Arroyo Grande, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CLAASSEN MUSHROOMS, INC., A California Corporation, CLAASSEN MUSHROOM FARM, A Partnership, DAVID E. CLAASSEN, JOHN GOLDMAN, HAROLD A. HYDE, G. GERALD FITZGERALD, ELIZABETH A. PENAAT, AND C.B. COLEMAN, Partners, Respondents, and INTERNATIONAL UNION OF AGRICULTURAL WORKERS , Charging Party.	Case No. 84-CE-12-OX(SM) 20 ALRB No. 9 (June 30,1994)

SUPPLEMENTAL DECISION AND ORDER

On January 28, 1994, Administrative Law Judge (ALJ) Douglas Gallop issued the attached Second Supplemental Decision and Order in this matter. Thereafter, General Counsel and Respondents Claassen Mushroom Farm (CMF) , David E. Claassen, G. Gerald FitzGerald, John Goldman, Harold A. Hyde and Elizabeth A. Penaat filed exceptions to the ALJ's second supplemental decision with supporting briefs.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ' s second supplemental decision in light of the exceptions[1] and briefs of the parties and has

[1] Respondents request attorney's fees to the extent they were incurred in defending the allegations that the limited partners were liable as individuals jointly and severally to remedy the unfair labor practices. General Counsel's allegations were not frivolous based on the evidence available before hearing. In any event, the Board lacks authority to award attorney's fees. (Sam Andrews' Sons v. ALRB (1986) 47 Cal.3d 157, 171-173 [253 Cal.Rptr. 30].)

decided to affirm the ALJ's rulings, findings, and conclusions, and to issue the attached Order.

ORDER

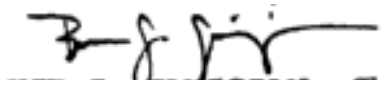
Respondents California Mushroom Farm, a partnership, and David E. Claassen, an individual, are jointly and severally liable with Claassen Mushrooms, Inc. (CMI)[2] to remedy the unfair labor practices found by the Board in its decision at 12 ALRB No. 13 in the amounts set forth in the Supplemental Decision of the Administrative Law Judge dated February 23, 1989 together with interest specified in the Board's decision in E.W. Merritt Farms (1988) 14 ALRB No. 5.[3] Respondents John Goldman, Harold A. Hyde, G. Gerald FitzGerald, and Elizabeth A. Penaat are not jointly or

[2] Our finding CMF and David E. Claassen jointly and severally liable does not preclude the Board from enforcing its backpay order against CMI should CMI again have assets to satisfy its obligations. We note further that because CMF has no assets, there is no impediment to collecting from its general partner, David E. Claassen. (Ohio Casualty Insurance Co. v. Harbor Insurance Co. (1966) 259 Cal.App.2d 207, 216 [66 Cal.Rptr. 340].)

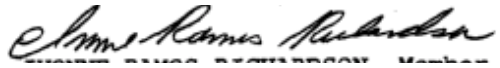
[3] The interest rates applicable under the Board's decision in Merritt apply to all monetary obligations owing under the Agricultural Labor Relations Act (Labor Code sec. 1140 et seq.) since the date of that decision, and supersede the rates applied under Lu-Ette Farms. Inc. (1982) 8 ALRB No. 55, cited by the ALJ in the February 23, 1989 Supplemental Decision.

severally liable,[4] as individuals, to remedy the unfair labor practices.

DATED: June 30, 1994



BRUCE J. JANIGIAN, Chairman



IVONNE SAMOS RICHARDSON, Member

LINDA A. PRICK, Member

[4] CMF, a limited partnership formed before the effective date of the Revised Uniform Limited Partnership Act (Revised Limited Partnership Act [RLPA] , Corp. Code sec. 15600 et seq.), never exercised the election available under the RLPA to bring itself under the terms of that Act. However, as reflected in the ALJ's analysis, under the facts of this case, the result would be the same under the terms of either the Uniform Limited Partnership Act (Limited Partnership Act, Corp. Code sec. 15500, et seq.) or the RLPA.

CASE SUMMARY

Claassen Mushrooms, Inc., et al. (International Union Agricultural Workers)

20 ALRB No. 9
Case No. 34-CE-12-OX(SM)

Administrative Law Judge's Decision

The Administrative Law Judge (ALJ) found that Claassen Mushroom Farm (CMF) , a limited partnership, and its general partner, David E. Claassen, were jointly and severally liable for remedying the unfair labor practices found to have been committed by Claassen Mushrooms, Inc. (CMI) at 12 ALRB No. 13. The ALJ dismissed the allegations in the notice of hearing alleging that five limited partners in CMF were liable either jointly or severally.

