STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| ACE TOMATO COMPANY, INC., A California Corporation, DELTA PRE-PACK CO., A California Company, BERENDA RANCH LLC, A Limited Liability Company, CHRISTOPHER G. LAGORIO, An Individual, CHRISTOPHER G. LAGORIO TRUSTS, CREEKSIDE VINEYARDS, INC., A California Corporation, DEAN JANSSEN, An Individual, JANN 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 PROPERTIES, LLC, A Limited Liability Company, 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, QUAIL CREEK VINEYARD, a California Company,<br><br>Respondents,<br><br>and<br><br>UNITED FARM WORKERS OF AMERICA,<br><br>Charging Party. | ) | Case No. 93-CE-37-VI<br>(20 ALRB No. 7)<br><br>ORDER DENYING ACE TOMATO'S APPLICATION FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTION TO DISMISS AND ALTERNATIVE MOTION FOR RECUSAL OF BOARD MEMBERS AND DR. PHILIP MARTIN<br><br>Admin. Order No. 2015-01<br><br>(February 19, 2015) |

On January 27, 2015,[1] Respondent Ace Tomato Company, Inc. (Ace), pursuant to section 20242(b) of the Board's regulations,[2] timely filed an Application for Special Permission to Appeal (Application) a ruling made on January 20 by the Administrative Law Judge (ALJ) denying Ace's motion to dismiss and Ace's alternate motion for recusal of two members of the Board and of Dr. Philip Martin (Ruling). Ace alleged in the Application that the ALJ's Ruling was made in error, that such error could not be effectively addressed via the exceptions process, and that this case presented unusual circumstances justifying an interim review.

The Executive Secretary directed that the parties would be allowed to file a response to the Application, by 4:00 p.m. on February 3. No response was received.

Ace's application is DENIED for the reasons discussed below.

Section 20242, subdivision (b) of the Board's regulations provides that rulings and orders of an ALJ are only appealable upon special permission of the Board. The standard of review for appeals of ALJ rulings during an evidentiary hearing was set forth in *Premiere Raspberries* (2012) 38 ALRB No. 11 (*Premiere*), as limited to issues that could not be resolved pursuant to the exceptions process outlined elsewhere in the Board's regulations. *Premiere* spoke to striking the proper balance between judicial efficiency and providing an avenue for review of rulings that would otherwise be effectively immunized from appeal.

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[1] All dates are for 2015 unless otherwise specified.

[2] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

In the instant matter, the Application fails to include persuasive legal authority for the assertions contained therein. Moreover, the Application does not state any sufficient legal reason why the Ruling cannot be satisfactorily addressed via the exceptions process. Ace argues that section 20282(a)(1) of the Board's regulations requires that exceptions cite to the page number of the ALJ's decision and to the corresponding portion of the transcript – and since it is unknown whether the ALJ will discuss the Ruling in his decision, the interlocutory appeal sought by the Application is appropriate. This argument fails, as section 20282(a)(1) requires citation to the *record*, not the hearing transcript, and Ace would not be precluded from citing to any materials in the record supporting its exception to the Ruling, regardless of how the Ruling is addressed in the ALJ's decision. (See *Venus Ranches, Inc.* (1982) 8 ALRB No. 60, p. 1, fn. 1; and *Brighton Farming Co., Inc.* (1994) 20 ALRB No. 20.) Moreover, Ace cites no authority for its argument.

Furthermore, both decisional and statutory authority indicate that ALJ actions similar to the Ruling are not suitable for interlocutory appeal. Under Federal law, interlocutory appeals from federal district courts are addressed by section 1291 of title 28 of the United States Code. The U. S. Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp.* (1949) 337 U.S. 541, set forth the standard for assessing the appealability of orders under said statute, holding, at page 546: "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no

intrusion by appeal. . . . Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."

California law follows a similar course. See *Barry v. Rodgers* (1956) 141 Cal.App.2d 340 (plaintiff appealed trial court order granting a motion to dismiss made by certain defendants, Court of Appeal held that such an order is not appealable); section 904.1 of the California Code of Civil Procedure (limiting appeals in civil matters); see also *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1222, 1226, citing *Day v. Papadakis* (1991) 231 Cal.App.3d 503, 507 (Section 904.1 "codifies the so-called 'one final judgment rule,' pursuant to which '[o]nly *final* judgments are appealable ....'" (Emphasis in original). Thus, the Ruling contains nothing which cannot be addressed via the exceptions process, and is not suitable for interlocutory appeal.

