST REQUEST)**

MOTION

All of the claims alleged in Plaintiffs' Master Consolidated Complaint (D.E. 36) ("Compl.") are subject to individual arbitration agreements between Plaintiffs and their employer, Defendant SFM, L.L.C., an affiliate of Sprouts Farmers Market, Inc. (for purposes of

this Motion only, collectively "Sprouts").[1] Because the issue of the enforcement of these agreements—which, if enforced, would preclude Plaintiffs from pursuing their claims in this Court in the form of a class action (or in any other procedural form)—is inexorably intertwined with a 2016 Fifth Circuit order finding that they are indeed enforceable, which is now pending *certiorari* review before the United States Supreme Court along with three other federal circuit decisions in which *certiorari* already has been granted on this issue, Sprouts moves the Court to stay this action until the Supreme Court rules on those pending cases.

In addition to the stay, Sprouts moves, pursuant to Fed.R.Civ.P. 6 and L.R.Civ. 7.3, for an extension of time to file a responsive pleading either ten (10) days after the stay requested expires, ten (10) days after the motion is denied, or as otherwise ordered by the Court.[2] Before filing this motion, counsel for Sprouts conferred with Plaintiffs' counsel to ask if Plaintiffs would agree to the requested stay. Plaintiffs' counsel stated that Plaintiffs would oppose a stay pending a ruling by the United States Supreme Court.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The individual Plaintiffs who filed the lawsuits consolidated as part of this proceeding all seek to pursue claims for damages against their current or former employer, Sprouts, arising out of an incident in which a Sprouts employee fell victim to a phishing scam and emailed the Plaintiffs' IRS Form W-2 earning statements for 2015 to an unknown criminal. Before that incident, however, all nine Plaintiffs signed binding agreements to individually arbitrate any and all claims arising out of or related to their employment relationship with Sprouts. The arbitration clauses contained in each of the agreements are valid, enforceable, and include the scope of the subject matter of Plaintiffs' individual claims against Sprouts.

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[1] These agreements also explicitly cover disputes between employees of SFM, L.L.C. and its affiliated entities.

[2] Pursuant to Sprouts' Unopposed Motion to Amend Case Management Order No. 2 (D.E. 38), Sprouts' anticipated responsive pleading—a motion to compel arbitration and stay pending arbitration—was to be filed March 6, 2017. For the reasons set forth in this Memorandum in Support, Sprouts determined that the more appropriate relief to request given the posture of the NLRB cases was a stay of proceedings rather than a stay and an order compelling arbitration immediately.

The primary argument Plaintiffs are anticipated to raise to oppose enforcement of their arbitration agreements is that the agreements unlawfully interfere with their right under Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, to engage in concerted activities. However, the issue whether arbitration agreements between Sprouts and its employees violate the NLRA because they prohibit class action litigation already has been litigated by the National Labor Relations Board ("NLRB"), acting on behalf of Sprouts' employees, and adjudicated in Sprouts' favor by the Fifth Circuit. Because the NLRB virtually represented Plaintiffs in that proceeding, they are collaterally estopped from re-litigating the issue here. Therefore, and because the arbitration agreements are otherwise enforceable, Plaintiffs are required to pursue their claims individually in arbitration and not in court. Still, Sprouts acknowledges that this Fifth Circuit order is presently the subject of a pending petition for *certiorari* filed by the NLRB, and it is directly related to three consolidated cases as to which the United States Supreme Court has granted *certiorari* to resolve the same issue presented by the arbitration agreements at issue here: whether employment arbitrations agreements that require employees to forego class or collective actions and instead individually arbitrate claims against their employer violate the NLRA. So as to not put the Court in the difficult position of having to decide whether, contrary to the Fifth Circuit's order, those agreements are unenforceable, Sprouts instead asks that the Court stay this action until such time as the Supreme Court provides a definitive and binding answer to this question.