The ALJ found that General Counsel failed to show that the limited partners were liable under applicable concepts of partnership law under either the Uniform Limited Partnership Act (ULPA) or the Revised Uniform Limited Partnership Act (RULPA), adopted by California on June 30, 1984. Under the RULPA, limited partners do not become individually liable when they participate in the partnership's business, while the ULPA contemplated that limited partners would have only the role of passive investors. While CMF was formed before passage of the ULPA and had never exercised the election that would have brought it under the RULPA, under applicable ULPA precedent, the limited partners' participation in the business did not constitute such an exercise of control as to take them out of the role of investors seeking to protect their investment.

The ALJ also found that under precedent of the National Labor Relations Act, the limited partners had not exercised control of the employer so as to allow them to be treated as an integral part of the employer.

Board Decision

The Board affirmed the ALJ's decision and adopted his rulings. The Board denied Respondents' request for attorney's fees for defending the limited partners from the allegations of liability. The General Counsel's theory that the limited partners were liable was not frivolous based on evidence available before the. hearing. More importantly, under Sam Andrews' Sons v. ALRB (1986) 47 Cal.App.3d 157 [253 Cal.Rptr. 30], the Board does not have authority to award attorney's fees.

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: CLAASSEN MUSHROOMS, INC., A California Corporation, CLAASSEN MUSHROOM FARM, A Partnership, DAVID E. CLAASSEN, JOHN GOLDMAN, HAROLD A. HYDE, G. GERALD FITZGERALD, ELIZABETH A. PENAAT, and C.B. COLEMAN, Partners, Respondents, and INTERNATIONAL UNION OF AGRICULTURAL WORKERS, Charging Party.	Case No. 84-CE-12-OX (SM) (12 ALRB No. 13)

Appearances:

M. Armon Cooper Kathleen R.
Tichenor St. Peter & Cooper
Three Embarcadero Center
Suite 2900 San Francisco,
California

For Respondents:
Claassen Mushroom Farm, a Partnership, David E. Claassen, John Goldman, Harold A. Hyde, G. Gerald Fitzgerald and Elizabeth A Penaat

For General Counsel:
Clifford Meneken
Salinas ALRB Regional Office
112 Boronda Road
Salinas, California

Before: Douglas Gallop
Administrative Law Judge

No Appearance for:

Claassen Mushrooms, Inc., a California Corporation, C.B. Coleman, an Individual, and International Union of Agricultural Workers

SECOND SUPPLIMENT DECISION DISION ADMINISTRATIVE LAW JDUGE

DOUGLAS GALLOP: This derivative liability hearing was conducted on November 16, 17, and 18, 1993 at San Francisco, California.

In this proceeding, the General Counsel of the Agricultural Labor Relations Board (hereinafter Board) seeks to find Claassen Mushroom Farm, a Partnership (CMF) , David E. Claassen, John Goldman, Harold A. Hyde, G. Gerald Fitzgerald and Elizabeth A. Penaat (collectively referred to as Respondents) jointly and severally liable to remedy unfair labor practices previously found to have been committed by Claassen Mushrooms, Inc., a California Corporation (CMI). General Counsel and C.B. Coleman, who was also named as a respondent in the Specification Alleging Derivative Liability, which issued on August 30, 1993, have entered into a settlement agreement resolving General Counsel's claims against Coleman. The remaining respondents deny that CMF and CMI constituted a single employer at any time, or that any of them are jointly or severally liable to remedy CMI's unfair labor practices. Subsequent to the hearing, General Counsel and Respondents filed written briefs.

Upon the entire record, including my observations of the witnesses, and after careful consideration of the briefs and other arguments presented, I make the following findings of fact and conclusions of law:

FINDINGS OP FACT

I. Jurisdiction

CMI, at least as of the time the unfair labor

practices were committed, was an agricultural employer, as defined by section 1140.4 (c) of the Agricultural Labor Relations Act (hereinafter Act) . Respondents deny that CMF is an agricultural employer, but is instead a passive investment entity which holds assets.

