Mario Martinez (SBN 200721)
Edgar I. Aguilasocho (SBN 285567)
1227 California Avenue
Bakersfield, California 93304
Tele: 661-324-8100
Fax: 661-324-8103
email: mariomtz@mclawmail.com
edgara@ufw.org

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	**Case No. 2013-RD-003-VIS**
GERAWAN FARMING, INC.,	
Employer,	
and	
SILVIA LOPEZ,	
Petitioner,	
and	
UNITED FARM WORKERS OF AMERICA	
Certified Bargaining Representative.	

UFW'S OBJECTIONS TO CONDUCT OF THE ELECTION AND MISCONDUCT AFFECTING THE RESULTS OF THE ELECTION; DETAILED STATEMENT OF FACTS AND LAW IN SUPPORT THEREOF

[Cal. Lab. Code 1156.3(e); 8 Cal. Code Regs. § 20365]

OBJECTION 1 (UNLAWFUL EMPLOYER INITIATION, ASSISTANCE AND SUPPORT TO DECERTIFICATION CAMPAIGN)

The Decertification Petition Should Be Dismissed Because The Employer Unlawfully Initiated, Assisted In and Supported The Gathering Of Signatures For The Petition And The Decertification Campaign.

Detailed Statement of Facts[1]

Unlawful Initiation and Assistance in crew of Foreperson Martin Elizondo

At various times throughout the decertification campaign, and during work time, workers arrived at Foreman Martin Elizondo's crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreman, Martin Elizondo. **Declaration 3, ¶ 5; Declaration 5, ¶ 7; Declaration 23, ¶ 7; Declaration 27, ¶ 4; Declaration 36, ¶¶ 3-5; Declaration 53, ¶ 4; Declaration 62, ¶¶ 3-8**.

On or about August 2013, at about 7 a.m. and during working hours, a woman named Maria Villafan, or also known as "Lolita" arrived in Foreman Elizondo's crew. Lolita began asking workers to sign a petition to get rid of the union. A worker asked Lolita what crew she worked in. Lolita responded that she worked in Foreperson Sonia Martinez's crew. The worker was aware that on that day Sonia Martinez's crew was working a block away. Lolita continued to go row by row asking workers for signatures. Lolita collected signatures for about thirty to forty minutes during working hours and in the presence of Foreman Elizondo. Foreman Elizondo never told Lolita to leave. **Declaration 27, ¶ 4**.

[1] The UFW is electing to serve a "Detailed Statement of Facts" on all parties instead of actual declarations, in accordance with section 20365(c)(2)(D) of the Board's Regulations. The declarations are being served on the Executive Secretary as required pursuant to that section. See 8 Cal. Code. Regs. § 20365(c)(2)(D).

On or about the first week of August, as the crew was gathering to attend the Foreman's "escuela" (school, or explanation of how work was to be done for the day), two women came to the crew to collect signatures to get the union out. The foreman was able to see the women arrive and also saw as they talked to crew members as he gave the school for the day. The women were asking workers to sign their names in a notebook. The foreman was present and could see what was happening but did not ask the women to leave or tell the workers to return to work.

A few minutes later, a young man also arrived at the crew from another crew and asked workers to sign in his notebook if they were union supporters. A worker recognized the young man and knew him to be against the union based on negative things he had said about the union and saying that they did not need a union. Therefore, the worker understood that the young man was misleading workers into signing a petition against the union. The foreman also saw the young man arrive and talk to several of his crew members but did not tell the young man anything. **Declaration 36, ¶ 3**.

On or about September 4, 2013, workers witnessed Juan Padilla, a fellow coworker from another crew, attempting to collect signatures for the decertification petition from members of Foreman Elizondo's crew. **Declaration 36, ¶ 4; Declaration 53, ¶ 4**. Padilla arrived during the crew's 8:30 a.m. break and continued speaking to workers about signing the decertification petition after the break had already ended. Foreman Elizondo's crew was approximately a thirty minute walk away from Padilla's. Padilla was on foot and did not have a car. Foreman Elizondo did not ask Padilla to leave. **Declaration 36, ¶ 4**.

Toward the end of September 2013, a worker, (First Name Unknown) Chavez, twice sought to collect signatures to get rid of the union during working hours, once shortly after 6:30 a.m. and then again at 10:30 a.m. Chavez was with the crew for several minutes after most of the

crew had already started working. Chavez told the other workers that the petition was to "take out the Union." Foreman Elizondo did not ask Chavez to leave at any time. **Declaration 36, ¶ 5**.

On or about October 3, 2013, at 8:30 a.m., a woman came into Foreman Elizondo's crew to collect signatures during working hours. The foreman did not ask her to leave. **Declaration 3, ¶ 5.**

Foreman Elizondo actively assisted in the collection of signatures for the decertification petition. **Declaration 62, ¶¶ 3-8; Declaration 5, ¶ 6.** On or about mid-August 2013, Foreman Elizondo gave a petition to a worker in his crew and asked the worker to collect signatures from other workers in order to get the union out. **Declaration 62, ¶ 3**. Foreman Elizondo told the worker that he was giving the worker the petition because he himself could not be involved in collecting signatures. **Declaration 5, ¶ 6.** Foreman Elizondo told the worker to have a meeting with workers the next work morning, explain to them what the petition says, and have the workers sign the petition. The worker felt pressured to accept the sheets and follow Foreman Elizondo's instructions because the worker had been in Foreman Elizondo's crew for a significant amount of time. **Declaration 62, ¶ 4**. The next morning, the worker asked a group of about ten workers to sign the petition. Foreman Elizondo was in an area where he could observe the worker asking other crew members to sign the petition. **Declaration 62, ¶ 7**. Later that morning, a worker from another crew arrived at Foreman Elizondo's crew, offered the worker more sheets to collect more signatures, and collected the signatures collected during the earlier meeting. **Declaration 62, ¶ 8**.

Gerawan Farming has a strict no solicitation work policy. It is both the policy and practice of Gerawan forepersons and supervisors to not permit workers to stop work for any reason, to leave to other crews, or to engage in non-work related activities. **Declaration 36, ¶ 4; Declaration 27, ¶ 4.** Despite this policy, foreman Elizondo permitted workers to gather signatures for a decertification petition during working hours. This assistance was not *de minimis* but represented

substantial assistance to the decertification efforts. **Declaration 3, ¶ 5; Declaration 5, ¶ 7; Declaration 23, ¶ 7; Declaration 36, ¶¶ 3-5; Declaration 53, ¶ 4; Declaration 62, ¶¶ 3-8.**

Unlawful Initiation and Assistance in crew of Foreperson Raquel Villavicencio

At various times throughout the decertification campaign, and during work time, workers arrived at Foreperson Raquel Villavicencio's crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreperson, Raquel Villavicencio. **Declaration 12, ¶ 10; Declaration 13, ¶ 8; Declaration 28, ¶ 4; Declaration 73, ¶ 8; Declaration 82, ¶5.**

On various occasions, workers saw that Jovita Eligio, a worker in the crew, gathered signatures in the crew during working hours. **Declaration 12, ¶ 10; Declaration 13, ¶ 8; Declaration 73, ¶ 8.** Foreperson Villavicencio and Jovita had several mini-meetings throughout the day on the days that Jovita would gather signatures on the petition. Foreperson Villavicencio did not have any other conversations or mini-meetings like she had with Jovita on those days **Declaration 73, ¶ 8.** Also, on or about September 2, 2013, Jovita arrived at the crew with her children. She got out of the car and asked for signatures from three (3) new people who had just begun working that week. She then got in her car and drove away. She had been missing from work in Foreperson Villavicencio's crew for about two weeks and had not been working that day either. **Declaration 82, ¶ 5.**

Petitioner Lopez also gathered signatures in Foreperson Villavicencio's crew during work hours. **Declaration 13, ¶ 8.** Another worker in the crew, Karla, also collected signatures in the crew during working hours. **Declaration 28, ¶ 4.** Foreperson Villavicencio was very close to these workers as they asked workers to sign the petition, sometimes as close as five feet away. **Declaration 28, ¶ 4.**

Workers also saw that various crew members, including Jovita Eligio, would leave the crew on various occasions in the middle of the work day to gather signatures. **Declaration 12, ¶ 10; Declaration 13, ¶ 8; Declaration 28, ¶ 5; Declaration 82, ¶ 4**. Carla (Last Name Unknown), Alicia (Last Name Unknown), and Maria Elena (Last Name Unknown) also left the crew during working hours to gather signatures, and met with Foreperson Villavicencio before they did so. **Declaration 73, ¶ 8**.Workers knew that workers who left the crew during working hours were leaving to gather signatures because they were carrying the papers to have people sign to get rid of the union. **Declaration 13, ¶ 8**. One some occasions these workers would leave the crew in the morning and would return about two hours later. On other occasions they would leave in the morning and return near the end of the day. Upon their return to the crew, they would go talk to Foreperson Villavicencio rather than return to work. They would speak to the foreperson for about ten minutes. On a few occasions, they would show the foreperson the petition. **Declaration 28, ¶ 5**.

A worker also discovered that at least one of these workers, Jovita Eligio, was counted as present and working many times when she was really absent from the crew. The worker would look at the attendance sheet when checking in at work. The worker knew that Jovita's name appeared a certain number of spaces above the worker's own. Jovita had been not worked at the crew for two weeks, but Jovita was marked as present on those days she was gone, using dashes next to her name instead of an "A" for absent. **Declaration 13, ¶ 8**. Another worker also noted that there were some occasions when crew members Maria Elena, Carla Cornejo, and Jovita would leave the crew and not work for over a week at a time. Even so, the worker saw Carla Cornejo pick up multiple checks from the foreperson for one of those weeks that she did not work at all. **Declaration 82, ¶ 4**.

Gerawan Farming has a strict no solicitation work policy. It is both the policy and practice of Gerawan forepersons and supervisors to not permit workers to stop work for any reason, to leave to other crews, or to engage in non-work related activities. Even so, Foreperson Villavicencio permitted workers to gather signatures during working hours without saying anything or telling the workers involved to go back to work. **Declaration 13, ¶ 8**.

Unlawful Initiation and Assistance in crew of Foreperson Jesus Padilla

Sometime in mid-August, 2013, at about 8 a.m. and during working hours, Foreman Jesus Padilla approached two workers in his crew. The foreman was carrying a clipboard with a sheet of paper on it, and asked one of them to sign it. The worker said in a loud voice that he was not going to sign it, and showed the paper to his co-worker. The paper contained a list with writing on top and two columns with signatures running down. The worker then gave the list back to the foreman, and the foreman gave it to crew-member Rolando Padilla. The workers then saw Rolando Padilla leave the crew with the sheet to go gather signatures in other crews. He was gone for about one hour and did not perform any work during the time he was gone. **Declaration 14, ¶ 6**.

Workers saw Rolando leave the crew with sheets in his hands on numerous occasions. He would leave for extended period of time during working hours to gather signatures to get rid of the union. Foreman Padilla would see Rolando leave during working hours, but he did not stop him from doing so. **Declaration 14, ¶ 6; Declaration 67, ¶ 4**.

Another worker saw Rolando Padilla leave his work area during work hours and proceed to go row by row asking workers to sign the petition to get rid of the union. Foreman Jesus Padilla could see Rolando collecting signatures. **Declaration 20, ¶ 3**. The worker would also see that Rolando left the crew on various occasions to collect signatures for about thirty minutes to two hours at a time. At times he never returned for the rest of the day. On one occasion, Rolando left

the crew about fifteen minutes before lunch began and, laughing, said, "I will be back I'm going to wash these dumb workers' minds." **Declaration 20, ¶ 4**.

On or about early July 2013, Rolando spoke with one of the workers and informed the worker that the company had bought him a new smartphone. Rolando said, "This is such a good phone to send all my messages now that I am such an important person. **Declaration 20, ¶ 5**.

After Silvia Lopez filed the decertification petition, Dan Gerawan began visiting Rolando on a daily basis. Throughout different times of the day, Dan Gerawan would arrive at Foreman Padilla's crew and pull Rolando to the side. Dan Gerawan and Rolando would secretively talk for about ten minutes. On some occasions, Marco Luna, vice president of Gerawan Farming, would also come along with Dan Gerawan. **Declaration 20, ¶ 6**.

On or about the third week of October 2013, during working hours, a worker observed that Dan Gerawan and a tall, white male holding a brief case, who appeared to be an attorney, pulled Rolando aside. Dan Gerawan and the other man spoke to Rolando for about thirty minutes. The workers saw that the man who appeared to be an attorney was taking pictures of Rolando. **Declaration 20, ¶ 8**.

On or about October 25, 2013, at about 3:30 p.m., a worker observed Rolando Padilla speaking with another crew-member. Rolando pulled out his wallet, which appeared to be full of money, and showed it to the crew-member. Rolando told the crew-member that if he started working on the company's side like Rolando was, he could earn a large sum of money. The worker understood Rolando o mean that if the crew-member joined the company's decertification campaign, the company would reward him with large sums of money. **Declaration 20, ¶ 10**.

Unlawful Initiation and Assistance in crew of Foreperson Cirilio Gomez

On July 19, 2013, four women were standing outside of the field where ForemanCirilio Gomez's crew was working in Kerman. One of these women asked workers to sign a petition for the company. When one of the workers asked what she meant by signing for the company, she explained that it was to get rid of the union. One of the women then asked Forman Gomez to tell the workers to sign the petition. Foreman Gomez then told the workers to sign the petition. One of the other workers asked what the petition was for, and Foreman Gomez responded, "it's for the union." **Declaration 50, ¶ 4**.

After Foreman Gomez said this, a worker told him that what he was saying was not true and that the petition was to get rid of the union. Foreman Gomez asked the worker in an angry voice how he knew. The Foreman kept pages from the petition so that workers could sign. **Declaration 50, ¶ 5**.

Unlawful Initiation and Assistance in crew of Foreperson Israel Lopez

On or about the end of September 2013, at approximately 4 p.m. and during working hours, three people arrived at Foreman Israel Lopez's crew in a gray car. These workers asked crew members for signatures to get the union out during working hours. **Declaration 7, ¶ 3; Declaration 74, ¶ 4**. They continued asking workers to sign the petition as they went to the bathroom. **Declaration 74, ¶ 4**.

On or about September 21, 2013, R&T FLC owner, Horacio Martinez, approached Foreman Israel Lopez's crew as they met Foreman Israel Lopez to pick up their checks and asked them to sign a petition. **Declaration 7, ¶¶ 4-5; Declaration 9, ¶ 4; Declaration 72, ¶ 3; Declaration 74, ¶¶ 6-7**. The contractor told the crew in a loud voice that "La Prima" had given him that paper because they didn't want the union, and they had asked him to collect signatures. **Declaration 7, ¶¶ 4-5; Declaration 9, ¶ 4**. The Contractor then said that if someone asks, they

should say that it was a lady that gave them this petition to sign. **Declaration 25, ¶ 3; Declaration 74, ¶ 7**.

Unlawful Initiation and Assistance in crew of Foreperson Candelario Rojas

At various times throughout the decertification campaign, and during work time, workers arrived at Foreman Candelario Rojas' crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreman, Candelario Rojas. **Declaration 31, ¶ 7**.This was also done in violation of the company's strict policy to not permit workers to stop work for any reason, to leave to other crews, or to engage in non-work related activities. **Declaration 31, ¶ 7**.

On July 26, 2013, at around 11:00 a.m., a worker asked a fellow co-worker what her work assignment was. The co-worker responded that her forelady, Raquel (last name unknown), had assigned her work on collecting signatures from other co-workers to get rid of the union. **Declaration 37, ¶ 6**.

Unlawful Initiation and Assistance in crew of Foreperson Ramiro Cruz

On or about June 2013, at approximately 9 a.m. three women came to Foreman Rojas' crew. A worker was having a conversation with the foreman when the women walked up and asked the worker to sign to get rid of the union. Foreman Cruz asked the worker if the worker was going to sign. The women also spoke to other workers during work hours. The foreman did not discipline when they stopped working to speak with the women. This was also done in violation of the company's strict policy to not permit workers to stop work for any reason, to leave to other crews, or to engage in non-work related activities. **Declaration 78, ¶ 3**.

Unlawful Initiation and Assistance in crew of Foreperson Alfredo Zarate

At various times throughout the decertification campaign, and during work time, workers arrived at Foreman Candelario Rojas' crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreman, Candelario Rojas. **Declaration 1, ¶ 8**.

Unlawful Initiation and Assistance in crew of Foreperson Leonel Nunez

At various times throughout the decertification campaign, and during work time, workers arrived at Foreman Leonel Nunez's crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreman, Leonel Nunez. **Declaration 38, ¶ 5**; **Declaration 41, ¶4**,

In or around July 2013, foreman Nunez held a meeting with his crew. During the meeting, a woman was also present holding a document. She was standing with the crew as Foreman Nunez said that the union did not benefit the workers and that the company did not want the union. He said that the union only wanted money. **Declaration 38, ¶ 5**; **Declaration 41, ¶ 4**. He said that Wawona workers, who he claimed had a union contract, were disappointed with the union's results. **Declaration 41, ¶ 4**. He also said that he had already signed the petition. The woman who was present at the meeting held the petition in her hand and did not say anything. Several workers then signed the petition. **Declaration 38, ¶ 5**. Foreman Nunez asked the workers to sign the petition. **Declaration 41, ¶ 6**. Later that day, Foreman Nunez approached a worker who had not signed the petition. Foreman Nunez began making negative comments about the union. Foreman Nunez intimidated the worker by saying that he knew there were two union supporters in his crew and seven in Francisco Maldonado's crew and that he knew who they were. **Declaration 41, ¶ 7**.