II. FACTUAL BACKGROUND

A. The March 2016 Phishing Scam

Plaintiffs all allege that on or about March 14, 2016, their personal information was stolen as a result of a phishing scam from an unknown person claiming to be a Sprouts executive. Compl. ¶¶ 24-25 (D.E. 36). Specifically, Plaintiffs allege that in response to the phishing email, personnel in the payroll department at Sprouts' headquarters in Phoenix, Arizona sent their 2015 IRS Form W-2 earning statements to unknown criminal actors. *Id.* The W-2 statements included each employees' full name, address, social security number, wages, and taxes withheld in 2015. *Id.* ¶ 23. Plaintiffs now seek declaratory and injunctive relief, damages, costs and

attorneys' fees on behalf of a purported class for a slew of claims against Sprouts arising out of Sprouts' unknowingly unsecure release of that information, including negligence, violations of the Arizona Consumer Fraud Act, breach of fiduciary duty, breach of confidentiality, breach of contract, breach of implied contract, invasion of privacy, unjust enrichment, violations of the Fair Labor Standards Act, and violations of seven California statutes. *See* D.E. 36.

B. The Mutual Binding Arbitration Agreements

Each Plaintiff signed one or more arbitration agreements agreeing to resolve in arbitration, on an individual basis, any claims or disputes arising out of or related to their employment with Sprouts. These agreements include the 2012 Mutual Binding Arbitration Agreement (the "2012 MBAA"), the 2013 Mutual Binding Arbitration Agreement (the "2013 MBAA"), and/or 2016 California Mutual Binding Arbitration Agreement (the "2016 California MBAA") (collectively, the "MBAAs"). Declaration of Derek Mirza ("Mirza Decl."), ¶ 2 & Ex. A.

1. The 2012 MBAA

Plaintiff Danielle Butler[3] signed the 2012 MBAA and agreed to binding arbitration as the mandatory forum for resolving any dispute arising out of or related to her employment with Sprouts, including those based on any state or federal laws.[4] *Id.* The 2012 MBAA specifies that "any claim, dispute, and/or controversy . . . 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." *Id.* at 1.

The section entitled "Agreement" specifies:

> To the extent permitted by applicable law, the arbitration procedures stated below shall constitute the sole and exclusive method for the resolution of any claim between the Company and Employee ***arising out of*** "***or related to***" the ***employment relationship***. The parties hereto EXPRESSLY WAIVE their rights, if any, to have such matter heard by a court or a jury and waive their rights, if any,

[3] Plaintiff Debra Price also signed the 2012 MBAA, but it was superseded when she executed the 2013 MBAA, as discussed below.

[4] The only limited exception to "included claims" in the 2012 Agreement are for "claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board [NLRB], claims brought pursuant to state workers compensation statutes, or as otherwise required by state or federal law." *Id.*

> to bring any claim in the form of a class or collective action. By waiving such rights, the parties are not waiving any remedy or relief due them under applicable law.

Id. (emphasis added). Under the sections entitled "Procedures" and "Jury Waiver & Collective/Class Action Waiver," the 2012 MBAA reiterates the Parties' agreement to waive any right to bring any claim in the procedural form of a class or collective action:

> **Procedures**
> . . . The arbitrator shall not have the authority to combine individually filed arbitrations into a class action or collective action. Awards shall include the arbitrator's written reasoned opinion. . . .
>
> * * *
>
> **Jury Waiver & Collective/Class Action Waiver**
> **Employee understands that by agreeing to this arbitration agreement, whether through his or her signature or by continuing employment on or after the January 1, 2012 effective date, both the Employee and the Company give up their rights to a trial by jury and that Employee waives his or her right, if any, to bring any claim in the form of a class or collective action.**
> The Company and Employee have agreed to the procedures above and to final and binding arbitration of all disputes that either has against the other which are within the scope of this Agreement.
> DO NOT SIGN UNTIL YOU HAVE READ AND UNDERSTOOD THE ABOVE STATEMENT AND AGREEMENT.

Id. at 2 (emphasis in original).

On January 24, 2012, Butler signed the 2012 MBAA (as noted therein, with a January 1, 2012 effective date), thereby acknowledging and agreeing that she had read the document, understood its terms, and signed it voluntarily.