Prior to the hearing, Respondents moved to dismiss the specification because their interests were purportedly not represented in the underlying proceeding, General Counsel was aware of their existence prior to the entry of a judgment enforcing the Board's order in Case No. 12 ALRB No. 13, the automatic stay provisions of Bankruptcy Code section 362 nullifies the underlying order, and the Board is without jurisdiction to seek recovery against Respondents, because jurisdiction is now solely held by the superior court which enforced the Board's order. At the hearing, this motion to dismiss was denied, for the reasons stated on the record.

II. The Business Operations of CMI and CMF The formation of CMI and CMF originated with David E. Claassen's desire to establish a highly automated mushroom farm. Claassen joined forces with Ira Coleman, who had experience in financing various business ventures. Although Claassen envisioned one business, he and Coleman, based on legal advice, decided to establish two enterprises, a corporation and limited partnership,[1] because investors would be eligible for tax credits

[1]Counsel for the General Counsel, for the first time in his brief, contends CMF must be considered a general partnership, because Respondents failed to produce a certificate of limited

not otherwise available. Coleman solicited investors to become stockholders in the corporation and contributors to the partnership.

CMI and CMF were created in 1982. Both were initially funded by the same investors, who also obtained various loans. Claassen, who owned 52% of the shares in CMI, owned a far smaller interest in CMF. CMI was organized to produce, harvest and market mushrooms. CMF's function was to construct the growing facility, purchase the project's equipment and lease it to CMI. Although the founders of CMF and CMI contemplated similar future projects with other mushroom farms, CMI is, to date, the only entity which has leased facilities or equipment from CMF. From the outset, it was determined that CMI would own the land upon which the business operated, along with appurtenances directly associated therewith, such as roads on the property. CMF would own the mushroom plant and equipment.

Claassen personally negotiated the purchase of land by the corporation, and equipment for the partnership. The equipment was paid for by CMI and then charged back to CMF. Claassen was in charge of the facility construction project. He engaged various

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partnership at the hearing, or to conclusively establish the existence of such a document by testimony. Irrespective of whether this issue may properly be raised at such a late point in the proceedings, the undersigned is satisfied the undisputed testimony and documentary evidence at the hearing preponderantly established CMF's limited partnership status. Furthermore, subsequent to the hearing, Respondents requested administrative notice be taken of two certificates of limited partnership for CMF, recorded on August 12, 1982 and July 1, 1984. Said request is granted, over opposition filed by General Counsel.

contractors for this purpose, including Goldman, who subsequently became an investor in the business. For a period of time, Goldman was authorized to write checks for CMI and to transfer funds between CMI bank accounts.

In addition to the contractors, CMI employees also performed work in construction of the facility. The contractors and CMI employees were paid by CMI, but CMF reimbursed CMI for these expenditures, and the other costs associated with the construction project were also assigned to the partnership.

Since the inception of CMI and CMF, Claassen has been the president and chief operating officer of CMI and general partner of CMF, and Harold A. Hyde has been the secretary of CMI. Ira Coleman was the original vice-president of CMI, but Goldman replaced Coleman after he died, and has since occupied that position. Claassen and all of the investors are members of CMI's board of directors, and limited partners in CMF, except for Claassen, the general partner.

While the mushroom plant was operational, Claassen was solely responsible for production-related decisions, including day-to-day labor relations matters, the raising, harvesting and sale of the mushrooms. Goldman briefly worked as a salesman at the outset of production, but then resigned in 1983, thereafter being involved as an inactive titular officer of CMI, investor and member of the board of directors.

Claassen also was responsible for the day-to-day operation of the partnership, which primarily consisted of

monitoring the lease-option agreement between CMI and CMF. CM I and CMF used the same accounting firm to allocate expenses and credits, and to prepare tax returns and financial statements. Beyond Goldman's brief stint as a sales employee, none of the individual respondents engaged in day-to-day production or distribution matters, beyond making occasional suggestions. As the majority shareholder in CMI, Claassen could not be removed as president or chief operating officer without his consent. Although he could be removed as general partner of CMF, this was never done.

While the business was operational, CMI's office was at the plant facility, and CMF's functions were performed there as well. CMI's business address was also initially the plant, while CMF used a mailbox located outside the facility. Later, CMI and CMF shared various business addresses, including a post office box and the residences of board members.

CMI and CMF, in addition to using the same accountant, have utilized the same law firms on several occasions, shared the services of a secretary employed by CMI, used CMI's telephone line for both CMI and CMF business, and used CMI's stationery for CMI and CMF purposes. CMI board meetings and CMF partnership meetings have generally been held at the same location and in sequential order. During construction of the facility, CMF-owned equipment was used by CMI employees, and CMI utilities were used for the project, later to be charged back to CMF.