On or about August 12, 2013, foreman Nunez pulled aside two workers to speak with them. Foreman Nunez took the two workers to an area where the rest of the crew would not hear or see

them. Foreman Nunez said that a representative from the company by the name of Jose Erevia, representatives from the union, and agents of the state would probably question them about signing the petition to get rid of the union. Foreman Nunez told them not to name him as being involved in requesting worker signatures for the petition. He told them to tell the company representative, the union, and the state that he was not involved in the request for signatures. Foreman Nunez told the workers to say that he was far away training a new worker when a lady came and asked them for signatures as they were returning to work from a meeting. **Declaration 38, ¶ 7**.

On August 13, 2013, Foreman Nunez called one of the two workers away from the crew and told the worker that Erevia wanted to speak to the worker. Erevia asked the worker about the day the worker signed the petition. The worker told Erevia the same thing that Foreman Nunez had asked the worker to say. **Declaration 38, ¶ 9**.

Unlawful Initiation and Assistance in crew of Foreperson Eugenio Lopez

On or about the middle of August 2013, a man and a woman approached Foreman Eugenio Lopez's crew. On or about the last week of August, a man, a woman, and her child approached Foreman Eugenio Lopez's crew. On both occasions, these people asked workers to sign a petition to get the union out. On both occasions, Foreman Eugenio Lopez stood near the people gathering signatures and watched workers during the whole time that they were speaking to crew members. At times, Foreman Eugenio Lopez was approximately twelve feet away from workers as they were being asked to sign the petition. One worker said that crew members were intimidated into signing because the foreman was so close to them as they were being asked to sign the decertification petition. **Declaration 22, ¶ 7-8**.

Unlawful Initiation and Assistance in crew of Foreperson Francisco Maldonado

At various times throughout the decertification campaign, and during work time, workers arrived at Foreman Francisco Maldonado's crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreman, Francisco Maldonado. **Declaration 75, ¶ 7**. In the absence of Foreman Francisco Maldonado, this solicitation was also done in the presence and with the consent of the acting foreman, Daniel Maldonado, and Counter Seferino Lopez. **Declaration 75, ¶ 11**. This was done in violation of the company's strict policy to not permit workers to stop work for any reason, to leave to other crews, or to engage in non-work related activities. **Declaration 75, ¶ 7**.

Unlawful Initiation and Assistance in crew of Foreperson Gloria Mendez

At various times throughout the decertification campaign, and during work time, workers arrived at Foreperson Gloria Mendez's crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreperson, Gloria Mendez. **Declaration 39, ¶¶3-7; Declaration 70, ¶ 6; Declaration 71, ¶¶ 3-5**. On or about July 13, 2013, while workers circulated the petition to get rid of the union and during work hours, Foreperson Gloria Mendez told workers that the union would "steal money from the workers by taking half of what they earn."**Declaration 39, ¶ 4**.

On or about June or July 2013, during the peach harvest and at about 11 a.m., worker Erika Solano began asking workers in the crew to sign a petition against the union. **Declaration 70, ¶ 6; Declaration 71, ¶ 4**. While this happened, Foreperson Gloria Mendez was about five rows away and could observe the gathering of the signatures. Normally if workers are talking to each other and not working they are told to get back to work, or threatened with discipline, but in this case the foreperson did not say anything to Erika. **Declaration 70, ¶ 6**. Erika spoke with workers in Gloria Mendez's crew for over thirty minutes, during working hours, and without any interruption from

Foreperson Gloria Mendez. Foreperson Gloria Mendez saw Erika talking to workers during working hours and allowed Erika to have the workers stop working, and climb down off the ladder in order to get signatures on a decertification petition. **Declaration 71, ¶ 5**.

On or about October 23, 2013, the crew finished working at about 3:50 p.m. Workers are normally not allowed to go home until the punchers come and punch their cards. The punchers were waiting about fifteen to twenty rows away from the crew. The punchers usually wait until they receive orders from the supervisors to punch the workers' cards. On that day, while the crew was waiting and during working hours, Silvia Lopez walked by alongside the road wearing a t-shirt that said "No UFW" with a red crossed-out circle. She would stop and ask groups of people in a loud voice if they had already signed, waiving a clipboard in the air. She did this for about one hour, gathering signatures and talking to people. Once Silvia walked away and disappeared, the punchers came by and started punching the workers' cards. Overall, the workers waited for about one hour. Workers usually do not wait more than ten minutes before the punchers come, count their boxes, and punch their cards. The forepersons were present during this time and did not say anything to Silvia and also did not tell the punchers to go punch the crew out. **Declaration 70, ¶ 6**.

Unlawful Initiation and Assistance in crew of Foreperson Jose Cabello

On or about August 10, 2013, at around 1:45 p.m. and during work time, workers arrived at Foreperson Jose Cabellos' crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreperson, Jose Cabellos. **Declaration 40, ¶ 5**. On or about August 10, 2013, at around 3:05 p.m., Foreman Cabello told workers that they should sign the petition that workers had left with him earlier that day because the company wanted their signatures to get rid of the union. The Foreman had about six copies of the petition on the hood of his van. Foreman Cabello

made this announcement while workers gathered to pick up their checks immediately after their shift. **Declaration 40, ¶ 6**.

Unlawful Initiation and Assistance in crew of Foreperson Jose Carrillo

Starting on or about July 2013, workers in Foreperson Jose Carrillo's crew interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreperson, Jose Carrillo. **Declaration 85, ¶ 3**.

Starting on or about July 2013, about eight workers in Foreman Carrillo's crew, including Aurelio (Last Name Unknown), Jose Angel (Last Name Unknown), "El Tamales," "El Chaquetas," Jose Luis Zarado, and about four other workers began to collect signatures to decertify the union within the crew. On about three occasions, while workers stood around in the morning before work began, workers overheard Foreman Leonel Calvillo ask those eight workers, "Hey do you all have the sheets? If you don't, go get them from my truck?" This was done in the presence of workers. These eight workers would then go get sheets from the foreman's truck, and would go row to row asking crew members to sign the petition. These eight workers would collect signatures during working hours in the presence of Foreman Carrillo. **Declaration 85, ¶ 3**.

After these eight workers would collect signatures within their own crew, they would leave the crew with the petition in their hands and would drive off in their own vehicle to collect signatures in other crews. The eight workers would leave the crew during working hours in the morning and would return, sometimes about two hours later, sometimes near the end of the day. Upon their return to the crew, rather than return to work, these eight workers would go talk to Foreman Carrillo. On at least three occasions, Foreman Carrillo would ask these workers, "Hey how did it go? How many signatures did you collect?" On one occasion, one of the eight workers

responded that he had only collected half a page of signatures. Foreman Carrillo replied, "How come you didn't get a full page of signatures. You need to get at least one full page of signatures." These eight workers would have the petition in hand. On a few occasions, the workers would show Foreman Carrillo the petition. These eight workers would talk to Foreman Carrillo for about ten minutes before returning to work. This was done in the presence of the crew. **Declaration 85, ¶ 4**.

Unlawful Initiation and Assistance in crew of Foreperson Rigoberto Hernandez

At various times throughout the decertification campaign, and during work time, workers arrived at Foreperson Rigoberto Hernandez's crew and interrupted crew members performing their job duties to request that they sign a decertification petition. This solicitation was done in the presence and with the consent of the foreperson, Rigoberto Hernandez. **Declaration 15, ¶ 4**.

Unlawful Initiation and Assistance in crew of Foreperson Silvano (Last Name Unknown)

On or about July 2013, foreman Silvano (Last Name Unknown) asked a worker to sign a petition. The worker asked Foreman Silvano what the petition was for. Foreman Silvano replied that it was so that the union would not come in. After speaking with the worker, Foreman Silvano jumped over to the next row and continued collecting signatures. **Declaration 81, ¶ 3**.

General Supervisory Assistance

Gathering of Signatures During Fruit Giveaways

On or about August 2013, the Company began giving away free fruit to workers. **Declaration 1, ¶ 4; Declaration 4, ¶ 5;Declaration 5, ¶ 5;Declaration 12, ¶ 6;Declaration 13, ¶ 4;Declaration 14, ¶ 5;Declaration 15, ¶ 8;Declaration 17, ¶ 4;Declaration 26, ¶ 7;Declaration 27, ¶ 5;Declaration 35, ¶ 6;Declaration 75, ¶ 6;Declaration 76, ¶ 8;Declaration 79, ¶ 4; Declaration 92, ¶ 3; Declaration 93, ¶ 3**.

Prior to the start of the decertification campaign, the company occasionally gave away fruit to workers. The fruit was generally of poor quality, was kept in boxes, and workers had to sort through the fruit themselves. **Declaration 5, ¶ 5; Declaration 15, ¶ 8; Declaration 17, ¶ 4; Declaration 26, ¶ 7; Declaration 27, ¶ 5; Declaration 35, ¶ 6; Declaration 75, ¶ 6; Declaration 76, ¶ 8; Declaration 79, ¶ 4**. The fruit giveaways were previously unannounced, and some workers did not know that it existed. **Declaration 12, ¶ 6; Declaration 13, ¶ 4; Declaration 14, ¶ 5**. Beginning on or about July and August 2013 and after the decertification campaign began, Dan and Norma Gerawan began staging elaborate fruit giveaways for the workers. Dan and Norma began handing away the fruit themselves. The fruit was of superior quality than before. **Declaration 15, ¶ 8; Declaration 75, ¶ 6**. In fact, the fruit was occasionally market-quality and marked with stickers for market. **Declaration 35, ¶ 6**. The Gerawans also provided "agua fresca" ("fresh fruit drinks") at these fruit giveaways. **Declaration 13, ¶ 4; Declaration 14, ¶ 5; Declaration 26, ¶ 7**. At the same time that the Gerawans were giving away fruit, workers with decertification petitions were standing within a few feet of the Gerawans gathering signatures. The Gerawans were close enough to observe which workers signed the petitions and which workers did not. **Declaration 1, ¶ 4; Declaration 12, ¶ 6; Declaration 13, ¶ 4 Declaration 17, ¶ 4; Declaration 26, ¶ 7; Declaration 27, ¶ 6; Declaration 93, ¶ 3.** This began in August and continued through at least September of 2013. **Declaration 1, ¶ 4; Declaration 12, ¶ 6; Declaration 13, ¶ 4 Declaration 17, ¶ 4; Declaration 26, ¶ 7; Declaration 27, ¶ 6**.

Gathering of Signatures During Work Stoppages

On or about September 30, 2013, as workers arrived to work in the morning, the entrances to the field were blocked. **Declaration 1, ¶ 6; Declaration 4, ¶ 6; Declaration 5, ¶ 8; Declaration 8, ¶ 5; Declaration 10, ¶ 5; Declaration 11, ¶ 7; Declaration 13, ¶ 5; Declaration 14, ¶ 7; Declaration 15, ¶ 14; Declaration 19, ¶ 6; Declaration 21, ¶ 5; Declaration 22, ¶ 3;**

Declaration 24, ¶ 4; Declaration 27, ¶ 7;Declaration 29, ¶¶ 8-9; Declaration 30, ¶ 3; Declaration 34, ¶ 4; Declaration 35, ¶ 8; Declaration 51, ¶ 7; Declaration 53, ¶ 5; Declaration 59, ¶ 3; Declaration 63, ¶ 3; Declaration 66, ¶ 8;Declaration 76, ¶ 9; Declaration 78, ¶ 4; Declaration 79, ¶ 8; Declaration 80, ¶ 3; Declaration 82, ¶ 7; Declaration 85, ¶ 5; Declaration 87, ¶ 5; Declaration 89, ¶ 5;Declaration 91, ¶ 4; Declaration 93, ¶ 4.

Workers saw company trailers, trucks, tractors, or other equipment blocking the entrance to the field. **Declaration 1, ¶ 6; Declaration 4, ¶ 6; Declaration 11, ¶ 7; Declaration 13, ¶ 5;Declaration 21, ¶ 5;Declaration 30, ¶ 3; Declaration 35, ¶ 8;Declaration 59, ¶ 3;Declaration 63, ¶ 3;Declaration 76, ¶ 9;Declaration 85, ¶ 5;Declaration 91, ¶ 4**.Workers also saw colored tape blocking the entrance. **Declaration 5, ¶ 8; Declaration 10, ¶ 5; Declaration 13, ¶ 5; Declaration 14, ¶ 7; Declaration 15, ¶ 14; Declaration 27, ¶ 7;Declaration 51, ¶ 7; Declaration 53, ¶ 5;Declaration 66, ¶ 8;Declaration 80, ¶ 3;Declaration 93, ¶ 4**. Most workers do not have access to this equipment, and workers are not supposed to access them without permission from supervisors or foremen. **Declaration 5, ¶ 8; Declaration 11, ¶ 7; Declaration 13, ¶ 5;Declaration 51, ¶ 7;Declaration 53, ¶ 5;Declaration 59, ¶ 3;Declaration 63, ¶ 3;Declaration 66, ¶ 8;Declaration 76, ¶ 9;Declaration 85, ¶ 5;Declaration 91, ¶ 4;Declaration 93, ¶ 4**. In addition, company foremen and supervisors normally prepare water, shade, ladders, trailers, and other equipment before work starts for the day. That day, the company had not prepared anything for workers to begin working. **Declaration 4, ¶ 6; Declaration 27, ¶ 7;Declaration 53, ¶ 5;Declaration 63, ¶ 3;Declaration 80, ¶ 3;Declaration 85, ¶ 5;Declaration 93, ¶ 4**. The common practice is also for foremen to move the portable restrooms into place the day before work to have them in place the next day; they were not in place that day. **Declaration 27, ¶ 7; Declaration 53, ¶ 5; Declaration 63, ¶ 3**.

This was during normal working hours, and foremen were present at the blocked entrances within sight of workers gathering signatures for the decertification petition. The foreman did not tell workers to stop distributing the petition. **Declaration 5, ¶ 8; Declaration 15, ¶ 14; Declaration 21, ¶ 5; Declaration 22, ¶ 4;Declaration 35, ¶ 8;Declaration 59, ¶ 3;Declaration 63, ¶ 4;Declaration 66, ¶ 8;Declaration 76, ¶ 9;Declaration 79, ¶ 9;Declaration 85, ¶ 6;Declaration 89, ¶ 5;Declaration 93, ¶ 4**. The foremen did not tell workers to go into work. **Declaration 5, ¶ 8; Declaration 15, ¶ 14; Declaration 21, ¶ 5;Declaration 82, ¶ 7**.

That same morning, an anti-union protest occurred on Highway 145 during working hours. Foremen were also present at the protest on Highway 145 as workers distributed the petition to decertify the union within sign, and the foremen did not ask these workers to stop gathering signatures. **Declaration 63, ¶ 6;Declaration 76, ¶ 10;Declaration 79, ¶ 11**. Portable restrooms were also placed at the location of the protest. **Declaration 10, ¶ 8;Declaration 82, ¶ 7;Declaration 89, ¶ 5;Declaration 91, ¶ 5**.

Gathering of Signatures During Sexual Harassment Trainings

On or about the first week of September, a Gerawan company representative gathered Foreman Israel Lopez's crew along with two other crews to give a sexual harassment training. The company representative said his name was Dan, though a worker was later able to identify the company representative as Oscar Garcia. One worker, a worker hired to work under an FLC, said that in his three seasons working at Gerawan Farming, the company had not given any type of trainings nor had they had any type of meeting with workers. Trainings in relation to work safety are always conducted by the FLC representatives. The meeting lasted about ten to fifteen minutes. At the end of the meeting, Oscar gave Foreman Lopez a sheet of paper for him to pass around so workers could sign in. The sheet of paper had lines work workers to sign but had no writing to explain what the signatures were for. The worker believed the those signatures were used for the

petition to get rid of the union because the worker had never before been asked to sign anything blank or anything for Gerawan in relation to training and/or meetings. **Declaration 72, ¶ 4**.

About three weeks later, another Gerawan representative conducted another sexual harassment training with Foreman Israel Lopez's crew, along with two other crews. The information given to these crews was almost the same as the information given by Oscar a few weeks before. That meeting also lasted ten to fifteen minutes. At the end of the meeting, the workers were asked to sign another piece of paper. The sheet of paper had lines for workers to sign but had no writing to explain what the signatures were for. The worker believed that this paper was used for a second petition to get rid of the union. **Declaration 72, ¶5**.

Analysis and Applicable Law

It is unlawful for an employer to initiate, solicit, support, or assist in the filing of an employee decertification petition. See Gallo Vineyards, Inc. (2004) 30 ALRB No. 2; Peter D. Solomon (1983) 9 ALRB No. 65; S & J Ranch, Inc. (1992) 18 ALRB No. 2; Placke Toyota, Inc. (1974) 215 NLRB 395; Central Washington Health Services Assoc. (1986) 279 NLRB 60; H & F Binch Co. (1967) 168 NLRB 929, 936. When an employer unlawfully instigates or assists workers in a decertification campaign, it interferes with its employees' "free" exercise of their rights and invalidates the election as a measure of employee free choice. Peter D. Solomon, Id. at 8, *citing* Gold Bond, Inc. (1954) 107 NLRB 1059 and Bond Stores, Inc. (1956) 116 NLRB 1929. Permitting employees to circulate a petition on work time with supervisory knowledge and acquiescence is a violation of the Act. See H & F Binch Co. (1967) 168 NLRB 929, 936; Process Supply Incorp. (1990) 300 NLRB 756, *and cases cited therein.*

Where - as in this case - a decertification petition has been initiated or sponsored by an employer, it "cannot be said to have raised a question concerning representation." Sperry Gyroscope Co. (1962) 136 NLRB 294, 297.

Where an employer is found to have initiated or supported decertification efforts, both the ALRB and NLRB will automatically dismiss the election petition. See e.g. Gallo Vineyards, Inc. (2004) 30 ALRB No. 2 (dismissing decertification petition where two supervisors initiated and assisted the gathering of signatures for a decertification petition); Abatti Farms, Inc. (1981) 7 ALRB 36, at 15 (holding that "Because of Respondent's support and assistance of the decertification campaign, the Petition for Decertification shall be, and it hereby is, dismissed"); Peter D. Solomon, Id. at 9–10 (holding that because the employer instigated and assisted in the decertification efforts, thereby violating employees' free exercise rights, the Board is "*required* to dismiss the decertification election petition") (emphasis added); S & J Ranch, Id. at 17 (setting aside a decertification petition because the employer unlawfully supported the signing of the petition, and therefore the petition was "improperly tainted by employer involvement, … was invalid from the outset, and therefore did not raise a bona fide question concerning representation"); Sperry Gyroscope, Id. at 297 (holding that since a decertification petition initiated and sponsored by the employer cannot raise a question concerning representation, "we shall in accordance with our *usual practice* order that the petition be dismissed, and that all proceedings on that petition be vacated and set aside and declared a nullity") (emphasis added).

Moreover, the Board has explained that such unlawful activity must be presumed disseminated and thus to have affected other crews even where there is no "direct" evidence of assistance:

> "presenting [employees] the papers for signature in the supervisors' presence at a time when such requests are legally prohibited, is a statement of significant interest to employees, unless other crews were already aware of such conduct elsewhere. We find that

it is reasonable to presume that such important news would spread beyond the two crews as to which direct evidence was available."

Gallo Vineyards, *supra,* at 23 – 24. The Board has previously stated that employee "knowledge of Employer involvement" in a "decertification effort could signal to employees that an employer could control a decertification request and that there could be adverse employment effects if an employee opposed such decertification." S & J Ranch (1992) 18 ALRB No. 10, at 4. Moreover, "the demonstrated capacity of supervisory solicitation in this case to deliver significant support 'on command' seen in this case puts the party who controls it in the position to have major influence on the staging of the electoral process as much as an employer who uses less direct means." Gallo Vineyards, *supra*, at 24. Given such pressure on the employees, even if there is no direct evidence of assistance in the other crews, Gallo presumes that any signature gathering is tainted because employees have already been placed on notice that the employer supports decertification and that if an employee opposes that effort by refusing to sign a petition, he or she may face adverse consequences. Moreover, unless such an unfair labor practice is remedied, there can be no true measure of employee free choice in an election. See Gallo Vineyards, *supra* at 24 – 25; S & J Ranch, 18 ALRB No. 10, at 4. [2]

[2] Nash De Camp Company (1999) 25 ALRB No. 7 and TNH Farms, Inc. (1984) 10 ALRB No. 37, have been incorrectly cited for the proposition that mere signature gathering on work time does not constitute a violation of the Act. Those cases are in direct conflict with NLRB authority which holds that where supervisors are "in the immediate vicinity" of signature gathering and "acquiesced" in it, such conduct supports a finding of unlawful assistance. See H & F Binch Co. (1967) 168 NLRB 929, 936; Process Supply Incorp. (1990) 300 NLRB 756, *and cases cited therein.* Nash de Camp and TNH are of questionable precedential value because neither case provides any substantive discussion of the underlying facts involved. Moreover, both cases relied on ALRB and NLRB cases that *did not* involve signature gathering on work time but instead involved *supervisory speech* – not conduct - that is alleged to have lent "assistance" to a campaign. See e.g. Admiral Petroleum (1979) 240 NLRB 894 (no unlawful assistance where a pro-union supervisor "signed a union authorization card, told employees in the production area that he had done so, and told them he thought they all might be able to get better working conditions … more regular hours and better pay"); Willet Motor Coach (1977) 227 NLRB 882 (no unlawful assistance found where supervisor told employees "that he favored the Union and that they should vote for it because they would then have seniority rights with the ability to bump junior employees"); Jack or Marion Radovich (1983) 9 ALRB No. 45 (no unlawful assistance found where company owner made speeches and handed out a two page leaflet accusing UFW of telling lies and making false promises); Interstate Mechanical Lab.

Accordingly, because the employer unlawfully assisted and supported the gathering of signatures for the decertification petition, the petition is invalid from the outset and cannot be said to have raised a question concerning representation. Without this unlawful assistance, Petitioner could not have presented a validly signed petition, and therefore could not have petitioned for an election. Moreover, the employer assisted in employee campaign activity against the Union on paid work time, causing employees to become disaffected with the Union and to vote against it. Accordingly, the Board must set aside the election because the unlawful assistance not only affected the outcome of the election, but also caused the election to take place in the first place.

OBJECTION 2 (UNLAWFUL ASSISTANCE TO THE DECERTIFICATION CAMPAIGN THROUGH DISPARATE TREATMENT)

The Petition Should Be Dismissed Because The Employer Provided Unlawful And Preferential Access To The Decertification Campaign.

Detailed Statement of Facts

UFW hereby incorporates by reference the detailed statement of facts from each prior objection, and specifically from Objection 1.

On or about August 27, 2013, workers in the crews of foreman Antonio Sanchez, Rafael Rodriguez, Cirilo Gomez, Martin Elizondo, Francisco Maldonado, Alfredo Zarate, and Jesus Padilla requested that their respective foreman permit the requesting worker to circulate a pro-UFW petition during working hours in their crew and in other crews. The foremen unconditionally denied these requests and ordered workers back to work. These denials were given in the presence of other workers. See **Declarations 36, ¶ 6; Declarations 42 – 49**.

The employee personnel manual distributed to all employees states that "Employees may not solicit or distribute literature for any purpose at any time on Company property, except as they

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(1943) 48 NLRB 551 (no unlawful assistance found where employer permitted meeting on company time where proponents and opponents of rival unions discussed upcoming election).

may be expressly authorized to do so by law or the Company." **Declaration 96**, Gerawan Employee Manual, at 7. It further provides that employees are only allowed to be on the employer's property during scheduled work hours or for Company business. **Declaration 96**, Employee Manual at 8. The employee manual also outlines that employees can be disciplined for leaving the company's premises or "your job during working hours without notifying your supervisor and getting permission." **Declaration 96**, Employee Manual at 13.

Analysis and Applicable Law

Under the ALRA, unequal access to employees granted by the employer to one side in a representational election campaign constitutes unlawful assistance and support. Royal Packing Company (1979) 5 ALRB No. 31, ALJ Decision at pages 22-23 (citing numerous cases); *aff'd. in* Royal Packing Co. v. ALRB (1980) 101 Cal. App. 3d 826, 838; see also H & F Binch Co. (1967) 168 NLRB 929, 936; Northern Metal Products Co.(1968) 171 NLRB 98. In addition, a valid no-solicitation rule is unlawful if it is enforced in a discriminatory manner. D'Arrigo Bros. of Ca. (2013) 39 ALRB No. 4, at 13 - 15; Reno Hilton Resorts (1995) 320 NLRB 197; Lawson Co. (1983) 267 NLRB 463; Hammary Mfg. Corp. (1982) 265 N.L.R.B. 57; St. Vincent's Hospital (1982) 265 NLRB 38.

In the instant case, supervisory involvement in the decertification signature gathering was both blatant and well known to employees. In some cases Gerawan supervisors were directly involved in the signature gathering; in other cases supervisors directed the gathering of signatures; in other cases Gerawan management authorized and permitted decertification gathering during working hours; and still in others, the company owners gave away fruit and fresh fruit drinks while workers gathered signatures in their presence. This blatant and unlawful support of the decertification effort was achieved despite the company's clear policy against solicitation at work. In contrast, UFW supporters were not permitted to campaign and circulate a UFW petition on work time, while proponents of the decertification campaign *were* permitted to circulate petitions

on work time and in violation of a strict company policy against solicitation during work time and a policy against leaving work without the supervisor's authorization.

This evidence demonstrates clear unlawful employer assistance to the decertification campaign. As in the recent D'Arrigo Bros. case, "UFW supporters were denied the opportunity to circulate a pro-union petition during working time and, thus, received disparate treatment. Moreover, the evidence indicates that [Gerawan] had a well-known company policy against solicitation of any kind . . . that otherwise was enforced strictly." D'Arrigo Bros., *supra*, at 14 - 15. In these circumstances, "it is reasonable to conclude that allowing decertification supporters to violate that policy would have created the impression that the company was sponsoring or at least supporting the solicitation of signatures in favor of decertification." Id. at 15; see also Royal Packing Company (1979) 5 ALRB No. 31, at 4-6 (employer granting of such advantages held to have "clearly demonstrated to employees its assistance and cooperation with one of the two competing" campaigns); Royal Packing Co. *supra*, at 838; see also H & F Binch Co. (1967) 168 NLRB 929, 936. Because of this disparate treatment, the decertification petition must be dismissed.

OBJECTION 3 (UNLAWFUL ASSISTANCE OF DECERTIFICATION EFFORTS THROUGH PROVISION OF ATTORNEY TO PETITIONER)

Detailed Statement of Facts

UFW hereby incorporates by reference the detailed statement of facts from each prior objection.

One of Petitioner's counsel, Anthony Raimondo specializes in "counter-organizing campaigns, unfair labor practice defense, grievance and arbitration defense" and collective bargaining negotiations on behalf of employers. He further "defends" employers in administrative proceedings before the NLRB, ALRB, California Labor Commissioner, U.S. Department of Labor, Cal-OSHA and EEOC. Mr. Raimondo previously worked in the law office

of Ron Barsamian, who is current counsel for Gerawan. Mr. Raimondo currently represents several farm labor contractors (FLCs) that provide labor for Gerawan, including Sunshine Ag, R & T, and T-Rod, Inc, and has represented these entities for years. September 25, 2013 Letter from Silas Shawver, with Exhibits, Case No. 2013-RD-02-VIS.

On August 30, Mr. Raimondo informed the ALRB offices that he had been retained by Petitioner Sylvia Lopez. Since then, Mr. Raimondo and his associate have been actively representing Petitioner in her decertification efforts. Since that time, Mr. Raimondo took on the representation of other Gerawan employees regarding decertifying the union. The FLCs represented by Mr. Raimondo have a direct interest in the outcome of Petitioner's decertification efforts as Dan Gerawan has publicly stated that if the union is successful through mandatory mediation, the resulting contract "could ultimately force the farm out of business."[3] September 25, 2013 Letter from Silas Shawver, with Exhibits, Case No. 2013-RD-02-VIS.

Analysis and Applicable Law

Gerawan is deemed the employer of the farm labor contractor employees for all purposes under the ALRA. Lab. Code § 1140.4(c). This legal framework establishes that the actions of Gerawan's farm labor contractors are imputed to Gerawan, and Gerawan is responsible for any unlawful conduct by its labor contractors. See, e.g. Sahara Packing Co. (1985) 11 ALRB No. 24; Giannini Packing Corp. (1983) 19 ALRB No. 16. This expansive view of employer liability for FLC misconduct has been confirmed repeatedly by the courts of appeal. See Vista Verde Farms v. ALRB (1981) 29 Cal. 3d 307, 312. Moreover, an employer's provision of legal services or legal representation for decertification efforts has been held unlawful under the ALRA. See Peter D. Solomon (1983) 9 ALRB No. 65, at 4 – 7, and fn. 5.

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[3]"California's Union-Sponsored War on Farmers." Wall Street Journal, September 2, 2013. http://online.wsj.com/news/articles/SB10001424127887324463604579040781488196964

In the instant case, the FLC and long-standing employer counsel has provided Petitioner and other workers with legal representation in violation of the Act. The provision of legal representation through the FLC – as opposed to directly through Gerawan is inconsequential under the Act. The violation is as clear as if Gerawan had provided the legal representation to Petitioner. Accordingly, this form of unlawful assistance violates the Act and requires dismissal of the election petition.

OBJECTION 4 (UNLAWFUL ASSISTANCE TO DECERTIFICATION CAMPAIGN BY PAYING FOR, SUPPORTING, OR COERCING WORKER PARTICIPATION IN ANTI-UFW PROTESTS OR ACTIVITIES)

Detailed Statement of Facts

UFW hereby incorporates by reference the detailed statement of facts from each prior objection.

On or about September 23, 2013, Gerawan supervisors requested, authorized, encouraged and/or permitted workers to leave work early to attend an anti-UFW protest at the Visalia office of the ALRB and to seek an election. **Declaration 82, ¶ 6; Dec. 91, ¶ 3**. On or about September, 24, 2013, Gerawan supervisors requested, authorized, encouraged and/or permitted workers to leave work early to attend an anti-UFW protest on Highway 145 near Gerawan's offices, wherein workers were calling for an election. **Declaration 1, ¶ 5; Dec. 31, ¶ 5; Dec. 51, ¶ 6; Dec. 85, ¶ 7.** On or about September 25, 2013, Gerawan supervisors requested, authorized, encouraged and/or permitted workers to leave work early to attend an anti-UFW protest on Highway 145 near Gerawan's offices, wherein workers were calling for an election. **Declaration 20, ¶ 10; Dec. 33, ¶ 4; Dec. 35, ¶ 14.** In one instance, Foreman Jaimez drove workers to the anti-UFW protest. **Dec. 33, ¶ 4**. On or about September 30, 2013, Gerawan supervisors and management blocked ranch entrances with company equipment like tractors, irrigation trucks, and ladders; failed to provide working equipment and materials to workers thus preventing workers from working; requested, authorized, encouraged and/or permitted workers to attend an anti-UFW protest on

Highway 45 near Gerawan's offices, and in some cases directly participated in the anti-UFW protest. **Declaration 1, ¶ 6** (foreman Elizondo yells at workers to go protest) ; Dec. 4, ¶ 8 (foreman Elizondo tells workers to go to protest); **Dec. 7, ¶ 6** (in presence of foreman Lopez, woman tells workers that they need to sign decertification petition to enter ranch and work); **Dec. 13, ¶ 5** (entrance blocked by equipment at Villavicencio crew); **Dec. 14, ¶ 7** (foreman Padilla tells workers the company wants workers to go to Highway 145 protest); **Dec. 15, ¶ 14** (foreman Hernandez encouraged worker to go to Highway 145 protest to support the company); **Dec. 17** (woman informs foreman Gomez there will be now work today and he accepts the message), **Dec. 18** (foreman Lopez arrived to protest in his car and joined the protest); **Dec. 19** (foreman Rodriguez puts workers in his van and takes them to protest), **Dec. 21** (foreman Lopez permits signature gathering in his crew while entrance is blocked by company equipment); **Dec. 22** (foreman Lopez does not clear blocked entrance), **Dec. 27** (Foreman Perez at blocked entrance, no work equipment ready), **Dec. 29** (Zarate crew entrance blocked and no work equipment is ready for workers), **Dec. 33** (foreman Jaimez drives workers to protest in his van), Dec. 34 (Foreman Jaimez tells workers to follow him to the protest). Dec. 35 (foreman present as decertification signatures gathered), Dec. 51 (entrance blocked by company equipment at Zarate crew), Dec. 59 (workers gathering signatures in presence of foreman Mendoza who does nothing to remove blocked entrances), Dec. 63 (workers gathering signatures in presence of foreman Rojas who does nothing to remove blocked entrances), Dec. 66 and 79 (workers gathering signatures in presence of various foremen who do nothing to clear blocked entrances), **Dec. 78. Dec. 79, Dec. 80, Dec. 82, Dec. 85, Dec. 87, Dec. 91. Dec. 93.** As described, instead of directing workers to work while ranch entrances were blocked or instead of clearing up ranch entrances, supervisors and foreman encouraged or acquiesced in the gathering of signatures for a decertification petition during normal working hours. Further, forepersons permitted the use of their vehicles for the transport of

workers to the anti-UFW protest or drove workers themselves to the protest. In addition, the company authorized the blockage of work entrances by failing to enforce work rules regarding unauthorized use of company vehicles and equipment. See Employee Manual at 7 (use of company property only for company purposes) and at 13 (using company equipment without permission). During the anti-UFW protest, Gerawan provided bathrooms which were accessible and used by the anti-UFW protestors. **Dec. 96**. Gerawan supervisors were seen protesting against UFW alongside bargaining unit workers, and workers were circulating a decertification petition during the protest in the presence of these supervisors.