2. The 2013 MBAA

The 2013 MBAA, which was executed by Plaintiffs Price, Julio Hernandez, Sandra Esposito, and Leticia Stocks[5], provides for arbitration as the exclusive forum for resolution of any claim "that arises from, relates to, or has any relationship or connection whatsoever with the Employee's employment . . . ." Mirza Decl. ¶ 5 & Ex. B. The 2013 MBAA provides that "any claim, complaint, grievance, cause of action, and/or controversy (collectively referred to as a

[5] Plaintiffs Nancy Castellano and Beverly Porras also executed the 2013 MBAA, but those agreements were superseded when they executed the 2016 MBAA, as discussed below.

'Dispute') that the Employee may have" against Sprouts, in addition to any claims that Sprouts may have against the employee, "shall be submitted to and determined exclusively by final, binding, private arbitration pursuant to the terms of this Agreement, the Federal Arbitration Act, and all other applicable state and federal law." *Id.* "Arbitrable Claims" include, but are not limited to, "all claims based on any federal, state, or local law, statute, or regulation" and specifically include, by way of example, claims related to "negligent or intentional interference with contract" and "invasion of privacy."

As with the 2012 MBAA, the 2013 MBAA contains an express waiver of class action procedures:

> **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.

Id.

On January 19, 2013, as a part of her continuing employment with Sprouts, Plaintiff Price manually signed an Acknowledgment of Receipt of Team Member Handbook indicating that she had received the 2013 MBAA. Mirza Decl. at ¶ 3 & Ex. B. The Acknowledgment of Receipt of Team Member Handbook stated:

> 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 Sprouts Farmers Markets constitutes my acceptance of the terms and conditions of that agreement.

Id. Pursuant to the terms of the 2013 MBAA, Price's agreement to arbitrate became effective on or about January 19, 2013. *See id.* ("This Agreement supersedes any and all prior agreements or policies regarding arbitration as it relates to a Dispute between the Company and the Employee.").

All new Sprouts employees electronically signed the 2013 MBAA during the onboarding process for new hires. Plaintiffs Hernandez, Esposito, and Stocks signed the 2013 MBAA in this way.

3. The 2016 California MBAA

In December 2015 (but to be effective in 2016), Sprouts revised the 2013 MBAA. To address certain requirements under California law, Sprouts issued two versions: one for California employees and one for non-California employees. Plaintiffs Castellano, Porras, Sean Wilson, and Cynthia Byrne executed the 2016 California MBAA in January 2016. Mirza Decl. ¶¶ 6-7 & Ex. C. Like the 2013 MBAA, the 2016 California MBAA provides that arbitration is the exclusive forum for resolution of:

> all complaints, charges, claims, controversies, disputes, counts, or causes of action of any nature (collectively, 'claims'), whether based in contract, tort, equity, or other legal theory, and whether arising under any federal, state, or local statute, ordinance, or regulation, or under the common law . . . arising out of or related to Team Member's employment with Sprouts and/or the termination thereof . . . .

Id.

As with the 2012 and 2013 MBAAs, the 2016 California MBAA contains an express waiver of class action procedures:

> **Waiver of Class, Collective, and Representative Action Claims**
> The Parties expressly intend and agree that: (a) class, collective and representative action procedures are hereby waived and shall not be asserted, nor will they apply, in any arbitration pursuant to this Agreement (b) each will not assert class, collective and representative action claims against the other in arbitration or otherwise, including any non-arbitration forum, (c) each will only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person, and (d) each will not participate in a representative capacity, or join or participate as a member of a class, collective or representative action instituted by someone else in court or arbitration pertaining to any claims encompassed by this Agreement.