Almost from the outset, CMI experienced serious

financial difficulties, at first arising from delays and cost overruns in construction of the facility and then, production below expected levels. This resulted in CMI's inability to pay its debts, including its bank loans and lease payments to CMF. The failure to pay rent jeopardized CMF, because it became unable to pay its equipment and construction loans.

CMF never took legal action to recover the rent due, and none was ever paid. At one point, CMF converted the arrears in rent to a loan to CMI. Otherwise, the arrears were entered in the books of CMI and CMF as a debt.

In an effort to save the business, the investors made personal loans and guaranteed additional bank loans. Also, CMF's partners transferred their tax credits to CMI, with no apparent consideration. A "finance committee" consisting of C.B. Coleman, Hyde and Penaat was formed to deal with Wells Fargo Bank, eventually attempting to dissuade it from foreclosing on the loans. As the financial situation became more desperate, various investors contacted outside companies to invest in, or purchase the business. None of these efforts was successful, and there is no evidence that either CMI or CMF could have been sold absent Claassen's consent.

Some of the investors, C.B. Coleman in particular, became increasingly dissatisfied with Claassen's operation of the mushroom farm, and his purported failure to advise them of his actions. Claassen was asked to resign as chief operating officer of CMI, and to hire an experienced grower. He did hire such a

grower, but refused to relinquish his position. There was also a movement to remove Claassen as general partner of CMF, but no formal action was taken.

The final blow to the mushroom farm took place on March 31, 1986, when a power surge destroyed the electrical system and some equipment. Although operations ceased at that point, and most agricultural employees (all of whom were on CMI's payroll) were let go, the plant remained open for about six more months, for cleanup and while new investors or a purchaser were sought.

As part of the effort to find new investors, a CMI employee hired after the power surge apparently put together a pamphlet, listing a "Management Committee" consisting of Penaat, Hyde and Fitzgerald, allegedly formed to direct the future business operations. There is no other evidence showing the formation of such a committee, which Claassen denied in his testimony and, at any rate, operations never resumed. The pamphlet was shown to perhaps one potential investor, after the power surge.

III. Post-Operational Events

Wells Fargo eventually foreclosed on its loans, and on June 17, 1986, one day after the Board issued its order in the underlying unfair labor practice case, CMI filed a Chapter 11 petition for bankruptcy. CMF, its partners and CMI entered into several agreements in conjunction with this proceeding. Among these was the sale of all CMF assets to CMI for the sum of $1, forgiveness of all debts between CMI and CMF and the transfer to

CMI of CMF's interest in a lawsuit against Pacific Gas & Electric Company (P. G. & E.), in which CMI and CMF were co-plaintiffs.[2] The investors who made personal loans to CMI are creditors in bankruptcy, as is the Board. All CMI assets, except for the P. G. & E. lawsuit, have been sold in the bankruptcy proceeding.

Once CMI no longer operated out of its facility, Fitzgerald agreed to act as designated agent for service of process for the corporation. Inasmuch as neither CMI nor CMF had any liquid assets, he also paid their taxes and tax preparation fees, at least for the years 1987-1989, and then requested a pro-rata reimbursement from the other investors.

The discriminatees in the underlying unfair labor practice case were discharged in February, March and May 1984. A Complaint and Notice of Hearing issued alleging CMI as the sole respondent. As noted above, the Board's order affirming the administrative law judge's findings of unfair labor practices issued on June *26,* 1986, and on November 16, 1988, an amended backpay specification issued. When CMI did not respond to the specification, an administrative law judge, on February *23,* 1989, granted a motion for summary judgment which was affirmed by the Board, without opposition, on March 17, 1989.

Subsequent to this hearing, the parties stipulated that by letter dated July 17, 1990, Counsel for the General Counsel informed CMF and the individual respondents herein that

[2]The plaintiffs were awarded damages after trial of the lawsuit, but P. G. & E. has appealed.

the General Counsel had made a preliminary determination each was jointly and severally liable to remedy the unfair labor practices in the underlying proceeding, based on various theories. On August 7, 1992, the Board filed a petition for enforcement of its March 17, 1989 order with the Monterey County Superior Court. In addition to CMI, the Board listed CMF and some of its partners as respondents in its application, but enforcement was granted only against CMI. It appears the other named Respondents were dropped by General Counsel.