Further, workers were using professional made signs in English, requesting that employees want a vote. Gerawan was reported to have paid for the signs. **Declaration 96**.

On or about October 2, 2013, Gerawan and its agents organized and paid for an anti-UFW bus trip to the ALRB offices in Sacramento. Approximately 8 – 10 charter buses from "Classic Charter" and "American Eagle" were paid for by Gerawan or its agents. The buses loaded workers on Gerawan's property at 4490 S. Madera Avenue (Gerawan's Kerman Ranch office), departed for the Sacramento ALRB offices and returned to Gerawan properties. Food and drinks were provided to the workers for the trip. **Declarations 15, 27, 79, 89, 92, 93.**

Gerawan supervisors informed and encouraged workers to go on the Sacramento trip. Supervisors and others informed employees they would be paid for going on the bus trip, and employees in fact were paid for the trip. **Declarations 15, 27, 79, 89, 92, 93.** In addition, prior to boarding the buses, Petitioner Sylvia Lopez and Foreman Perez were heard telling employees to sign a sheet so that they would be paid by the company for going to Sacramento. **Declaration 15, Dec. 27. Declaration 96.**

On or about October 25, 2013, Gerawan supervisors requested, authorized, encouraged and/or permitted workers to attend, and/or approved early releases for employees to attend an

anti-UFW protest at the Fresno Superior court. **Declarations 19, 35, 67, 69, 70, 71, 92**. On or about October 29, 2013, Gerawan supervisors requested, authorized, encouraged and/or permitted workers to attend, and/or approved early releases for employees to attend an anti-UFW protest at the ALRB office in Visalia. **Declaration 11**. On or about November 1, 2013 Gerawan supervisors encouraged workers to attend, and/or approved early releases for employees to attend an anti-UFW protest at the ALRB office in Visalia, and otherwise engaged in actions to coerce employees into participating in anti-UFW demonstrations. **Declarations 3, 5, 8, 11, 12, 13, 27, 35, 56, 58, 60, 64, 68, 76, 77, 80, 88, 89.** In addition, employees were paid for attending the protests. **Declaration 95**.

Analysis and Applicable Law

As discussed *supra*, it is unlawful for an employer to have supported the decertification efforts in this campaign. See Royal Packing Company (1979) 5 ALRB No. 31, at 4-6 (employer granting of advantages held to have "clearly demonstrated to employees its assistance and cooperation with one of the two competing" campaigns); Royal Packing Co. *supra*, at 838; see also H & F Binch Co. (1967) 168 NLRB 929, 936. By lending significant material, monetary, and other support to anti-UFW activity with the goal of decertifying the UFW, Gerawan has provided unlawful assistance to the decertification efforts.

In addition, an employer cannot interfere with an employee choice to support a union, to oppose a union, or to refrain from either support or opposition. To this end, employers cannot compel employees to participate in a labor dispute. The Board and the courts "have consistently recognized that 'the right to engage in union organizing or not is a protected right with which an employer cannot interfere by compelling an employee to participate in the dispute.' In other words, employees have the 'right to express an opinion or to remain silent.'" Allegheny Ludlum Corp. (2001) 333 NLRB 734, 740. When an employer pressures, coerces, or solicits an employee to make an "observeable choice" concerning a union campaign, the employer has violated its

employees' section 1153 rights. See Allegheny Ludlum, Id; Barton Nelson (1995) 318 NLRB 712.

In this case, because Gerawan refused to recognize UFW as its employees' bargaining representative, its management and supervisors orchestrated "work stoppages" and public actions designed to coerce workers into rejecting their certified bargaining representative and bringing public attention to the false claim that workers wanted a vote. These work stoppages and protests were organized, paid for and supported by Gerawan and its agents. This management orchestrated publicity against the UFW required workers to make "observeable choices" between complying with supervisors' requests to protest against the UFW or to be identified as a union supporter. In some occasions this required workers to sign decertification petitions in the presence of the company's owners. By requiring employees to make these observable choices, Gerawan unlawfully coerced its employees in the exercise of their rights and interfered with employee free choice.

OBJECTION 5 (COERCING WORKERS INTO PARTICIPATING IN ANTI-UFW ACTIVITIES)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection, and specifically from Objection 4.

Analysis and Applicable Law

An employer cannot interfere with an employee choice to support a union, to oppose a union, or to refrain from either support or opposition. The Board and the courts "have consistently recognized that 'the right to engage in union organizing or not is a protected right with which an employer cannot interfere by compelling an employee to participate in the dispute.'" Allegheny Ludlum Corp. (2001) 333 NLRB 734, 740. When an employer pressures, coerces, or solicits an employee to make an "observeable choice" concerning a union campaign, the employer

has violated its employees' section 1153 rights. See Allegheny Ludlum, Id; Barton Nelson (1995) 318 NLRB 712.

In the instant case, Gerawan's campaign of fabricated worker protests against UFW representation coerced workers into choosing to support Gerawan or to defy Gerawan management's requests for workers to participate in anti-UFW publicity. This conduct coerces workers in the exercise of their rights and interferes with employee free choice.

OBJECTION 6 (BAD FAITH BARGAINING THROUGH PROPOSAL TO EXCLUDE FLC's FROM AGREEMENT)

Detailed Statement of Facts

UFW hereby incorporates by reference the detailed statement of facts from each prior objection.

On or about January 18, 2013, and continuing to date, Gerawan negotiators proposed to exclude all farm labor contractor employees from being covered by any collective bargaining agreement. UFW's negotiator objected to this exclusion and informed Gerawan's negotiators that it was unlawful. Gerawan insisted on this exclusion even through the Mandatory Mediation and Conciliation process. Gerawan therefore refused to negotiate over the terms and conditions of employment for its employees hired through farm labor contractors. **Dec. 96**. Gerawan employs approximately 2,000 – 3,000 farm labor contractor employees every year. **Dec. 96**.

Analysis and Applicable Law

Labor Code section 1140.4(c) excludes from the definition of employer any farm labor contractor. Instead, pursuant to the plain language of the statute, "[t]he employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part." Lab. Code § 1140.4(c). The ALRA therefore deems Gerawan to be the agricultural employer of any farm labor contractor employees engaged to work on its fields and those FLC employees form part of the bargaining unit. See TMY Farms (1976) 2 ALRB No. 58, at 4 – 5 (holding that pursuant to

labor Code section 1140.4(c) and 1156.2, farm labor contractor employees "must" be included in the bargaining unit with direct hire employees). By proposing and insisting that UFW agree to exclude farm labor contractor employees from the terms and benefits of any agreement, Gerawan violated its duty to bargain over the terms and conditions of employment for a substantial number of bargaining unit employees. See Cal. Lab. Code § 1153(e).

Both the ALRB and the NLRB have affirmed that an employer's refusal to bargain over employees who are in the bargaining unit is a *per se* violation of the law. See Paul W. Bertuccio (1984) 10 ALRB No. 26, at ALJ decision 19 – 27 (Board upheld ALJ finding that employer's refusal to bargain over farm labor contractor employees was *per s*e violation of the Act), *overr'd. and modified on other grounds*; Beyerl Chevrolet (1975) 221 NLRB 710 (holding that employer's "inclusion of language which arbitrarily limits the scope of the unit in any of its bargaining proposals [by excluding part-time employees] . . . constituted bad-faith bargaining in violation of Section 8(a)(5) and (1)"); Douds v. International Longshoremen's Assn. (2nd Cir. 1957) 241 F.2d 278, 283 (holding that "after the Board has decided what the appropriate bargaining unit is, [when] one party over the objection of the other demands a change in that unit[,] [s]uch a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act" and "is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3)").

Through Gerawan's proposal and insistence on excluding farm labor contractor employees from the coverage of any collective bargaining agreement, Gerawan engaged in bad faith bargaining in violation of the Act, undermined the UFW's role as representative of all Gerawan employees, and communicated to its labor contractor employees that collective bargaining for them would be meaningless.

This bad faith bargaining conduct had a serious and detrimental effect on employee free choice. "It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then require a new election which 'would not be likely to demonstrate the employees' true, undistorted desires, since employee disaffection with the union in such cases is in all likelihood prompted by employer-induced failure to achieve desired results at the bargaining table." NLRB v. Big Three Industries, Inc. (1974) 497 F.2d 43, 52. The Board has repeated that an employer's unlawful refusal to bargain "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." Id. at 52. Therefore, to permit a decertification election to proceed when there has been an unlawful refusal to bargain "would surely controvert the spirit of the Act" and would allow the employer to "profit by his own wrongdoing." Bishop v. NLRB (5th Cir. 1974) 502 F.2d 1024, at 1029; see also Big Three Industries, Inc. (1973) 201 NLRB 197 (dismissing decertification petition in light of complaint against the employer for unlawful bargaining).

OBJECTION 7 (BAD FAITH BARGAINING BY REFUSING TO PROVIDE CORRECT EMPLOYEE CONTACT INFORMATION)

The election should be dismissed because the employer refused to provide accurate employee contact information to the UFW, thus preventing UFW from communicating with a substantial number of bargaining unit employees.

Detailed Statement of Facts

On or about October 12, 2012, UFW requested negotiations with Gerawan and requested information, including employee contact information. On or about mid-November, Gerawan began to provide some employee information to UFW, and provided additional employee information until on or about mid to late January, 2013. UFW organizers visited and attempted to visit Gerawan employees at the addresses that Gerawan provided. The UFW organizers kept records of their visits and documented addresses that did not exist or that were incorrect for any

other reason, such as the address being non-residential, the worker not living there or the worker having moved to another address. UFW informed Gerawan that the employee list provided by Gerawan contained over 2,000 bad addresses and identified the specific addresses that were not correct. From on or about the end of January, 2013 through at least May, 2013, UFW asked that Gerawan provide it with correct addresses. UFW continued to make repeated requests that Gerawan correct the 2,000 bad addresses. Gerawan never provided the UFW with any corrections to the more than 2,000 incorrect addresses identified by the UFW. **Declaration 96.**

Gerawan's failure to provide correct addresses hindered the UFW's ability to communicate with its members and interfered with employees' ability to communicate with their bargaining representative. This refusal to provide correct employee information is a clear violation of the Act. Labor Code section 1157.3 requires employers to maintain accurate and current payroll lists containing the names and addresses of all their employees. This duty includes the related obligation to provide "accurate and current" names and addresses to the union upon request. See Cardinal Distributing Co. v. ALRB (1984) 159 Cal. App. 3d 758, 767 – 769. ("Petitioner's prolonged failure to provide piece-rate workers' names and addresses made it impossible for the union to talk with those employees and to meaningfully represent them . . . the union's repeated requests for this information reasonably implied that the data was necessary for bargaining and that petitioner's intransigence was successfully undermining the union's attempts to negotiate knowledgeably . . ."). An employer has the statutory obligation to provide, on request, relevant information that a union needs for the proper performance of its duties as collective bargaining representative. A failure to timely produce such information violates section 1153(a) and (e) of the Act. See Bud Antle, Inc. (2013) 39 ALRB No. 12; Richard A. Glass Company, Inc. (1988) 14 ALRB No. 11, at pages 18-27; Mario Saikhon, Inc. (1987) 13 ALRB No. 8.

The election should be dismissed because the employer engaged in bad faith bargaining by repeatedly refusing to provide accurate employee contact information to the UFW, thus preventing UFW from communicating with a substantial number of bargaining unit employees.

OBJECTION 8 (PROVIDING INACCURATE EMPLOYEE LIST USED IN ELECTION)

The Election Petition Must Be Dismissed Because The Employer Provided An Eligibility List With Numerous Errors That Prevented The Union From Communicating With A Substantial Number Of Voters

Detailed Statement of Facts

In the days leading up to the election, Union organizers attempted to make home visits to all the workers on the eligibility list. Home visits were a critical part of the Union's election campaign. Despite the Union's best efforts to communicate with workers at their homes, the employer provided a substantially deficient eligibility list that contained numerous errors and prevented such communication. In the course of their home visits, Union organizers were able to document approximately 633 total incorrect addresses on the eligibility list. The addresses were incorrect for one of the following reasons: the employee no longer lived at the address; the address was non-existent; the address was a P.O. Box instead of a physical address; no apartment numbers were listed on the addresses; or the address was not a local address. **Declaration 96**.[4]

Analysis and Applicable Law

Following the NLRB's "Excelsior Rule," this Board has held that an employer's failure to furnish a complete and accurate eligibility list is grounds for overturning an election. See Gallo Vineyards, Inc. (2009) 35 ALRB No. 6; Yoder Bros. (1976) 2 ALRB No. 4; Betteravia Farms (1983) 9 ALRB No. 46; Silva Harvesting, Inc. (1985) 11 ALRB No. 12. More specifically, where

[4] Since the votes in this case have been impounded, it is impossible to know at this time whether the defective eligibility list affected the outcome of the election. See Gallo Vineyards, Inc. (2009) 35 ALRB No. 6. However, in this case the defective eligibility list would impact a margin of approximately 1,266 votes.

the employer provides lists which did not provide accurate and complete local contact information for employees, and such inadequate lists affects a union's ability to communicate with employees, an election must be set aside. See Gallo Vineyards, *supra*; Silva Harvesting, Inc., *supra*; see also Carl Dobler & Sons (1985) 11 ALRB No. 37. In this case, home visits were a critical part of the UFW's campaign. Since UFW was unable to communicate with approximately 633 employees, these deficient lists had a significant impact on the outcome of the election. Moreover, the Union wasted valuable resources seeking employees who ultimately were not present or accessible at the listed addresses. See Silva Harvesting, *supra*, at 9.

OBJECTION 9 (BAD FAITH BARGAINING THROUGH UNILATERAL WAGE INCREASE TO FLC EMPLOYEES)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts for each of the prior objections.

In approximately June 2013, Gerawan unilaterally gave a wage increase to its agricultural employees hired through farm labor contractors ("FLC"). The increase was a bump in wages from $8 per hour to $9 per hour. Gerawan provided no notice to the UFW of the intended wage increase to FLC employees, nor did it provide the union with an opportunity to bargain over their wage increase. **Declaration 96**.

Analysis and Applicable Law

An employer's failure to provide notice and an opportunity to bargain over a wage increase and the unilateral granting of the wage increase is a clear violation of the Act. See Romar Carrot (1978) 4 ALRB No. 56, at 3 – 4; Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36; N.A. Pricola Produce (1981) 7 ALRB No. 49; George Arakelian Farms (1982) 8 ALRB No. 36.

Gerawan's failure to provide UFW with notice and an opportunity to bargain over the wage increase undermines the union's role as bargaining representative and constitutes misconduct affecting the integrity of the election.

OBJECTION 10 (UNLAWFUL GRANT OF BENEFIT THROUGH UNILATERAL WAGE INCREASE TO FLC EMPLOYEES)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection, and specifically from Objection 9.

In addition to failing in its duty to bargain with UFW as described above, when Gerawan unilaterally increased its wages for FLC employees in June, 2013, Gerawan unlawfully granted a benefit to its employees in order to erode union support and seek decertification.

Labor Code section 1153 not only prohibits "intrusive threats and promises but also conduct immediately favorable to employees" which would reasonably interfere with employee freedom of choice for or against unionization. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964); see also Harry Carian Sales v. ALRB; 39 Cal. 3d 209 (1985).

Accordingly, the bestowing of benefits or benefit increases violate the Act when they interfere with workers' organizational rights during organizational campaigns, or in times preceding a representation election. See NLRB v. Exchange Parts (1964) 375 U.S. 405; Harry Carian Sales (1985) 39 Cal. 3d 209; Royal Packing Co. v. ALRB (1980) 101 Cal. App. 3d 826 (1980); Anderson Farms Co. (1977) 3 ALRB 67. Such benefit grants have been referred to by the ALRB and NLRB as "well-timed increases in benefits." Exchange Parts, 375 U.S. at 409; Royal Packing Co., 101 Cal. App. 3d at 840. Well-timed increases in benefits are illegal because the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." Exchange Parts, 375 U.S. at 409, *citing* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 686 (1944); see also NLRB

v. Crown Can Co., 138 F.2d 263, 267 (8th Cir. 1943) (stating that "Interference is no less interference because it is accomplished through allurements rather than coercion.").

When a grant of benefits is made at the peak of a pre-election campaign, "there can be little room for doubt that the increase was made to induce employees to vote against the union." Harry Carian, 39 Cal. 3d at 244; see also Anderson Farms, 3 ALRB 67 at p. 17-19; Arrow Elastic Corp., 230 NLRB 23 (1977) (holding that an announcement of new benefits in the period preceding an election is deemed unlawful as calculated to influence the employees in their choice of a bargaining representative). This is particularly true when there is a pattern of threats and coercion that would reasonably tend to interfere with and restrain employees in the exercise of their rights. Harry Carian, *supra*, at 245.

OBJECTION 11 (BAD FAITH BARGAINING THROUGH UNILATERAL WAGE INCREASE OF PACKING WORKERS)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection.