Id. The Parties further agreed that disputes involving multiple claims, "some of which are subject to individual arbitration" and "some that are not" would be severed, the latter of which would be stayed for the duration of the arbitration proceedings. *Id.*

In January 2016, all current Sprouts employees, including Plaintiffs Castellano, Wilson, Byrne, and Porras, attended in-store meetings during which Sprouts distributed copies of the 2016 California MBAA and a revised Sprouts Team Member Handbook. Each of these Plaintiffs signed both the 2016 California MBAA and a Policies Acknowledgement Form ("PAF"), *id.*, indicating that he/she received the new Team Member Handbook that described Sprouts' dispute resolution policy, which specifically references the MBAAs. Like the 2013 MBAA, the 2016 California MBAA included a provision notifying employees such as Castellano and Porras who had previously signed the 2013 MBAA that the new agreement superseded all prior arbitration agreements. *Id.* ("This Agreement . . . supersedes any and all prior agreements or policies regarding arbitration as it relates to claims between Team Member and Sprouts.").

4. NLRB Litigation

In July 2013, the NLRB's then-Acting General Counsel issued an administrative complaint against SFM, L.L.C. (which does business in California as SF Markets, LLC), alleging that Sprouts' maintenance of its arbitration agreements, threat to terminate and termination of an employee based on her refusal to acknowledge receipt of a revised agreement, and its effort to compel individual arbitration in a wage and hour suit filed in a California state court, each constituted unfair labor practices in violation of the NLRA because they purportedly interfered with its employees' right to engage in concerted legal activity.

The NLRB's claims arose out of unfair labor practice charges filed by two former Sprouts employees, neither of which is a named plaintiff in this case or a potential class member given that their employment ended prior to and thus they did not have any 2015 W-2 information released. That case involved an allegation that Sprouts violated the NLRA by seeking to enforce and enforcing an earlier iteration of the 2012 MBAA against former employee Jana Mestanek in the state court wage and hour suit she filed, and in which the California court granted Sprouts'

motion to compel individual arbitration and stay the litigation. *SF Markets, L.L.C.*, 363 NLRB No. 146, at 9 (Mar. 24, 2016). That case also involved an alleged unlawful termination of former Sprouts employee Laura Christensen based on her refusal to sign the PAF and to thereby acknowledge her receipt of and agreement to the terms of the 2013 MBAA. The primary issue litigated in this NLRB case was whether the MBAAs at issue were enforceable where Sprouts not only mandated arbitration, but also required employees to arbitrate an individual basis, and to thereby forego class and collective procedures in any forum. *Id.*

In March 2016, the NLRB issued a Decision and Order finding that Sprouts' enforcement of the pre-2012 MBAA to preclude class claims and the express class and collective action waiver in the 2013 MBAA each violated the NLRA, and thereby rendered those agreements invalid and unenforceable. *Id.* Sprouts filed a petition for review of the NLRB's decision in the Fifth Circuit. On July 26, 2016, the Fifth Circuit granted Sprouts' motion for summary disposition, denied enforcement of the NLRB's Decision and Order, and thereby resolved that Sprouts' MBAAs, including the express class and collective action waiver therein that compels individual arbitration of most employment-related claims, is enforceable. *SF Markets, L.L.C. v. NLRB*, 2016 WL 7468041 (5th Cir. July 26, 2016) ("NLRB Litigation"). On December 22, 2016, the NLRB filed a petition for *certiorari*, No. 16-801.[6]

In a case not involving any parties in this action, *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted* (U.S. Jan. 13, 2017), the Ninth Circuit issued a ruling contrary to the Fifth Circuit in the NLRB Litigation, holding that a class action waiver in an employment arbitration agreement violated the NLRA and was, therefore, unenforceable. The United States Supreme Court granted a petition for writ of *certiorari* in *Morris* along with two other cases, *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted* (U.S. Jan. 13, 2017), which reached the same holding as *Morris*, and *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted* (U.S. Jan. 13, 2017), which held that class and collective action

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[6] Sprouts responded to the NLRB's petition on January 23, 2017. The petition was distributed for conference on February 24, 2017, but as of the date of this Motion, the petition shows as pending on the Supreme Court's online docket. *See* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-801.htm (last accessed March 6, 2017).

waivers in employment agreements are enforceable. The consolidated Supreme Court proceeding is docketed as *NLRB v. Murphy Oil USA, Inc.*, No. 16-301, and oral argument has been continued to the October 2017 Supreme Court term.

