STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

REVEILLE FARMS, LLC, **Respondent,** **and** **DIONICIO PEREZ LOPEZ,** **Charging Party**	**Case No.: 2017-CE-066-SAL** **ORDER GRANTING MOTION FOR DEFAULT JUDGMENT**

On January 24, 2019,[1] the General Counsel moved for default judgment against Reveille Farms, LLC (Respondent). The Complaint in this matter was filed and served on Respondent's attorney on December 28, 2018. Respondent's attorney acknowledged receipt. No Answer was filed by the due date, January 10. Thus, the General Counsel seeks an order that all Complaint allegations be deemed admitted and for entry of default judgment. After being granted a three-week extension of time to pursue settlement, on March 1, Respondent filed its opposition to the Motion for Default Judgment along with a proposed Answer to the Complaint. The General Counsel is without doubt entitled to take default judgment pursuant to the nearly identical facts in *AllStar Seed Co.*[2] Default judgment is granted based upon the following facts and analysis.

[1] All further dates are in 2019 unless otherwise specified.

[2] (2003) 29 ALRB No. 2, pp. 6-7 (Respondent's mistake of law in failing to file an answer, although reasonable, was not excusable neglect as it was not the act of a reasonably prudent person under the same circumstances. The Board rationalized that to hold otherwise would run the risk of having no standards.)

I. Procedural Facts

1. Farm labor contractor Michel Labor Services (FLC Michel) provided labor for a project at Respondent's property from late September to early October 2017.

2. The unfair labor practice charge in this case was filed on October 22, 2017, alleging that Respondent violated the Agricultural Labor Relations Act (the Act)[3] when its agent FLC Michel terminated employees because they engaged in protected concerted activity.

3. Respondent's attorney became involved in the investigation of the underlying unfair labor practice charge in October 2017 when he received a letter from the Agricultural Labor Relations Board (ALRB) about alleged unfair labor practices. Along with an attorney for FLC Michel, Respondent's attorney attended informal interviews of witnesses conducted by the ALRB in August and September 2018.

4. Respondent's attorney did not at any time enter a "formal" notice of appearance as attorney for Respondent. However, on October 30, 2017, he emailed the Regional Office of the ALRB stating that he would be representing Respondent in connection with the investigation.

5. Respondent's attorney concedes that during the 2018 holidays, he received a copy of the Complaint. He believed however, that it was a courtesy copy and thought that the Complaint would have to be personally served on Respondent. It does not appear that a copy of the Complaint was served on the Respondent at its principal place of business.

6. There is no record evidence that prior to moving for default judgment, Respondent's attorney was informed by the General Counsel that his client's Answer

[3] California Labor Code §§ 1140-1166.3.

was overdue. The first he learned of this was when the motion for default judgment was filed.

II. Arguments

The General Counsel asserts that the Complaint was properly served on Respondent by email and certified mail to its attorney on December 28. Attached to the Complaint were excerpts from ALRB regulations.[4] The first such excerpted regulation, Section 20230, was reprinted stating, "The respondent shall file an answer within 10 days of the service of the complaint. . . ." Following issuance of the complaint, the General Counsel received a signed certified mail receipt for the Complaint. No Answer was filed by January 10. The General Counsel states that these undisputed facts entitle it to default judgment. Thus, the General Counsel claims that Respondent was properly served through service to its attorney, Respondent's attorney acknowledged receipt, and Respondent did not file an Answer.[5] According to the General Counsel, the allegations of the Complaint should be deemed admitted and default judgment is appropriate.

Respondent argues that a timely Answer was not filed due to mistake, inadvertence, surprise, and/or excusable neglect. Respondent's attorney points out that he had never been involved in an ALRB proceeding prior to this one. Moreover, he asserts that throughout the investigation, there was never a request for documents or witnesses from Respondent. All such requests were addressed to FLC Michel. FLC Michel had its own attorney present during the informal interviews conducted by the Regional Office. Respondent's attorney was also present at these interviews. When the complaint was received by Respondent's attorney during the 2018 holidays, he assumed it was a

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[4] 8 C.C.R. §20100 et seq.

[5] The General Counsel cites *Azteca Farms, Inc.* (1992) 18 ALRB No. 15, at p. 10, which holds that in order to deem complaint allegations admitted the General Counsel must show that the complaint was served on Respondent at its principal place of business, Respondent acknowledged receipt, and Respondent did not file an answer within 10 days of receipt.

courtesy copy and "tendered" the complaint to FLC Michel's counsel. Thus, Respondent asserts mistake, inadvertence, and excusable neglect.