ANALYSIS AND CONCLUSIONS OF LAW

At the hearing, Respondents moved to dismiss the Specification on the basis that derivative liability requires some sort of wrongdoing by the subsequently-added party, such as transferring or receiving assets to avoid payment of a judgment. The motion was denied on the basis that §20291 (f) of the Board's Regulations does not contain such a requirement. In addition, a review of the cases shows that derivative liability has been found without any showing the parties transferred assets to avoid remedying the unfair labor practices.

Respondents, for the first time in their brief, also contend this action is premature, because it has not been established that CMI is unwilling or unable to satisfy the backpay award. This position is somewhat odd, since Respondents have also strenuously argued their rights are being denied by the delay in instituting these proceedings. It is also apparent CMI is currently unable to satisfy the award, because it is bankrupt,

conducts no income-generating operation, and its only asset is the P. G. & E. judgement currently on appeal. There is no requirement in the Act or §20291 (f) of the Regulations that General Counsel delay proceedings in derivative liability cases to determine whether the original respondent is willing and able to comply with the order. C.C.C. Associates v. NLRB (2nd Cir. 1962) 306 F.2d 534 [50 LRRM 2882], cited by Respondents, does not establish the premise that General Counsel must delay derivative liability proceedings until it is determined the original respondent cannot or will not comply. Rather, the Court, in upholding the National Labor Relations Board's (NLRB) right to delay such proceedings, noted several advantages in doing so. These include avoiding the need to litigate complex corporate identity issues pending a determination on the merits, potential settlement and satisfaction of the order by the original respondent. In noting these advantages, the Court nowhere established a rule as to the timing of, or preconditions to instituting derivative liability proceedings.

The Board has adopted the test established by the courts and the National Labor Relations Board for determining single employer status. This test is aptly described in Andrews Distribution Company (1988) 14 ALRB No. 19, at pages 5 and 6, as follows:

> The analysis employed by the National Labor Relations Board (NLRB or Board) and the courts in determining whether two or more entities are sufficiently integrated so that they may fairly be treated as a single employer is that set out in

> Parklane Hosiery Co. (1973) 203 NLRB 597 [83 LRRM 1630], amended 207 NLRB 991 [85 LRRM 1029] . The four principal factors considered by the NLRB in Parklane, supra. were: (1) functional interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. In NLRB v. Carson Cable TV. et al. (9th Cir. 1986) 795 F.2d 879 [123 LRRM 2225], the court observed that the NLRB has often stressed the first three of the factors listed above, particularly that which relates to control of labor relations, because such factors are reliable indicators of an operational integration. The court cautioned that while no one factor is controlling, neither must all four factors be present in order to find single employer status. Thus, single employer status depends on all of the circumstances and has been characterized as an absence of an "'arm's length' relationship .. . . among unintegrated companies . " (Blumenfeld Theaters Circuit (1979) 240 NLRB 206, 215 [100 LRRM 1229], enforced (9th Cir. 1980) 626 F.2d 865 [106 LRRM 2869].)

Thus, the Board has found a single employer relationship to exist based solely on functional integration of operations. See Pioneer Nursery/River West, Inc. (1983) 9 ALRB No. 38, at pages 4-5.

The evidence establishes that CMI and CMF have at all times been highly integrated operations, which do not deal with each other at arms length. Indeed, the only reason two entities were established at all was to create tax advantages for the investors which otherwise would not have been available. Notwithstanding any long-term contemplated expansions for CMF, the only enterprise CMI and CMF have ever engaged in was the establishment, financing and operation of the individual mushroom farm. To the extent there has been a division of functions

between CM I and CMF, this has been based on the tax consequences, and even this division was blurred when CMF, in effect, turned over its facility construction project to CMI.

That CMF's day-to-day business activities have been limited does not result in CMF constituting a separate entity. At all times, CMF provided substantial financial support to the operation, and its facilities and equipment were used in production. Other facts showing functional integration include the high level of financial interdependence between the entities, and the common use of facilities, supplies, accountants, attorneys and lending institutions. The forgiveness of debts, transfers of tax-credits without consideration, assignment of assets for nominal consideration, unenforced loans which were also apparently interest-free and the failure to enforce the lease agreement amply demonstrate that CMI and CMF have not dealt at arms length, but are a single integrated enterprise.