III. ARGUMENT

A. If the Case is Not Stayed, the Federal Arbitration Act Requires This Court to Enforce the Parties' Agreements to Arbitrate.

It is well-established that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* requires courts to "'rigorously enforce agreements to arbitrate.'" *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985)); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*, 470 U.S. at 218; *see also* 9 U.S.C. § 4 ("[T]he court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (emphasis added)).

"[T]he provisions of the FAA are mandatory." *Dortch v. Quality Rest. Concepts, LLC*, No. 1:12-CV-198, 2013 U.S. Dist. LEXIS 59904, at *5 (E.D. Tenn. Apr. 26, 2013) (citing *Dean Witter*, 470 U.S. at 218). Section 4 of the FAA provides that "the district court can determine *only whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms*." *Simula*, 175 F.3d at 719-20 (emphasis added). Because the Fifth Circuit has resolved the precise issue of whether the Parties' arbitration agreements violate the NLRA by finding that they do not, this litigation should be stayed so that the Parties may proceed to arbitration on each Plaintiff's individual claims pursuant to the terms of their agreements. Indeed, "[t]he standard for demonstrating arbitrability is not high," and the proper procedure here where Plaintiffs are collaterally estopped from re-litigating the issue is to stay this action pending completion of arbitration. However, for the reasons discussed below, Sprouts acknowledges that a different type of stay may be more appropriate here under the peculiar circumstances of this case.

To determine whether to enforce an arbitration agreement a court must determine: 1)

whether a valid agreement to arbitrate exists; and 2) whether the dispute at issue falls within the scope of that agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Ultimately, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

1. The Arbitration Provisions Are Valid and Enforceable.

Pursuant to the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The general rule in interpreting arbitration agreements is that courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 942 (D. Ariz. 2011). In Arizona and California, a valid contract requires an offer, acceptance, consideration, and mutual assent. *Muchesko v. Muchesko*, 955 P.2d 21, 24 (Ariz. Ct. App. 1997); *Kruse v. Bank of Am.*, 202 Cal. App. 3d 38, 59 (1988). In the employment context, an at-will employee who is offered a new condition of employment accepts that offer through continuing the employment relationship. *See DiGiacinto v. Ameriko-Omserv Corp.*, 59 Cal. App. 4th 629, 637 (1997); *Leone v. Precision Plumbing & Heating*, 591 P.2d 1002, 1004 (Ariz. Ct. App. 1979).

Here, each Plaintiff was provided an MBAA (and in some cases, more than one version over the course of employment), and each Plaintiff had reasonable notice of and access to the terms and conditions of the agreement. Mirza Decl. at ¶¶ 2-7. In addition, each Plaintiff expressly acknowledged Sprouts' mandatory dispute resolution policy. In light of Plaintiffs' agreements to the terms of the MBAAs, as manifested by their signature and their continued employment with Sprouts after their receipt of it, Sprouts did not exercise its legal right to otherwise terminate Plaintiffs' employment, which constitutes adequate consideration in exchange for the terms in the arbitration agreements.[7] *See DiGiacinto*, 59 Cal. App. 4th at 633 ("Consideration is present on both sides."); *Coup*, 823 F. Supp. 2d at 943 (concluding that the

[7] Plaintiff Hernandez declined to sign the 2016 MBAA. Thus, the 2013 MBAA, which he did sign, remains binding and enforceable.

employer's implied promises of plaintiffs' continued employment were sufficient consideration for the arbitration agreements); *Penn v. Fidel*, 2011 U.S. Dist. LEXIS 46926, 2011 WL 1559224, * 2 (D. Ariz. April 25, 2011) (although plaintiff was hired two weeks before signing an arbitration agreement, the arbitration agreement was valid and enforceable).

Accordingly, the Parties' mutual assent to be bound by the terms of the MBAAs—including Plaintiffs' agreement to submit *any* claims or disputes against Sprouts to final and binding arbitration (except for certain claims, none of which are alleged in the Consolidated Complaint here) cannot reasonably be questioned.