Moreover, at no time between receipt of the Complaint and filing of the motion for default judgment did the General Counsel alert Respondent's attorney that an Answer was overdue.[6] Respondent avers that if prior notice had been provided, it would have immediately filed an Answer. Thus, Respondent asserts "surprise."

Further, Respondent argues that attorney involvement in the investigation was not a formal appearance pursuant to ALRB Regulations Sections 20162 and 20164. Read together, Respondent argues that these regulations mean it is appropriate to serve documents on a party's counsel only if the attorney has filed a formal notice of appearance or a signed pleading. Because Respondent's attorney did not enter a formal notice of appearance and did not file a pleading until February 6, there was no formal entry of appearance. As mentioned before, he acknowledges, however, that on October 30, 2017, he sent an email to the ALRB investigators stating that he would be representing Respondent in connection with the investigation.

Finally, relying on Section 473(b) of the Califonia Code of Civil Procedure,[7] Respondent asserts that it would be equitably just that it be relieved of strict enforcement of technical rules of procedure.[8]

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[6] Respondent cites the voluntary California Attorney Guidelines of Civility and Professionalism which provide, "An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning."

[7] The section provides in relevant part: "The court may, upon any terms as may be just, relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

[8] Respondent cites *Melde v. Reynolds* (1900) 129 Cal. 308, 311: [Section 473(b)] is a remedial provision . . . which require[s] it to be liberally construed with a view to effect its objects and promote justice, is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. To the same effect, Respondent cites *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 736; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 608-609.

III. Analysis

The proof of service of the Complaint lists only service on Respondent's attorney via certified mail and email. That is, it does not reflect service of the Complaint on Respondent itself at its principal place of business. Prior pleadings in this case were also served only on Respondent's attorney.[9] Service solely on Respondent's attorney by certified mail appears to satisfy the requirements on the Act. Although he had not filed a formal notice of appearance and had not signed a pleading filed with the Board, those requirements are not necessary for service of the Complaint. The applicable regulation, section 20166, requires service, inter alia, "on the attorney or representative of each party." The rule does not specify that a formal notice of appearance or signed pleading be filed in order for service on a party's attorney to satisfy proper service. Accordingly, Respondent's argument that default judgment is not appropriate because the Complaint was not properly served lacks merit.

Respondent also seeks to avoid default judgment based upon mistake, inadvertence or excusable neglect. Respondent's attorney believed that FLC Michel was the focus of the investigation and would take care of answering the Complaint. As a practical matter, farm labor contractors are statutorily excluded from the definition of employer.[10] Consistent with this exclusion, both the underlying unfair labor practice charge and the Complaint clearly identify Reveille Farms, LLC, as the employer in this matter. Both the charge and Complaint refer to FLC Michel as an agent of Reveille Farms, LLC. Thus, Respondent's attorney knew or should have known that Reveille

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[9] For instance, the General Counsel's subpoenas of July 24, 2018 were served only on Respondent's attorney but not on Respondent's principal place of business. The same is true for a non-party petition to revoke deposition subpoenas filed by attorneys for FLC Michel on July 30, 2018; and an order denying the petition of August 14, 2018, among others.

[10] ALRA, Labor Code §1140.4(c)" "The term 'agricultural employer . . . shall exclude . . . any farm labor contractor. . . . The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part." See also, *Gourmet Harvesting & Packing* (1978) 4 ALRB No. 14, p. 3 (company that fits within the definition of a farm labor contractor is excluded from definition of employer).

Farms, LLC was the Respondent and FLC Michel was not the Respondent.[11] Attached to the Complaint was notice that " respondent shall file an answer within 10 days of service of the complaint. . . ."

Obviously, Respondent's attorney did not appreciate any of these facts due to his lack of experience in ALRB practice and his failure to become acquainted with this area of the law at some point between October 2017 and January 10, 2019. The definitional exclusion of farm labor contractors as employers is perhaps counterintuitive and unique to the ALRA. Even given the extensive length of time between his entry into ALRB practice and issuance of the Complaint, it is possible nonetheless to find the failure to understand the definitional exclusion of farm labor contractors is an excusable mistake of law.[12]

However, an excusable mistake of law does not automatically constitute excusable negligence. The question of whether conduct may be classified as excusable negligence must be answered by determining, as a question of fact,[13] whether Respondent had a duty to make some inquiry into the significance of the Compliant.[14] There is no record evidence that Respondent made any inquiry.