Although functional integration and interdependence alone would establish CMI and CMF as a single employer, several other facts also point to this conclusion. Thus, the operational management of both entities has always existed in the same individual, Claassen. While Respondents contend CMF never had any employees, the CMF construction project was transferred to CMI, under the labor relations control of Claassen, and the decision to divide the functions of CMI and CMF, which in itself had major labor relations implications, was initially made by the same individuals. Thus, given the interrelated nature of the

operation, even if CMF did not have employees on its payroll, Claassen's control of these integrated businesses' labor relations policies establishes that part of the single employer test. International Measurement and Control Company, Inc., et al. (1991) 304 NLRB 738 [139 LRRM 1066] , enfd. NLRB v. International Measurement and Control Company Inc., et al. (7th Cir. 1992) 978 F.2d 334 [141 LRRM 2601] ; Anthony Harvesting. Inc. (1992) 18 ALRB No. 7.

Although Claassen's ownership and control of CM I is greater than his ownership interest in CMF, CM I and CMF share common investors and guarantors of loans, and the officers and board members of CM I have all been partners of CMF. Based on the foregoing, it is concluded that CMI and CMF constitute a single employer, and as such, both are agricultural employers under §1140.4(c).

Respondents argue that, pursuant to Corporations Code §15013,[3] CMF is not derivatively liable, because the unfair labor practices did not relate to its business, and no agent of CMF, acting in such a capacity, participated in the conduct leading to the unfair labor practice findings. This argument lacks merit, because CMF and CMI have been found to constitute a single employer and thus, CMF's business also includes the

[3]§15013 reads, "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."

business activities of CMI, which were the subject of the underlying case. It is clear the various entities which constitute a single employer are liable to remedy unfair labor practices, even if a particular entity was not directly involved in the commission thereof. JMC Transport. Inc., et al. (1987) 283 NLRB 554 [126 LRRM 1102]; Ensincr's Supermarket. Inc., et al. (1987) 284 NLRB 302. Therefore, CMF is liable to remedy the unfair labor practices.

Respondents further contend that Claassen cannot be found individually liable until CMF defaults on its obligations, citing Gleason v. White (1867) 34 Cal. 258. The relevance of this case is questionable, since it involved an action by a partner against the estate of the deceased co-partner for money purportedly owed to the plaintiff by the partnership. The Corporations Code does not set forth default as a prerequisite to individual liability, and cases involving the liability of partners to third parties have been silent on this as well. In any event, the issue is moot, since it is undisputed CMF has no assets, and none are anticipated in the future.

Corporations Code §15509 subjects the general partner of a limited partnership to the same liabilities as a partner in a regular partnership. Partners are jointly and severally liable for everything chargeable to the partnership under §15013 and §15014, but only jointly liable for all other debts. In both single employer and alter ego cases, joint and several liability has been imposed on individuals and corporate entities.

JMC Transport, Inc., et al., supra; Ensing's Supermarket. Inc., et al., supra; Appelbaum Industries, Inc., et al. (1989) 294 NLRB 981 [133 LRRM 1083].[4] §15013, as noted above, creates partnership liability for wrongful acts or omissions of partners acting in the ordinary course of the business. Respondents contend that if any of them are liable, the liability is joint only, again because the unfair labor practices concerned CMI business. For the reasons stated above, this argument is not correct. Accordingly, CMF and Claassen are each jointly and severally liable to remedy the unfair labor practices.

The other individuals remaining as respondents were at all times limited partners in CMF. As corporate officers, board members, employees and/or agents of CMI, they would not be subject to individual liability based on CMI's obligations. The liability of limited partners for partnership debts is set forth in §15632 of the Corporations Code. Section 15632(a) currently reads:

> A limited partner is not liable for any obligation of a limited partnership unless named as a general partner in the certificate or, in addition to the exercise of the rights and powers of a limited partner, the limited partner participates in the control of the business. If a limited partner participates in the control of the business without being named as a general partner, the partner may be held liable as a general partner only to persons who transact business with the limited partnership with actual knowledge of that partner's participation in control and

[4]The remedy arising from single employer status is the same as where an alter ego is found. Appelbaum Industries. Inc., et al., supra, at page 982, fn. 3.

> with, a reasonable belief, based on the limited partner's conduct, that the partner is a general partner at the time of transaction. Nothing in this chapter shall be construed to affect the liability of a limited partner to third parties for the limited partner's participation in tortious conduct.