On or about October 25, 2013, Gerawan announced to its field pack workers that it was increasing its wage by 25 cents per box. **Declaration 69 ¶ 8; Dec. 71, ¶ 7; Dec. 86, ¶ 4; Dec. 94, ¶ 4.** Gerawan provided no notice to the UFW of the wage increase to the field pack employees, nor did it provide the union with an opportunity to bargain over their wage increase. **Declaration 96**.

Analysis and Applicable Law

An employer's failure to provide notice and an opportunity to bargain over a wage increase and the unilateral granting of the wage increase is a clear violation of the Act. See Romar Carrot (1978) 4 ALRB No. 56, at 3 – 4; Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36; N.A. Pricola Produce (1981) 7 ALRB No. 49; George Arakelian Farms (1982) 8 ALRB No. 36.

Gerawan's failure to provide UFW with notice and an opportunity to bargain over the wage increase to the packers undermined the union's role as bargaining representative and constitutes misconduct requiring dismissal of the election petition.

OBJECTION 12 (UNLAWFUL GRANT OF BENEFIT THROUGH UNILATERAL WAGE INCREASE TO FIELD PACK EMPLOYEES)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection, and specifically from Objection 11. In addition to failing in its duty to bargain with UFW as described above, when Gerawan unilaterally increased its wages for field pack employees on or about October 25, 2013, Gerawan unlawfully granted a benefit to its employees in order to erode union support and achieve decertification of the union.

Labor Code section 1153 not only prohibits "conduct immediately favorable to employees" which would reasonably interfere with employee freedom of choice for or against unionization. NLRB v. Exchange Parts Co. (1964) 375 U.S. 405; see also Harry Carian Sales v. ALRB (1985) 39 Cal. 3d 209. Therefore, the bestowing of benefits or increases violate the Act when they interfere with workers' organizational rights during organizational campaigns, or in times preceding a representation election. See Exchange Parts, Id.; Harry Carian, Id.; Royal Packing Co. v. ALRB (1980) 101 Cal. App. 3d 826; Anderson Farms Co. (1977) 3 ALRB 67. Well-timed increases in benefits are illegal because the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." Exchange Parts, *supra*, at 409, *citing* Medo Photo Supply Corp. v. NLRB (1944) 321 U.S. 678, 686.

When a grant of benefits is made at the peak of a pre-election campaign, "there can be little room for doubt that the increase was made to induce employees to vote against the union." Harry Carian, *supra*, at 244; see also Anderson Farms, 3 ALRB 67 at p. 17-19; Arrow Elastic Corp., 230

NLRB 23 (1977) (holding that an announcement of new benefits in the period preceding an election is deemed unlawful as calculated to influence the employees in their choice of a bargaining representative).

Because the announcement of the 25 cent per box wage increase was made just days before the election, it is clear the wage increase was an unlawful grant of a benefit affecting employee free choice.

OBJECTION 13 (BAD FAITH BARGAINING BY REFUSING TO PROVIDE REQUESTED INFORMATION – SHEETS SIGNED BY EMPLOYEES)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection.

On or about December, 2012, Gerawan held captive audience meetings with employees and distributed a flyer. At the end of the meeting, Gerawan's HR Director asked employees to sign some documents. Employees were not given an opportunity to read or review the documents. **Declaration 4, ¶ 3; Dec. 15, ¶ 3; Dec. 23, ¶ 3; Dec. 75, ¶ 4; Dec. 76, ¶ 3**. Employees thereafter asked their union representatives to find out what they had signed and to obtain copies of the signed papers. UFW thereafter requested from Gerawan copies of the sheets that workers were asked to sign in December, 2012. Since that time, Gerawan has refused and continues to refuse to provide the requested information. **Declaration 96**.

OBJECTION 14 (BAD FAITH BARGAINING BY REFUSING TO PROVIDE FINANCIAL INFORMATION)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection.

Numerous Gerawans supervisors, representatives, and agents threatened workers with job loss, bankruptcy, closure, and/or discontinuance of operations if the union were successful (See Objection 21, *infra*). In Gerawan's September 4, 2013 Opposition to the ALRB's Petition for a Preliminary Injunction before Fresno Superior Court, in defending the threats of job loss made

by its supervisors to employees, Gerawan's counsel took the position that threats regarding job loss to Gerawan workers if the Union wins or enters the farm are "permissible discussions of possible collateral and subsequent consequences of a union victory" and "objective statements regarding possible consequences of a union victory." Gerawan Opp. at p. 13, lines 19 - 20 - 14, lines 2 - 5. **Declaration 96**. Similarly, in a September 3, 2013 editorial from the Wall Street Journal (WSJ), Dan Gerawan, one of Gerawan's owners, is quoted as saying that "an imposed contract" from the Mandatory Mediation and Conciliation process "could ultimately force the farm out of business." See fn. 3 *supra*.

Based on the foregoing, UFW requested certain financial information from Gerawan, in an effort for UFW to take into account Gerawan's financial condition and revise bargaining proposals if necessary. Gerawan refused to provide any of the requested information and its counsel again repeated the threat of the company closing due to UFW's proposals. **Declaration 96.**

Analysis and Applicable Law

When an employer makes claims that it is unable to meet a union's bargaining proposals, the requirement to bargain in good faith requires that the employer substantiate those claims with proof. See NLRB v. Truitt Manufacturing Co. (1956) 351 U.S. 149. A failure to substantiate those claims when presented with a union's information request for such information constitutes bad faith bargaining under the Act. Truitt Mfg., Id.; Leiferman Enterprises, LLC (2008) 352 NLRB 152, 154.

In the instant case, Gerawan made absolutely no effort to substantiate its claims that an "imposed contract" could "ultimately force the farm out of business." In fact, Gerawan's response to the UFW's information request repeated the claims, alleging that UFW's proposals "threaten to disrupt, if not destroy, Gerawan's ability to operate and compete . . ." and that

UFW's proposals, "if adopted, can very easily destroy a business model that has run successfully . . ." **Declaration 96**.

Because Gerawan plainly violated its obligation to bargain in good faith by providing relevant information requested by the union, it has undermined the union's representative status and affected employee free choice.

OBJECTION 15 (BAD FAITH BARGAINING THROUGH DISPARAGEMENT AND UNDERMINING OF UNION)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection.

UFW requested renewed negotiations with Gerawan in October 2012, and requested various categories of information, including employee contact information. Shortly thereafter, Gerawan began a letter and flyer campaign designed to undermine the union and attacks its status as representative of Gerawan's employees. To this end, Gerawan distributed flyers to workers and held captive audience meetings, repeatedly telling employees that it was unfair for UFW to represent them, and urging employees to seek ways to reject representation. Eventually, the Gerawans directly asked workers to contact them to discuss issues regarding unionization and to discuss ways to reject union representation.

Gerawan's flyers[5] stated the following:

November 13, 2012 Flyer

- With respect to turning employee information over to UFW, Gerawan said "we did not want this to happen but we have no control over this."
- "The UFW says they represent you, even though you probably did not even work here 22 years ago and some of you were not even born yet."

November 22, 2012 Flyer

[5] The flyers were received by Gerawan's workers beginning in November 2012 and continuing through the election. See **Declarations 1 – 4, 96**.

- Gerawan poses the question of whether workers want UFW to represent them and answers by stating: "The UFW says you had a choice 22 years ago, even though you didn't even work here (and some of you were not even born yet)."

- Gerawan states again the company owner did not want this to happen.

- Gerawan poses the query that "it makes no sense that the UFW can claim to represent me."

- Gerawan instructs workers to talk to the ALRB about it being unfair that UFW represents the Gerawan workers, and provides the ALRB phone number.

November 30, 2012 Flyer

- Gerawan tells employees that there is no vote planned because "the union already says they represent you because of a vote that happened 22 years ago even though you did not even work here (and some of you were not even born yet). If you want to know why there is no vote planned, you can call the ALRB . . . " The notice provides a telephone number for the ALRB.
- Gerawan states: "If you want to know why there is no vote planned, you can call the ALRB . . . and have them explain how elections are scheduled and conducted."

- "Do Ray, Dan, and Mike [the company owners] want [union representation] to happen? No."

- Gerawan repeats that it "had to give" employee addresses to the union but that it "had no choice" and "did not want to."

Undated Flyer Distributed at December, 2012 Captive Audience Meeting

- Gerawan repeats it did not want to turn over employee information to the union and did not want the union to visit employees at their homes;

- Gerawan repeats that similar refrain that UFW "says they represent you" even though employees were not here 22 years ago;

- Gerawan poses whether workers have a choice about UFW representation and states that "UFW says you had a choice 22 years ago . . ."

- Gerawan repeats that the company's owners, Ray, Dan and Mike "do not want this to happen."

- Gerawan queries what will happen to workers "if they refuse to let the UFW represent" them or refuse to give UFW money. Gerawan claims it does not know.

- Gerawan states that it is "unfair" for UFW to represent its employees and that it "makes no sense," and that the ALRB is the appropriate agency to answer questions;

- Gerawan informs employees that there is no vote planned because the "union says they already represent you because of a vote that happened 22 years ago;"

- Despite telling employees that the company cannot answer questions, the Gerawan flyers provide the phone number and email for Jose Erevia, Gerawan's HR manager, and also provide a toll free number for "anonymous comments."

December 21, 2012 Flyer

- Gerawan states that "[t]he UFW says they represent you even though they went away 20 years ago and have not done anything at our company since then," that "the union disappeared" and that the union now "says they still represent you;"

- Gerawan directs employees to call the ALRB

February 22, 2013 Flyer [mis-dated as 2012]

- Gerawan informs employees that it has sued UFW for defamation and provides a Spanish language copy of the lawsuit

- Gerawan states that employees have reported they do not want money taken from their check, that Gerawan understands, and that employees can call the ALRB for help;

- Gerawan suggests that the UFW worker negotiating committee does not contain appropriate representatives

March 20, 2013 Flyer

- Gerawan announces that the "new base wage for crew labor will be 9.50 per hour." This was a wage increase. Gerawan says it has informed the union of its plan "and assumes they will not cause any unnecessary delay."

- Gerawan says that "Ray, Mike and Dan Gerawan have made the decision to give crew labor a raise just as they always have."[6]

Undated "As Always, Our Door is Open" Flyer

- Gerawan states that "Jose Erevia helps with any questions or problems" and instructs the worker to call him or email him. If further provides that workers can speak with the company owners and provides a phone number to contact them. Following this, the flyer informs employees that a union contract will probably result in dues deductions and states that "[t]he union wants us to fire you if you don't give them some of your money for dues."[7]

Undated "Union Wants Mediator to Impose Contract" Flyer

- Flyer states that "union told us they want to force you to give them some money, even if you do not want to" and that union "wants the government to appoint a mediator to force a contract on you."

Undated "Be Respectful" Flyer

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[6] A March 28, 2013 flyer reflects a subsequent proposed wage increase, which includes a telephone number for Jose Erevia and the 1-800 "anonymous caller" line.

[7] This statement is repeated in flyers distributed with worker pay stubs.

- States that "Jose Erevia helps with any question or problem. Call him at 559-637-9463. To speak with Ray, Mike or Dan Gerawan, call 559-354-8201."

July 15, 2013 Flyer

- Gerawan informs employees that Gerawan wants to hear about employee complaints over unsafe and unjust labor practices and commits to resolving the complaints.

November 2, 2013 Flyer

- Gerawan states that "after disappearing for 20 years, the union wants to force you to pay them 3% of your earnings without a vote."

Undated Business Card With Jose Erevia Picture

- Erevia business card tells employees that supervisors cannot answer questions about the union, but "for help, contact me at (559) 637 – 9643"

Fruit Giveaway Announcement (July 2, 2013)

- Flyer announcing that every Friday, "fruit will be available near packinghouses for employee to take home."

Fruit Giveaway and Fresh Fruit Drink Giveaway Announcement (August 19, 2013)

- Flyer announcing that fruit giveaway and fresh fruit drink giveaway will be every Saturday instead of Fridays.

Notice Attached to September 21, 2013 Pay Stub Informing Workers No Intermediary is Needed

- Notice attached to employee pay stub informing workers that "Thanks to our open door policy, you don't need an intermediary."

Notice Attached to September 30, 2013 Pay Stub Informing Workers That Mediated is Wrong and Gerawan is Appealing

- Notice informs worker that MMC contact is wrong and will be imposed on Gerawan and workers without anyone having any choice; and that Gerawan is challenging the contract.

October 2, 2013 Voice Recording Denigrating the MMC Contract

- Gerawan informs employees that MMC contract is wrong and that "We did not want this to happen, and we believe that this process is unfair for the company and for you the employees."

Employer Bargaining Proposals Refusing to Recognize UFW Status

Gerawan refused to recognize the UFW's legitimate role as its employees' certified bargaining representative. This is reflected in the employer's bargaining proposals, all of which refused to accept that UFW legally represents its employees. Each and every one of the

employer's bargaining proposals contained language that reflect a refusal to recognize the UFW as the legitimate bargaining representative of its employees. **Dec. 96**.

Analysis and Applicable Law

While employers generally retain the right to communicate non-coercively with employees regarding collective bargaining, this right is not unlimited and the employer's speech cannot attack either the union or the bargaining process. An employer cannot "deliberately bargain and communicate as though the union did not exist, in clear derogation of the union's status as exclusive representative of its members under" the Act. NLRB v. General Electric Co. (1969) 418 F.3d 736, 762 – 763; *citing* NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229, 234. Therefore, "a communications program that pictured the Company as the true defender of the employees' interests, further denigrating the Union . . ." and one that "ignor[es] the legitimacy and relevance of the Union's position as statutory representative of its members" is unlawful. General Electric, Id. at 756 - 757.

When an employer engages in communications "designed to undercut the Union's status as employee representative" and seeks to "influence[] employees to reject the Union as their bargaining representative," the employer has violated the Act. NLRB v. Armored Transport, Inc. (2003) 339 NLRB 374, 377 – 378. Section 1155 does not provide an employer with unlimited speech rights, even if the speech does not contain a threat or a promise. The NLRB has flatly rejected that proposition. See e.g. General Electric, *supra*, at 760 – 761 (construing Labor Code section 1155's federal counterpart [29 U.S.C. § 158(c)] to reject employer's claim that § 158(c) bars the Board from finding an unfair labor practice if the communication contains no "threat or promise of benefit" and finding that §158(c) does not immunize all employer statements from Board scrutiny); NLRB v. Pratt & Whitney Air Craft Division (2nd Cir. 1986) 789 F.2d 121, 134 (holding that "attempts to coerce the employees, or to portray the employer rather than the union as

the workers' true protector, remove such speech from the penumbra of protection and may constitute an unfair labor practice").

Gerawan's barrage of communications to its employees represents a clear rejection of the UFW's role as its employees bargaining representative. Ignoring the Board's well established precedent that UFW remains "certified until decertified,"[8] Gerawan continually attacks UFW's right to represent Gerawan employees by claiming that "UFW says they represent" workers, by stating that there has been no vote, by stating that the UFW's representation is unfair, and by directing workers to (first) call the ALRB about this unfairness, and then to call Gerawan's HR Director and its owners. In addition, Gerawan's communications reflect taking sole credit for wage increases, portraying the Union as only interested in dues collection, and claiming that only Gerawan has the workers' interests at stake. Gerawan's communications escalate to direct dealing in violation of the Act when it asks employees to call Gerawan's management regarding union security issues and in order to resolve any "questions or complaints." This undermining of the union's role is illegal and reasonably affected employee free choice, causing employees to abandon faith in the bargaining process, as well as causing them to seek decertification. Gerawan's communication strategy constitutes a "clear derogation of the union's status as exclusive representative of its members under" the Act. NLRB v. General Electric Co. (1969) 418 F.3d 736, 762 – 763.

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[8] See, e.g. In re Dole Fresh Fruit Co. (1994) 22 ALRB No. 4 (rejecting employer's "abandonment" defense and finding that duty to bargain continues until a union is decertified, is defunct, or disclaims interest in unit); In re Pictsweet Mushroom Farms (2003) 29 ALRB No. 3; In re San Joaquin Tomato Growers, Inc. (2011) 37 ALRB No. 5 (both rejecting "abandonment" as a defense to the Board's mandatory mediation and conciliation process).

OBJECTION 16 (INITIATION OF DECERTIFICATION EFFORTS THROUGH DISPARAGEMENT CAMPAIGN)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection, and specifically from Objection 15. As detailed therein, Respondent's communications campaign directed at employees sought to disparage and undermine UFW's role as bargaining representative. Over time, Gerawan's communications to employees become more aggressive, to the point that Gerawan advised its employees to contact the ALRB for the purposes of finding out how to avoid alleged negative consequences that would flow from union representation. Gerawan repeatedly told employees that it was unfair for UFW to represent them, that UFW had abandoned employees, and that there is no vote planned. In connection with this issue of no vote being planned, Gerawan instructed its employees to call the ALRB so the ALRB can explain "why there is no vote planned," why it's unfair to have UFW represent the workers when "you weren't even born," and to find out what to do if workers do not want money taken away from them by the union. Viewed in this context and in the context of its other illegal conduct, Gerawan initiated the decertification efforts which led to the filing of two decertification petitions.