2. The Individual Claims Plaintiffs Allege in the Complaint Are Subject to Arbitration.

Each of the applicable MBAAs requires that any and all claims or disputes be submitted to and determined exclusively by binding arbitration. Exs. A-C. Applicable precedent explains that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1131 (9th Cir. 2000).

Each of the Plaintiffs' individual claims (negligence, violations of the Arizona Consumer Fraud Act, breach of fiduciary duty, breach of confidentiality, breach of contract, breach of implied contract, invasion of privacy, unjust enrichment, violations of the Fair Labor Standards Act, and violations of seven California statutes) arise out of and are related to their employment with Sprouts. Indeed, Sprouts could only have possessed the W-2 information for the Plaintiffs—specifically, their personal and earnings information—as a result of the existence of an employment relationship between it and the Plaintiffs. Thus, the Plaintiffs' claims fall within the scope of those employment-related claims expressly covered by the MBAAs.

Courts within the Ninth Circuit, including the District of Arizona, have enforced agreements containing broad arbitration provisions similar to those in the MBAAs in favor of arbitration; these courts have liberally construed language such as "arising out of" or "related to" as expansive in their scope and in favor of submitting claims to arbitration. *See, e.g.*, *Chiron*, 207 F.3d at 1131 (affirming finding of arbitrability where "[t]he parties' arbitration clause [wa]s broad and far reaching: '*Any dispute, controversy or claim arising out of or relating to* the

validity, construction, enforceability or performance of this Agreement . . . .'" (emphasis added)); *McAllister v. Halls*, No. CV-15-02204-PHX-DLR, 2016 U.S. Dist. LEXIS 17529, at *3 (D. Ariz. Feb. 11, 2016) (granting defendants' motion to compel arbitration where the arbitration agreement stated: "Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, shall be settled by arbitration"); *PPG Indus. v. Pilkington PLC*, 825 F. Supp. 1465, 1478 (D. Ariz. 1993) ("The phrase 'arising out of or relating to' has been construed as creating a broad arbitration clause."); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) ("arising out of or relating to" is a broad arbitration clause).[8]

Each of the MBAAs contains broad arbitration provisions. The 2016 MBAA mandates arbitration for "all complaints, charges, claims, controversies, disputes, counts, or causes of action of any nature . . . *arising out of or related to* Team Member's employment with Sprouts and/or the termination thereof." Ex. C, ¶ 4 (emphasis added). The 2013 MBAA also explicitly contemplates that "Arbitrable Claims" include, but are not limited to "*all* claims based on any federal, state, or local law, statute, or regulation" and specifically include, by way of example, claims related to "negligent or intentional interference with contract" and "invasion of privacy." Mirza Decl., Ex. B ("Included Claims"). In the same vein, the 2012 MBAA includes within its scope of arbitrable claims "all disputes, whether they be based on the state employment statutes, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation, equitable law, or otherwise . . . ." *Id.* at Ex. A ("Agreement").

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[8] Other jurisdictions that have reviewed arbitration provisions similar to those in the MBAAs have consistently held such clauses to constitute "broad" arbitration provisions that should be enforced accordingly. *See, e.g.*, *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 172 (2nd Cir. 2004) (any dispute "arising out of" agreement is a broad arbitration clause); *Battaglia v. McKendry*, 233 F.3d 720, 727 (3rd Cir. 2000) ("arising under" is normally given a broad construction in arbitration provisions); *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 385-86 (11th Cir. 1996) ("any dispute . . . which may arise hereunder" is a broad clause; rejecting a distinction between "arising under" and "arising out of"); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996); *Housh v. Dinovo Invs., Inc.*, No. 02-2562-KHV, 2003 WL 1119526, at *3 (D. Kan. March 7, 2003) (clause covering all controversies "arising out of" agreement is "broad" and akin to clauses covering all disputes "arising under" or "relating to" agreement); *Simply Fit of N. Am., Inc. v. Poyner*, 579 F.Supp.2d 371, 378-79 (E.D.N.Y. 2008) (all claims "arising under" agreement is a broad clause). Thus, the presumption of arbitrability arises on each of Plaintiffs' individual claims against Sprouts.