Under similar circumstances, the Board has found that failure to make any inquiry does not represent the conduct of a reasonably prudent person even in light of a excusable mistake of law and thus does not constitute excusable negligence.[15] Thus it is found that Respondent's ignorance of the law coupled with negligence in ascertaining the

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[11] See, e.g., *Jacob Diepersloot d/b/a JD Farms* (2018) 44 ALRB No. 12, p. 9 (mistake in believing farm labor contractor would be litigating the administrative process combined with mistake in believing the farm labor contractor was the employer does excuse untimely filing of answer).

[12] See *AllStar Seed Company* (2003) 29 ALRB No. 2, p 6 (failure to file answer due to error to appreciate that withdrawal of NLRB charge did not prevent assertion of jurisdiction by ALRB was reasonable mistake of law.)

[13] Id.

[14] Id.

[15] Id. at p. 7.

law's requirements does not constitute excusable neglect and therefore does not afford relief from entry of default.[16]

Finally, Respondent's argument of "surprise" is unavailing. Failure of the General Counsel to warn Respondent's attorney that its Answer was overdue is not fatal to the General Counsel's motion. As Respondent points out, in a perfect world such notice would have been given. However, as Respondent acknowledges, the law does not require such notice and lack of such notice does not provide a basis for failure to enter default judgment.

Respondent also argues that California Code of Civil Procedure Section 473(b), which sets forth standards for setting aside default judgment, teaches that public policy favors trial on the merits whenever possible.[17] In citing to Section 473(b), the ALRB stated:[18]

> The overriding principle [of public policy favoring trial on the merits] is illustrated by the following passage from Weitz v. Yankosky (1966) 63 Cal.2d 849:
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> > It is the policy of the law to favor, wherever possible, a hearing on the merits, and appellate courts are much more disposed to affirm an order where the result is to compel a trial upon the merits than they are when the judgment by default is allowed to stand and it appears that a substantial defense could be made. Stated another way, the policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. (Citations omitted.)

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[16] Id. at p. 4, citing *Robbins v. Los Angeles Unified School District* (1992) 3 Cal.App.4th 313, 319 (while mistake of law is a ground for relief under section 473, the issue of which mistake of law constitutes excusable neglect presents a question of fact).

[17] Respondent cites *Ron Burns Construction Co. v. Moore* (2010) 184 Ca.App.4th 1406, 1413.

[18] *AllStar Seed Co.,* supra, 29 ALRB No. 2, p. 4; see also, *Jacob Diepersloot d/b/a JD Farms* (2018) 44 ALRB No. 12, p. 6-7, adopting standard in CCP section 473.

Under the circumstances of this case, it appears that neither the General Counsel, the charging party, nor the public at large would suffer any great prejudice due to two months of time elapsing for a late-filed Answer. However, the precedent cited above in *AllStar Seed Company* appears to foreclose denial of default judgment on this basis. In *AllStar,* the Board held under similar circumstances:[19]

> While we recognize that the courts have erred on the side of granting relief from default, it is also true that courts have made it clear that there are standards that must be met in order to grant such relief. While we do not take lightly a decision to deny relief from default, to do otherwise in this case does run the risk of having no standards. Therefore, we affirm the ALJ's [grant of default] and adopt her recommended Order, as modified.

Pursuant to 8 CCR § 20232, all allegations not denied in an Answer shall be deemed admitted. Because there is not good cause for failure to file an Answer, it is hereby ORDERED that all the allegations of the complaint are admitted, the General Counsel's motion for default judgment is GRANTED, and Respondent's proposed Answer is STRICKEN.

Having found the allegations of the complaint admitted, the following findings of fact and conclusions of law are made:

IV. Findings of Fact

1. On October 22, 2017 Dionicio Perez Lopez properly and timely filed unfair labor practice charge 2017-CE-066-SAL alleging that Respondent committed an unfair labor practice when its agent FLC Michel terminated him as well as Pedro Esparza, Antonio Mendez Guillen, Francisco Javier Gutierrez and Alfonso Flores (collectively "discriminatees") from employment on October 12, 2017 because they engaged in

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[19] *AllStar Seed Co.,* supra, 29 ALRB No. 2, p. 7.

protected concerted activity. On October 24, 2017, the Regional Director served Respondent with the charge via certified mail.

2. At all material times, Respondent was an agricultural employer within the meaning of Section 1140.4(a) and (c) of the Act. Respondent is a limited liability company duly organized and existing under the laws of the State of California. Respondent grows and harvests beans and almonds in Sacramento County.