Analysis and Applicable Law

An employer initiates or instigates a decertification petition when the employer implants the idea of decertification in the minds of employees who later pursue decertification. Peter D. Solomon (1983) 9 ALRB No. 65; Sperry Gyroscope Co., (1962) 136 NLRB 294. When an employer unlawfully initiates a decertification campaign, it interferes with its employees' "free" exercise of their rights and invalidates the election as a measure of employee free choice. Peter D. Solomon, Id. at 8, *citing* Gold Bond, Inc. (1954) 107 NLRB 1059 and Bond Stores, Inc. (1956) 116 NLRB 1929.

In similar circumstances, in Armored Transport, Inc. (2003) 339 NLRB 374, the NLRB held that an employer's aggressive letter writing campaign constituted initiation of decertification efforts. In that case, as in this case, the employer directed its employees "as to the decertification process by suggesting that they go to the Board to request a new election . . ." Armored Transport, at 378. The Board there stated that the employer's letters, "especially considered in the context of the Respondent's direct dealing, unlawfully undermined the Union and influenced employees to reject the Union as their bargaining representative. Although the letters did not expressly advise the employees to get rid of the Union, such express appeals are not necessary to establish that an employer effectively solicited decertification and thereby violated Section 8(a)(1) of the Act." Id., at 378, *citing* Wire Products Mfg. Corp. (1998) 326 NLRB 625, 626.

As in Armored Transport, Gerawan here actively requested that its employees contact the labor board so that the Board could explain to the workers why it was so unfair to have UFW represent them, so that the Board could help employees regarding why they should not pay money to the union, and so that that Board could explain "why no vote is planned." Taking into account the entire course of Gerawan's letters and its other unlawful conduct, Gerawan initiated the decertification efforts and thereby invalidated the petition as a measure of free choice. See Peter Solomon, *supra*; Sperry Gyroscope, *supra*.

OBJECTION 17 (DIRECT DEALING AND SOLICITATION OF GRIEVANCES)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection, and specifically from Objections 15 and 16.

In its undated "As Always, Our Door is Open" flyer, Gerawan states that "Jose Erevia helps with any questions or problems" and instructs workers to call him or email him, and provides his contact information. If further provides that workers can speak with the company owners and

provides a phone number to contact them. The Undated "Be Respectful" Flyer states that "Jose Erevia helps with any question or problem. Call him at 559-637-9463. To speak with Ray, Mike or Dan Gerawan, call 559-354-8201." Similarly, the flyer distributed to workers on or about July 15, 2013 states that Gerawan wants to hear about employee complaints over unsafe and unjust labor practices and commits to resolving the complaints.

In his Undated Business Card, Jose Erevia tells employees that supervisors cannot answer questions about the union, but "for help, contact me at (559) 637 – 9643." In its Notice Attached to the September 21, 2013 Pay Stubs to employees, Gerawan informs its employees that "Thanks to our open door policy, you don't need an intermediary."

Through their flyers, media, and in meetings with workers and other communications with workers, Gerawan supervisors and management informed employees that the company could more easily resolve employee complaints directly with employees. See **Declarations 31, ¶ 6; Dec. 90. ¶ 6.**

In a DVD given to workers just days before the election entitled "The Truth About Why the United Farm Workers is so desperate to impose a contract on the employees of Gerawan Farming (the Prima)," Gerawan representatives tell employees that "There are many ways for you to make suggestions or let us know about issues without having to wait for the union to come around and hope they will listen. We listen, investigate thoroughly and quickly, and then act on what you tell us." In addition, Gerawan representatives state that "The union cannot solve problems; the union can only bring your problems to our attention so we can resolve them." "Gerawan Farms is here every day, in the fields, talking to workers to solve problems, striving to make it a better place to

work." "Direct communication" between Gerawan and employees is "how Si Se Puede is reached."[9]

In a television interview regarding Gerawan's fight against Senate Bill 25 (Steinberg), which would expand Mandatory Mediation and Conciliation to subsequent contracts, Dan Gerawan claims that it's the protector of his farmworker employees and that the company needed to launch an anti-UFW and anti-SB 25 campaign ad for its employees' sake. See http://www.news10.net/news/local/story.aspx?storyid=254668.

Analysis and Applicable Law

Efforts to bypass the union through seeking to resolve problems directly with employees are considered direct dealing in violation of the Act. See NLRB v. Pratt & Whitney Air Craft (2nd Cir. 1986) 789 F.2d 121, 134; McFarland Rose Production (1980) 6 ALRB No. 18, 7 - 8. It is a "violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees . . ." Medo Photo Supply v. NLRB (1944) 321 U.S. 678, 684.

Similarly, the solicitation of employee grievances before an election coupled with promises, express or implied, to remedy such complaints impinges upon the free exercise of employee rights and is violative of the Act. Tom Bengard Ranch, Inc. (1978) 4 ALRB No. 33, at 7, *citing* Montgomery Ward & Co., Inc. (1976) 225 NLRB 112.

In the present case, Gerawan's communications through its supervisors and representatives sought out "any employee problems or concerns" and explicitly or implicitly promised to remedy them. This conduct constitutes unlawful solicitation of grievances and direct dealing, and conveyed to employees that union representation is unnecessary and that they can resolve their

[9] Although various workers declare that they were provided the DVD, UFW is providing only one copy to the Executive Secretary to avoid duplication and unnecessary duplication of exhibits.

problems directly with the employer. This misconduct affects employee free choice and requires the setting aside of the election.

OBJECTION 18 (UNLAWFUL INTERROGATION OF EMPLOYEES)

Detailed Statement of Facts

In the time leading up to the election, various workers were interrogated regarding whether or not they supported the union. See **Declaration 13, ¶ 6** (on or about November 1, Supervisor Lucio asks worker whether worker was going to support anti-UFW protesters on November 1 and when worker responds "No," Supervisor Lucio asks whether worker wants UFW to take away 3% of her wages); **Dec 23, ¶ 8** (on or about first week of October, Foreman Martin Elizondo asks worker if he is a union supporter); **61, ¶ 4** (on or about beginning of October, Foreman Esteban Cruz asks worker who the worker will vote for: union or the company?); **Dec. 90, ¶ 3** (on or about the second week of October Foreman Francisco Mendoza asks worker whether worker is with the company or with the union; states the reason he is asking is because he believes his crew is being given little work because the company believes his crew has union supporters).

Analysis and Applicable Law

Employer interrogation of employees regarding their union sympathies is a violation of the ALRA. Karahadian Ranches, Inc., v. ALRB, 38 Cal. 3d 1 (1985); Arnaudo Bros., 3 ALRB 78 (1977); NLRB v. West Coast Casket Co., 205 F.2d 902 (1953). The natural tendency of employer interrogation is to instill in the minds of those questioned a fear of discrimination because of the information that the employer has obtained. West Coast Casket, 205 F.2d at 904; Arnaudo Bros., 3 ALRB 78 at p. 17. The free speech doctrine does not give employers a license to interrogate, because questioning is not designed to express views but to ascertain the views of the person questioned. Arnaudo Bros., Id.; Struksnes Construction Co., 165 NLRB 1062 (1965).

Moreover, because agricultural employers may not voluntarily recognize bargaining representatives under the ALRA, it is critical that they refrain from any form of unlawful interrogations. See Harry Carian v. ALRB (1984) 36 Cal. 3d 654.

The employer's interrogation of employees regarding their union sympathies is a clear violation of the Act. This interrogation instilled in the minds of the workers a fear discrimination for exercising their rights. Because of this fear, employees were unable to freely choose a bargaining representative and so the election must be set aside.

OBJECTION 19 (UNLAWFUL GRANT OF BENEFITS AND BAD FAITH BARGAINING THROUGH UNILATERAL IMPLEMENTATION OF NEW BENEFITS)

Detailed Statement of Facts

Employee Discount Program

On or about October 19 and October 26, 2013, Gerawan announced to its employees an "Employee Discount Program." The employee discount program offers various discounts from merchants to Gerawan employees for the purchase of goods and services. Gerawan had never before provided, promoted or announced the existence of such an employee discount program to its field workers. A flyer announcing this new discount program was provided to employees with their paychecks either on or about October 19 or October 26. **Declaration 5, 8, 11, 13, 14, 16, 19, 23, 26, 27, 31, 34, 35, 36, 61, 65, 66, 70, 75, 80, 89, 90, 91, 93.** The employer failed to provide notice and an opportunity to bargain over this new employee discount program. **Declaration 96**.

Free Fruit and Juice Drink Giveaway

On or about July and August, in the middle of Gerawan's first decertification attempt, Gerawan announced to its workers that it would be giving away fruit and "aguas frescas" (fresh fruit drinks) to workers every Friday or Saturday after work at certain locations. Gerawan had previously not given away fruit or juice drinks in this manner. In addition, on some of the occasions of these free fruit giveaways, owners Dan and Norma Gerawan, and other company

representatives were present while employees gathered decertification signatures. **Declarations 1, 4, 5, 11, 12, 13, 14, 15, 16, 17, 26, 27, 31, 35, 36, 51, 54, 68, 75, 76, 79, 92, 93**. The employer failed to provide notice and an opportunity to bargain over this free fruit giveaway. **Declaration 96.**

Analysis and Applicable Law

Unlawful Grant of Benefit

Labor Code section 1153 not only prohibits "conduct immediately favorable to employees" which would reasonably interfere with employee freedom of choice for or against unionization. NLRB v. Exchange Parts Co. (1964) 375 U.S. 405; see also Harry Carian Sales v. ALRB (1985) 39 Cal. 3d 209. Therefore, the bestowing of benefits or increases violate the Act when they interfere with workers' organizational rights during organizational campaigns, or in times preceding a representation election. See Exchange Parts, Id.; Harry Carian, Id.; Royal Packing Co. v. ALRB (1980) 101 Cal. App. 3d 826; Anderson Farms Co. (1977) 3 ALRB 67. Well-timed increases in benefits are illegal because the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." Exchange Parts, *supra*, at 409, *citing* Medo Photo Supply Corp. v. NLRB (1944) 321 U.S. 678, 686.

When a grant of benefits is made at the during an election campaign, "there can be little room for doubt that the increase was made to induce employees to vote against the union." Harry Carian, *supra*, at 244; see also Anderson Farms, 3 ALRB 67 at p. 17-19; Arrow Elastic Corp. (1977) 230 NLRB 23 (holding that an announcement of new benefits in the period preceding an election is deemed unlawful as calculated to influence the employees in their choice of a bargaining representative). By granting new benefits to employees through the Employee Discount Program and the Free Fruit giveaways, Gerawan has unlawfully interfered with employee free choice.

Bad Faith Bargaining

An employer's failure to provide notice and an opportunity to bargain over an employee benefit and the unilateral granting of the benefit is a clear violation of the Act. See Romar Carrot (1978) 4 ALRB No. 56, at 3 – 4; Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36; N.A. Pricola Produce (1981) 7 ALRB No. 49; George Arakelian Farms (1982) 8 ALRB No. 36.

Gerawan's failure to provide UFW with notice and an opportunity to bargain over the wage Employee Discount Program and the Free Fruit giveaway undermines the union's role as bargaining representative and constitutes misconduct requiring dismissal of the election petition.

OBJECTION 20 (ILLEGAL GRANT OF BENEFIT AND BAD FAITH BARGAINING THROUGH UNILATERAL CHANGE IN MEDICAL PROVDER NETWORK)

Detailed Statement of Facts

On or about November 2, 2013, Gerawan distributed to employees a flyer announcing that the company had made a change or selection of a "Medical Provider Network" for purposes of providing "a group of health care providers used by Gerawan to treat employees injured on the job." While Gerawan indicates the date of the flyer is February 2, 2013, Gerawan did not previously provide this notice to employees prior to on or about November 2, 2013. Gerawan did not ever provide notice of this change or selection to UFW and never offered to bargain over this selection. **Declaration 96**.

Analysis and Applicable Law

As discussed *supra*, the employer's announcement of this benefit to workers on or about the time that an election was announced constitutes an unlawful grant of a benefit. See Harry Carian, *supra*, at 244; see also Anderson Farms, 3 ALRB 67 at p. 17-19; Arrow Elastic Corp. (1977) 230 NLRB 23.

The Employer violated the Act by unilaterally selecting or changing Medical Provider Networks. An employer violates the act when it unilaterally, without notice to, or bargaining with

the union, selects or changes insurance plans and thereby prevents the union from investigating the nature of the new plan. Aztec Bus Lines (1988) 289 NLRB 1021, 1037. It does not matter if the plans offer similar coverage. Id.; see also Clear Pine Mouldings (1978) 238 NLRB 69, 80 (finding that employer's purchase of Aetna plan violated NLRA, even when coverage was identical to previous plan). The critical question is whether the employer failed to disclose details of the new plan, thus leaving the union unable to investigate the details of the new plan (such as the plan's coverage, the carrier's financial condition and reputation for prompt and fair resolution of claims, etc.) prior to the plan's implementation. Aztec Bus Lines, *supra*, 1037; Anthony Motor Co., Inc. (1994) 314 NLRB 443.

OBJECTION 21 (THREATS OF BANKRUPTCY, CLOSURE OR DISCONTINUANCE OF OPERATIONS)

Detailed Statement of Facts

On or about November 4, 2013, Foreman Beningno Gonzalez said that if Union was successful, the company would cut down fruit trees and convert their operations to almond tree production. **Declaration #4: ¶ 10.**

On or about mid-October, Foreperson Raquel Villavicencio said that if Union was successful, the company would cut down fruit trees, go bankrupt, and/or convert their operations to almond tree production. **Declaration #12: ¶ 12, 13; Declaration #13: ¶ 11,12.**

After the Union negotiating campaign began, foreman Torres said if the Union was successful, the company would cut down the fruit trees and convert their operations to almond tree production. **Declaration #15: ¶12**. Similarly, Supervisor Chuy said that if the Union were successful, the company would go bankrupt. **Declaration #15: ¶11.**

On different occasions throughout the decertification campaign, Petitioner Silvia Lopez went into crew and would tell workers that they should sign the petition because she had spoken to the

boss and he told her that if the union came in that he would replace the grape vines with almond trees and that the boss would rather sell the business than have the union come into the company. **Declaration #26: ¶ 13.**

On or about November 1, 2013, while workers waited for puncher to punch cards, coworkers began to talk about the threat they heard that if union came in the company would cut down all the trees and begin a new operation. Forewoman Emma Cortez responded "Yes, they are going to grow pure almonds." **Declaration #32: ¶3.**

On or about October 22nd, workers heard Petitioner Silvia Lopez say that if the Union were successful, the company would cut down the fruit trees and convert their operations to almond tree production. She also said the company was already knocking down trees. **Declaration #35: ¶13.**

On or about October 23, 2012, after a worker declined to sign Silvia Lopez's decertification petition, foreman Mendoza asked to speak with the worker. Foreman Mendoza said that he had to sign or else they wouldn't have work next year because they would destroy all the groves and plant almonds. **Declaration #67: ¶10.**

During the first days of November, workers were discussing why their coworkers would refuse union benefits. Foreman Gabriel was about a row away when he responded that thanks to the union, the company is going to cut down the vineyards and no one is going to have job. **Declaration #68: ¶6**

On or about mid-October, before the crew layoff, foreman Maldonado said that if the union were successful, the company would cut down all the trees and plant another type of harvest that would result in less work for the workers. Foreman Maldonado also said that the Union would not be able to win against the company because the owner had too much money. **Declaration #75: ¶10.**

On or about mid-September, HR Manager Jose Erevia, an unnamed supervisor, Foreman Jinez, and Dan and Norma Gerawan spoke to a few gathered crews. Erevia said that if the union went in the "older Gerawan" might decide to cut down all the trees and change operations to almonds, which would provide less work for the workers. Erevia said that the "older Gerawan" was already a millionaire and he could cut down the trees if he wanted and that the workers were the ones that would end up losing. At this same meeting Dan Gerawan told workers that the union won an election a long time ago but had abandoned the workers. **Declaration #80: ¶6.**

On or about October 22, 2013, after some workers rebuffed Petitioner Silvia Lopez' and another worker's attempt to gather signatures, as she was leaving the crew, Lopez stopped and told asked workers why they supported the union and said that if the union went in, the company would tear down the field and there would be no more work. Foreman Mendoza was about 5-6 rows away. **Declaration #84: ¶4.**

During the peach harvest, the company gathered several crews for a captive audience meeting in which various crews were put together. A company representative named Jaime talked to the crews and said that if the union came in, the company would cut down the grapes and then go bankrupt. **Declaration #89: ¶3**

On or about the first week of November, Foreman Mendoza said that the fields workers were working on would be destroyed and they were going to plant almond trees. **Declaration #90: ¶9.**

On or about the last week of September, Foreman Rios said that if the union were successful, the company had the needed machinery to cut down the fruit trees and convert their operations to other productions that required less labor. **Declaration #91: ¶6.**

On or about the first week of October, Foreman Alfredo Zarate told workers in his crew that he believed that the company would not send the crew to the grape harvest because the company was punishing the workers for supporting the union. **Declaration #21: ¶7**

On or about July 28, 2013, when workers did were not signing a decertification petition, worker Dona Chaide asked Foreman Nunez to gather and talk to the workers because they were not signing. Nunez gathered about 20 workers and told them that they should sign the petition to get rid of the union. He said that the union would only reduce worker hours and the company would go out of business with the union around. **Declaration #41: ¶5.**

On or about October 19, 2013, a worker called foreman Zarate about picking up his last check from him company. Foreman Zarate said if he went to the company office that he would have to take off the union bumper sticker from his truck because he did not know what would happen if he arrived with the union sticker on his truck. When the worker met the foreman to pick up his check on or about October 19, the worker asked foreman Zarate when they would begin working again, and foreman Zarate responded that the worker should go ask for work from the union because it was the union supporters' fault that the whole crew was fired. He also said that the company had a list of the worker names and pictures and that they would never be able to work for the company again. He told the worker to take his union bumper sticker off his truck. **Declaration #51: ¶9, 10.**

On or about November 1, 2013, Foreman Gabriel encouraged workers to go to protest against the union. Some workers said that if workers didn't go to the protest they would not have a job the next day. Foreman Gabriel did not correct the worker, nor did he say that was not true.