B. Plaintiffs are Collaterally Estopped from Litigating the Issue of Whether the MBAAs Violate the NLRA Based on the Mandatory Arbitration and Class-Action Waiver Provisions.

Plaintiffs, current and former Sprouts employees, are collaterally estopped from re-litigating the issue of whether the MBAAs are invalid because they require employees to forego class or collective action procedures and instead individually arbitrate claims. The Fifth Circuit resolved this issue by denying enforcement of the NLRB's Decision and Order.

"In order for collateral estoppel to apply, the issue to be foreclosed in the second litigation must have been litigated and decided in the first case." *Starker v. United States*, 602 F.2d 1341, 1344 (9th Cir. 1979). When considering whether the Fifth Circuit's final order will present a likelihood of preclusion, the Ninth Circuit requires courts to find issue preclusion "if three requirements are met: (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be re-litigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Int'l Longshore & Warehouse Union v. ICTSI Oregon, Inc.*, 932 F. Supp. 2d 1181, 1200 (D. Or. 2013) (quoting *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006)). All three requirements are met here.

First, the issue on which Plaintiffs seek to invalidate their arbitration agreements is identical to the issue decided in the NLRB Litigation. In both proceedings, the basis for the argument that Sprouts' arbitration agreements are invalid is that they prohibit employees from seeking relief on a collective or class-wide basis in violation of the NLRA.

Second, although the NLRB Litigation is pending on the NLRB's petition for *certiorari*, the NLRB's pursuit of Supreme Court review does not deprive the Fifth Circuit's judgment of its finality. *See Roche Palo Alto LLC v. Apotex, Inc.*, 526 F.Supp.2d 985, 998 (N.D. Cal. 2007). In *Roche Palo Alto*, the court there held that the "Defendants conten[tion] that the resolution in [the earlier litigation] is not yet a 'final judgment on the merits' because they have filed a still-pending petition for a writ of certiorari before the United States Supreme Court" was "contrary to the law." *Id.* (citing *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988)). In federal courts, the preclusive effects of a lower court judgment cannot be suspended simply because an

appeal remains undecided. *Robi*, 838 F.2d at 327 (citing Restatement (Second) of Judgments § 13 (1982); 18 Wright § 4433, at 305, and holding that the standard is whether the lower court judgment is "sufficiently firm" to justify issue preclusion). Thus, the pending *certiorari* petition in the NLRB Litigation, by itself, does not alter the preclusive effect of the Fifth Circuit's order. On the other hand, the outcome of the Supreme Court's ultimate decision in *Murphy Oil* plainly will impact the proper resolution of the arbitration issues in this case one way or the other. As a result, as discussed in Part C, below, Sprouts requests that the Court exercise its discretion to stay this case until a ruling issues in *Murphy Oil* rather than making a definitive decision that the agreements are or are not enforceable.

Third, although the Plaintiffs here were not parties in the NLRB Litigation, they are in privity with the NLRB, which brought its enforcement action on behalf of all Sprouts employees who were or are subject to the class and collective action waivers in the MBAAs. Because the purposes underlying the doctrine of collateral estoppel include to "conserve judicial resources, protect litigants from multiple lawsuits, and foster certainty and reliance in legal relations," *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980), collateral estoppel may apply in cases in which the parties are not identical. *Jacobs v. CBS Broadcasting, Inc.*, 291 F.3d 1173, 1176 n.2 (9th Cir. 2002).

The Ninth Circuit has declared that "privity is a flexible concept dependent on the particular relationship between the parties in each individual set of cases." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-82 (9th Cir. 2003) (citation omitted). Indeed, "[p]rivity has traditionally been understood as referring to the existence of a substantive legal relationship, such as by contract, from which it was deemed appropriate to bind one of the contracting parties to the results of the other party's participation in litigation." *Int'l Longshore*, 932 F. Supp. 2d at 1201 (citing *Taylor v. Sturgell*, 553 U.S. 880, 894 n.8, (2008)) (quotation omitted). In an NLRB action, if two parties are subject to the same operative contractual language with another party, just one of them can bind the other to the results of litigation arising from that language because the parties' interests are "bound together." *Id. See also State of Idaho Potato Com'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 713

n.3 (9th Cir. 2005) (defensive nonmutual collateral estoppel precludes a plaintiff from re-litigating an issue that the plaintiff, or the plaintiff's "privy," previously litigated unsuccessfully against a different party); *Syverson v. Int'l Business Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007); *see also ITT Rayonier*, 627 F.2d at 1000 ("Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, that determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation."). Stated another way, a non-party may be bound if a party is so closely aligned with its interests as to be its "virtual representative." *See ITT Rayonier*, 627 F.2d at 1003.