3. At all material times, FLC Michel was acting as an agent for Respondent.

4. At all material times, Dionicio Perez Lopez (Perez), Pedro Esparza (Esparza), Antonio Mendez Guillen (Guillen), Francisco Javier Gutierrez (Gutierrez), and Alfonso Flores (Flores) were agricultural workers, as defined in Section 1140.4(b), employed by Respondent. (Complaint paragraphs 4-8)

5. At all material times, Supervisor Juan Medina (Supervisor Medina), Foreman Jose Lugo (Foreman Lugo), Foreman Juan Andrade (Foreman Andrade), owner Manuel Michel (Owner Michel), Payroll Officer Pedro Campos (Payroll Campos), Receptionist Dalia Figueroa (Receptionist Figueroa), and Office Manager Maria Torres (Manager Torres) were statutory supervisors within the meaning of Section 1140.4(j). (Complaint paragraphs 9-15)

6. In October 2017 Respondent contracted with FLC Michel to provide labor to harvest almonds and beans.

7. In October 2017, FLC Michel hired the discriminatees to harvest for Respondent.

8. The discriminatees worked in crews supervised by Foreman Lugo, Foreman Andrade, and Supervisor Medina.

9. The discriminatees drove to work together in Esparza's van.

10. Before the beginning of each workday, Esparza would contact one of the foremen or supervisors via telephone for the location of the field where the workers were supposed to report.

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11. On October 9, the foreman tasked the discriminatees with tying down the almond trees.

12. That day, when the discriminatees arrived to the field at around 6:30 a.m., they discovered that it was extremely windy.

13. The discriminatees attempted to tie down the trees but were unable to do so due to the wind.

14. The discriminatees discussed and agreed that they could not continue working because of the windy conditions and they decided to leave for the day.

15. Esparza told Foreman Lugo that he and the discriminatees would be leaving for the day because the wind prevented them from tying down the trees.

16. Foreman Lugo suggested that the workers go to a different field and pick up roots and debris instead.

17. The discriminatees agreed and went to a different location to pick up roots and debris.

18. After an hour, the discriminatees still felt that the conditions were too windy to continue working as the wind blew dirt into their eyes and it was unsafe.

19. Mr. Esparza contacted Foreman Lugo and informed him that he and the discriminatees were leaving because it was too windy and it was unsafe.

20. Foreman Lugo acknowledged that the workers were leaving for the day.

21. On October 11, the discriminatees harvested beans for Respondent. At or around 10 a.m., the discriminatees noticed that the foreman failed to leave water, bathrooms, and shade. They discussed the problem.

22. Esparza called Foreman Andrade and complained on behalf of the discriminatees that there was no water, bathrooms, or shade in the field.

23. Foreman Andrade responded that he was too busy to bring the water, bathrooms, and shade.

24. Esparza then called Foreman Medina to complain about the lack of water, bathrooms, and shade.

25. Foreman Medina also responded that he was too busy.

26. The workers continued working and eventually noticed that someone had brought water and shade, but no bathrooms were brought to the field that day.

27. The following day, on October 12, the workers arrived to Respondent's field at or around 6:30 a.m. and immediately noticed that there was no waters, bathrooms, or shade at the field.

28. Mr. Esparza called Foreman Andrade and complained on behalf of the discriminatees that there was no water, bathrooms, or shade at the field.

29. Foreman Andrade responded again that he did not have time to deliver the items to the field.

30. The discriminatees continued working until approximately noon without water, bathrooms, or shade.

31. At or around noon, the discriminatees again discussed the problem and agreed to leave the field for the day because the foremen refused to deliver water, bathrooms, or shade.

32. Esparza contacted Foreman Andrade to inform him that he and the discriminatees were leaving because there was no water, bathrooms, or shade at the field.

33. Foreman Andrade acknowledged their decision to leave.

34. At or around 6 p.m. that day Esparza called Foreman Andrade to inquire about the work location and assignment for the following day.

35. Foreman Andrade responded that he would have to call Esparza later in the evening to provide him with the information.

36. Foreman Andrade called Esparza at or around 9 p.m. that night and told him that after speaking to Supervisor Medina, there was no more work available for the discriminatees.

37. The following day, October 13, at or around 10 a.m., the discriminatees went to FLC Michel's administrative offices to inquire about their employment and to return a water jug.

38. Once there, the discriminatees spoke to Receptionist Figueroa and Manager Torres. Both women responded that they did not know the status of their employment and recommended that they speak to Payroll Campos.

39. Payroll Campos arrived to the office and the discriminatees renewed their complaints about the lack of water, bathrooms, and shade and asked about whether their employment had been terminated.

40. Payroll Campos stated that he could not assist them but that he would speak to Owner Michel and contact them once he had more information.

41. Esparza then requested to speak to Owner Michel personally but Payroll Campos asserted that Owner Michel was unavailable.