The cases cited by Ace are distinguishable. Ace argues that the Board may look to California law for analogous situations to determine when it would be appropriate to grant interim review. Ace states that California courts may grant interim review of non-appealable interlocutory orders where "unusual circumstances" are present, citing *Morehart v. City of Santa Barbara* (1994) 7 Cal.4th 725, 744-745. In that case, the California Supreme Court treated an otherwise unappealable interlocutory appeal from a trial court's judgment as a petition for a writ of mandate, reasoning that one of the unusual circumstances justifying this action was that there was considerable

prior precedent indicating that the appeal was proper – and the Court was disapproving that precedent in its decision. *(Id.*, at pp. 741-747.) Assuming arguendo, that a California court's authority to treat an interim appeal as a petition for a writ under "unusual circumstances" is analogous to the present situation, no such circumstances exist in the instant matter, and any interlocutory appeal of the Ruling would not be justified.

Ace also cites *In re City of Memphis* (6th Cir. 2002) 293 F.3d 345, in support of its argument that there is a controlling question of law in the instant case regarding issues of laches and bias, and therefore, interim review via granting of the Application is appropriate. In *City of Memphis*, Petitioner City sought interlocutory appeal of a trial court order excluding evidence that it sought to introduce. (*Id.* at p. 348.) The trial court certified the decision for interlocutory appeal, applying a federal statute that permits a federal trial court to make an order immediately appealable where, in the court's opinion, (1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. (*Id.* at p. 350; 28 U.S.C. § 1292(b).) The Sixth Circuit Court of Appeals declined to permit the appeal, reasoning that the evidentiary issue was not controlling, and furthermore, the City would present its case the same way without the evidence, and would then be able to appeal the exclusion of the evidence after a final judgment – thus, there would be no material advancement of the ultimate termination of the litigation. (*Id.* at p. 351.)

Ace argues that the standard applied in *City of Memphis* weighs in favor of granting the application. However, we find that the Sixth Circuit's reasoning in rejecting the appeal applies in the current matter. Ace may present its arguments in support of its motion to dismiss on grounds of laches, and motion for disqualification of Board members for bias, during the normal exceptions process after issuance of the ALJ's decision. Even if the Board were to grant the Application, Ace would be arguing the same issues before the Board – and if Ace disagreed with the Board's ultimate decision (whether reached via the exceptions process or the Application), it would have the right to seek review in the court of appeal. Thus, the ultimate termination of this litigation would not be materially advanced.

Ace's remaining case citations also fail to support the Application. For example, in the case of *In re Facebook, Inc.* (S.D.N.Y. 2014) 986 F.Supp.2d 524, where interlocutory appeal of the denial of defendants' motion to dismiss was denied, the Court reasoned thusly: "[T]he issues raised by Defendants are a repeat of the arguments Defendants unsuccessfully raised in its motion to dismiss, and a motion for certification of an interlocutory appeal may not be used to simply repeat arguments made in [a] motion to dismiss." (*Id.* at pp. 530-531.) This perfectly captures the essence of the instant case, and why Ace's Application must be denied.

Lastly, in *Olson v. Cory* (1983) 35 Cal.3d 390, the California Supreme Court treated a normally impermissible interlocutory appeal as a writ of mandate, but explained that this could be done only in unusual circumstances, which in that case were that the issue of appealability was not clear in advance, and also that all issues in

the litigation had been resolved except for the one before the Court. *(Id*. at p. 401.) Such unusual circumstances do not exist in the present case, as the resolution of the issues in the current litigation are exactly what the Board will resolve during the exceptions process, in accordance with *Premiere Raspberries* (2012) 38 ALRB No. 11.

Because we find that the matters that Ace seeks to appeal can be addressed effectively through exceptions, the Application for Special Permission to Appeal is hereby DENIED.

Dated: February 19, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member