Following §15632(a) is an extensive list of acts which a limited partner may engage in, without losing the protection of that status. §15632(c) states that this list does not constitute the only conduct by limited partners which is protected.

The second sentence of §15632, in essentially its current form, was added by amendment, effective April 30, 1984, and operative July 1, 1984.[5] Since there is no evidence the Board, General Counsel or any of the discriminatees knew of any participation in the control of CMF which might have been exercised by the named limited partners, a threshold issue may be whether the applicable law should be §15632(a) as it exists today, as it existed when the Superior Court issued its order enforcing the backpay order or some other dates, such as when the discriminatees were discharged. Counsel for the General Counsel contends the requirement of knowledge does not apply to this proceeding, because none of the interested parties herein are "persons who transact business with the limited partnership." This position is supported by the provision, in §15632(a), that limited partners are liable for their tortious conduct.

[5]The remainder of §15632 has also been amended, primarily to expand or clarify the conduct permitted for limited partners while retaining that status.

One District Court has considered this issue as. it arose under a similar amendment to Maryland's Partnership Act. In that case, the Court declined to decide the issue, but instead found that those courts which had previously considered knowledge of and reliance on the limited partner's conduct a factor to consider in determining loss of limited partner status were correct, and the amendment merely codified those cases. Mount Vernon Savings and Loan Association, et al. v. Partridge Associates, et al . (D.Md. 1987) 679 F.Supp. 522.

Even without the 1984 amendment, §15632(a) requires participation in the control of the business before limited partnership status is lost. Thus, a limited partner may be actively involved in the day-to-day operation of the partnership's affairs, provided the limited partner does not have the ultimate decision-making authority. Mount Vernon Savings and Loan Association, supra, at page 528.

In one case, the limited partners were found individually liable where, in a farming operation, they were directly involved in deciding what crops to plant, could withdraw money from partnership accounts, the general partner could not withdraw such money without a limited partner co-signing, and the limited partners removed the general partner from his position. Therefore, the limited partners, in fact, controlled the business operation. Holzman v. DeEscamilla (1948) 86 Cal.App.2d 858 [195 P.2d 833]. It is noted, however, that this case arose prior to the creation of §15632 which, since 1983, has permitted limited

partners to remove general partners without losing their protected status.[6]

It has also been held that the conduct of a partner in the partner's related position as a corporate officer will not be considered partnership conduct, and in such circumstances, corporate limits on liability should be respected. Western Camps, Inc. v. Riverway Ranch Enterprises, et al. (1977) 70 Cal.App.3d 714 [138 Cal.Rptr. 918] . In that case, a limited partnership consisted of a corporation as the general partner, and one of the defendants was both an officer of the corporation and an individual limited partner. Although the defendant actively participated in control of the business, by negotiating and binding the partnership to a lease, those activities were engaged in as part of the defendant's corporate duties. Accordingly, limited partnership, status was not lost.

Counsel for the General Counsel cites Bergeson v. Life Insurance Corporation of America (B.C. Utah 1958) 170 F.Supp. 150, affd. in part (10th Cir. 1959) 265 F.2d 227 and Delaney v. Fidelity Lease. Ltd. (Texas Sup.Ct. 1975) 526 S.W.2d 543 for the proposition that limited partners who become officers in related corporations per se participate in control of the partnership business, and lose their limited partnership status. Inasmuch as the instant case is governed by California law, Western Camps. Inc. v. Riverway Ranch Enterprises, et al., supra, in which the Court of Appeal specifically rejected Delaney. would take

[6]See Corporations Code §15632 (b) (5) (F) .

precedence. Furthermore, neither Delaney nor the Tenth Circuit, in Bergeson, adopted such a per se rule for corporate officers. In Delaney, the case was remanded for a determination whether the limited partners, in their capacity as related corporate officers, participated in control of the business by their conduct, not by their mere status. The Tenth Circuit, in Bergeson. based its finding of liability on the partners' failure to comply with Utah's partnership statute, and to avoid their unjust enrichment. Counsel's attempt to distinguish the facts herein from Western Camps, on the basis CMF and CMI are more closely interrelated, is not persuasive. Clearly, the corporate officer/limited partner in Western Camps conducted business which simultaneously affected both the partnership and the corporation.