The Plaintiffs' interests in whether the provisions mandating individual arbitration and waiving class and collective litigation are enforceable bind them together with Mestanek and Christensen, the two employees who are parties to NLRB Litigation. To hold otherwise would be to re-litigate an issue that the Fifth Circuit has resolved. Collateral estoppel exists to prevent this sort of duplicative litigation. *See generally Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co.*, 843 F.2d 1253, 1256 (9th Cir. 1988) ("principles of wise judicial administration" include "prevention of forum shopping and the avoidance of duplicative litigation"). It also exists to avoid the resulting waste of judicial resources and to foster certainty and reliance in legal relations. *See ITT Rayonier*, 627 F.2d at 1000.

Thus, Plaintiffs here should be precluded from duplicating the issue of the arbitration agreements' validity and enforceability.

C. The Proceedings Should Be Stayed until *Murphy Oil* is decided.

As noted above, Ninth Circuit law governing the "finality" requirement of collateral estoppel would permit the Court to compel arbitration immediately. However, the undersigned realize that the uncertainty surrounding the outcome of the *Murphy Oil* case places this Court and the parties in a potentially untenable position if it rules definitively on a motion to compel arbitration at this time. On one hand, to permit Plaintiffs to pursue their claims in this lawsuit would serve to immediately deprive Sprouts of the benefit of its rights under the MBAAs and the FAA, even if the Supreme Court ultimately affirms the rationale behind the Fifth Circuit's conclusion that class and collective action waivers in employment arbitration agreements are

valid. On the other hand, it is possible that the Supreme Court will ultimately decide in *Murphy Oil* that class and collective action waivers do violate the NLRA, in which case immediately sending the Plaintiffs' claims to arbitration would end up legally incorrect and inefficient.

Under the circumstances, Sprouts respectfully submits that the proper course of action is to stay proceedings in this case until the Supreme Court issues its ruling in *Murphy Oil*. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) (a trial court has the discretion to stay an action before it pending resolution of independent proceedings that bear upon the case). The district court in the Seventh Circuit's *Epic Systems* case (one of the three consolidated cases) has stayed its action under the reasoning that "[t]he worst possible outcome would be to litigate the dispute, to have the [Supreme Court] reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced." *See Lewis v. Epic Sys. Corp.*, No. 15-cv-82-bbc, 2017 U.S. Dist. LEXIS 17624, at *2 (W.D. Wis. Feb. 8, 2017) (quoting *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)). Where "the potential benefits of arbitration would be lost if a case could proceed in district court while a decision denying a request to arbitrate was pending on appeal," the court therefore granted defendant's motion to stay the action pending the decision in *Murphy Oil*. *Id.*

A stay in this case will likewise preserve the status quo until the Supreme Court rules definitively on the question of whether class and collective action waivers in employment arbitration agreements are valid and prevent the expense to both parties of legal proceedings—either in this Court or in arbitration—that may turn out to be unnecessary or unwarranted regardless of how the *Murphy Oil* case is ultimately decided.

IV. CONCLUSION

For the foregoing reasons, Sprouts respectfully requests that the Court stay these proceedings entirely pending the United States Supreme Court's decision in *Murphy Oil* and grant it an extension of time to file a responsive pleading either ten (10) days after the stay requested expires, ten (10) days after the motion is denied, or as otherwise ordered by the Court.

Dated this 6th day of March, 2017

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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was served on all counsel of record on this 6th day of March, 2017.

/s/ Paul G. Karlsgodt