42. The discriminatees left the office and Esparza called Owner Michel on his cell phone.

43. Owner Michel did not answer but Esparza left a voice message, renewing the discriminatees' complaints and inquiring as to the status of their employment.

44. The discriminatees never heard back from FLC Michel.

V. Conclusions of Law

Based upon these admitted facts, it is found that:

1. The discriminatees engaged in protected concerted activity by requesting water, bathrooms, and shade.

2. Respondent, through its agent FLC Michel, had knowledge that the discriminatees engaged in protected concerted activity.

3. Immediately thereafter, Respondent refused to provide further work to the discriminatees thus terminating the discriminatees' employment.

4. By terminating the discriminatees' employment because they engaged in protected, concerted activity, Respondent unlawfully retaliated against the discriminatees, interfering, restraining, and coercing them in violation of their right to engage in protected, concerted activity for the purpose of mutual aid and protection and in violation

of section 1153(a) of the Act.

ORDER

By the authority of section 1160.3 of the Act, the Agricultural Labor Relations Board (Board) hereby order that Respondent Reveille Farms, LLC, its agents and officers, successors and assigns are order to do the following:

1. Cease and desist from:
    a. Unlawfully discharging its agricultural employees because they have engaged in activity protected by section 1152 of the Act.
    b. In any like or related manner interfering with, restraining or coercing its agricultural employees in the exercise of their rights guaranteed by section 1152 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
    a. Offer Dionicio Perez Lopez, Pedro Esparza, Antonio Mendez Guillen, Francisco Javier Gutierrez, and Alfonso Flores immediate reinstatement to their former or substantially equivalent employment without prejudice to their seniority or other rights and privileges of employment.
    b. Make Dionicio Perez Lopez, Pedro Esparza, Antonio Mendez Guillen, Francisco Javier Gutierrez, and Alfonso Flores whole for all wages and economic losses they have suffered since on or about October 12, 2017, as a result of their discharge. Loss of pay or other economic losses are to be determined in accordance with established Board precedent. Such amounts hall include interest to be determine in the manner set forth in *Kentucky River Medical Center* (2010) 356 NLRB No. 8 and excess tax liability to be computed in accordance with *Tortillas Don Chavas*

(2014) 361 NLRB No. 10, minus tax withholdings required by federal and state laws.

c. Preserve and, upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination by the Regional Director of the back pay amounts due under the terms of this Order. Upon request of the Regional Director, the records shall be provided in electronic form if they are customarily maintained in that form.

d. Sign the attached Notice to Employees and, after its translation by a Board agent(s) into all appropriate languages, as determined by the Regional Director, reproduce sufficient copies in each language for all purposes set forth in this Order.

e. Mail copies of the Notice, in all appropriate languages, within 30 days after the date of this Order becomes final, or when directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period from October 12, 2017 until October 12, 2018.

f. Post copies of the Notices in all appropriate languages, in conspicuous places on Respondent's property for a 60-day period, the period and place(s) of posting to be determined by the Regional Director, and exercise care to replace any Notice which may be altered, defaced, covered or removed. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to tis premises to confirm the posting of the Notice.

g. Arrange for a representative of Respondent or a Board agent(s) to distribute and read the Notice in all appropriate languages to all of Respondent's agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director.

Following the reading, the Board agent(s) shall be given an opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondents to all non-hourly wage employees in order to compensate them for time lost at the reading and during the question and answer period.

h. Provide a copy of the attached Notice to each agricultural employee hired to work for Respondent during the one-year period following the date this Order becomes final.

i. Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with the terms. Upon request of the Regional Director, the regional office periodically thereafter in writing of further steps taken until full compliance with this Order is achieved.

SO ORDERED. Dated: March, 8, 2019

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating a charge that was filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. Because we did not contest such charges by timely filing an answer to the complaint, the ALRB deemed the allegations to be true and found that we violated the Agricultural Labor Relations Act (ALRA) by discharging employees for complaining about the terms and conditions of his employment such as failure to provide water, shade, and bathrooms.

The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

We also want to inform you that the ALRA is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another;
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that;

WE WILL NOT discharge employees who engage in protected-concerted activity.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the ALRA.

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WE WILL offer reinstatement to Dionicio Perez Lopez, Pedro Esparza, Antonio Mendez Guillen, Francisco Javier Gutierrez, and Alfonso Flores to their former or substantially equivalent positions of employment and make them whole for all loss of pay or other economic loss they has suffered as a result of our unlawful conduct.

Dated: _____

By:_____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro Street, Salinas, California 93901. The telephone number is (831) 769-8031.

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE