STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO COMPANY, INC., A California Corporation, DELTA PRE-PACK CO., A California Company, BERENDA RANCH LLC, A Limited Liability Company, CHRISTOPHER G. LAGORIO TRUSTS, CREEKSIDE VINEYARDS, INC., A California Corporation, DEAN JANSSEN, An Individual, KATHLEEN LAGORIO JANSSEN, An Individual, KATHLEEN LAGORIO JANSSEN TRUST, K.L.J. LLC, Limited Liability Company, K.L. JANSSEN LIVING TRUST, JANSSEN & SONS LLC, Limited Liability Company, LAGORIO FARMING CO., INC., A California Corporation, LAGORIO FARMS, LLC, A Limited Liability Company, LAGORIO LEASING CO., A California Company, LAGORIO PROPERTIES LP, A Limited Partnership, ROLLING HILLS VINEYARD LP, A Limited Partnership, Respondents, And UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case Nos. 93-CE-037-VI (20 ALRB No. 7) 2012-CE-007-VIS 2012-CE-028-VIS 2012-CE-029-VIS 2012-CE-024-VIS (39-2012-00285778-CU-PT-STK; C072330) 2012-MMC-001 (38 ALRB No. 6; 38 ALRB No. 8; F065589; 39-2012-00286876-CU-OE-STK; C072300) 39- 2012-00287876-CU-PT-STK 39-2013-00293857-CU-PT-STK ORDER DENYING JOINT MOTION FOR RECONSIDERATION Admin. Order No. 2013-43

On September 11, 2013, the General Counsel submitted a formal bilateral settlement agreement in the above-captioned matter for the approval of the Agricultural Labor Relations Board (Board) pursuant to Board regulations sections 20298(d)(2) and 20298(f)(1)(A). On September 24, 2013, the Board issued an Order Conditionally Approving Formal Bilateral Settlement Agreement. On October 3, 2013, the General Counsel sought an extension of time to file what was represented to be a joint motion for reconsideration by the parties. The Board granted the extension of time based on that representation. On October 11, 2013, the General Counsel and the United Farm Workers of America (UFW) filed what purported to be a joint motion for reconsideration of the Board's September 24, 2013 order. The General Counsel represented that Respondents are in agreement with the substance of the arguments in the motion (Joint Motion for Reconsideration at p. 1, n. 1.), but, for unknown reasons, Respondents did not join in the motion.[1]

PLEASE TAKE NOTICE that the General Counsel and UFW's Joint Motion for Reconsideration is DENIED. We take this opportunity to clarify the reasons for our previous conditional approval of the formal bilateral settlement agreement and the legal limitations on the Board in imposing remedies outside of those provided for by the Agricultural Labor Relations Act (ALRA or Act). In particular, we write to leave no doubt that the ALRA does not permit the settlement of unfair labor practice cases by means of payments to charities rather than to aggrieved agricultural workers, and the

[1] On October 7, 2013, Ace Tomato Company, Inc. (Ace) separately filed a Motion for Reconsideration of the Board's Order Conditionally Approving Formal Bilateral Settlement. The Board denied Ace's motion on October 8, 2013 as untimely.

Board can approve no such settlement. Regardless of the good work such charities perform, the remedial provisions of the ALRA were meant to provide relief to agricultural employees harmed by the commission of unfair labor practices. It is those employees we are bound to protect and we cannot countenance the diversion of their remedy to others.

We write to make clear our intention that the parties reach a settlement on those matters within the Board's sole jurisdiction, namely the compliance matter in Case No. 93-CE-37-VI and the Ace MMC matter, Case No. 2012-MMC-001, with or without the General Counsel's assistance, and with or without a global settlement including the resolution of any unlitigated unfair labor practice charges or other matters outside of the Board's sole jurisdiction. We also take this opportunity to clarify the General Counsel's role in acting on behalf of the Board in this compliance proceeding. Such clarification has become necessary because the General Counsel, in acting as a de facto agent of the Board for these compliance matters, has placed the Board in the position of denying a motion for reconsideration that not only fails to meet the requirements for a motion for reconsideration, but also puts the Board in the unseemly position of effectively negotiating with its own agent for compliance to achieve the Board's objectives.

DISCUSSION

The Board appreciates the tremendous effort expended in securing a global formal bilateral settlement agreement. That said, the Board's conditions as stated in Administrative Order 2013-35 were not provided merely as a matter of preference, but

were provided to ensure the settlement complies with the law and is enforceable under the law. Some settlement provisions needed to be included within the four corners of the agreement and not merely referenced in order to be part of the agreement (a basic tenet of contract law); another provision was in violation of the Board's regulations; and the remedy of providing charitable contributions to non-profits is a remedy that not only fails to achieve the purposes of the ALRA, but violates it. The General Counsel and the UFW cite no extraordinary circumstances warranting review of these conditions that, if adopted by the parties, would make the settlement agreement consistent with the ALRA, the Board's regulations, and basic tenets of contract law.

I. Standard for Granting a Motion for Reconsideration

The oft-repeated but seldom heeded standard for granting a motion for reconsideration is that the moving party show *extraordinary circumstances*, i.e., an intervening change in the law or evidence previously unavailable or newly discovered. (*South Lakes Dairy Farm* (2013) 39 ALRB No. 2 at p. 2; *Arie de Jong dba Milky Way Dairy* (2003) 29 ALRB No. 4 at p. 4, n.8; *Mario Saikhon, Inc.* (1991) 17 ALRB No. 6 at pp. 4-5.). The General Counsel and the UFW raise no intervening change in law, new evidence, or even an error in law that might merit reconsideration. Instead, the General Counsel and the UFW ask the Board to reconsider its order conditionally approving the formal bilateral settlement agreement in this matter because the appropriateness of the agreement has not been litigated and the parties have not been given the opportunity to address the concerns that the Board raises with the agreement. (Joint Motion for Reconsideration at p. 3). The General Counsel and the UFW

conclude that the Board has lowered the standard for granting motions for reconsideration in compliance cases, citing an administrative order, *San Joaquin Tomato Growers*, Admin. Order 2013-39, for the proposition that the Board granted reconsideration because of a typographical error and the need to reconsider a statement in the decision regarding withholding of taxes. (Joint Motion for Reconsideration at p. 3.) Notwithstanding the fact that administrative orders are not binding precedent and may not be cited as such, the General Counsel and the UFW raise arguments that, although obviously erroneous, bear addressing lest they be raised in yet another unmeritorious motion for reconsideration.

a. Litigating the Appropriateness of the Settlement

The General Counsel and the UFW argue that the motion for reconsideration should be granted because there has been no opportunity to litigate the appropriateness of the settlement. (Joint Motion for Reconsideration at p. 3 ("[T]he primary justification for an exceedingly high bar for granting reconsideration is not applicable because the question of the appropriateness of the settlement agreement has not been litigated. The settlement agreement was filed with the Board without the benefit of briefing and without the Board having identified the legal issues raised by the agreement.") In fact, there has been briefing on this settlement – the General Counsel's Statement in Support. California Code of Regulations, title 8, section 20298(f)(1)(A) provides that, for formal settlement agreements, the General Counsel shall submit a statement in support and charging parties have five days to file a statement objecting to the settlement. The statement in support was the General Counsel's opportunity to

address the legality of the settlement provisions and the charging parties' opportunity to raise any objections. The Board identified the legal issues raised by the agreement and approved the agreement pending adoption of the conditions the Board imposed to bring the agreement into compliance with the law. Inasmuch as the Board controls settlement of compliance matters, it is inappropriate for the General Counsel, as the Board's agent for compliance, to attempt to "litigate" the Board's expressed conditions on settlement of compliance matters any further absent meeting the requirements for a motion for reconsideration. In contrast, with respect to settlement of unlitigated charges and complaints, which do not fall under the Board's sole jurisdiction, the Board's approval is not required for informal settlements, although such approval was requested in this case. (Cal. Code of Regs., tit. 8, § 20298 (d) (1).)

The General Counsel and the UFW cite the administrative order in *San Joaquin Tomato Growers, Inc.*, Administrative Order 2013-39, for the proposition that the standard for granting a motion for reconsideration has been lowered. As stated previously, administrative orders are not binding precedent of the Board, and the need to clarify the responsibility for tax and other withholding with respect to the make whole remedy in that matter represented an extraordinary circumstance, i.e., a need to determine whether the employer or the ALRB would be responsible for compliance with tax laws when issuing makewhole awards. Mere disagreement with the Board's decision does not present extraordinary circumstances, as the Board noted in a previous administrative order filed less than two months ago denying a motion for

reconsideration from the General Counsel, *Bud Antle, Inc.*, Administrative Order 2013-30.

II. The Payment of Monies to Charities As a Remedy for Unfair Labor Practices Violates the ALRA

The General Counsel and the UFW argue that the payment of monies to charities as a remedy for unfair labor practices does not conflict with the purposes of the Act. To that end, the General Counsel and the UFW blatantly misrepresent the Board's order on this provision, stating that "The Board admits there is nothing about the charity payment that is contrary to the purposes of the Act." (Joint Motion for Reconsideration at p. 5.) The Board's order in this matter stated that the payment of monies to charities as a remedy failed to effectuate the purposes of the Act and was contrary to NLRB precedent. (*Ace Tomato Co.*, Admin. Order 2013-35 at pp. 5-9.) The Board does not understand how its statement could be read as an endorsement of payments to charities in lieu of remedies for aggrieved agricultural employees. However, to remove any possible doubt, we will be explicit: In no uncertain terms, the payment of monies to charities, as opposed to aggrieved employees, as a remedy for unfair labor practices violates the Act.

Section 1160.3 of the Act states that the remedies for an unfair labor practice include reinstatement of employees with or without backpay, making employees whole (makewhole), and such other relief as will effectuate the policies of this part. (Lab. Code § 1160.3.) The California courts have narrowly construed the remedies available to the Board that do not benefit employees, prohibiting the award of compensatory

damages to persons injured in their property or business by unlawful secondary boycott activity, (*United Farm Workers of America, AFL-CIO v. Agricultural Labor Relations Board* (1995) 41 Cal.App.4th 303, 324-325). The California Court of Appeal disapproved of the Board's award of compensatory damages in that matter on the grounds that the Board's interpretation of Section 1160.3 violated rules of statutory construction:

> The ALRB's interpretation of section 1160.3 is unsupportable. Pertinent here is the statutory construction principle of *ejusdem generis* . . . which construes general words following the enumeration of particular classes of persons or things, to be within the same general nature or class as the enumerated items. (citation omitted). The enumeration in section 1160.3 of corrective remedies such as reinstatement, backpay, and employee make-whole, all of which are intended to benefit *employees*, undermines the ALRB's argument [that] the statute's provision for "such other relief as will effectuate the policies of this part" authorizes an award of compensatory damages to persons injured in their property or business by a union's secondary boycott. (*Id.* (emphasis in original) (bracketed material supplied).)

It stands to reason that if the California Court of Appeal disapproved of the Board's award of compensatory damages to persons injured in their property or business by a secondary boycott because the remedy was not consistent with enumerated statutory remedies that were intended to benefit employees, surely an award of monies to charities, however well-intended, would not pass legal muster. The Board has been prohibited from awarding attorney's fees because Section 1160.3 did not specifically provide for them as required by Code of Civil Procedure section 1021 (*Sam Andrews' Sons v. Agricultural Labor Relations Board* (1988) 47 Cal.3d 157, 171-173), and has even had its notice and mailing remedy limited where a single, isolated unfair labor practice had occurred in private and was considered to not have become known to other

employees. (*M.B. Zaninovich, Inc. v. Agricultural Labor Relations Board* (1981) 114 Cal.App.3d 665, 684-690.) The provision of Section 1160.3 allowing for "such remedies that will effectuate the policies of the Act" is not without limits, as the courts have shown.

A reviewing court will not disturb a Board remedial order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the act." (*Cardinal Distributing Co. v. Agricultural Labor Relations Board* (1984) 159 Cal.App.3d 758, 778, *citing Butte View Farms v. Agricultural Labor Relations Board* (1979) 95 Cal.App.3d 961, 967.) This attempt to divert to charities monies that might otherwise and should go to aggrieved agricultural employees is such a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act. Furthermore, it appears unseemly at best for the General Counsel and the UFW to pursue a remedy that benefits the UFW foundation and does not directly benefit those agricultural employees the UFW represents that were aggrieved by the unfair labor practices at issue.

III. The Board Declines to Delegate Its Authority to Enforce MMC Procedures in Case No. 2012-MMC-001

No compelling reasons have been provided by the General Counsel and the UFW for the Board to delegate its authority to enforce MMC procedures in the MMC matter at issue to the General Counsel. As a matter of principle, the delegation of the powers of the Board will not be the subject of settlement negotiations. The Board may entertain requests as to how it exercises its authority in furtherance of a settlement

agreement (e.g., withdrawing a decision), but the delegation of its powers is not subject to negotiation, especially not with its own agent for compliance in this case, the General Counsel.

The UFW and the General Counsel state in their Joint Motion, "The delegation of authority under Section 1164.3(f) delegates to the General Counsel a power that is not exclusively in the hands of the Board, but that is shared, by statute, by all the parties to the action." (Joint Motion for Reconsideration at p. 5.) Precisely because the parties to MMC, which do not include the General Counsel or the Board, may seek enforcement of an MMC order 60 days after it takes effect, there is no need to delegate enforcement powers in MMC to the General Counsel.

IV. The Release of Claims Clause

The General Counsel and the UFW propose that "the Board, in accepting and adopting the agreement, clarify that Section 20298(a) of the Regulations supersedes the agreement of the Parties and that no language in the agreement can be interpreted or serve as a waiver of the General Counsel's duty to investigate and prosecute unfair labor practices." (Joint Motion for Reconsideration at p. 6.) It is the responsibility of the parties, and not the Board, to submit for approval a settlement agreement that comports with the law and the Board's regulations.

V. Omission of Terms in the Agreement

The General Counsel and the UFW argue that the Board should leave to them the duty to act in good faith to effectuate terms left unstated in the agreement, including which workers are the beneficiaries of the agreement, the specifics of the wire transfer instructions for payments by the Respondents, and language related to the Agricultural Employees Relief Fund. (Joint Motion for Reconsideration at p. 6). The Board declines to do so.

A settlement agreement is a contract. A basic tenet of the law of contracts is the parol evidence rule, codified at Civil Code sections 1625and 1856. Civil Code section 1856, subdivision (b) provides, "the terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement." Section 12 of the Formal Bilateral Settlement Agreement states, "The Agreement and Personal Guarantee Agreement contain the entire agreement between the Parties and supersede all prior discussions and negotiations." (Formal Bilateral Settlement Agreement at p. 10.) Therefore, consistent additional terms cannot supplement the Agreement by its own terms and under Civil Code section 1856. The Board would be remiss in its duties to approve a settlement agreement that leaves out terms essential to effectuating remedies for compliance with Board decisions.

CONCLUSION

Given that Respondents did not join in this Motion for Reconsideration, the Board questions whether the Motion reflects the intentions of all the parties. Although

a global settlement is desirable, the Board questions whether the potentially large liability posed by the compliance matter in 93-CE-37-VI is being used to extract concessions on the unlitigated unfair labor practice matters that would not be possible but for the potentially large liability in the compliance matter, creating an obstacle to settlement on the compliance and MMC matters within the Board's sole jurisdiction. That would mean that the General Counsel, who has the authority to settle unlitigated unfair labor practice charges, might be in conflict with her role as a de facto agent of the Board for purposes of achieving compliance in 93-CE-37-VI. Thus, by filing this unmeritorious Motion for Reconsideration, the General Counsel has put the Board in the position of effectively "negotiating" with its own compliance agent to achieve the Board's objectives.

Again, let us be explicit: The General Counsel is free to settle any unlitigated unfair labor practice charges without the Board's approval in her role as the General Counsel. Settlement of those matters, however, should not create an impediment to her role as an agent for Board compliance in achieving the Board's objective, which is settlement of the compliance matter in 93-CE-37-VI and disbursement of makewhole funds to the aggrieved agricultural employees as soon as possible. The Board is open to the parties settling 93-CE-37-VI with or without a global settlement, and with or without the agency of the General Counsel on the Board's behalf.

ORDER

The General Counsel and United Farm Workers of America's Motion for Reconsideration is DENIED. The parties have fifteen (15) calendar days from the date

of this order to submit a settlement agreement that conforms to Administrative Order 2013-35. If the parties fail to do so, the Board will resume sole jurisdiction over compliance in 93-CE-37-VI and 2012-MMC-001 and schedule a settlement conference with the parties toward the goal of achieving settlement of all matters within the Board's sole jurisdiction without the agency of the General Counsel.

By Direction of the Board.

Dated: October 18, 2013

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member