The California Supreme Court permitted considerable business activity by a limited partner without loss of status, even prior to the enactment of Corporations Code §15632. Thus, where an automobile dealership consisted of an individual general partner and individual limited partner, the limited partner was not liable for the partnership's debts, even though he was a sales manger, exercised some supervisory authority, sold vehicles, was authorized to co-sign checks, loaned $50,000.00 to the partnership, leased the premises to the general partner, was given a 10% ownership interest in the business, eventually purchased some of the assets and later operated the business himself. The Court distinguished between participation in, and control of the partnership, and found the evidence insufficient to establish the

latter, required element. Grainger v. Antoyan (1957) 48 Cal.2d 805 [313 P.2d 848] .

At the outset, and recognizing that the evidence, probably due to the related nature of the entities, is somewhat unfocused on this point, it appears that many of the activities General Counsel attributes to the named limited partners were primarily engaged in their capacity as corporate officers and shareholders of the corporation. Furthermore, to the extent any of these individuals were employees of CMF or CMI, officers, directors or shareholders of CMI, made or guaranteed loans, incurred debts for the partnership other than in the ordinary course of the partnership's business, consulted or advised the general partner with respect to the business of the partnership, sought the removal of the general partner or participated in partnership meetings, all of such conduct is permitted under §15632 and/or the above cited cases.[7]

The evidence establishes little other activity with

[7]Security Pacific National Bank v. Matek (1985) 175 Cal. App. 3d 1071 [233 Cal. Rptr. 288], cited by Counsel for the General Counsel, does not dictate a contrary result. That case involved a prejudgment garnishment under Code of Civil Procedure §483.010, which by its terms is limited to actions for recovery of contractual debts. The defendant was a partner who had loaned money from the plaintiff to the partnership. In finding the defendant subject to liability, the Court held he was a general partner, because no certificate of limited partnership was ever filed, and the business was referred to a general partnership in the partnership agreement. While it was found that by securing the loan, the defendant "actively engaged in" the partnership business, the Court did not find such conduct to amount to participation in control of the business, and the finding was directed to the defendant's contention he was not a partner, but a passive investor.

respect to the named limited partners. It is true that Goldman, for a period of time, could write checks and transfer funds between corporate accounts, on a project considered part of the partnership's operations. Even assuming this authority could be considered a partnership responsibility, it was limited to the construction phase of the facility, and ended prior to commission of the unfair labor practices. The designation of Fitzgerald as agent for service of process and use of limited partners' residences as business addresses hardly establishes control of the partnership. Finally, the limited partners' search for new investors or a purchaser of the business, to the extent such efforts involved CMF, does not establish control of the business, in the absence of a showing the limited partners had some actual and independent control over the sale of the business. Based on the foregoing, it is concluded that the limited partners remaining as named respondents are not jointly or severally liable to remedy the unfair labor practices.

The undersigned has given considerable thought as to whether Claassen, as an individual, should be responsible for the considerable interest which has accrued in this matter. It is noted Claassen was personally involved in the underlying unfair labor practices, but over ten years have now passed since they were committed. General Counsel's representatives could have, if they in fact did not, easily ascertained the existence of additional, potentially responsible parties by the close of the original hearing, since Claassen participated and testified

therein. It is clear General Counsel believed Respondents were derivatively liable in 1990, but nevertheless waited another three years before issuing this Specification. There is no evidence to suggest assets have been concealed to prevent satisfaction of the judgement, and by striking interest for Claassen, General Counsel could still pursue this aspect of the remedy against CMI and CMF.

Nevertheless, and in spite of the inclination to deny interest against Claassen, the cases uniformly have granted this in derivative liability cases, even where no assets were concealed and the derivatively liable parties did not directly participate in the unfair labor practices. See eg. JMC Transport, Inc., et al., supra; Ensing's Supermarket. Inc., et al., supra; Carrothers Construction Company (1985) 274 NLRB 762 [119 LRRM 1028] . Therefore, while liability for interest is not mandated by statute, the denial thereof is a matter properly to be determined by the Board.

ORDER

Respondent California Mushroom Farm, a Partnership, and David E. Claassen, an individual, are jointly and severally liable to remedy to unfair labor practices found in ALRB Case No. 84-CE-12-OX(SM) , including interest. Respondents John Goldman, Harold A. Hyde, G. Gerald Fitzgerald and Elizabeth A. Penaat are not jointly or severally liable, as individuals, to remedy the unfair labor practices.

DATED: January 28, 1994

Douglas Gallop

DOUGLAS GALLOP
Administrative Law Judge