Declaration #56: ¶4.

Throughout the season, Foreman Maldonado would often tell union supporters in his crew that "you don't even know what you are doing to yourselves" ("ni saben lo que se estan hacienda a ustedes mismos"). **Declaration #66: ¶4**

On or about July, 2013, Forewoman Raquel Villavicencio and Foreman Benjamin gathered the workers in the crew to sign a petition to get rid of a union supporter from the crew. Forewoman Raquel urged the workers in her crew to sign the petition to get rid of the union supporter in her crew and to not be afraid to sign the petition. She said that the union supporter was causing too many problems and that everyone who is with the union was going to get fired. **Declaration #73: ¶ 4 - 7.**

On or about September, 2013, while a worker was working in the rows, foreman Carrillo approached him and said that when the company wins, they were going to fire the worker for supporting the union. He then said, "Let's see if the UFW will give you a job." **Declaration #85: ¶9.**

Analysis and Applicable Law

In addition to prohibiting promises of benefits, the Act also clearly forbids employers from making threats of reprisals or force. See e.g. Cal. Labor Code § 1155. For example, threats of discharge, threats of company closure, or threats of transfers clearly violate the Act. See Jasmine Vineyards, Inc. (1977) 3 ALRB 74; Arnaudo Bros., Inc. (1977) 3 ALRB 78; Jerry Roth Chevrolet, (1971) 194 NLRB 352; Anderson Farms (1977) 3 ALRB 67; Hansen Farms (1976) 2 ALRB 61. Importantly, a violation may be found in a statement in which threats may be reasonably inferred. Jack or Marion Radovich (1983) 9 ALRB 16, at p.3; Arrow Lettuce, (1988) 14 ALRB No. 7. Furthermore, threats made during an election campaign can reasonably be expected to be discussed, repeated, or disseminated among employees, and so the impact of such statements will

carry beyond the person to whom they are directed. Triple E Produce v. ALRB (1983) 35 Cal. 3d 42, 51; United Broadcasting Company of New York (1980) 248 NLRB 403, 404. For this reason, when there is an organizing or election campaign, the Board should scrutinize such threats closely, as the making of such threats tends to undermine worker free choice. See Harry Carian Sales (1985) 39 Cal. 3d 209 at 251; Royal Packing Co. (1980) 101 Cal. App. 3d 826, 840.

Similarly, an employer's threat during an election campaign to change its crop operation to one that provides less work is unlawful and grounds for setting aside an election. Arnaudo Bros. (1977) 3 ALRB 78, ALJ Dec. 18 (where the Board affirmed finding that the owner of a farm violated the Act when he threatened to pant alfalfa rather than tomatoes and thus reduce available work in case of union victory); see also 299 Lincoln Street, Inc. (1988) 292 NLRB 172, at 172, 192 -193 (Board held that threats by owner of nursing home to change its operations, and implication that this would reduce workforce, was unlawful and grounds for setting aside election).

The threats of job loss as reflected in the detailed statement of facts were expansive and covered a vast number of crews. In addition, threats made during an election campaign can reasonably be expected to be discussed, repeated, or disseminated among employees, and so the impact of such statements will carry beyond the person to whom they are directed. Triple E Produce v. ALRB (1983) 35 Cal. 3d 42, 51 (1983); United Broadcasting Company of New York (1980) 248 NLRB 403, 404. For this reason, when there is an organizing or election campaign, the Board should scrutinize such threats closely, as the making of such threats tends to undermine worker free choice. See Harry Carian Sales, 39 Cal. 3d at 251; Royal Packing Co., 101 Cal. App. 3d at 840. Because of the employer's and petitioner's repeated threats of job loss interfered with employee free choice, the election should be set aside.

OBJECTION 22 (UNLAWFUL DISCHARGE/LAY OFF OF UNION SUPPORTERS)

Detailed Statement of Facts

In the instant case, beginning in October and continuing, Gerawan laid off workers in approximately 13 crews because those workers were supportive of the union and did not support Gerawan's decertification efforts. These include the following crews identified by foreman name: Alfredo Zarate, Israel Lopez FLC, Rigoberto Hernandez, Antonio Sanchez, Benigno Gonzalez, Francisco Mendoza, Francisco Maldonado, Candelario G. Rojas, Carlos Rodriguez, Juan Padilla, Jesus S. Perez, Francisco G. Gomez, Sonia Martinez. Workers from these various crews relate that despite this year's early to mid-October lay off dates, in past seasons, they and their crew have continued working into later parts of the season, often into late November. **Declarations 1, 2, 6, 7, 10, 12, 13, 21, 26, 29, 31, 51, 64, 66, 69, 72, 75, 76, 78, 91, 93**. In addition, new employees have been hired into those crews since the lay offs occurred. **Declarations 57, 72, 75, 76, 78, 91, 93**. In one case, Foreman Zarate told workers that the reason they were laid off was because they support the UFW. **Declarations 1, 2, 10, 21, 51, ¶ 9**. In addition, a known union supporter was disciplined for his union activity and laid off. **Dec. 47.**

The timing of the lay offs (occurring earlier than usual), the hiring of new employees into those crews, and the fact that Gerawan and Petitioner's counsel were found to be sharing information with decertification efforts makes it clear that Gerawan knew which employees and crews signed the decertification petition for the decertification attempt that was dismissed on September 25, 2013 (Case No. 2013-RD-02-VIS). It is noteworthy that in his decision blocking the instant petition (Case No. 2013-RD-03-VIS), Regional Director Shawver found that Gerawan's attorney "freely shared information with Mr. Raimondo [petitioner's attorney] . . . during the course of the General Counsel's investigation of petition 2013-RD-002-VIS." October 31, 2013, Silas Shawver Letter, Case No. 2013-RD-3-VIS. Moreover, Gerawan is charged in Complaint 2013-CE-27-VIS with providing Petitioner with unlawful assistance through the

provision of legal services by Mr. Raimondo, thus further supporting the conclusion that Gerawan had access to the decertification petition and thereby identified which workers to lay off.

Analysis and Applicable Law

Employers may not fire or lay off workers for their union activity before a representation election. Valley Farms (1976) 2 ALRB 42 at 2; Sam Andrews (1977) 3 ALRB 45 at 21; Anderson Farms (1976) 2 ALRB 67 at 13; Domino of California, Inc. (1973) 205 NLRB 123. Firing or laying off a worker for union activity before an election "is a display of the employer's economic power that cannot help but chill the desire of a voter to support the union." Valley Farms, Id. at 2. Therefore, when an employer fires union supporters in the period preceding an election, the election will be set aside. Valley Farms, Id.; Domino of California, Id. Sam Andrews, Id. at 21. A new election is necessary in such circumstances because the message will undoubtedly spread that "the employer will retaliate against those that [support] the UFW." Valley Farms, Id. at 2.

OBJECTION 23 (EMPLOYEES HIRED FOR PURPOSE OF SUPPORTING DECERTIFICATION EFFORTS AND FOR VOTING IN VIOLATION OF THE ACT)

Detailed Statement of Facts

UFW hereby incorporates the detailed statement of facts from each prior objection, and specifically from Objection 22. As discussed therein, employees that normally work late into October or through November were laid off, and new employees were hired into their crews. **Declarations 1, 2, 6, 7, 10, 12, 13, 21, 26, 29, 31, 51, 64, 66, 69, 72, 75, 76, 78, 91, 93.** This hiring of new employees into crews which were recently laid off is a clear violation of Labor Code section 1154.6.

Analysis and Applicable Law

Section 1154.6 is violated when employees are hired specifically for the purpose of voting in an ALRB election, a practice sometimes referred to as packing a unit. Arakelian Farms (1983) 9 ALRB No. 25. The same conduct independently violates section 1153(a) and (c). Gerawan Ranches (1992) 18 ALRB No. 5, fn. 4, *citing* Trend Construction (1982) 263 NLRB 295, 300.

The employer's replacement of workers that support the union with new employees was effectuated in order to deny workers their right to union representation. By doing so the employer sought to achieve its twin unlawful goals of gathering support for its decertification efforts and hiring a complement of workers that was not guaranteed – in its eyes – to vote against the company. Such misconduct violates the Act and is grounds for setting aside the election.

OBJECTION 24 (IMPROPER UNIT EXCLUSION OF PACKING SHED EMPLOYEES)

Detailed Statement of Facts

During August 8, 2013 Mandatory Mediation and Conciliation proceedings between Gerawan and UFW, Gerawan HR Supervisor Jose Erevia testified concerning Gerawan's packing house employees. According to Erevia, the packing house employees only pack Gerawan grapes and do not pack any outside employer's fruit. See August 8, 2013 Transcript of Proceedings, Gerawan Farming, Inc. and UFW, 2013-MMC-03, at 126; **Declaration 96**. Erevia also testified that the packers are paid overtime after 10 hours, not 8 hours, thus indicating they are treated as "agricultural employees." August 8, 2013 Transcript, at 128; see California IWC Wage Order 14-2001, ¶ 3 (establishing overtime provisions of 10 hours for agricultural employees).[10] Further, the packers work on Gerawan's farm property. August 8, 2013, Transcript. Finally, although there are approximately 2,000 packing house employees, none of the packing house employees were included in the election list and none voted. **Declaration 96**.

[10] In 1995, the Board issued a decision 21 ALRB No. 6 (In re Gerawan Ranches), deferring to the findings of the NLRB that the packing house employees were commercial because Gerawan packed "outside fruit" from three different entities.

Analysis and Applicable Law

Despite a finding that Gerawan's packing house was "commercial" in 1995 this was based on a finding that Gerawan packed "outside" fruit under the Camsco Produce rule. Given Mr. Erevia's clear testimony that Gerawan packers now only pack Gerawan grapes, the circumstances have now changed and Gerawan's packers are no longer commercial employees. Accordingly, based on the plain language of the statute, all Gerawan's agricultural employees in the State of California were required to vote in the election. Cal Lab. Code § 1156.2 (The bargaining unit shall be all the agricultural employees of an employer). At a minimum, the Board needs to investigate this issue to determine whether the packing house employees should have been included in the unit. See Kawahara Nurseries, Inc. (2010) 36 ALRB No 3, 16 – 19. Whether intentional or not, disenfranchisement of workers by not being advised of an election or included in the unit is grounds for setting aside this election. Sequoia Orange Co. (1987) 13 ALRB No. 18.

OBJECTION 25 (PEAK STATUTORY REQUIREMENTS NOT MET)

Detailed Statement of Facts

Based upon the employee lists provided by Gerawan to UFW as part of negotiation requests, in 2012 Gerawan employed 5172 total direct hire employees, and 6363 FLC employees, for a total of 11,535 employees. **Declaration 96**. Moreover, analysis of these lists shows that Gerawan's peak employment months are September with an approximate peak of 5,500 employees for that month and October with an approximate peak of 5,000 employees for that month. **Dec. 96**. The decertification petition filed in this case alleges that there were 2,300 employees working at the time it was filed.

Analysis and Applicable Law

Pursuant to Labor Code section 1156.3(a)(1), any election needs to take place when the number of employees currently employed "is not less than 50 percent of [an employer's] peak

agricultural employment for the current calendar year." Lab. Code § 1156.3(a)(1). The peak requirement ensures "that the total number of employees eligible to vote is representative of the potential size of the work force which will be bound by the results of the election." See Tepusquet Vineyards (1984) 10 ALRB No. 29, at 5 - 6, *citing* Wine World, Inc. (1979) 5 ALRB No. 41, Charles Malovich (1979) 5 ALRB No. 33.

The current petition alleges that there were 2,300 workers employed by Gerawan at the time of its filing. If we take the total employees for the year - 11, 535 - the 2,000 current employees is far below 50% of that number. If we use the high peak month of September - 5,500 employees - the 2,000 employees currently alleged in the petition is still well below 50% of that number. Either way, the current petition is not timely because it fails to meet the 50% peak requirement. To proceed with an election under these circumstances would effectively deprive the voting rights of "the work force which will be bound by the results of the election." Tepusquet, *supra*, at 4 - 5. Accordingly, the petition should be dismissed on these grounds.

OBJECTION 26 (NO STATUTORY RIGHT TO SEEK DECERTIFICATION AT THIS TIME)

Detailed Statement of Facts and Analysis and Law

Prior Board orders recognize that UFW has never signed a collective bargaining agreement with Gerawan. See In re Gerawan Farming, Inc. (2013) 39 ALRB No. 5.

Labor Code section 1156.7 provides that a collective bargaining agreement executed by an employer and a labor organization "shall be a bar to a petition for an election among such employees for the term of the agreement, but in any event such bar shall not exceed three years . . ." Lab. Code § 1156.7(a). It further provides that a decertification petition "*shall not be deemed timely unless it is filed during the year preceding the expiration of a collective-bargaining agreement which would otherwise bar the holding of an election*, and when the number of agricultural employees is not less than 50 percent of the employer's peak agricultural employment

for the current calendar year." Lab Code § 1156.7(c) (emphasis added).

Therefore, by the plain terms of the statute, a decertification petition can only be filed during the expiring year of a collective bargaining agreement. Here, because there has never been a collective bargaining agreement with Gerawan, and hence no expiring agreement, the decertification petition is not "timely" and must be dismissed pursuant to labor Code section 1156.7. Thus, the simple and plain reading of the statute requires the dismissal of the instant petition. See Tracy E. Sagle, The ALRB - Twenty Years Later, 8 San Joaquin Agric. L. Rev. 139, 159-60 (1998) (Under the plain language of the ALRA a union may not be decertified "unless the employees first have had the privilege of living under contract").

In Cattle Valley Farms (1982) 8 ALRB No. 24, the Board deviated from the plain language of the statute by announcing a new "rule" that "when there is no contract between the employer and the incumbent union, the election petition shall be filed under, and processed in accordance with, section 1156.3(a) rather than 1156.7." Cattle Valley, at 7. But section 1156.3 clearly applies only to initial election petitions where there is no collective bargaining representative.

Cattle Valley's support for this radical change in how to apply the statute is based on its citation to the Montebello Rose Co. case. Montebello Rose Co. v. ALRB (1981) 119 Cal. App. 3d 1. The Board stated that "In accordance with the interpretation of our statute by the court in Montebello Rose Co. . . . we hereby authorize the Regional Director . . . to conduct a decertification election on the basis of a representation petition filed pursuant to section 1156.3 when there is no collective bargaining agreement in existence between the parties." Cattle Valley, at 4.

But Montebello Rose had nothing to do with decertification petitions and in fact did not deal with the right of employees to file such petitions. By its own terms, Montebello Rose addressed four specific issues: (1) whether the doctrine of *res judicata* bars relitigation of the good

faith bargaining issue in an unfair labor practice proceeding after the Board has denied an extension of the initial certification under Labor Code section 1155.2; (2) whether an employer's duty to bargain with the certified employee representative continues beyond the initial certification year absent an extension of the certification period as provided in section 1155.2; (3) whether the six-month limitation period for issuing an unfair labor practice complaint is tolled in a surface bargaining case until such time as the charging party discovers, or should have discovered, the other party's bad faith bargaining; and (4) whether written communications between an employer and his attorney-negotiator concerning collective bargaining negotiations are within the attorney-client privilege or any other recognized privilege. See Montebello Rose Co. v. ALRB (1981) 119 Cal. App. 3d 1, at 6. Labor Code section 1156.3 and 1156.7 were not even discussed by the Court of Appeals in Montebello Rose. Therefore, the Board's alteration of the statutory procedure for acceptance of a decertification petition, based on a purported interpretation of the statute by the Montebello Rose case is misplaced and has absolutely no statutory authority.

What is important about Montebello Rose is its affirmation of the principle that despite "the deference which should be given to the Board, [courts] nevertheless have an obligation to ascertain the intent of the Legislature so as to effectuate the purpose of the law." Montebello Rose, at 24. Therefore, "when administrative rules or regulations 'alter or amend the statute or enlarge or impair its scope,' they 'are void and courts not only may, but it is their obligation to strike down such regulations . . .'" Montebello Rose, at 24, *citing* J. R. Norton Co. v. ALRB (1979) 26 Cal.3d 1, 29.

Through the Board's alteration of the statutory principles regarding timeliness of decertification petitions as announced by Cattle Valley, the Board has clearly altered the language of Labor Code section 1156.7. Accordingly, unless a decertification petition is filed during the expiring year of a collective bargaining agreement, the petition is untimely and must be dismissed.

Because the decertification petition in this case was not filed in the expiring year of a CBA, it is untimely and should be dismissed.

OBJECTION 27 (ORDERING OF THE ELECTION BY THE ALRB EXCEEDED ITS STATUTORY AUTHORITY – NO FINDING OF A BONA FIDE QUESTION OF REPRESENTATION)

Detailed Statement of Facts

On October 31, 2013, ALRB Visalia Regional Director declined to proceed with an election by concluding that "Gerawan's actions have created an atmosphere where its employees cannot exercise their choice in a free and fair way." In his "blocking" and dismissal letter, the Regional Director states that "[t]he reasons for blocking the decision, namely the existence of serious unremedied unfair labor practices that preclude the holding of a free and fair election (particularly as alleged in Complaint 2013-CE-27-VIS), *would also prevent the Regional Director from finding that there is a bona fide question of representation.*" October 31, 2013, Regional Director Silas Shawver Blocking Letter, Case No. 2013-RD-003-VIS (emphasis added).

Analysis and Applicable Law

Labor Code section 1156.3(b) requires that the Board find reasonable cause to believe "that a bona fide question of representation exists" before it directs an election by secret ballot. In ordering that an election take place, the Board's Administrative Order No. 2013-46 did not make the requisite finding that there is a *bona fide* question of representation, as required by the plain language of the Labor Code. In fact, the Board's delegated agent, the Visalia Regional Director, made the exact opposite finding when he concluded that Gerawan's unfair labor practices "would also prevent the Regional Director from finding that there is a bona fide question of representation." See Labor Code § 1142(b) (the Board has delegated to its regional staff the obligation to investigate whether there exists a question concerning representation).

Because the Board can only order an election when it (or its delegated agents) determines

that there is a bona fide question of representation, because the Board's order fails to find there is such a bona fide question, and because the Board's delegated agent found the opposite, the Board exceeded its statutory authority in ordering an election. The election is therefore invalid and must be dismissed.

OBJECTION 28 (BOARD ORDERING ELECTION IN VIOLATION OF STATUTORY PROCEDURES FOR SEEKING REVIEW OF REGIONAL DIRECTOR DECISIONS)

Detailed Statement of Facts and Analysis/Applicable Law

In Admin. Order No. 2013-46, the Board cites to Labor Code section 1142(b) as its authority to vacate the Regional Director's decision to block the election in this case. However, section 1142(b) authorize the exercise of the Board's power only "upon a request for review" of the Regional Director's blocking decision. Cal. Lab. Code § 1142(b). The language of the statute states: "The board may review any action taken pursuant to the authority delegated under this section upon a request for a review of such action filed with the board by an interested party." Lab. Code § 1142(b).

This is also confirmed by the Board's own regulations which state that "requests for review of other delegated action" "shall" be filed with the Board "within five days of service of notice of the action for which review is requested." 8 Cal. Code Regs. § 20393(a). Furthermore, section 1142(b) states that "The entire record considered by the board in considering or acting upon any such request or review shall be made available to all parties prior to such consideration or action, and the board's findings and action thereon shall be published as a decision of the board." Cal. Lab. Code § 1142(b).

While the Board may claim that the use of the word "may" suggests that the Board can *sua sponte* review the blocking decision of a Regional Director, such a reading is plainly incorrect. "The word "may" may be either mandatory or permissive, depending on all the circumstances. *Where persons or the public have an interest in having an act done by a public body "may " in a*

statute means " must." Words permissive in form, when a public duty is involved, are considered as mandatory." Hess Collection Winery v. Agricultural Labor Relations Bd. (2006) 140 Cal.App.4th 1584, 1606–1607 (internal quotes and citations omitted) (emphasis added). Therefore, pursuant to the Hess case and authority cited therein, the statute's use of the word "may" imposes a duty on the Board to only review blocking decisions of its Regional Directors "upon a request for a review of such action filed with the board by an interested party."[11]

The Board's administrative order No. 2013-49 states that Labor Code section 1142 does not preclude the Board from acting *sua sponte* to review a regional director's decision blocking an election and cites to Bayou Vista Dairy (2006) 32 ALRB No. 6 as support for that proposition. But Bayou Vista Dairy did not involve *sua sponte* review of a blocking decision. Rather it involved *sua sponte* review of a Regional Director's decision to dismiss an election *after the election had been conducted* and the ballots had been impounded. In Bayou Vista, the Regional Director claimed he had authority to dismiss the election petition because of his issuance of a complaint well after the election had taken place. In rejecting this argument, the Board held that the Regional Director's authority to block an election must be exercised *before the election takes place*, and that once an election takes place, the proper procedure for resolution of misconduct is through the objections process. Bayou Vista, Id. at 5 – 7. This is entirely consistent with Board authority that after an election takes place, a Regional Director has no authority to dismiss an election and the proper procedure for dismissing an election is through the objections procedure. See e.g. Con Agra Turkey Company (1993) 19 ALRB No. 11; Nurserymen's Exchange, Inc. (2011) 37 ALRB No. 1; Cal. Lab. Code 1156.3(e).

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[11] Administrative orders discussing the Board's *sua sponte* authority in election matters are not precedent. See South Lakes Dairy Farms (2013) 39 ALRB No. 2, at 3; 8 Cal. Code Regs. § 20287. Moreover, any published decision on other *sua sponte* actions cannot override the ruling in the Hess case that "may" means "shall" when public duties are involved.

Therefore, Bayou Vista Dairy does not support a reading that the Board can *sua sponte* overrule a Regional Director's decision to block an election.

In the instant case, as the Board concedes, no party filed a request for review of the Regional Director's action blocking the election. The Board tries to evade this point by stating that "there is little doubt as a practical matter that one or both of the[] [aggrieved] parties would have sought review" of the Regional Director's decision. However, this does not justify the Board's refusal to follow the plain language of the statute which requires the filing of a request for review before ruling on a decision to block an election. The request for review serves the important function of properly framing the issues before the Board, and would potentially permit a response by other parties.[12] Moreover, the request would provide to the Board and the parties "the entire record considered by the board," when it ruled on its decision. Lab. Code § 1142(b). Based on the absence of a properly filed request for review and a "record" made available to the parties prior to considering a decision on the Regional Director's blocking decision, the Board is and was without authority to unilaterally vacate the Regional Director's decision.

The Board's reading that the Labor Code authorizes it to unilaterally vacate a Regional Director's decision to block an election is inconsistent with the plain language of the statute. The Board cannot "alter or amend the statute or enlarge or impair its scope." If it does so, the Board's action is void. See Addamek & Dessert, Inc. v. ALRB (1986) 178 Cal. App. 3d 970, at 978.

Because no request for review was filed, the Board's decision to vacate the Regional Director's decision is void. Accordingly, the election petition should be dismissed.

OBJECTION 29 (IMPROPER *EX PARTE* COMMUNICATIONS, OR APPEARANCE OF *EX PARTE* COMMUNICATIONS BETWEEN GERAWAN/PETITIONERS WITH ALRB OR ITS AGENTS)

[12] The Board's claim that "a delay could have resulted in the loss of peak employment" is unavailing given that its own Regional Director – who actually reviewed peak employment records and communicated with the parties – found that "the peak requirement will be met for several additional weeks." Shawver October 31, 2013 Letter, at 2.

Detailed Statement of Facts

On or about October 31, during working hours, and prior to the Visalia Regional Director's issuance of his decision blocking the decertification petition in this case, company owner Dan Gerawan visited various work crews, held captive audience meetings, and informed employees that the ALRB (or people in Sacramento) had finally listened to them and that they (the workers) were going to have an election. Mr. Gerawan explained this as a "historic" event and explained that the company would continue to support the workers' efforts to vote out the UFW. He was very pleased to make the announcement that an election was going to take place. These meetings occurred well before the ALRB overruled the Regional Director's decision to block the election, and therefore well before an ordered election. **Declarations 8, 11, 17, 18, 19, 22, 60, 61, 65, 80, 85**.

In addition, on October 31, Petitioner's counsel was issuing press releases indicating that the ALRB had ordered an election would be taking place. **Declaration 96**. Further, UFW was informed that ALRB agents in Sacramento were already planning an election before the Regional Director issued his blocking decision on October 31. **Declaration 96**.

Analysis and Applicable Law

The Board "views with the utmost seriousness allegations that conduct of [its] agents, whether intentional or inadvertent, has acquired such an appearance of bias that it tended to affect the exercise of free choice by agricultural employees." Sam Andrews' Sons (1989) 15 ALRB No. 5. To this end, the Board and its agents must "avoid giving even the impression of bias." Id. If actual bias or even the appearance of bias creates an atmosphere which renders improbable a free choice by the voters, the election must be set aside. Agri-Sun Nursery (1987) 13 ALRB No. 19.

In the instant case, owner Dan Gerawan's October 31 statements to crews that they would be voting in an election created the appearance that the ALRB itself or that Board agents in

Sacramento were having ex parte communications with Gerawan and were intent on ordering an election, regardless of what the Regional Director's investigation revealed. Such statements by Mr. Gerawan also created the impression that Gerawan – who had previously been found to have assisted the decertification process – controlled the staging of the decertification election. "Knowledge of Employer involvement in the [] decertification effort could signal to employees that an employer could control the decertification request and that there could be adverse employment effects if an employee opposed decertification." S & J Ranch, 18 ALRB No. 10 at 4.

This appearance of bias and appearance that Gerawan had inside information concerning the ordering of the election created an atmosphere that rendered "improbable a free choice by the voters." Agri-Sun Nursery, *supra.* Accordingly, the election must be set aside.

OBJECTION 30 (SILVIA LOPEZ NOT AN EMPLOYEE AND NON EMPLOYEES GATHERING SIGNATURES)

Detailed Statement of Facts

UFW incorporates the detailed statement of facts from its earlier objections.

Silvia Lopez does not appear on any employee lists for employees who worked for Gerawan in 2012. She also does not appear in employee lists for employees that performed work prior to June, 2013. Based on the employee lists provided by Gerawan to the UFW, Lopez first appears as an employee who performed work for Gerawan in June, 2013, well after Gerawan began its decertification and disparagement campaign against the union. **Declaration 96**. Lopez therefore appears to have been hired for the purpose of organizing the decertification campaign against UFW. In addition, employees from Lopez crew declare that Lopez was regularly absent and did not regularly perform work in the crew. **Declarations 4, 13**. Furthermore, as discussed above, Lopez was heard repeating the same threats of job loss to workers that the company made in connection with her signature gathering efforts. Finally,

workers report that packing house workers identified by packing house badges, were gathering signatures for the decertification efforts. **Declarations 13, 26, 29.** These workers are not currently part of the bargaining unit.

Analysis and Applicable Law

Under the ALRA, only petitions filed on behalf of agricultural employees are valid and an employee who files any type of petition on behalf of an employer, rather than on behalf of employees, is acting as an agent of the employer. M. Caratan, Inc. (1983) 9 ALRB No. 33, 5 – 6. In such a case, the "employee-agent's filing of the petition becomes the act of the employer just as clearly as if the employer itself or any of its supervisors had filed it." Id., at 6. Therefore, "the same law and precedents which invalidate any petition filed by an employer or its supervisors, also invalidate any ALRB petition filed by an agent of the employer." Id. *citing* Modern Hard Chrome Service Co. (1959) 124 NLRB 1235, 1236 (dismissing a decertification petition filed by an agent of the employer); see also Clyde J. Merris (1948) 77 NLRB 1375, at 1377 (dismissing a decertification petition filed by a foreman, *finding that no question concerning representation exists*).

Because Ms. Lopez was not an agricultural employee in 2012 and shows no work history until June 2013, and because she was regularly absent from her crew, her hiring suggests she was hired for the sole purpose of serving Gerawan's decertification efforts. In addition, Lopez repeated Gerawan's threats of job loss in her efforts to collect signatures, informed workers they would be paid for attending anti-UFW protests, and engaged in other significant conduct that was consistent with Gerawan's anti-union campaign. As discussed herein, her efforts to decertify the union received substantial and unlawful assistance. Accordingly, she must be viewed as Gerawan's agent and her petition is therefore invalid and should be dismissed.

OBJECTION 31 (MISLEADING ALTERED BALLOT DISTRIBUTED TO WORKERS)

Detailed Statement of Facts

On the day before the election – November 4 – altered ALRB ballots were being distributed to workers indicating that workers should vote "No Union." The ballots were distributed with the Official ALRB Notice of Election, thus giving workers the impression that the altered ballots were official state documents. **Declarations 11, 30, 31, 34, 53, 54, 61, 64, 89, 90, 92.** In some cases, the people distributing the altered ballots and official ALRB Notice of Election told employees they were representatives of the ALRB. **Declaration 89**. Although the workforce is predominantly Spanish-speaking, the altered ballot has the words "sample" in English, thereby preventing workers from determining that the ballot is propaganda. In addition, in distinction to the NLRB, the ALRB does not have a policy or practice of using sample ballots or distributing any sample ballots to workers, and did not do so in this case. **Declaration 96**.

Analysis and Applicable Law

With regard to altered Board documents, the NLRB determines whether the altered document on its face identifies the party responsible for its preparation. NLRB v. Hub Plastics, Inc. (6th Cir. 1995) 52 F.3d 608, 613, *citing* SDC Invest., Inc. (1985) 274 NLRB 556, 557. If the altered ballot does identify the party responsible, then the election will stand because, based on the NLRB's Midland rule, the employees will know that the document is propaganda, and will treat it accordingly. If the source of the document is not clearly identified, however, then "it becomes necessary to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party's cause." Hub Plastics, Id. When the election is a close one, the Board and courts examine altered ballots with great care. Hub Plastics, Id., *citing* NLRB v. Hyatt Hotels, Inc. (6th Cir. 1989) 887 F.2d 109, 111; see also Jury's Boston Hotel (2011) 356 NLRB No. 114 (applying the SDC

Investment rule).

In the instant case, several factors support finding that the altered ballots would reasonably mislead employees into believing that the Board favored the "No Union" selection. First, the ALRB historically has not used sample ballots and did not do so in this case. Second, the ballot was not clearly marked by either the company or the petitioner. Third, the ballot was distributed with the Official ALRB Notice of Election. Fourth, although the ballot was marked as "sample," it was done so in English, not Spanish. Finally, on some occasions, workers that distributed the altered ballot informed the recipient that they were representatives of the ALRB. These factors would reasonably mislead the recipients of the altered ballots to believe that the ALRB favored the No Union choice. Accordingly, under the standards set out under the NLRA, and under the unique features of the ALRA, the election should be set aside.

OBJECTION 32 (VIOLENCE AND THREATS OF VIOLENCE DIRECTED AT UFW SUPPORTERS)

Detailed Statement of Facts

On or about November 1, 2013, anti-UFW Gerawan employees threatened to use violence against UFW supporters by threatening to beat them with sticks. This threat was verbalized in the presence of Gerawan's HR director Jose Erevia, and in the presence of foreman Gabriel (last name unknown). Moreover, in the presence of the HR manager and the foreman, on their way to an anti-UFW demonstration, the workers entered Gerawan fields to gather sticks that they said would be used to beat UFW supporters. The HR manager and the foreman did not intervene in the matter and permitted workers to verbalize the threat and gather sticks in support of the threat. **Declaration 56**. In a separate incident, on or about September 30, 2013, a Gerawan employee at an anti-UFW demonstration threw a rock at a UFW supporter's car. The supporter's car had a UFW flag. **Declaration 55**. Gerawan's employee manual states that the company does not tolerate workplace violence, including "verbalizing a desire to harm coworkers." **Declaration**

96, Employee Manual at 16 – 17. The manual further states that employees may be discharged for "harassing, threatening, intimidating or coercing a supervisor or another employee."

Declaration 96, Employee Manual at 12.

Analysis and Applicable Law

The Board does not tolerate violence or threats of violence, and especially so when such misconduct has an effect on the election process. Threats of violence and actual violence will set aside an election when they create an atmosphere of fear or coercion rendering employee free choice of representatives impossible. T. Ito & Sons Farms (1985) 11 ALRB No. 36; Ace Tomato Co., Inc. (1989)15 ALRB No. 7.

In the instant case, Gerawan's supervisors and representatives permitted workers to publicize that they were going to beat UFW workers with sticks and permitted workers to gather Gerawan equipment – sticks – in support of those threats in the presence of other crew members. Despite Gerawan's employee manual which states that it does not tolerate workplace violence or tolerate verbalizing a desire to harm coworkers, Gerawan's supervisors and representatives permitted workers to verbalize threats of violence against UFW supporters and permitted them to gather sticks in support of actualizing that threat. The rock throwing incident also was a violation of company rules and policies. Such violence and threatened violence created an atmosphere of fear and coercion requiring dismissal of the decertification petition.

CONCLUSION

FOR ALL THE FOREGOING REASONS, the election petition should be dismissed.

Respectfully submitted, November 13, 2013

Mario Martinez, Attorney
United Farm Workers of America