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17 STATE OF CALIFORNIA

18 AGRICULTURAL LABOR RELATIONS BOARD

19 In the Matter of:

20 CINAGRO FARMS, INC.

21 Respondent,

22 and

23 MARISOL JIMENEZ,

24 Charging Party.

Case No.: 2017-CE-008-SAL

**GENERAL COUNSEL'S
POST HEARING BRIEF**

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION..... | 1 |
| II. STATEMENT OF FACTS | 2 |
| A. Foreman Mendoza and his crew started working at Cinagro in late 2016 | 2 |
| B. Foreman Mendoza and his crew receive their first paychecks from Cinagro..... | 4 |
| C. The working conditions for Foreman Mendoza's crew changed as they continued their work for Respondent | 5 |
| D. Workers in Foreman Mendoza's crew complained to him and GM Macias about the lack of payroll deductions and wage statements with their paychecks..... | 7 |
| E. Workers held a meeting with GM Macias in early February 2017 to complain about the persistent lack of wage statements and payroll deductions from their paychecks and to try and obtain a date in which Cinagro would provide them with proper wage statements..... | 9 |
| F. Respondent hires new workers in mid-February 2017..... | 10 |
| G. Owner Dighera hired Barbara Ito to prepare payroll for the agricultural workers on February 24, 2017 | 11 |
| H. Foreman Mendoza's crew held another meeting with GM Macias in late February 2017 to request proper paystubs and deductions | 12 |
| I. On Saturday, March 4, GM Macias sent Foreman Mendoza and his crew home earlier than the others working and told Foreman Mendoza that he did not know if there would be work on Monday, March 6 | 13 |
| J. On Sunday, March 5, GM Macias called Foreman Mendoza and told him that there was no work on Monday, March 6 | 14 |
| K. GM Macias scheduled the other group of workers to work the week of March 6-11 | 14 |
| L. On Friday, March 10, Foreman Mendoza picked up the paychecks for his crew and GM Macias told him there was no more work for them..... | 16 |

1 M. GM Macias did not call Foreman Mendoza and his crew back to work and
2 instead hired additional workers17

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
III. ARGUMENT18

A. Legal Standard.....19

B. Cinagro's Witnesses lacked credibility, while Charging Party and Foreman
Mendoza's testimony was corroborated by co-workers and payroll records20

C. Foreman Mendoza's crew engaged in protected concerted activity and Respondent
had knowledge of their activity25

i. Charging Party and her co-workers engaged in protected
concerted activity when they complained about drinking water ..25

ii. Charging Party and her co-workers engaged in protected
concerted activity when they complained about the lack of
paystubs26

D. The evidence introduced at trial shows that Cinagro terminated Charging Party
and her co-workers because they engaged in protected concerted activity28

i. Charging Party and her co-workers reasonably interpreted
GM Macias' statement that there was "no work until further notice,"
together with his actions, as a termination of their employment . 30

1. GM Macias repeated lies to the workers about the non-
Availability of work in March led Foreman Mendoza and the
workers in his crew to believe they were terminated31

2. After not working for three days and knowing they were
not scheduled for any upcoming days while new workers
continued in their place, Charging Party and her co-workers
reasonably believed that Cinagro had terminated them.....33

3. Cinagro provided the workers with two paychecks on

| | | |
|----|---|----|
| 1 | March 10, rather than the normal single paycheck indicating | |
| 2 | that Cinagro was terminating them..... | 35 |
| 3 | 4. Cinagro's agents' words and actions, as a whole, would | |
| 4 | lead a reasonably prudent employee to believe that Cinagro | |
| 5 | terminated them. | 36 |
| 6 | 5. Charging Party and several of her co-workers met with | |
| 7 | Oxnard ALRB staff on March 10, shortly after they were told | |
| 8 | that there was "no work until further notice", which evidences | |
| 9 | that the workers reasonably believed that Cinagro had fired | |
| 10 | them | 38 |
| 11 | ii. Respondent did not clarify any ambiguity it caused about the | |
| 12 | status of work for Foreman Mendoza's crew, nor did it repudiate GM | |
| 13 | Macias' words and actions or inform the workers that they were not | |
| 14 | terminated | 38 |
| 15 | E. The evidence at trial proves that Cinagro was substantially motivated to | |
| 16 | terminate Foreman Mendoza's crew because they engaged in protected concerted | |
| 17 | activity | 39 |
| 18 | i. A short amount of time passed between the workers' complaints | |
| 19 | in February and GM Macias not scheduling them to work | 40 |
| 20 | ii. Cinagro did not lay off Charging Party and her co-workers | |
| 21 | for lack of work, because work was available and Cinagro hired new | |
| 22 | workers even as it told Charging Party and her co-workers that there | |
| 23 | was no work for them | 40 |
| 24 | iii. Cinagro's explanation for the terminations shift repeatedly and | |
| 25 | is not credible..... | 41 |
| 26 | F. Respondent failed to show that it would not have called Charging Party and her | |
| 27 | co-workers to work even if they had not complained about the lack of drinking water | |
| 28 | and paystubs..... | 43 |

G. The Aricultural Labor Relations Act protects Foreman Mendoza because Cinagro fired him to eliminate his crew because of their protected concerted activity44

i. The discriminatees' employment was conditioned on continued employment of Foreman Mendoza46

ii. Cinagro discharged Foreman Mendoza as the means to discharge the workers in his crew because of their protected concerted activity47

IV. CONCLUSION49

TABLE OF AUTHORITIES

Cases

| | |
|--|--------------------|
| <i>America Protection Industries, et al.</i> (1991) 17 ALRB No. 21..... | 38 |
| <i>Asplundh Tree Expert Co. v. NLRB</i> (3d Cir. 2004) 365 F.3d 168, 172 fn. 3..... | 25 |
| <i>Aukeman Farms</i> (2008) 34 ALRB No. 2, p. 5..... | 29 |
| <i>Boyd Branson Flowers, Inc.</i> (1995) 21 ALRB No. 4, p. 2 Fn. 4..... | 30, 38, 39 |
| <i>California Valley Land Co., Inc.</i> (1991) 17 ALRB No. 8, pp. 6-7..... | 29 |
| <i>Dole Farming, Inc.</i> (1996) 22 ALRB No. 8, 30, 15..... | 18, 23, 30, 36, 39 |
| <i>Dublin Town Ltd.</i> (1986) 282 NLRB 307, 308..... | 36 |
| <i>Flexsteel Industries</i> 316 NLRB 745, 757-758..... | 44 |
| <i>Foster Poultry Farms</i> (1980) 6 ALRB No. 15, p. 7..... | 28 |
| <i>George Arakelian Farms, Inc. v. ALRB</i> (1980) 111 Cal.App. 3d 258..... | 31 |
| <i>Gerawan Farming, Inc.</i> 45 ALRB No. 7..... | 39 |
| <i>Giannini Packing Co.</i> (1993) 19 ALRB No. 16, ALJD p. 17..... | 34 |
| <i>Gourmet Farms, Inc.</i> (1984) 10 ALRB No. 41..... | 25 |
| <i>Gurinder S. Sandhu dba Sandhu Brothers Poultry and Farming</i> (2014) 40 ALRB No. 12, p. 12..... | 19, 40 |
| <i>Hadley's Date Garden, Inc.</i> (2005) 31 ALRB 1, p. 14..... | 40 |
| <i>Hale Manufacturing Col., Inc.</i> (1977) 228 NLRB 10, 13..... | 30, 31, 36, 38 |
| <i>Harlan Ranch Co.</i> (1992) 18 ALRB No. 8..... | 40 |
| <i>H&R Gunlund Ranches, Inc.</i> (2013) 39 ALRB No. 21, pp. 3-4..... | 29 |
| <i>J & L Farms</i> , (1982) 8 ALRB No. 46..... | 19 |
| <i>Kawahara Nurseries, Inc.</i> (2014) 40 ALRB No. 11, p. 11..... | 29, 42 |
| <i>Krebs and King Toyota, Inc.</i> (1972) 197 NLRB 462..... | 45 |
| <i>Lawrence Scarrone</i> (1981) 7 ALRB No. 13..... | 19 |
| <i>Leiser Const., LLC</i> (2007) 349 NLRB 413, 416..... | 30 |
| <i>Lightning Farms</i> (1986) 12 ALRB No. 7, ALJD p. 9..... | 28 |

| | | |
|----|--|----------------|
| 1 | <i>Martori Brothers v. ALRB</i> (1981) 29 Cal.3d 721 | 43 |
| 2 | <i>Meyers Industries</i> (1984) 268 NLRB 493, 497 (<i>Meyers I</i>) | 25 |
| 3 | <i>Miranda Mushroom Farm, Inc. et al.</i> (1980) 6 ALRB No. 22..... | 19, 29 |
| 4 | <i>Nash-De Camp Co. v. ALRB.</i> (1983) 146 Cal.App.3d 92, 104 | 25, 26, 28 |
| 5 | <i>New Breed Leasing Corp. v. NLRB.</i> (9 th Cir.1997) 111 F.3d 1460, 1465 | 29 |
| 6 | <i>NLRB v. Washington Aluminum Co.</i> (1962) 370 U.S. 9..... | 19, 26 |
| 7 | <i>NLRB v. Ridgeway Trucking Co.</i> (5 th Cir. 1980) 622 F.2d 1222..... | 30 |
| 8 | <i>NLRB v. Hilton Mobile Homes</i> (8 th Cir. 1967) 387 F.2d 719 | 30 |
| 9 | <i>NLRB v. Trumbull Asphalt Co. of Delaware</i> (8 th Cir. 1964) 327 F.2d 841, 843 | 30, 38 |
| 10 | <i>NLRB v. Hale Manufacturing Co.</i> (8 th Cir 1978) 570 F.2d 705 | 31 |
| 11 | <i>P&M Vanderpool</i> (2014) 40 ALRB No. 8, p. 21 | 30 |
| 12 | <i>Phillips Industries, Inc.,</i> (1968) 172 NLRB No. 2119, 2128..... | 19 |
| 13 | <i>Pioneer Drilling Co., Inc.</i> (1967) 162 LRB 918..... | 45, 47 |
| 14 | <i>Pride Ambulance Co.</i> (2011) 356 NLRB 1023, 1024 | 30, 31 |
| 15 | <i>Ranch No. 1, Inc.</i> (1986) 12 ALRB No. 21, p. 6 | 42 |
| 16 | <i>Ray and Star Gerawan, dba Gerawan Ranches and Gerawan Co., Inc.</i> (1992) 18 ALRB | |
| 17 | No. 5, p. 4, 9 | 34 |
| 18 | <i>Ridgeway Trucking Co.</i> (1979) 243 NLRB 1048 | 30, 36, 38 |
| 19 | <i>Rincon Pacific, LLC</i> (2020) 46 ALRB No. 4, p. 20-21 | 28, 39 |
| 20 | <i>Ruline Nursery</i> (1981) 7 ALRB No. 21, p. 11 | 44, 45 |
| 21 | <i>Sam Andrews' Sons</i> (1987) 13 ALRB No. 15, pp. 8-9..... | 34 |
| 22 | <i>Sequoia Orange, Co.</i> (1985) 11 ALRB No. 21, ALJD p. 92..... | 45, 46, 47, 48 |
| 23 | <i>Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB.</i> (9 th Cir. 1974) 497 F.2d..... | 26 |
| 24 | <i>Smith Packing, Inc.</i> (2020) 46 ALRB No. 3..... | 29 |
| 25 | <i>State Plaza Hotel</i> (2006) 347 NLRB 755, 756-757..... | 28 |
| 26 | <i>Superior Farming Co. v. ALRB,</i> 151 Cal.App.3d 100, 122..... | 28 |
| 27 | <i>The Garin Company</i> (1986) 12 ALRB No. 14, pp. 4-5 | 42 |
| 28 | <i>VADA of Oklahoma, Inc.</i> (1975) 216 NLRB 750..... | 45 |

1 *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083.....19, 28, 29, 43

2 *Wonderful Orchards, LLC* (2020) 46 ALRB No. 2 ALJD p. 227, 28, 43, 44

3 *Woolf Farming Co. of Cal., Inc.* (2009) 35 ALRB No. 2, pp. 1-2.....29

4 **Statutes**

5 Lab Code § 226.....5

6 Lab Code § 226(a)21

7 Lab. Code § 1152.....19, 28

8 Lab. Code § 1153(a)19, 29

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1 **I. INTRODUCTION**

2 Marisol Jimenez, Hector Vasquez Cruz, Yolando Antonio, Rigoberto Perez, Maria
3 Duarte and Maria Angelica Santiago, together with their Foreman Victor Mendoza (Foreman
4 Mendoza) formed a united crew that worked well together and produced high quality work. In
5 2016, Foreman Mendoza and the crew were paid by farm labor contractors and performed work
6 for various vegetable growers. The crew worked hard together to ensure continued employment
7 and eventually were performing work for Cinagro Farms, LLC in late 2016. While still being
8 paid by the farm labor contractor, they had access to clean restrooms and drinking water out in
9 the field and had no complaints with how they were paid. But in November 2016, after Cinagro
10 directly hired Victor Mendoza and his crew, things changed.

11 The crew encountered dirty restrooms in the field and a lack of drinking water. The crew
12 also found out that Cinagro was not making payroll deductions, not issuing them paystubs, and
13 did not carry workers' compensation insurance. United, they took their concerns to Foreman
14 Mendoza. He relayed the complaints to General Manager Rene Macias (GM Macias). As the
15 crew continued to encounter the same issues, they took their complaints to GM Macias who
16 responded that Cinagro was working on getting them the paystubs they wanted and would make
17 payroll deductions.

18 Owner Tony Dighera (Owner Dighera) hired a payroll manager to prepare the payroll for
19 him and he instructed her to pay them gross wages without making any deductions. The only
20 thing that changed with a payroll manager was she prepared an attachment to the paychecks. The
21 attachment did not provide them with any more information than the name of the crops they
22 harvested and gross amounts. Owner Dighera and GM Macias knew that the specific information
23 the crew requested on a wage statement such as withholdings, the number of boxes, the rates,
24 and the hours worked would not be provided to the workers. Four years after Charging Party
25 Marisol Jimenez filed the underlying unfair labor practice charge in this matter, Cinagro
26 continues to pay its agricultural workers the same way.

27 In response to Foreman Mendoza's crew's persistent requests for payroll deductions and
28 pay stubs, Cinagro terminated the entire crew along with Foreman Mendoza. Despite Owner

1 Dighera's testimony that there was plenty of work for Foreman Mendoza's crew and other
2 workers hired by GM Macias, GM Macias told Foreman Mendoza there was no work for his
3 crew "until further notice." GM Macias had no intention of calling Foreman Mendoza's crew
4 back to work just as Cinagro had no intention of changing the way it paid the crew. The record
5 shows that later that same month, Cinagro hired new employees and did not call Foreman
6 Mendoza or any of the crew members to work.

7 Cinagro terminated Foreman Mendoza and his crew precisely because they engaged in
8 protected activity during their employment at Cinagro by asking for proper wage deductions and
9 statements, as well as adequate bathrooms and drinking water. Cinagro violated the Agricultural
10 Labor Relations Act (the Act) and it should be held liable for making all of the affected workers
11 and the foreman whole.

12 **II. STATEMENT OF FACTS**

13 In 2016 and 2017, Cinagro Farms, Inc. (Cinagro or Respondent) grew green kale, red
14 kale, radishes, cabbage, cilantro, spinach, pumpkins, anise, and other vegetables at ranches
15 located in Fillmore and Moorpark, California. (First Amended Complaint ¶9, Answer to First
16 Amended Complaint ¶1; Reporter's Transcript¹ IV 85:15-18; VII 87:13-17.) The ranch located in
17 Moorpark was known as Tierra Rejada. (RT I 34:18-19, 146:5-7; RT II 54:1-5, 119:24-25,
18 120:1-3).

19 **A. Foreman Mendoza and his crew started working at Cinagro in late 2016.**

20 In September and October 2016, Marisol Jimenez, Hector Cruz, Yolanda Antonio,
21 Rigoberto Perez, Maria Duarte, and Maria Santiago worked together in a crew supervised by
22 Victor Mendoza (Foreman Mendoza).² (RT II 118:9-10.) The crew was paid by farm labor
23 contractor (FLC) Mike's Farm Labor (Mike's Farm Labor) and performed work for various
24 growers. (RT II 31:6-15, 32:17-33:4.) In November 2016, Mike's Farm Labor transferred
25 Foreman Mendoza and his crew to work for FLC Art's Labor Service (Art's Labor). (RT V 30:6-
26 15; 31:6-9) While employed by Art's Labor, the workers followed Foreman Mendoza's

27 ¹ Hereinafter RT will be used for Reporter's Transcript.

28 ² Witnesses for both Respondent and the General Counsel were uncertain about specific dates due to the
amount of time that has passed since the ULP was filed and the hearing was held. (GCX I.)

1 instructions and continued performing work for various growers, including Cinagro.³ (RT II
2 32:17-33:4, 55:16-56:19.) At Cinagro, Foreman Mendoza's crew harvested vegetables and
3 weeded. (RT IV 85:1-10; V 39:18-23.) While the crew was paid by Art's Labor, it provided the
4 restrooms in the field for the crew at Cinagro and compensated Foreman Mendoza for supplying
5 drinking water to the crew daily. (RT IV 86:22-87:12; 87:24-88:13.)

6 In late October or November 2016, Art's Labor Service told Foreman Mendoza's crew of
7 approximately ten workers that they would be working directly for Cinagro. (RT IV 78:10-15; V
8 73:24-74:6) After the transition, the crew continued performing the same work harvesting
9 vegetables and weeding. (RT IV 85:1-10; V 39:18-23, GCX 6, GCX 12.) Cinagro's General
10 Manager Rene Macias (GM Macias) oversaw Foreman Mendoza and the crew. (RT IV 79:22-25;
11 VII 130:12-13; 179:3-7). Shortly after Cinagro hired the crew, GM Macias added two long-
12 standing Cinagro employees to Foreman Mendoza's crew: Ignacia Sanchez and Maria Lauriano.
13 (RT IV 84:18-24; VI 130:25-131:8; VII 130:12-13.) Both of them worked at Cinagro since
14 approximately 2015, were directly paid by Cinagro, and were supervised by GM Macias before
15 he assigned them to Foreman Mendoza's crew.⁴ (RT VI 50:13-19; 82:8-11; 85:12-14; VII
16 174:17-25.)

17 GM Macias and Owner Dighera held a meeting with Foreman Mendoza and the crew to
18 tell them that they were no longer working for Art's Labor, but instead working for Cinagro. (RT
19 I 40:8-10; II: 121:6-12; III 90:1-4; VII 65:10-14; 65:23-66:2.) GM Macias informed Foreman
20 Mendoza and the workers that their working conditions would not change. (RT IV 79:22-25,
21 82:4-7.) Ms. Jimenez, Mr. Cruz, Ms. Antonio, Mr. Perez, and Ms. Santiago testified about this
22 meeting. (RT I 40:19-21; II: 120:20-25; 121:1-3; III 90:10-15; 92:13-15; IV 22:5-7.) Mr. Perez
23 said that GM Macias and Owner Dighera told him and his co-workers that they wanted the
24 workers to continue working the same and "they would get the same pay." (RT III 90:21-23; IV
25

26 ³ The owner of Art's Labor is Arturo Vasquez. His brother, Mike Vasquez, owns Mike's Farm Labor. (RT
V 93:22-94:2.)

27 ⁴ Maria Lauriano and Ignacia Sanchez testified for Respondent at the hearing. Both have known GM
28 Macias for a long time. (RT VI 130:25-131:8.) GM Macias drove Maria Lauriano to the hearing to testify. (RT VII
147:6-8; 198:18-199:7.) When Maria Lauriano was asked if she saw GM Macias the morning she testified, she said
no. (RT VI 81:16-17.) GM Macias admitted driving her to the hearing. (RT VII 147:6-8.)

1 82:4-7.) At this meeting, nobody told the workers that Cinagro would not be making payroll
2 deductions from their pay. (RT I 127:25-128:7, RT I 152:15-153:1, RT IV 81:18-21.) During his
3 testimony, Owner Dighera would not provide a clear answer as to what he and GM Macias told
4 the workers about not making payroll deductions from their pay. He testified, "...we explained
5 the situation, that we were not set up for this, we would get it as quickly as we could." (RT VII
6 65:10-14; 65:23-66:2.)⁵ Ms. Jimenez testified that GM Macias told them that Cinagro would pay
7 them with personal checks while they filled out paperwork because Cinagro was a "new
8 company," and once they filled out the paperwork, it would pay them with regular checks. (RT I
9 40:14-18.)

10 When Respondent hired Foreman Mendoza and his crew, it did not have any forepersons
11 and was increasing its workforce in preparation for the increase in orders it was receiving. (RT
12 VII 130:9-10.) Foreman Mendoza's crew harvested black kale, green kale, red kale, cilantro,
13 radishes, anise, cabbage, and lettuce. (RT IV 85:15-18; V 82:20-24; VII 176:14-18.) GM Macias
14 was solely responsible for assigning what crops the crew harvested. (RT VII 13:9-13.) At the end
15 of each workday or in the evening before the following workday, GM Macias instructed
16 Foreman Mendoza where his crew was to report to work. (RT VII 179:3-7.) Foreman Mendoza
17 was then responsible for letting the workers in his crew know where to report. (RT I 35:2-10, II
18 120:4-16.) Respondent paid workers for their work hourly, by a piece rate, or a combination of
19 both. (RT I 127:17-24.) The workers marked their completed boxes and Foreman Mendoza
20 tracked the number of boxes each worker completed. (RT I 35:19-36:1.) Foreman Mendoza
21 relayed each worker's daily production to GM Macias. (RT VII 86:14-17.) Foreman Mendoza
22 oversaw the crew's work and ensured the quality of the work. (RT IV 85:22-86:13.)

23 **B. Foreman Mendoza and his crew receive their first paychecks from Cinagro.**

24 In November 2016, Foreman Mendoza and the workers received their first paychecks
25 from Respondent. (RT IV 80:12-13.) While working at both Mike's Farm Labor and Art's
26

27
28 ⁵ Owner Dighera testified that GM Macias told the workers that payroll deductions would not be taken and
"they were fine with it." (RT VII 65:23-66:2.) None of the workers testified that is what they were told.

1 Labor, Foreman Mendoza and his crew received paystubs⁶ showing details of their daily earnings
2 and deductions. (RT I 39:20-40:3, RT II 55:16-56:19, 123:7-9, RT III 98:8-13). The checks
3 issued by Cinagro looked different. (RT IV 80:12-22.) Several workers described them as
4 “personal checks.” (RT I 45:8-11; II 53:23-25.) They did not recognize them as payroll checks
5 typically received from employers because their names and the amount of payment was
6 handwritten and they lacked any type of wage statement showing deductions or any description
7 of their earnings.⁷ (RT II 123:24-124:1; 127:11-14; IV 106:3-7, VII 8:407.) Yolanda Antonio
8 (Ms. Antonio) testified, “when the contractor paid us, they gave us paystubs that listed the
9 deductions for the state, for medical.” (RT II 123:7-9.) The first checks from Respondent did not
10 have a paycheck stub. (RT II 123:24-124:1; III 158:9-17.)

11 Foreman Mendoza said the workers in his crew compared a check from the FLC with the
12 check from Cinagro, and “...in the contractor’s check they would pay us the gross amount and
13 then they would list deductions. In the personal check, it just listed the amount and that turned
14 out to be gross.” (RT IV 81:6-13.) Ms. Antonio testified that her concern was that there was
15 nothing with her check to show itemized deductions. (RT III 20:6-8.) When the workers received
16 their second paychecks from Cinagro, they asked Foreman Mendoza when they would receive
17 paycheck stubs and he told them he would find out. (RT IV 106:8-23). Foreman Mendoza
18 contacted GM Macias and asked him when he and the crew would receive paycheck stubs and
19 GM Macias told him that he was going to call the office and find out when the paycheck stub
20 would be ready. (RT IV 107:7-16.) GM Macias told Foreman Mendoza to relay that information
21 to the workers in his crew and he did. (RT IV 107:21-108:4.)

22 **C. The working conditions for Foreman Mendoza’s crew changed as they**
23 **continued their work for Respondent.**

24 For some weeks after Respondent hired the crew directly, the restrooms that Art’s Labor
25 previously provided remained in the fields. (RT IV 86:22-87:12.) There was one restroom for
26

27 ⁶ The terms “paystubs” and “wage statements” are used interchangeably in this brief and refer to the
document that all employers are required to give their employees per California Labor Code § 226. (RT II 124-127.)

28 ⁷ The workers could not recall whether the name on the left-hand corner of the check was Cinagro or the
name of an individual. (RT III 21:21-25.)

1 men and one restroom for women. (RT IV 87:1-3.) When Art's Labor removed those restrooms
2 from the field, Cinagro replaced them with one restroom that the women and men had to share.
3 (RT IV 87:10-12.) Ms. Antonio and Ms. Jimenez testified that Cinagro did not maintain the
4 restrooms.⁸ (RT I 88:1-5; II 150:16-25.)

5 Ms. Jimenez testified that when Cinagro hired the crew, it did not provide drinking water
6 and when it did, it would run out of and the water would get warm. Maria Santiago (Ms.
7 Santiago) corroborated Ms. Jimenez's testimony about Cinagro not providing drinking water.
8 (RT I 54:24-55:6; 58:1-2; III 155:8-10; 156:11-23.) Ms. Jimenez, together with her co-workers
9 Maria Duarte (Ms. Duarte) and Hector Cruz (Mr. Cruz) talked to Foreman Mendoza about the
10 lack of drinking water. (RT I 55:15-19.) Foreman Mendoza told them that Cinagro did not say
11 anything to him about supplying them with drinking water. Ms. Jimenez and her co-workers told
12 Foreman Mendoza to ask Cinagro about drinking water and Foreman Mendoza told them he
13 would talk to GM Macias about it. (RT 55:21-56:10.) GM Macias took water out to the crew on
14 two occasions. (RT IV 91:10-92:21.) Ms. Jimenez testified that she talked to GM Macias in the
15 field about the water he took out to the crew. She informed him that he did not take enough water
16 out to the crew because the crew would run out of water. (RT I 57:16-58:3.) GM Macias told
17 Ms. Jimenez that he was "dealing with that" so he could take water out to them. (RT I 58:12-16.)
18 Ms. Jimenez spoke to GM another time, together with Mr. Cruz when GM Macias went out to
19 the field. (RT I 58:22-24.) Ms. Jimenez asked him what was going on with the water and GM
20 Macias told her he did not have cash with him and if they wanted to go to the store close to the
21 ranch and purchase water, he would reimburse them for it. (RT I 59:2-7.) Ms. Jimenez and Mr.
22 Cruz left the ranch to purchase water for the crew, and upon their return showed GM Macias the
23 receipts for the purchase. GM Macias told them he would pay them back later but nobody from
24 Cinagro reimbursed them for the purchase. (RT I 59:9-21.)

25 One day, GM Macias took four one-gallon jugs of water to put into the yellow jugs that
26 held the drinking water for the crew. (RT IV 89:24-90:21.) After the workers in the crew drank
27

28 ⁸ Ms. Antonio testified that she complained to GM Macias that the restrooms were uncleaned. (RT II
150:16-25; III 52:12-22.)

1 that water, they told Foreman Mendoza that they did not like the way it tasted, and they would
2 not drink it. (RT IV 89:13-16.) Foreman Mendoza tasted the water, and he did not like the way it
3 tasted either. (RT V 77:10-78:4.) He relayed the workers' complaints about the water to GM
4 Macias. (RT IV 89:17-22.) GM Macias told Foreman Mendoza that was the only type of water
5 that Respondent would provide. (RT V 77:10-78:4.) Foreman Mendoza told GM Macias that he
6 had to leave the field to get water for the workers and GM Macias told him it was fine that he left
7 for that. (RT IV 89:17-22.)

8 Eventually Foreman Mendoza started providing drinking water to his crew every day by
9 taking the yellow jugs to a water dispenser near a grocery store and filling them up. (RT IV 90:5-
10 22.) He told GM Macias that he was filling the jugs up each day by purchasing drinking water
11 and asked GM Macias if Respondent was going to reimburse him. (RT IV 88:10-22.) GM
12 Macias said Cinagro would not reimburse him.⁹ (RT IV 87:24-88:22.) Respondent's witnesses
13 testified that Respondent paid Foreman Mendoza an "extra hour per day" for purchasing and
14 taking drinking water to the crew. (RT VII 11:13-14) Respondent did not provide any evidence
15 of this and the paycheck stub issued to Foreman Mendoza dated March 10, 2017 lacks any
16 details regarding what Foreman Mendoza was paid for, only showing a total number of hours
17 and the gross wages amount. (GCX 2.)

18 **D. Workers in Foreman Mendoza's crew complained to him and to GM Macias**
19 **about the lack of payroll deductions and wage statements with their**
20 **paychecks.**

21 Even though GM Macias agreed to resolve the problems with the checks, the next checks
22 still lacked wage statements. (RT I 153:2-3; RT II 7:21-8:21.) The workers in Foreman
23 Mendoza's crew discussed this amongst themselves and again expressed their concerns to
24 Foreman Mendoza. (RT I 43:2-9; 45:8-11; 153:4-12; III 95:23-25; 96:1-8; IV 106:8-23.) In
25 November, Ms. Antonio and Mr. Perez talked to Foreman Mendoza and Ms. Antonio told him
26 that she needed wage statements to show proof of her income to Medi-Cal for services for her

27 ⁹ GM Macias placed a plastic bag near his truck where crewmembers who wanted to, could place their
28 recyclables. He turned the recyclables in for cash and used the cash to purchase the drinking water. Some workers
were aware of this and contributed their recyclables. (RT II 152:17-18; III 132:8-16.)

1 children. (RT II 127:15-19; 129:6-11; III 96:6-12.) Foreman Mendoza told them that he would
2 relay their requests to GM Macias and he did. (RT II 129:6-11, III 96:6-12.) In December, Mr.
3 Cruz and Ms. Jimenez talked to Foreman Mendoza about the paychecks and the lack of
4 deductions taken from their pay. (RT I 46:9-14.) Ms. Jimenez explained to Foreman Mendoza
5 that she needed proof of her income for personal paperwork that she was processing at the time.
6 (RT I 40:22-41:2; 42:21-25.) Foreman Mendoza told Mr. Cruz and Ms. Jimenez that he would let
7 GM Macias know and then get back to them. (RT I 46:16-17; 153:4-12.) Foreman Mendoza
8 relayed the workers' concerns to GM Macias and GM Macias told Foreman Mendoza that
9 Respondent was "working on it." (RT I 46:16-17; 107:1-108:4.)

10 As they continued to receive paychecks without wage statements or withholdings, Ms.
11 Jimenez and Mr. Cruz decided to talk to GM Macias directly. (RT I 47:14-48:1.) In December,
12 Ms. Jimenez expressed their concerns and asked GM Macias when she and her co-workers
13 would receive wage statements. (RT I 48:2-4.) GM Macias told Ms. Jimenez he would relay her
14 message to "the boss." (RT I 47:19-23.) Mr. Cruz testified about speaking to GM Macias on two
15 occasions with Ms. Jimenez. (RT I 153:15-154:1.) Mr. Cruz testified that on one occasion, GM
16 Macias told them to be patient because Cinagro was a small company, "just starting out," and the
17 following Monday the checks were going to be different than the ones they had received. (RT I
18 152:15-153:1.)

19 Whenever the workers raised concerns about the lack of wage statements to Foreman
20 Mendoza, he reported the concerns to GM Macias.¹⁰ (RT 106:24-25.) GM Macias told Foreman
21 Mendoza to tell the workers in his crew that GM Macias was calling the office to find out when
22 the paycheck stubs would be ready. (RT IV 107:14-23.) Foreman Mendoza told the workers in
23 his crew what GM Macias told him. (RT 107:1-108:4.)

24 In February 2017, Ms. Antonio and Mr. Perez also talked to GM Macias together. (RT II
25 129:6-23.) Ms. Antonio told GM Macias that she needed wage statements for her children to
26 qualify for Medi-Cal benefits. (RT II 130:1-5; III 97:22-98:1.) GM Macias told Ms. Antonio and
27

28 ¹⁰ Foreman Mendoza included his concern to GM Macias about when Cinagro would start paying the
workers with a paycheck stub. (RT IV 107:8-10.)

1 Mr. Perez that Respondent was in the process and that Cinagro would provide them with
2 paycheck stubs. (RT II 130:7-8; III 98:2-4.)¹¹

3 **E. Workers held a meeting with GM Macias in early February 2017 to complain**
4 **about the persistent lack of wage statements and payroll deductions from**
5 **their paychecks and to try and obtain a date in which Cinagro would provide**
6 **them with proper wage statements.**

7 After their individual complaints and requests to both Foreman Mendoza and GM Macias
8 did not result in receiving wage statements and payroll deductions, the workers told Foreman
9 Mendoza that together they wanted to meet with GM Macias. (RT IV 123:13-124:16.) Foreman
10 Mendoza called GM Macias out to the field. (RT IV 111:17-25.)¹² The entire crew was present at
11 this meeting with GM Macias in early February. ¹³ (RT I 48:18-24; 49:2-12; 154:16-155:7; RT II
12 133:23-134:3; III 99:15-22; 158:14-21.) Ms. Jimenez told GM Macias, "Please provide us with
13 an answer as to when you will give us normal checks because we are getting notices that we need
14 to provide proof of our work."¹⁴ (RT I 49:15-19, RT II 135:3-6, RT III 159:6-12.) Ms. Jimenez
15 heard her co-workers Ms. Antonio, Ms. Santiago, and Mr. Perez speak at this meeting.¹⁵ (RT I
16 50:2-6; III 100:2-4.) Ms. Antonio asked GM Macias to provide them with a specific date as to
17 when wage statements would be provided because she urgently needed them, they had waited a
18 long time and Respondent told them months prior that it would be fixed soon. (RT I 50:20-51:1;
19 156:5-17; RT II 134:6-14.) Ms. Antonio testified that GM Macias told them that "they were on
20 it" and they would receive a paystub the following week. (RT II 134:17-23.) Mr. Perez said that
21 he needed a solution to the problem with the paycheck stubs. (RT I 51:2-7, RT III 100:2-4.) Ms.
22 Santiago said that she needed paystubs for proving her income when she took her children to
23 medical clinics. (RT I 51:8-12, RT III 159:15-18; 160:7-10.) GM Macias' response to the

24 ¹¹ Ms. Antonio also spoke to Owner Dighera with GM Macias present, approximately two weeks before her
25 last day of work. She told him that she wanted wage statements with her paycheck. (RT II 138:16-139:3; 139:24-
26 140:2.)

27 ¹² Foreman Mendoza's memory of the timeline varied slightly from the workers in his crew. The majority
28 of the workers who testified about the first meeting with GM Macias said it happened in early February 2017. (RT II
29 133:23-134:3; IV 112:11-23.)

30 ¹³ Maria Lauriano denied ever being present at a meeting when their co-workers met with GM Macias
31 together to discuss their requests for wage statements. (RT VI 52:11-16.)

32 ¹⁴ Ms. Santiago testified that she heard Ms. Jimenez speak up at this meeting. (RT III 159:6-12.)

33 ¹⁵ Ms. Jimenez and Ms. Antonio both testified that they spoke at this meeting and heard the other speak.
(RT II 135:3-6.)

1 workers did not change; again, he told them that he had given their message to “the boss,” and
2 that “the company was working on getting them paystubs.” (RT II 134:19-23; RT III 100:9-19.)
3 From November 2016 through February 2017, Cinagro issued paychecks to agricultural workers
4 without any type of a wage statement and without making payroll deductions from their pay. (RT
5 V 122:7-123:10; VII 59:19-60:2.) Foreman Mendoza testified that after the meeting, GM Macias
6 told him, “we should wait a little longer for the office to process things and for us to get our
7 paycheck stubs.” (RT IV 113:2-23; 114:24-115:1.)

8 **F. Respondent hires new workers in mid-February 2017.**

9 In mid-February 2017, GM Macias hired another group of workers.¹⁶ (RT VII 130:21-
10 24.) Owner Dighera testified that the crew was hired to help Foreman Mendoza’s crew. (RT IV
11 126:15-19; 127:24-128:2.) Ms. Jimenez testified that during a meeting held by GM Macias, he
12 told her and the crew that the other workers were “only going to be there to support us because
13 there was going to be a lot of orders.” (RT I 38:23-25.) GM Macias testified that he hired four to
14 five people, naming Cesar Miranda as the “foreman” of that group.¹⁷ (RT VII 84:24-85:9.) While
15 both Foreman Mendoza’s crew and the other group of workers worked for Respondent, GM
16 Macias was in charge of assigning which crops each group would harvest.¹⁸ (RT VII 13:9-13.)
17 The two crews did not harvest the same product or work together. (RT IV 128:16-129:1.)
18 Foreman Mendoza testified that he did not see the other group of workers harvest cilantro,
19 cabbage or lettuce (all commodities harvested by Foreman Mendoza’s crew). (RT V 103:3-18.)
20 Owner Dighera testified that the other workers were paid the same way as Foreman Mendoza’s
21 crew and they did not complain about how they were paid. (RT VII 88:5-23.)

22
23
24 ¹⁶ GM Macias testified that he hired these workers about two weeks before Foreman Mendoza crew’s last
25 day of work. (RT VII 130:21-24.) The records for four workers who were not in Foreman Mendoza’s crew show
employment starting on February 21, 2017. (GCX 12, pages CFI011010, CFI011012-011014.)

26 ¹⁷ Respondent’s records show that Cesar Miranda was not labeled a “foreman” like Victor Mendoza and
was paid piece rate like all other employees in the group. (GCX 2; GCX 5 CFI011025.)

27 ¹⁸ Respondent’s records show that Ignacia Sanchez and Maria Lauriano harvested collards on February 22,
28 23 and 24, while the rest of the workers in Foreman Mendoza’s crew did not. (GCX 12 CFI011001-CFI011008).
Despite Ignacia Sanchez and Maria Lauriano denying that they worked apart from Foreman Mendoza’s crew,
Owner Dighera testified that GM Macias could have assigned some workers to harvest one thing while others
harvested something else. (RT VII 86:19-87:16.)

G. Owner Dighera hired Barbara Ito to prepare payroll for the agricultural workers on February 24, 2017.

Owner Dighera learned of the workers' complaints and requests for paystubs from GM Macias. (RT VII 64:17-23; 65:2-4.) Owner Dighera hired Barbara Ito (Ms. Ito), a professional bookkeeper with expertise in agricultural payroll in Ventura County in February 2017. (RT V 114:7-21; 116:3-7, 156:10-14; VII 60:15-22; 66:12-22.) Ms. Ito testified that when she started performing payroll for Cinagro, she did not calculate withholdings and did a gross payroll. (RT V 119:7-11.) When asked, "who instructed you to do a gross payroll?" Ms. Ito replied, "Tony." (RT V 119:12-14.) Per Owner Dighera's instruction, she prepared the weekly paychecks with only gross wages, without any money withheld for deductions from the checks. (RT V 120:3-14.) At the time Ms. Ito started working for Respondent, she worked for eight other growers and Cinagro was her only client that classified agricultural workers in this way.¹⁹ (RT V 136:20-137:10.) Owner Dighera denied that he instructed Ms. Ito to classify the workers as vendors. (RT VII 61:1-7.) When asked if he instructed her to make the correct deductions, he responded that he did not specify anything to her other than to do the payroll for the crew. (RT VII 19-23.) However, he knew about payroll deductions that were required for employees because at that time, he employed Arlis (last name unknown) and paid her as an employee, making payroll deductions from her pay. (RT VII 84:11-14.) Ms. Ito also testified that when Tony instructed her not to take deductions, they "discussed the fact that they would be handled as vendors, not employees."²⁰ (RT V 127:15-19.) Under questioning by ALJ Soble, Owner Dighera admitted that he knew the way he paid the agricultural workers was not lawful and that he was concerned about penalties. (RT VII 90:25-91:19-24.)

Ms. Ito prepared payroll for Respondent for the first time on February 24, 2017. (RT V 126:11-19; 156:10-14.) The workers in Foreman Mendoza's crew received an attachment to their paychecks dated February 24. (RT V 126:11-19; GCX 11.) General Counsel's Exhibit 11, the attachment to Ms. Antonio's February 24 paycheck, shows her name next to the word "Vendor",

¹⁹ Ms. Ito testified that to date she continues to do payroll for Cinagro and continues to prepare the payroll the same way. (RT V 115:21-23.)

²⁰ Vendors means independent contractors. (RT V 127:20-21.)

1 the date, Respondent's name and address, and various commodities with dollar amounts next to
2 them.²¹ (RT V 127:2-14.) Ms. Antonio testified while looking at the February 24 statement that it
3 did not contain information about deductions, number of hours worked, the pay period, the
4 number of boxes harvested, nor the rates. (RT III 39:16-40:5; 47:7-8; 67:7-19; GCX 11.) Ms. Ito
5 confirmed in her testimony that the attachment did not show the number of hours worked by the
6 person, nor the number of pieces harvested, nor the rates at which the workers were paid. (RT V
7 127:6-14; GCX 11). Ms. Antonio and Mr. Perez testified that the attachments were not the
8 paystubs they needed. (RT II 133:2-6; III 98:8-13). Mr. Perez said he wanted the type of checks
9 and statements he was used to getting prior to being paid by Respondent. (RT II 135:14-18; III
10 98:8-13.) Ms. Jimenez testified that Respondent never gave her documentation for the things she
11 needed the paycheck stubs for. (RT I 92:22-25; 115:16-116:3.) Mr. Perez testified that when they
12 received a paycheck stub it was "not useful at all" because it did not include the boxes nor the
13 amounts.²² (RT III 98:8-13.)

14 **H. Foreman Mendoza's crew held another meeting with GM Macias in late**
15 **February 2017 to request proper paystubs and deductions.**

16 Ms. Duarte testified that in February 2017, she received "something" with her paycheck,
17 but it lacked information about payroll deductions for Medi-Cal and social security, and the year-
18 to-date totals. (RT II 55:3-25.) Ms. Duarte spoke to her co-workers Ms. Jimenez, Mr. Cruz, Mr.
19 Perez, and Ms. Antonio about the lack of information on the papers attached to their paychecks.
20 (RT II 57:19-22.) Ms. Antonio testified that she spoke to GM Macias about this attachment and
21 told him that Medi-Cal did not accept it because it was not a paycheck stub and she wanted a
22 paycheck stub that listed what was deducted for Medi-Cal and for the State. (RT II 130:14-21;
23 132:25-133:1.)

24 Foreman Mendoza testified that after the workers received the attachment to their checks
25 prepared by Ms. Ito, they told him that they wanted to speak to GM Macias again. (RT II 5:3-15;
26 IV 123:13-25.) Foreman Mendoza called GM Macias and told him that the workers wanted him

27 ²¹ Ms. Antonio referred to this document as a "box count" even though it did not provide the number of
boxes she harvested. (RT III 39:9-17.)

28 ²² Mr. Cruz wanted proper paystubs with payroll deductions taken from his pay to file his taxes. (RT II
6:22-7:1.)

1 to go out to the field to talk to him about the paycheck stub. (RT 124:1-16.) GM Macias went out
2 to the field the following day and met with the crew. (RT I 51:19-52:4, RT II 5:3-15; 5:20-23;
3 RT II 58:18-24.) Ms. Duarte placed this meeting close in time to the crew's last day of work.
4 (RT II 58:18-24.) Foreman Mendoza testified that it was a Saturday. (RT IV 124:10-14.) The
5 workers told GM Macias that they wanted a paycheck stub that specified "the deductions that
6 should be on the check." (RT III 39:16-40:5; IV 124:21-23.) Ms. Duarte complained to GM
7 Macias telling him she needed a "regular paycheck stub." (RT II 56:16-57:1.) GM Macias told
8 Ms. Duarte that "they were working on that still at the office." (RT II 57:14-18.) Ms. Antonio
9 described what she needed to GM Macias as a "paystub that included deductions for Medi-Cal,
10 for the state..." (RT II 133:2-6.) Mr. Cruz testified that at that meeting, that in addition to asking
11 GM Macias when Respondent would provide them with proper paycheck stubs, they asked if
12 Respondent had workers' compensation insurance.²³ (RT II 5:17-19; 6:9-17.)

13 Foreman Mendoza testified that he heard GM Macias tell the workers that he would call
14 the office and "see what they could arrange so that they could provide the paycheck stub." (RT
15 IV 124:17-125:15; 126:2-14.) GM Macias left after the meeting. (RT IV 125:14-15.) Foreman
16 Mendoza testified that sometime after that meeting, GM Macias told him that he did not know
17 how long it would be before they would be able to receive the paycheck stubs "the way it should
18 be." (RT IV 126:2-7.)

19 **I. On Saturday, March 4, GM Macias sent Foreman Mendoza and his crew**
20 **home earlier than the others working and told Foreman Mendoza that he did**
21 **not know if there would be work on Monday, March 6.**

22 On Saturday, March 4, 2017, Foreman Mendoza's crew and the other group of workers
23 were working at the same ranch. (RT I 61:1-2, II 10:23-11:3; IV 132:3-5.) GM Macias stopped
24 Foreman Mendoza's crew at noon and told them to go home because there was not a lot of work.
25 (RT III 58:8-9; IV 130:21-131:24). Respondent's payroll document shows that Foreman
26 Mendoza worked 4.75 hours on March 4. (RX 1, p.1.) Workers testified that as they left the field,

27 ²³ Two workers in Foreman Mendoza's crew cut themselves while working. (RT III 160:16-18; IV 100:3-
28 7.) GM Macias went to the field and told the injured workers to either go home or go to the hospital and represent
that they injured themselves at home. (RT III 160:16-161:2-11; 161:24-162:1; RT II 42:1-9, RT IV 98:11-100:7.)

1 they saw the other group of workers continue working. (RT I 61:1-2; IV 132:3-5)²⁴ Also, on
2 Saturday, GM Macias told Foreman Mendoza he would let him know if there was going to be
3 work on Monday. (RT IV 131:4-7) Foreman Mendoza informed the crew. (RT I 61:16-18; RT II
4 6:22-7:1; 60:12-20.)

5 **J. On Sunday, March 5, GM Macias called Foreman Mendoza and told him**
6 **that there was no work on Monday, March 6.**

7 On Sunday, March 5, 2017, GM Macias called Foreman Mendoza and told him to let the
8 workers in his crew know that there would not be work on Monday. (RT IV 132:6-15) On
9 Sunday, Foreman Mendoza let the crew know. (RT I 62:3-6; 64:8-9; 65:5-7; 71:18-20; II 11:4-9;
10 11:18-20; IV 132:6-15.) Ms. Antonio testified that she called Foreman Mendoza to ask if they
11 would work on Monday and he told her that GM Macias said there was no work until further
12 notice. (RT II 136:1-3.)

13 **K. GM Macias scheduled the other group of workers to work the week of**
14 **March 6-11.**

15 On Monday, March 6, Ms. Jimenez, Mr. Cruz, and Ms. Duarte together were driving to a
16 blueberry farm to see if they could obtain work for the day since Respondent did not schedule
17 them to work that day.²⁵ (RT I 71:21-72:3; II 12:3-5; 60:22-61:15.) As the workers drove by
18 Respondent's ranch in Moorpark, they observed workers harvesting. (RT I 73:1-3; II 12:3-5; IV
19 132:25-133:11.) They parked the car and Ms. Duarte took photos of the workers harvesting at the
20 ranch. (RT II 60:22-61:15; GCX 4.)

21 From the car, Ms. Jimenez called GM Macias' cell phone using speakerphone so Ms.
22 Duarte and Mr. Cruz could hear the conversation. (RT I 73:6-11; 74:24-14, II 12:12-20.) Ms.
23 Jimenez told GM Macias that one of the workers who was working called her to ask where she
24 was working "because they had not seen us." (RT I 73:8-11.) GM Macias responded, "...nobody
25 was working because they did not have any orders and the cooler was full of vegetables." (RT I
26 73:13-15.) Mr. Cruz testified that while he listened to the conversation, he saw GM Macias

27 ²⁴ Despite Respondent's claim that Cesar Miranda was the Foreman of the other group, a review of his
28 payroll records does not support that claim. Mr. Miranda was paid similarly to the others in the crew, not an hourly
rate like Foreman Mendoza. (GCX5.)

²⁵ Mr. Cruz's recollection of the day he went with Ms. Jimenez and Ms. Duarte to the blueberry field was
slightly off. He recalled it was a Wednesday while Ms. Jimenez and Ms. Duarte recalled it was a Monday. (RT II
12:3-5.)

1 standing in the field with the other workers. (RT I 74:24-75:14; II 12:12-20; 13:23-14:6.) Cesar
2 Miranda, Franco Olivares, Ruth Mancinas, Emiliano Cruz, Isidro Villavicencio, and Blanca
3 Alejandro worked on Monday, March 6. (GCX 6.) Ms. Jimenez then asked GM Macias when the
4 next time her and her co-workers would work, and he told her he did not know and said, there
5 was no work “until further notice.” (RT I 73:17-19.)

6 After the call, Ms. Jimenez called Ms. Antonio and told her that she saw others working
7 at Respondent’s Tierra Rejada ranch.²⁶ (RT II 136:9-12.) After Ms. Jimenez’s call, Ms. Antonio
8 and Mr. Perez called GM Macias twice and he did not answer her calls. (RT II 136:13-17; III
9 62:9-17.) That same day, GM Macias called Foreman Mendoza and told him that there was no
10 work on Tuesday, and to let his crew know. (RT IV 132:16-25.) Foreman Mendoza called the
11 workers in his crew to let them know that there was no work on Tuesday, March 7. (RT III
12 63:17-21; IV 132:16-25.) Ms. Antonio testified that on Monday, Foreman Mendoza told her that
13 GM Macias said there was no work for the crew until further notice. (RT III 63:17-21.) While on
14 the phone with either Ms. Duarte or Ms. Jimenez to let them know that there was no work on
15 Tuesday, Foreman Mendoza was informed that they saw others working at the Tierra Rejada
16 ranch that day.²⁷ (RT II 77:5-79:3.)

17 The other group of workers did not work on Tuesday, March 7, but returned on
18 Wednesday March 8. (RT IV 134:2-5, GCX 6). GM Macias did not call Foreman Mendoza on
19 Tuesday to advise that his crew would work on Wednesday. Instead, on Wednesday, March 8,
20 GM Macias called Foreman Mendoza and told him that due to a lack of work the crew was going
21 to stop work a few days and to pick up everyone’s paychecks on Friday. (RT IV 133:15-134:5.)
22 During this call, Foreman Mendoza told GM Macias that he knew the other group of workers
23 worked on Monday. (RT IV 134:6-10.) GM Macias denied that they worked that day. (RT IV
24 134:6-16.) GM Macias ended the call by telling Foreman Mendoza that there was not a specific
25 day for his crew to return to work. (RT IV 134:24-135:2.) The same six workers who GM

26 Ms. Antonio and Mr. Perez waited at home that day, waiting to find out when they would resume work at
Cinagro. (RT II 136:9-11.)

27 Ms. Duarte testified that when she spoke with Foreman Mendoza she was in the car with Ms. Jimenez
and Mr. Cruz and used the speakerphone function so they could listen to the conversation. (RT II 77:5-79:3.)

Macias scheduled to work on Monday, March 6, worked on Wednesday, March 8 and Thursday, March 9. (GCX 6.)

L. On Friday, March 10, Foreman Mendoza picked up the paychecks for his crew and GM Macias told him there was no more work for them.

On Friday, March 10, Foreman Mendoza went to the Moorpark ranch to pick up the crew's paychecks from GM Macias. (RT V 9:14-25, 11:21-24; 135:3-22.) When Foreman Mendoza met with GM Macias, GM Macias was short with his words, and acted as if he wanted to end the conversation quickly. (RT V 11:25-12:5; 74:13-18.) GM Macias told Foreman Mendoza that due to a lack of work he did not know when the crew would return to work and he would call Foreman Mendoza. GM Macias also told Foreman Mendoza to tell the workers in his crew it was their last day worked, and when there was more work, he would call them. (RT V 135:3-136:2.) GM Macias handed Foreman Mendoza an envelope that contained paychecks for Foreman Mendoza and the members of his crew, except for Ignacia Sanchez and Maria Lauriano. (RT V 11:21-24; VII 178:15-20.) Foreman Mendoza thanked GM Macias for the checks and for the job because he understood from his interactions with GM Macias and GM Macias' lie about the other crew working that Cinagro would not call him or his crew for work again. (RT IV 136:3-5; 147:24-148:4; V12:17-13:7.)

Foreman Mendoza then told the workers where he would be so they could pick up their checks. (RT IV 136:6-140:2.)²⁸ Foreman Mendoza testified that he gave each worker two checks on that day. (RT V 9:14-25; 17:2-5.) As Foreman Mendoza gave each worker the last paychecks, he told them that GM Macias told him that there was no more work for them until further notice. (RT I 121:4-21; IV 136:6-140:2.) Foreman Mendoza testified that the workers were bothered when Foreman Mendoza told them this and gave them their last checks. (RT V 90:4-7.) Foreman Mendoza testified that it was obvious to them all that GM Macias fired them because even though he told them there was no work for a couple of days, he scheduled others to work. Almost all of the workers in the crew and Foreman Mendoza found out others worked on Monday after GM Macias told him that there was no work because Ms. Jimenez, Mr. Cruz and Ms. Duarte saw

²⁸ GM Macias gave Ignacia Sanchez and Maria Lauriano their last checks directly. (RT VI 39:24-40:6; 40:25-41:3; 98:16-20; 106:5-8; VII 136:6-11.)

1 the other group working, and Ms. Jimenez told Ms. Antonio, Mr. Perez and Foreman Mendoza.
2 (RT IV 143:24-144:3; V 5:25-6:4; 90:8-13.) The same six workers who GM Macias scheduled to
3 work on Monday, March 6, Wednesday, March 8 and Thursday, March 9, worked at Cinagro on
4 Friday, March 10 and Saturday, March 11. (GCX 6.)²⁹

5 **M. GM Macias did not call Foreman Mendoza and his crew back to work and**
6 **instead hired additional workers.**

7 After GM Macias provided the final paychecks to Foreman Mendoza, he did not call
8 Foreman Mendoza or any of the workers from his crew to schedule them to work for Respondent
9 again. (RT II 15:22-24; 138:8-9; II 138:8-9; III 103:9-11; V 91:5-8.)³⁰ Mr. Perez called GM
10 Macias to find out if he would be called back to work and GM Macias did not answer his call.
11 (RT III 103:6-8.) None of the seasons for the vegetables that Foreman Mendoza's crew harvested
12 were over during this time. (RT III 58:19-22; V85:10-86:21.) Owner Dighera testified that in the
13 beginning of March 2017, there was enough work for Foreman Mendoza's crew and the other
14 group of workers. (RT VII 93:4-9.) He also testified that in early March, "there was always
15 work, even later in March 2017." (RT VII 94:8-11; 95:13-14.)

16 Ms. Jimenez and her co-workers filed the unfair labor practice (ULP) charge on March
17 13, 2017, signing it on March 10, the same day Ms. Jimenez received her last paycheck (GCX 1.)
18 Owner Dighera admitted that he knew about the charge and knew that workers alleged that
19 Respondent terminated Ms. Jimenez and her co-workers' employment because they complained
20 about the paystubs and other working conditions. (RT VII 73:11-14.) Despite this knowledge,
21 Owner Dighera never contacted the workers or Foreman Mendoza to offer them work or to
22 clarify that they were not terminated. (RT VII 74:22-24; 106:3-6.) Instead, Owner Dighera called
23 a neighboring agricultural operator because he was told workers from Foreman Mendoza's crew
24 were working there. (RT VII 76:2-10.) Owner Dighera testified that his sole purpose of calling
25 the agricultural operator to find out who was working there was to mitigate their potential
26 damages from him. (RT VII 106:7-12.)

27 ²⁹ Blanca Alejandre did not work on March 10. (GCX 6)

28 ³⁰ None of the workers, nor Foreman Mendoza voluntarily quit their jobs. (RT I 71:18-20, RT II 15:25-
16:1, RT II 138:10-11, RT III 103:12-13.)

1 Instead of calling Foreman Mendoza's crew back to work, Cinagro hired new workers.
2 (RT II 15:22-24; 138:8-9; III 103:9-11; V 91:5-8; VII 102:17-18.) The week following March 10
3 was March 13-17. Respondent had seven agricultural employees that week. (GCX 7
4 CFI000094.) Ms. Santiago cut her finger while working for Respondent on the last day her crew
5 worked or a day before. (RT III 160:16-161:11.) She stopped working due to her injury and
6 approximately on Tuesday, March 7, she took a doctor's note to Respondent's office to let
7 Respondent know her medical provider ordered her not to work for two weeks. (RT III 162:12-
8 14; IV 8:3-8.) Approximately two weeks later, GM Macias called Ms. Santiago and told her to
9 pick up a check. (RT IV 8:24-9:4.) When Ms. Santiago went to pick up the check from GM
10 Macias, which would have been in the week of March 13-17, she asked him if she could return to
11 work. He told her that there was no work available, and he did not know if there would be work
12 available "down the line." (RT IV 9:4-10; 9:11-16.)

13 The week of March 27-April 2, Cinagro had eleven agricultural employees. (GCX 9
14 CFI000144.) Finally, the week of April 3-9, Respondent had twelve agricultural workers
15 working. (GCX 10 CFI 000176.)

16 **III. ARGUMENT**

17 Respondent violated the Act by refusing to schedule Foreman Mendoza and his crew for
18 work in retaliation for the workers' complaints about the lack of drinking water and the way
19 Cinagro paid them. Cinagro's owner knew he was not paying the workers lawfully. (RT 91:1-4,
20 16:19-24.) Yet instead of addressing the workers' complaints, Cinagro told the workers there
21 was no more work as it simultaneously hired new workers to do the work formerly done by
22 Charging Party and her co-workers. To the extent that the words "no work until further notice,"
23 coupled with giving the workers their final checks, were ambiguous, Respondent breached its
24 duty to clarify the ambiguity. *Dole Farming, Inc.* (1996) 22 ALRB No. 8, at p. 30 of the
25 Administrative Law Judge's Decision (ALJD). Cinagro's "further notice" never arrived, and
26 Respondent failed to make clear, unconditional offers of reinstatement to Foreman Mendoza and
27 his crew.
28

1 **A. Legal Standard**

2 Section 1152 of the ALRA grants agricultural employees the right, inter alia, “to engage
3 in . . . concerted activities for the purpose of mutual aid and protection.” Retaliation against
4 employees for engaging in protected concerted activities is considered interference, restraint or
5 coercion in the exercise of that right, in violation of section 1153(a). *Gurinder S. Sandhu dba*
6 *Sandhu Brothers Poultry and Farming* (2014) 40 ALRB No. 12, p. 12; *J & L Farms* (1982) 8
7 ALRB No. 46; *Lawrence Scarrone* (1981) 7 ALRB No. 13; *Miranda Mushroom Farm, Inc., et*
8 *al.* (1980) 6 ALRB No. 22; *NLRB v. Washington Aluminum Co.* (1962) 370 U.S. 9; *Phillips*
9 *Industries, Inc.* (1968) 172 NLRB 2119, 2128.

10 To establish a prima facie case of unlawful discrimination, the General Counsel must
11 prove by a preponderance of the evidence that: (1) the employees engaged in protected concerted
12 activity; (2) the employer had knowledge of the activity; and (3) that a motive for the adverse
13 action taken by the employer was the protected activity. *Lawrence Scarrone, supra*, 7 ALRB No.
14 13 at p 4. Once the General Counsel establishes a prima facie case, the burden then shifts to the
15 employer to show that it would have taken the same adverse action even in the absence of the
16 employee’s protected concerted activity. *J & L Farms* (1982) 8 ALRB No. 46, p. 2; *Wright Line,*
17 *a Division of Wright Line, Inc.* (1980) 251 NLRB 1083.

18 The General Counsel satisfied her burden at hearing by presenting ample evidence that
19 the workers complained to GM Macias about the lack of drinking water, the way Cinagro paid
20 them, and the lack of paystubs. (RT I 47:14-49:12; 57:16-58:3; 58:22-24; 153:15-154:1; 154:16-
21 155:7; II 129:6-23; 130:1-5; 133:23-134:3; III 97:22-98:1; 99:15-22; 158:14-21.) Cinagro
22 admitted knowing of the workers’ paystub complaints. (RT IV 106:8-23; 123:13-25; VII 19:4-
23 20:15; 64:17-23; 65:2-4; 189:4-12; 190:23-191:5.) After engaging in protected concerted
24 activity, the workers’ employment ended at Cinagro.

25 Moreover, Cinagro’s actions--including not scheduling the crew to work, stating there
26 was “no work until further notice,” issuing final paychecks, while simultaneously scheduling
27 new workers to work -- amounted to a discharge in the mind of a reasonable worker. Because a
28 prudent worker would reasonably believe that Cinagro’s words and actions amounted to a

1 discharge, Cinagro had a duty to clarify any ambiguity that its words and actions might have
2 caused. Cinagro failed that duty and thus violated the Act.

3 **B. Cinagro's witnesses lacked credibility, while Charging Party and Foreman**
4 **Mendoza's testimony was corroborated by co-workers and payroll records.**

5 Owner Dighera's and GM Macias' versions of what they said to the workers and
6 representations about work not being available are not credible and should not be credited. The
7 two witnesses contradicted each other on the key issue of whether work was available in March
8 2017.³¹ Respondent's other two witnesses—workers Ignacia Sanchez and Maria Lauriano, and
9 neutral payroll professional Barbara Ito—contradicted Owner Dighera and GM Macias on
10 important points. Ms. Ito stated that Owner Dighera told her to pay the workers as “vendors” or
11 independent contractors, not as employees, a point that Owner Dighera denied, until he was
12 questioned by ALJ Soble. (RT V 119:7-11.) Conversely, Charging Party's testimony of what
13 occurred between March 4 and 10 was corroborated by the testimony of Foreman Mendoza and
14 five co-workers, as well as by payroll records.

15 Owner Dighera

16 Owner Dighera repeatedly misrepresented important facts during his testimony, and
17 Respondent's own witnesses contradicted much of his testimony. First, Owner Dighera was
18 untruthful when he testified that he did not instruct Ms. Ito to classify Foreman Mendoza and his
19 crew as vendors. (RT VII 61:1-7.) Ms. Ito testified that Owner Dighera instructed her to pay the
20 workers gross wages and not to make withholdings from their pay. (RT V 119:12-14.) Ms. Ito, a
21 neutral witness, is most reliable because even though Cinagro continues to employ her for
22 payroll services, she still testified that Cinagro instructed her to improperly classify workers. (RT
23 V 115:21-23; 119:12-17.) Her testimony is corroborated by Cinagro's actual practices. Cinagro
24 paid the workers as “vendors,” not employees; Owner Dighera was aware of this and could have
25 instructed Ms. Ito to change the workers' classification but did not. (GCX 2-3, 11.) Owner

26
27 ³¹ Up until the hearing, Respondent's position asserted through its counsel was that Foreman Mendoza and
28 his crew did not show up to work and voluntarily quit. (Respondent's June 16, 2020 Answer, p. 2, lines 12-14; Pre-
Hearing Conference Order January 4, 2021, p. 3, lines 8-10; Respondent's Answer to the Amended Complaint, p. 2,
line 12 – p. 3. line 3.)

1 Dighera then contradicted his prior testimony when he testified in response to ALJ Soble's
2 question that he knew that the manner he was paying Foreman Mendoza's crew was unlawful
3 and that he was concerned about the penalties if he was caught.³² (VII 91:1-4; 16:19-24.)

4 Second, Owner Dighera was untruthful when he said that he always used farm labor
5 contractors for his labor needs. (RT VII 4:19-5:1) Both Ignacia Sanchez and Maria Lauriano,
6 who worked for Cinagro since 2015 said that they were never paid by farm labor contractors at
7 Cinagro. (RT VI 82:8-11; 123:5-8.) Third, Owner Dighera was untruthful when he testified that
8 Foreman Mendoza's crew did a lot of weeding two to three weeks before March 4. (RT VII
9 14:15-15:21.) Foreman Mendoza's crew did not perform any weeding work the week of
10 February 21-25 (GCX 12) and only weeded on three days between February 27 and March 4,
11 2017. (RX 1.) The crew's work as weeders and their willingness to do weeding is central to what
12 Cinagro proffered as a defense for the first time at the hearing, so Owner Dighera's false
13 testimony about weeding significantly damages his credibility.

14 Fourth, Owner Dighera was untruthful when he said that during the months of January
15 through March 2017, he did not meet with any workers in the field and did not speak with any
16 workers. (RT VII 9:11-20; 25:11-13.) GM Macias testified that Owner Dighera was in the field
17 frequently in the morning and occasionally in the afternoon in January through March 2017. (RT
18 VII 181:7-14.) Ms. Antonio testified that when Owner Dighera went out to the field to take the
19 crew sweet bread, approximately two weeks before her last day of work, she spoke to him about
20 her concerns; GM Macias translated. (RT II 138:16-139:3.) Respondent's witnesses Ignacia
21 Sanchez, Maria Lauriano and GM Macias testified that Owner Dighera went out to the field to
22 take them coffee or cold drinks. (RT VI 46:20-21; 124:24-125:2; VII 181:13-17.)

23 Off the witness stand, Owner Dighera was also frequently dishonest with the workers.
24 Owner Dighera told Foreman Mendoza and his crew that he was working on fixing the problem

26 ³² Beginning on February 24, Cinagro provided Charging Party and her co-workers with a new type of
27 check and a pay statement indicating that they were "vendors." (GCX 2-3, 11.) The pay statements show that
28 Cinagro misclassified the workers as "vendors" and not employees, contrary to California Industrial Wage
Commission Order 14, Section 2. This explains why Cinagro failed to provide the workers with pay information that
they requested, and which is required under California Labor Code section 226(a). This further demonstrates that
Cinagro never intended to provide itemized wage statements that the workers sought.

1 of paying them gross wages and not providing them paycheck stubs. (RT II 138:16-139:3; VII
2 19:4-20:15; 65:8-14.) He feigned concern and asked them to be patient. (RT VII 65:10-66:2.)
3 Yet, as demonstrated by Ms. Ito's testimony, Owner Dighera was responsible for the workers'
4 misclassification as "vendors." (RT V 119:12-14.) From November 2016 until February 24,
5 Owner Dighera and GM Macias misclassified the workers. (RT VII 8:4-7; 59:19-60:2.) And after
6 February 24, Owner Dighera instructed Ms. Ito to misclassify the workers. (RT V 119:12-14.)
7 Owner Dighera's statement to the crew that his business "was not set up for this," might have
8 been true, but his statement that he would get what they needed "as quickly as we could" was
9 certainly untrue. (RT VII 65:10-66:2; 69:10-12.)

10 GM Macias

11 GM Macias was not a credible witness on key issues. Many of his answers were non-
12 responsive, internally inconsistent, and his testimony was contradicted by others and by
13 Cinagro's own records. Crucial to this case is what GM Macias told Foreman Mendoza and his
14 crew about the availability of work between March 4 and 10, 2017. On that point, GM Macias
15 offered a confused timeline, lacked corroboration, and offered testimony that was contradicted
16 by Cinagro's own witnesses.

17 All parties agree that Foreman Mendoza's crew did not work after March 4. Eight
18 witnesses—Foreman Mendoza, Charging Party Jimenez, Ms. Duarte, Mr. Cruz, Ms. Antonio,
19 Ms. Santiago, and Cinagro's witnesses Ignacia Sanchez and Maria Lauriano—testified that GM
20 Macias told the crew that there was no work until further notice.³³ (RT I 73:17-19; II 14:11-14;
21 60:12-20; 136:1-3; III 63:17-21; IV 9:4-10; 16:1-4; 132:16-25; 133:15-134:16; 134:24-135:22;
22 VI 43:17-24; 101:25-102:6.) GM Macias, alone, testified that Foreman Mendoza's crew did not
23 show up to work and surmised on the stand that it was because the crew did not like weeding.
24 (RT VII 137:7-14.) Respondent did not produce any evidence to support GM Macias' testimony.
25 Cinagro's assertion that the workers did not show up to work is inconsistent with the undisputed
26 fact that the workers wanted to resolve the issue of how they were paid and receive paycheck

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28 ³³ Either directly or through Foreman Mendoza.

1 stubs. If they did not intend to work, there would be no reason to want to resolve this issue. *Dole*
2 *Farming* 22 ALRB No. 8, ALJD p. 15.

3 The record demonstrates that Foreman Mendoza's crew had repeatedly weeded in the
4 past and that the work available on March 6 was harvesting, not weeding. (RT IV 85:1-10;
5 V39:18-23; GCX 6.) GM Macias testified that he told Foreman Mendoza on Sunday, March 5
6 that only weeding work was available the next day and that Foreman Mendoza agreed to check if
7 anyone from his crew wanted to weed. (RT VII 137:7-14; 143:9-13 143:9-13.) GM Macias'
8 testimony is not credible and should not be credited. First, GM Macias' testimony that only
9 weeding work was available on March 6 is contradicted by the evidence. (GCX 3.) Second, GM
10 Macias' surmisal that Foreman Mendoza and his crew did not like to do weeding work is
11 contradicted by evidence showing that they performed weeding work on numerous previous
12 occasions, including as recently as March 3. (RX 1.) Also, there is no evidence in the record that
13 the workers refused the weeding work. Third, the workers that GM Macias scheduled to work on
14 March 6, 8, 9, 10 and 11 performed harvesting. (GCX 6, GCX 6 CFI000072-CFI000077.) In
15 fact, none of the newly hired workers who GM Macias retained performed weeding work
16 between March 6 and April 2. (GCX 7, GCX 8, GCX 9.) GM Macias' testimony that he told
17 Foreman Mendoza only weeding work was available is not credible. His testimony that Foreman
18 Mendoza's crew did not like weeding work is also unsupported, and in fact, the last week that
19 Foreman Mendoza's crew worked (February 25 to March 4), they weeded and cleaned work.³⁴
20 (RX 1.)

21 Throughout his testimony, GM Macias was often non-responsive and his responses were
22 self-serving and should not be credited. For instance, Respondent's counsel asked GM Macias,
23 "Did Mr. Mendoza ever tell you that the workers did not want to come back?" (RT VII 143:18-
24 19.) GM Macias' response was evasive: "During those days, it was also the rainy season. And
25 when I would tell Victor what they had to do, I would ask him to find how people were going to
26 show up and how many people wanted to work. He told me he would tell them and ask them
27

28 ³⁴ General Counsel's Exhibit 5 shows that the other workers also performed weeding work on March 1-3.

1 because not everybody wanted to work. And I told him that was optional since I didn't want
2 them to be at risk for slipping and falling or anything like that." (RT VII 143:18-144:2.)

3 Charging Party and her witnesses

4 Eight witnesses—including two of Respondent's witnesses--Foreman Mendoza,
5 Charging Party Jimenez, Ms. Duarte, Mr. Cruz, Ms. Antonio, Ms. Santiago, and Cinagro's
6 witnesses Ignacia Sanchez and Maria Lauriano—testified that GM Macias told the crew that
7 there was no work until further notice.³⁵ (RT I 73:17-19; II 14:11-14; 60:12-20; 136:1-3; III
8 63:17-21; IV 9:4-10; 16:1-4; 132:16-25; 133:15-134:16; 134:24-135:22; VI 43:17-24; 101:25-
9 102:6.) Each of these witnesses corroborated each other on the crucial question of what GM
10 Macias told the workers and Foreman Mendoza.

11 Additionally, while Owner Dighera initially denied meeting with the workers in the field,
12 multiple witnesses corroborated one another's testimony that Owner Dighera came to the field
13 and spoke with one or more workers on multiple occasions. (RT II 138:16-139:3; VI 46:20-21;
14 124:24-125:2; VII 181:13-17.) Ms. Antonio testified that she spoke to him about her concerns in
15 the field. (RT II 138:16-139:3.) Respondent's witnesses Ignacia Sanchez, Maria Lauriano and
16 GM Macias each testified that Owner Dighera was out in the field. (RT VI 46:20-21; 124:24-
17 125:2; VII 181:13-17.) And ultimately, Owner Dighera's own testimony corroborated Charging
18 Party's and her co-workers' testimony that he had spoken with the workers in the field. (RT VII
19 19:4-20:15.)

20 Several worker witnesses also corroborated one another's testimony that the newly hired
21 workers worked on March 6, which GM Macias repeatedly denied. (RT I 73:1-3; II 12:6-8;
22 60:22-61:15.) Payroll records confirm the worker witnesses' testimony; Cinagro's own records
23 show that the newly hired employees worked on March 6, a day that GM Macias had denied that
24 anybody had worked. (GCX 6.)

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³⁵ Either directly or through Foreman Mendoza.

1 For all of the above reasons, the ALJ should credit Charging Party and her witnesses'
2 testimony that GM Macias told the workers that there was no more work for them "until further
3 notice," while the newly hired workers continued to work throughout March and into April 2017.

4 **C. Foreman Mendoza's crew engaged in protected concerted activity and**
5 **Respondent had knowledge of their activity.**

6 The General Counsel presented substantial evidence that Ms. Jimenez and her co-workers
7 engaged in protected concerted activity when they joined together to talk to Foreman Mendoza
8 and GM Macias about their working conditions. *Meyers Industries* (1984) 268 NLRB 493, 497
9 (*Meyers I*); *Gourmet Farms, Inc.* (1984) 10 ALRB No. 41 (holding an employee's activity is
10 concerted, if it is engaged in, with, or on authority of, other employees, and not solely by and on
11 behalf of the employee.) Actions taken for mutual aid and protection include those intended to
12 improve conditions of employment. *Asplundh Tree Expert Co. v. NLRB* (3d Cir. 2004) 365 F.3d
13 168, 172 fn. 3. Foreman Mendoza acknowledged that the workers in his crew engaged in
14 protected concerted activity when, on various occasions together, they talked to him about work
15 conditions such as the lack of drinking water and paystubs. (RT IV 89:13-16; 89:17-22; 106:8-
16 23.) Even GM Macias admitted to receiving complaints from workers in the crew. (RT VII
17 178:1-8; 189:4-12; 191:12-24.)

18 **i. Charging Party and her co-workers engaged in protected concerted**
19 **activity when they complained about drinking water.**

20 The workers in Foreman Mendoza's crew complained to Foreman Mendoza about the
21 lack of drinking water. (RT I 55:15-19.) They also complained to Foreman Mendoza about the
22 taste of the drinking water that GM Macias took out to the crew. (RT IV 75:12-25; V 77:10-
23 78:4.) Ms. Jimenez and Mr. Cruz, together, spoke to GM Macias about the lack of drinking water
24 for the crew and GM Macias told them to go buy the water for the crew. (RT I 58:22-59:21.) The
25 conversations that the workers had with Foreman Mendoza and GM Macias about the drinking
26 water was concerted activity, protected by the Act. *Nash-De Camp Co. v. ALRB* (1983) 146
27 Cal.App.3d 92, 104. Concerted activity is protected if it meets four conditions: (1) there must be
28 a work-related complaint or grievance; (2) a specific remedy or result must be sought through
such activity; (3) the concerted activity must further some group interest; and (4) the activity

1 should not be unlawful or otherwise improper (e.g., violent, in breach of contract or indefensibly
2 disloyal). *Nash-De Camp Co., supra*, 146 Cal.App.3d at 104 citing *Shelly & Anderson Furniture*
3 *Mfg. Co., Inc. v. NLRB*, (9th Cir. 1974) 497 F.2d at 1202-1203; *NLRB v. Washington Aluminum*
4 *Co., supra*, 370 U.S. at 17.

5 Here, the crew's complaints to Foreman Mendoza and Ms. Jimenez and Mr. Cruz's
6 complaints to GM Macias about the drinking water were protected because: (1) their complaints
7 were work-related (the need for drinking water at work), (2) they sought a specific remedy (that
8 Respondent provide drinking water to the crew), (3) the concerted activity furthered a group
9 interest (the entire crew benefited from drinking water), and (4) the workers' complaints were
10 not unlawful, violent, in breach of contract, or indefensibly disloyal. *Nash-De Camp Co., supra*,
11 146 Cal.App.3d at 104. Although GM Macias denied receiving the complaint, he was not
12 credible.

13 **ii. Charging Party and her co-workers engaged in protected concerted**
14 **activity when they complained about the lack of paystubs.**

15 At various times from late November 2016 through February 2017, members of Foreman
16 Mendoza's crew individually and collectively complained to Foreman Mendoza and GM Macias
17 about the lack of paystubs.³⁶ Foreman Mendoza testified that the workers in his crew first raised
18 their concerns to him when they received their second paychecks from Cinagro – which appeared
19 different than the ones they received from Art's Labor or Mike's Farm Labor. (RT IV 80:14-
20 81:14.) After Foreman Mendoza relayed those concerns to GM Macias, GM Macias told him that
21 they were working on it. (RT IV 123:13-25.) Despite this representation, Respondent continued
22 to pay the workers without paystubs. (RT I 153:2-3; II 7:21-8:21.) In fact, in February 2017,
23 Barbara Ito testified that Owner Dighera instructed her to classify the workers as independent
24 contractors rather than make payroll deductions. (RT V 119:7-14.)

25 From December 2016 through February 2017, the workers frequently complained to
26 Foreman Mendoza and GM Macias about the lack of paystubs. Ms. Antonio and Mr. Perez,

27 ³⁶ Six workers and Foreman Mendoza testified about Cinagro paying them without withholdings, the lack
28 of a paystub and the lack of detailed information once Cinagro did provide them with an attachment to their
paychecks. (RT II 5:17-19; 6:9-17; 55:3-25; 56:16-57:1; 123:24-124:1; 127:11-14; 130:14-2; 132:25-133:6; III
139:16-40:5; IV 106:3-7; 124:21-23; VII 8:407.)

1 together, complained to Foreman Mendoza in November 2016 and to GM Macias in February
2 2017. (RT II 127:15-19; 129:6-123; III 96:6-12.) Ms. Jimenez and Mr. Cruz, together, told
3 Foreman Mendoza and GM Macias in December 2016 that they needed correct paychecks and a
4 wage statement with their checks. (RT I 40:22-41:2; 42:21-25; 48:2-4.) Foreman Mendoza, Ms.
5 Jimenez, Mr. Cruz, Ms. Santiago, Ms. Duarte, Mr. Perez and Ms. Antonio each testified that they
6 met with GM Macias in the field in February 2017 and again told him they needed paystubs.³⁷
7 (RT I 48:18-24; 49:2-12; 154:16-155:7; RT II 129:6-23; 133:23-134:3; III 99:15-22; 158:14-21.)
8 Ms. Duarte, Mr. Cruz and Ms. Antonio testified about complaints to GM Macias about the
9 attachment to their paychecks prepared by Ms. Ito. (RT II 5:17-19; 6:9-17; 56:16-57:1; 133:2-6.)

10 On direct examination GM Macias denied that he met with Foreman Mendoza and his
11 crew about the lack of paystubs. (RT VII 142:14-143:3.) Yet on cross examination, GM Macias
12 admitted that members of Foreman Mendoza's crew told him that they wanted proper paystubs.
13 (RT VII 142:14-143:3; 189:4-12.) Owner Dighera testified that in Spring 2017, GM Macias told
14 him that the workers in Foreman Mendoza's crew had complaints about the way Respondent was
15 paying them and wanted to know when Respondent would issue them proper paystubs. (RT VII
16 64:17-23; 65:2-4; 66:7-9.)

17 Similar to their complaints about drinking water, the workers' complaints to Foreman
18 Mendoza, GM Macias and Owner Dighera about paystubs were protected under the Act. The
19 complaints were related to the work they performed and how they were paid for that work. The
20 workers sought the specific remedy of being paid with payroll deductions and receiving itemized
21 wage statements. This remedy would further the interest of all workers by ensuring they were
22 paid properly and receiving wage statements they could use to qualify for social services, file
23 their year-end taxes, and understand whether they were being paid for all of the work they
24 performed. (RT II 6:22-7:1; 55:3-25; 130:14-21; 132:25-133:6.) Finally, the workers' complaints
25 were not unlawful, violent, in breach of contract, or indefensibly disloyal. *Nash-De Camp Co*,
26 *supra*, 146 Cal.App.3d at 104.

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28 ³⁷ Due to the passage of time, the ability of witnesses to recall the exact dates and sequence of events is understandable. *Wonderful Orchards, LLC* (2020) 46 ALRB No. 2, ALJD p. 2.

1 Foreman Mendoza's and GM Macias' knowledge of these complaints is imputed to
2 Respondent. *Lightning Farms* (1986) 12 ALRB No. 7, ALJD p. 9 (knowledge of concerted
3 activities by the foreman and general foreman is imputed to Respondent), citing *Foster Poultry*
4 *Farms* (1980) 6 ALRB No. 15, p. 7. See also *Wonderful Orchards, LLC* (2020) 46 ALRB No. 2,
5 ALJD p. 14, fn. 54 ("A supervisor's knowledge of protected concerted activities is imputed to an
6 employer in the absence of credible evidence to the contrary,") citing *State Plaza Hotel* (2006)
7 347 NLRB 755, 756-757; and *Rincon Pacific, LLC* (2020) 46 ALRB No. 4, p. 20-21, citing
8 *Superior Farming Co. v. ALRB*, 151 Cal. App. 3d 100, 122 (court rejected the employer's
9 argument that the crew leader's actions could not be imputed to the company absent company
10 knowledge of the wrongful conduct.) Foreman Mendoza and GM Macias primarily received the
11 complaints from Ms. Jimenez and her co-workers' regarding the drinking water and their lack of
12 paystubs. (RT I 43:2-9; 45:8-11; 47:14-49-12; 55:15-56:10; 57:16-58:3; 58:22-59:7; 153:4-
13 155:7; 153:4-12; II 129:6-23; 133:23-134:3 III 95:23-96:8; 99:15-22; 158:14-21; IV 89:13-16;
14 106:8-23.) Even so, both GM Macias and Owner Dighera ultimately testified that they knew of
15 the workers' complaints regarding their lack of paystubs. (RT VII 64:17-23; 65:2-4; 66:7-9.)

16 The General Counsel thus carried her burden of proving by a preponderance of the
17 evidence that Charging Party and her co-workers engaged in protected concerted activity when
18 they complained to Foreman Mendoza, GM Macias and Owner Dighera about the drinking water
19 and the lack of paystubs. The General Counsel also carried her burden of showing that Cinagro,
20 through its agents, knew about the workers' protected activity.

21 **D. The evidence introduced at trial shows that Cinagro terminated**
22 **Charging Party and her co-workers because they engaged in protected**
23 **concerted activity.**

24 Under the burden-shifting standard set forth in *Wright Line, A Div. of Wright Line, Inc.*
25 (1980) 251 NLRB 1083, 1087, the preponderance of evidence introduced at trial proves that
26 Cinagro terminated Charging Party and her co-workers because they exercised rights granted to
27 them under Section 1152 of the Agricultural Labor Relations Act ("Act.")

28 "In discrimination cases under Labor Code section 1153, subdivisions (a)
and (c), the General Counsel has the initial burden of establishing a prima facie

1 case. The General Counsel must show by a preponderance of the evidence that the
2 employees engaged in protected concerted activity, the employer knew of or
3 suspected such protected activity, and there was a causal relationship between the
4 employees' protected activity and the adverse employment action on the part of
the employer (i.e., the employee's protected activity was a "motivating factor" for
the adverse action.)"

5 *Kawahara Nurseries, Inc.* (2014) 40 ALRB No. 11, p. 11, citing *California Valley Land Co., Inc.*
6 (1991) 17 ALRB No. 8, pp. 6-7; *Woolf Farming Co. of Cal., Inc.* (2009) 35 ALRB No. 2, pp. 1-
7 2; *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083, 1087.

8 With respect to the element of causal connection, "the Board may infer a discriminatory
9 motive from direct or circumstantial evidence." *Smith Packing, Inc.* (2020) 46 ALRB No. 3, ALJ
10 Dec. p. 25, citing *New Breed Leasing Corp. v. NLRB* (9th Cir. 1997) 111 F.3d 1460, 1465.

11 Where discriminatory motive is not apparent from direct evidence, the Board may look to a
12 variety of factors to infer the true motive of the employer, including: the timing or proximity of
13 the adverse action to the activity, disparate treatment, failure to follow established rules or
14 procedures, and false or inconsistent reasons given for the adverse action, among others.

15 *Aukeman Farms* (2008) 34 ALRB No. 2, p. 5, citing *Miranda Mushroom Farms, Inc., et al.*
16 (1980) 6 ALRB No. 22; *H & R Gunlund Ranches, Inc.* (2013) 39 ALRB No. 21, pp. 3-4.

17 As detailed below, the direct and circumstantial evidence introduced at trial shows that
18 Cinagro terminated Charging Party and her co-workers because they exercised rights under
19 Section 1152 of the Act. Cinagro gave false and inconsistent reasons for its termination of
20 Foreman Mendoza's crew. The timing of GM Macias' announcement to the workers that there
21 was no more work for them corresponds closely in time to the workers' complaints. Cinagro
22 changed Foreman Mendoza's crew's work schedule and pattern without a justifiable reason for
23 the change. And Cinagro treated the workers on Foreman Mendoza's crew, who complained
24 about paystubs, differently than it did the newly hired workers who were paid the same way and
25 did not complain about it.

1 **i. Charging Party and her co-workers reasonably interpreted GM**
2 **Macias' statement that there was "no work until further notice,"**
3 **together with his actions, as a termination of their employment.**

4 The test for determining whether an employer's words and actions constitute an unlawful
5 discharge is set forth in *Ridgeway Trucking Co.* (1979) 243 NLRB 1048; enf'd. *NLRB v.*
6 *Ridgeway Trucking Co.* (5th Cir. 1980) 622 F.2d 1222:

7 "whether [an employer's] statements constitute an unlawful discharge
8 depends on whether they would reasonably lead the employees to believe that
9 they had been discharged"... "the fact of discharge does not depend on the use of
10 formal words of firing... It is sufficient if the words or actions of the employer
11 would logically lead a prudent person to believe his tenure has been terminated.""

12 *Id.* at p. 1048-1049, citing *NLRB v. Hilton Mobile Homes* (8th Cir. 1967) 387 F.2d 719 and *NLRB*
13 *v. Trumbull Asphalt Co. of Delaware* (8th Cir. 1964) 327 F.2d 841, 843. See also *P&M*
14 *Vanderpool* (2014) 40 ALRB No. 8, p. 21 [a discharge occurs if an employer's conduct or words
15 would reasonably cause employees to believe that the employer had discharged them.]

16 "To determine what a prudent person would logically believe as to his employment
17 status, it is necessary to consider the entire course of relevant events from the employee's
18 perspective."³⁸ *Pride Ambulance Co.* (2011) 356 NLRB 1023, 1024, citing *Leiser Const., LLC*
19 (2007) 349 NLRB 413, 416. See also *Dole Farming, Inc.* (1996) 22 ALRB No. 8, p. 2-3, fn. 3.
20 ["In determining whether or not a striker has been discharged, the events must be viewed through
21 the striker's eyes and not as the employer would have viewed them."] Whether an employer
22 intended to convey a termination is irrelevant to the analysis. *Dole Farming, Inc.* (1996) 22
23 ALRB No. 8, ALJD p. 24, citing *Branson Flowers, Inc.* (1995) 21 ALRB No. 4, p. 2. Fn. 4
24 ["even if (the employer) did not intend to convey the message that the employees were fired, the
25 credited statements establish that the employees would reasonably believe that they had been
26 fired."]

27 In *Hale Manufacturing Co., Inc.* the NLRB found that the employer had discharged
28 employees, although the employer did not "directly and specifically tell the employees that they
were fired or terminated." *Hale Manufacturing Co., Inc.* (1977) 228 NLRB 10, 13; enf'd. *NLRB*

³⁸ This is an objective standard.

1 *v. Hale Manufacturing Co.* (8th Cir. 1978) 570 F.2d 705. In *Hale*, seven employees hired to
2 build trailers reported to work, but refused to work for two hours until they had the opportunity
3 to ask the plant manager for a raise. *Id.* at p. 10-11. The plant manager, later, heard their
4 complaints and then raised his hand and angrily told the employees “there just isn’t any way I am
5 paying it; you are all going to have to go home.” *Id.* at p. 11. The employees clocked out and left
6 the building. *Ibid.*

7 The next day, one of the employees returned and the plant manager told him, “I didn’t
8 fire you, you quit.” *Ibid.* At the hearing, the employer argued that it did not intend to terminate
9 the employees, that the employees quit or went on an economic strike or slowdown, and that in
10 any event, the workers were offered their jobs back, which they all refused. *Id.* at p. 12.

11 The NLRB found that the words spoken by the plant manager, “you are all going to have
12 to go home,” could be reasonably interpreted by the employees to indicate that he had fired them,
13 even though he “did not directly and specifically tell the employees that they were fired or
14 terminated.” *Id.* at p. 13. Similarly, in the present case, given the “entire course of relevant events
15 from the employee’s perspective,”³⁹ the Administrative Law Judge should find that GM Macias
16 terminated charging party and her co-workers when he stopped calling them to report to work,
17 repeatedly told them that there was “no work until further notice,” paid them their final
18 paychecks, while simultaneously providing work to a newly hired crew. (RT IV 132:6-134:5; III
19 63:17-21; IV 134:24-135:2; V 9:14-25; 11:21-24; 135:3-22; 135:23-136:2; VI 134:6-10; GCX 6-
20 10.)

21 **1. GM Macias’ repeated lies to the workers about the non-availability of**
22 **work in March led Foreman Mendoza and the workers in his crew to**
23 **believe they were terminated.**

24 GM Macias’ lies to both Foreman Mendoza and the workers in his crew reasonably led
25 them to believe they were terminated. A misrepresentation is usually done with the intent to
26 deceive. (Black’s Law Dictionary, Second Edition 2001, p. 452.) GM Macias intended to deceive

27 ³⁹ *Pride Ambulance Co.* (2011) 356 NLRB 1023, 1024; but see *George Arakelian Farms, Inc. v. ALRB*
28 (1980) 111 Cal. App. 3d 258, 271-272, which is distinguishable as the employer presented substantial evidence of
business justification and had engaged in numerous rounds of layoffs prior to laying off the irrigators, who happened
to be union supporters.

1 Foreman Mendoza and his crew that there was no work available when in fact there was. GM
2 Macias told Foreman Mendoza on Sunday, March 5 that there was no work on Monday, March 6
3 and to let his crew know. Foreman Mendoza did. (RT I 62:3-6; 64:8-9; 65:5-7; 71:18-20; II 11:4-
4 9; 11:18-20; IV 132:6-15.) GM Macias deceived Foreman Mendoza and his crew because he
5 scheduled others to work on Monday, March 6 evidencing that in fact there was work available.
6 (GCX 4 and 6.)

7 GM Macias did not expect the workers in Foreman Mendoza's crew to discover that he
8 deceived them. When confronted by Ms. Jimenez over the phone on Monday about this, GM
9 Macias lied again saying, "...nobody was working because they did not have any orders and the
10 cooler was full of vegetables." (RT I 73:13-15.) GM Macias' statement about nobody working is
11 demonstratively false. General Counsel's Exhibit 6 shows that six workers worked that day. GM
12 Macias was standing in the field with those workers at the time he told Ms. Jimenez that no one
13 was working. (RT I 74:24-75:14; II 12:12-20; 13:23-14:6.) Ms. Duarte took photos of the others
14 working most likely because she found it extraordinary that he was denying what she was
15 simultaneously witnessing. On the same phone call with GM Macias on Monday, Ms. Jimenez
16 attempted to ascertain when she and her crew would work again by asking GM Macias when the
17 next time she and her crew would work. (RT I 73:17-19.) By this time, Ms. Jimenez was most
18 likely evaluating whether they were fired by GM Macias. If he was able to provide her with a
19 day when they crew would work again, any doubt about the status of her employment may have
20 been cleared up. But that was not the case. GM Macias told her that he did not know and that
21 they would not work "until further notice." (RT I 73:17-19.) These events led Ms. Jimenez to
22 believe she and her co-workers were fired because she knew that GM Macias was solely
23 responsible for scheduling work and he relayed his decision to her that her and her crew would
24 not work. (RT VII 13:9-13; 130:12-13.) In response to ALJ Soble's question, "What caused you
25 to stop working at Cinagro?" Ms. Antonio replied, "They didn't let us know where we should
26 show up." (RT III 29:15-18.) ALJ Soble followed, "When you say they, do you mean Victor
27 Mendoza or Rene or someone different?" Ms. Antonio replied, "Victor told us that Rene had said
28 **nothing** until further notice." (emphasis added) (RT III 29:19-23.)

1 GM Macias called Foreman Mendoza on Wednesday, March 8, not to schedule him and
2 the crew to work on Thursday, Friday or Saturday, but rather to tell Foreman Mendoza that due
3 to a lack of work his crew was going to stop working for a few days, he did not have a specific
4 day the crew would return to work, and to pick up the crew's paychecks on Friday. (RT IV
5 133:15-134:5.) Perhaps with a strong suspicion and in an attempt to evaluate GM Macias'
6 response to his statement, Foreman Mendoza told GM Macias that he knew that the new workers
7 worked on Monday, March 6. (RT IV 134:6-10.) GM Macias lied again and denied to Foreman
8 Mendoza that the others worked on Monday. Foreman Mendoza testified that during this call on
9 Wednesday, he did not think GM Macias would call him and the crew back to work because "he
10 just told me that the checks were going to be there on Friday, and I did not receive a call from
11 him again." (RT V 8:8-9:5.)

12 On March 10, Foreman Mendoza met with GM Macias to receive the paychecks for his
13 crew. (RT V 9:14-25; 11:21-24; 135:3-22.) GM Macias told Foreman Mendoza that they had
14 worked their last day and when there was more work, he would call them. (RT V 135:23-136:2.)
15 GM Macias' final lie was that he would call Foreman Mendoza and the crew back to work.
16 Foreman Mendoza knew that was not true. At the hearing ALJ Soble questioned Foreman
17 Mendoza, "...when Rene told you that there would be no work for the next few days, what did
18 you understand that to mean?" (RT IV 143:25-144:1.) Foreman Mendoza replied, "We
19 understood, by seeing the other crew and us not working, it was obvious to us that they were
20 firing us." (RT IV 144:2-3.)

21 **2. After not working for three days and knowing they were not**
22 **scheduled for any upcoming days while new workers continued in**
23 **their place, Charging Party and her co-workers reasonably believed**
24 **that Cinagro had terminated them.**

25 Ordinarily GM Macias told Foreman Mendoza the day before where the crew would
26 work the next day. (RT VII 179:3-7.) The crew rarely missed days. (RT IV 84:10-17; GCX 12;
27 RX 1.) There were exceptions, including for rain; in those instances, Foreman Mendoza's crew
28 might not work for "only one day." (RT V 13:24-14:14.) This was the established pattern for the
previous five months. (RT V 13:24-14:14.)

1 GM Macias broke this pattern when he suddenly told Foreman Mendoza on March 8 that
2 there was no work “until further notice” and to come two days later to pick up the workers’
3 paychecks. (RT IV 133:15-134:5.) The General Counsel does not dispute Cinagro’s right to
4 break with its own established patterns and procedures if the reason for the variance is not for an
5 illicit reason. *Sam Andrews’ Sons* (1987) 13 ALRB No. 15, pp. 8-9. But in this instance, Cinagro
6 broke with its past pattern to punish workers on Foreman Mendoza’s crew for having
7 complained about the lack of proper paystubs, which owner Dighera admitted he was anxious
8 about. (RT VII 90:25-91:4.)

9 Not working for two days, then three days, then five days was not normal for Foreman
10 Mendoza’s crew and led them to reasonably believe that Cinagro was terminating them. (RT V
11 13:24-14:14.) Not being offered work, when in the past the crew had worked relatively
12 continuously, coupled with being told that there was “no work until further notice,” while new
13 workers continued in their place, would lead any reasonably prudent worker to believe that
14 Cinagro had terminated them, and that is what the discriminatees in this case in fact believed.

15 Breaking with past practices, without proper justification, can be evidence of
16 discrimination. *Ray and Star Gerawan, dba Gerawan Ranches and Gerawan Co., Inc.* (1992) 18
17 ALRB No. 5, p. 4, 9. [Abrupt and deeper layoffs than normal practice is evidence of retaliation];
18 see also *Giannini Packing Co.* (1993) 19 ALRB No. 16, ALJD p. 17 [“Failing to adhere to
19 established reemployment practices, resorting to contrived and false reasons, and giving shifting
20 and inconsistent explanations all constitute strong circumstantial evidence of the existence of an
21 undisclosed and forbidden motive.”] In this instance, Cinagro furloughed an existing crew that
22 complained about paystubs, while continuing to work a newly hired crew that did not complain
23 about paystubs. GM Macias’ claim that there was no work available is contradicted by the fact
24 that the new workers continued working and that Cinagro continued to hire new workers in
25 March and April. (GCX 7-10.) It is also contradicted by Owner Dighera’s testimony that “there
26 was always work, even later in March 2017” and there was enough work at the beginning of
27 March 2017 to keep all of the people from both crews. (RT VII 93:4-9; 94:8-11; 95:13-14.) Such
28

1 actions can only reasonably be explained as retaliation for Charging Party's and her co-workers'
2 complaints.

3 **3. Cinagro provided the workers with two paychecks on March 10,**
4 **rather than the normal single paycheck indicating that Cinagro was**
5 **terminating them.**

6 Ordinarily, GM Macias would give Foreman Mendoza paychecks every Friday in the
7 field to distribute to the workers in his crew. (RT IV 105:8-106:2.) Rather than provide the
8 weekly paychecks to Foreman Mendoza in the field on Friday, as was Supervisor Macias'
9 normal course, he called Foreman Mendoza on Wednesday, March 8 and instructed him to pick
10 up his and the crew's paychecks at the ranch on Friday, March 10. (RT V 85:3-6; VII 158:13-
11 17.) This was a departure from the norm. Further departing from the norm, Supervisor Macias
12 provided Foreman Mendoza with two paychecks for him, and two paychecks for each of the
13 workers in his crew. (RT IV 144:10-22; V 9:14-25; 17:2-5.) On normal paydays, Respondent
14 provided workers with one paycheck. Respondent's witnesses testified that the paycheck on
15 Friday was for work completed the previous week. However, none of the paychecks and
16 attachments provided included date ranges or hours which the payments represented. (RT V
17 83:5-84:14; 98:7-13.) General Counsel's Exhibit 3 is a copy of a check made out to Rigoberto
18 Perez with an attachment dated March 10, 2017. The document contains no information as to
19 what the pay period is. (GCX 3.) This is also true of General Counsel's Exhibits 2 and 11. (GCX
20 2, 11.) On March 10, at the ranch, not in the office, GM Macias provided Foreman Mendoza
21 two checks for each worker in an envelope.⁴⁰ (RT V 9:14-25; 17:2-5.) While providing these
22 checks, GM Macias told Foreman Mendoza that due to lack of work he did not know when the
23 crew would return to work and he would call Foreman Mendoza. GM Macias also told Foreman
24 Mendoza to tell the workers it was their last day worked, and when there was more work, he
25 would call us. (RT IV 135:3-22; V 11:21-24.)

26
27 ⁴⁰ There was not clear testimony on what the "second" check represented. The significance of providing a
28 second check indicates that Cinagro was finalizing its monetary obligations to the crew. GM Macias could not rebut
this testimony because he testified that the checks were inside an envelope that he handed to Foreman Mendoza and
did not know how many checks were in the envelope. (RT VII 178:15-20.)

1 In *Ridgeway, Dole* and the present case, the employer broke with established procedures
2 and paid the workers their final paychecks in an extraordinary fashion, which the Board found as
3 evidence of a discharge. *Dole, supra*, ALJD p. 32; *Ridgeway Trucking, supra*, p. 1049. See also
4 *Dublin Town Ltd.* (1986) 282 NLRB 307, 308 [employees had a reasonable basis for believing
5 they had been discharged, in part, because the employer broke from his normal practice of
6 paying employees in cash and instead gave striking employees their checks.] In *Dole Farming,*
7 *Inc.*, the workers refused to work under a new work schedule and complained to the ranch
8 manager about wages. *Id.* at p. 10. The ranch manager refused to continue the discussion with the
9 workers and “told them to go home.” *Id.* at p. 13. Later, the ranch manager personally returned
10 with the checks rather than leaving it to the crew’s supervisor, as was the norm. *Id.* at p. 14. The
11 ranch manager distributed the checks although it was not Friday, the normal payday. *Ibid.* The
12 Board found that “The departure from the norm suggests a discharge rather than a simple quit.”
13 *Id.* at p. 32. The departures from the norm here led Charging Party and her co-workers to
14 reasonably believe they were fired: GM Macias calling Foreman Mendoza on Wednesday to pick
15 up the checks on Friday outside of the normal payday cycle and providing two checks for each
16 worker rather than the one check they normally received.

17 **4. Cinagro’s agents’ words and actions, as a whole, would lead a**
18 **reasonably prudent employee to believe that Cinagro terminated them.**

19 The entire course of relevant events would lead a prudent worker to believe that Cinagro
20 had fired them. Similar to *Hale Manufacturing Co.* and *Ridgeway Trucking Co.*, GM Macias did
21 not explicitly tell charging party and her co-workers that they were fired. GM Macias repeatedly
22 told Foreman Mendoza and the workers that there was “no work until further notice,” while he
23 hired new workers and gave them work. (RT I 73:13-19; IV 132:6-15; 133:15-134:5; 134:24-
24 135:2; GCX 6-10.) Nonetheless, ample evidence shows that a reasonable worker would believe
25 Cinagro terminated their employment.

26 First, the evidence indicates that GM Macias was well aware of the workers’ demands
27 that Cinagro provide drinking water, workers’ compensation, and paystubs. (RT I 154:16-155:7;
28 II 9:8-25; III 156:8-23; 158:14-21; 160:7-10; VII 189:4-12; 191:12-24; 192:14-19.) And the

1 workers were aware of Cinagro's and GM Macias' long history of stringing them along and not
2 addressing their concerns. (RT I 46:26-27; 58:12-16; 107:1-108:4; 152:15-153:1; II 134:17-23;
3 IV 107:14-23.)

4 Second, work was available. The company hired new workers approximately two weeks
5 before they first told Charging Party and her co-workers that there was no work for them midday
6 March 4. (RT VII 130:21-24, GCX 12.) The new workers worked March 4, 6, 8, 9, 10 and 11.
7 (GCX 6.) Furthermore, Cinagro grew its workforce during the following work weeks -- March
8 13 to 17, March 27 to April 2, and April 3 to 9, proving that work was available. (GCX 7-10.)

9 Third, GM Macias lied to Foreman Mendoza and the workers on, at least, March 4, 5, 6,
10 8, and 10 about the availability of work and/or whether the new employees continued working.
11 (RT I 73:13-15; II 136:1-3; IV 131:4-7; 132:6-25; 133:15-134:5; V 135:3-136:2.) Charging Party
12 and her co-workers were aware of these lies. (RT I 73:13-19; II 136:9-12.) On at least one
13 occasion on March 6, Mr. Cruz, Ms. Jimenez and Ms. Duarte witnessed GM Macias standing in
14 a field as the new employees worked when, simultaneously, GM Macias told Ms. Jimenez that
15 there was no work, and the new employees were not working. (RT I 74:24-75:14; II 12:12-20;
16 13:23-14:16.) On March 8, Foreman Mendoza inquired about work that occurred on March 6
17 despite GM Macias' representation to him that there was no work on March 6. (RT IV 134:6-10.)
18 It was during that conversation that GM Macias told Foreman Mendoza to pick up the workers'
19 checks because there was no work for them. (RT IV 133:15-134:5.)

20 Fourth, by March 8, the discriminatees had not worked for three days and knew that they
21 were not scheduled for the next three days. (RT I 73:1-3; II 12:3-5; IV 132:6-15; 132:25-133:11;
22 134:24-135:2.) Ordinarily, GM Macias told Foreman Mendoza the day before where the crew
23 would be working the next day. (RT IV 79:22-25; VII 178:21-179:7.) This was the established
24 pattern for the previous five months. (RT V 13:24-14:14.) GM Macias broke this pattern when
25 he suddenly told Foreman Mendoza on March 8 that there was no work "until further notice" and
26 to come two days later to pick up the workers' paychecks. (RT IV 133:15-134:5.)
27
28

1 Fifth, GM Macias also broke with past practices when, on March 10, he gave Foreman
2 Mendoza two paychecks for each worker. (RT V 9:14-25; 11:21-24; 17:2-5; VII 178:15-20.)
3 This change indicated to the workers that they were being terminated. (RT V 90:4-7.)

4 Given these circumstances, a reasonable worker would believe Cinagro terminated them
5 on March 4 and had no intention of recalling them.

6 **5. Charging Party and several of her co-workers met with Oxnard**
7 **ALRB staff on March 10, shortly after they were told that there was**
8 **“no work until further notice,” which evidences that the workers**
9 **reasonably believed that Cinagro had fired them.**

10 As in *Ridgeway Trucking Co.* and *Hale Manufacturing Co.*, the workers sought legal
11 assistance after they were terminated. (GCX 1.) On March 10, 2017, the same day that Foreman
12 Mendoza gave his crew their final paychecks, Charging Party Jimenez and several of her co-
13 workers met with staff of the Oxnard Sub-regional Office of the ALRB. (GCX 1.) Charging
14 Party Jimenez signed the charge on March 10, and it was filed on March 13. (GCX 1.) The
15 workers’ meeting with ALRB staff immediately on the heels of their termination is evidence that
16 the workers reasonably believed that Cinagro had fired them illegally. *NLRB v. Ridgeway*
17 *Trucking Co.* (5th Cir. 1980) 622 F.2d 1222, 1224. A prudent person who did not believe they
18 had been terminated would not have sought legal assistance for a wrongful termination.

19 **ii. Respondent did not clarify any ambiguity it caused about the status of**
20 **work for Foreman Mendoza’s crew, nor did it repudiate GM Macias’**
21 **words and actions or inform the workers that they were not terminated.**

22 An employer violates the Act by causing workers to reasonably believe that they were
23 discharged for engaging in protected concerted activity “even if [the employer] did not intend to
24 convey the message that the workers were fired.” *Boyd Branson Flowers, Inc.* (1995) 21 ALRB
25 No. 4, p. 2, fn. 4, citing *American Protection Industries, et al.* (1991) 17 ALRB No. 21, ALJ
26 Dec., p. 18; *Trumbull Asphalt Company of Delaware* (8th Cir. 1964) 327 F.2d 841, 843; [“it was
27 incumbent upon Boyd, if he did not intend to fire the employees, to clarify the situation.”] and
28 *Ridgeway Trucking Co., supra*. Even if “the entire affair was the result of a misunderstanding...,
it was incumbent upon [the employer], if he did not intend to fire the employees, to clarify the
situation.” *Ibid.*

1 The Charge was served on Owner Dighera on March 13. (GCX 1) Owner Dighera
2 testified that he was aware of the Charge and understood its allegations. (RT VII 73:11-14.) If
3 there were any questions in Owner Dighera's mind about whether workers in Foreman
4 Mendoza's crew thought they were fired or laid off, receipt of the Charge answered that
5 question. The Charge put Cinagro on notice that the workers believed that they had been fired in
6 retaliation for their protected concerted activity. (GCX 1; RT VII 73:11-14.) And how did
7 Cinagro respond? Did Cinagro call each worker, or send a letter to each worker clarifying that
8 the workers were not terminated, but simply laid off pending future work? No. Instead, Owner
9 Dighera, upon receipt of the Charge, called a neighboring blueberry grower to ask if the workers
10 were working there. (RT VII 104:16-105:1; 113:2-4.) Owner Dighera testified that his reason for
11 calling was not to locate the workers and clarify that they were not terminated. (RT VII 106:3-6.)
12 Instead, he called the neighboring farmer to find out if they were working to mitigate his
13 damages if they made a claim against him. (RT 106:7-12.) Cinagro breached its duty to clarify
14 the ambiguity caused by its own words and actions. Further, as the Board found in *Boyd Branson*
15 *Flowers, Inc.* and *Dole*, Cinagro likely did not clarify the ambiguity because GM Macias and Mr.
16 Dighera believed that they had, in fact, terminated the work relationship when GM Macias told
17 the workers that there was "no work until further notice." (RT I 73:17-19; 121:4-21; II 136:1-3;
18 III 63:17-21; V 135:23-140:2.)

19 **E. The evidence at trial proves that Cinagro was substantially motivated to**
20 **terminate Foreman Mendoza's crew because they engaged in protected**
21 **concerted activity.**

22 The preponderance of evidence at the hearing showed that employees engaged in
23 protected concerted activity, Respondent knew of the activity, and Respondent fired Foreman
24 Mendoza and his crew in March 2017. The circumstantial evidence supports a finding that there
25 was a causal relationship between the employees' protected activity and the adverse employment
26 action on the part of the employer (i.e., the employee's protected activity was a 'motivating
27 factor' for the adverse action). *Rincon Pacific, LLC* (2020) 46 ALRB No. 4, 26-27 citing
28 *Gerawan Farming, Inc.* 45 ALRB No. 7, pp. 3-4.

1 **i. A short amount of time passed between the workers' complaints in**
2 **February and GM Macias not scheduling them to work.**

3 The short amount of time that passed from the workers' last complaints in February to
4 GM Macias, to the day GM Macias decided to discharge the crew strongly supports an inference
5 that Respondent unlawfully discharged the discriminatees. *Harlan Ranch Co.* (1992) 18 ALRB
6 No. 8, ALJD p. 44 [Where employees were laid off within 3 weeks of their concerted activity
7 and employer failed to prove unavailability of work, General Counsel proved the layoffs
8 unlawful.] *Hadley's Date Gardens, Inc.* (2005) 31 ALRB 1, p. 14. (The Board found that while
9 timing or proximity of the adverse action to the protected concerted activity on its own will not
10 establish a violation, timing is a "strong circumstantial factor.") Although timing alone does not
11 establish a violation, it does suggest improper motive for Respondent's acts. *Sandhu Brothers*
12 *Poultry and Farming* (2014) 40 ALRB No. 12. The workers participated in a meeting with GM
13 Macias in the beginning of February and another at the end of February. (RT I 48:18-24; 49:2-
14 12; 51:19-52:4; 154:16-155:7; RT II 5:3-15; 5:20-23; 58:18-24; 133:23-134:3; III 99:15-22;
15 158:14-21.) Ms. Duarte testified that the last time her and her co-workers met with GM Macias
16 about the lack of paycheck stubs it was close to their last day of work. (RT II 58:18-24.) The first
17 payroll prepared by Ms. Ito and containing some sort of attachment to the check was on February
18 24, 2017. (RT V 126:11-19; 156:10-14.) Upon receiving those paychecks with the purported
19 paystubs, the workers' complaints continued because the purported paystubs lacked numerous
20 pieces of information required by law, including information the workers desperately needed to
21 qualify for certain benefits for their children, and to understand if they were paid correctly. (RT
22 II 55:3-25; 57:19-22; 130:14-21; 132:25-133:1; III 39:16-40:5; IV 124:21-23.)

23 **ii. Cinagro did not lay off Charging Party and her co-workers for lack of**
24 **work, because work was available and Cinagro hired new workers**
25 **even as it told Charging Party and her co-workers that there was no**
26 **work for them.**

27 According to the testimony of GM Macias, Cinagro hired four or five new workers
28 approximately two weeks before he told Foreman Mendoza that there was no more work for his
29 crew. (RT VII 130:21-24.) Records for four workers who were not in Foreman Mendoza's crew
30 show that the workers started on February 21, 2017. (GCX 12.) Owner Dighera testified that the

1 workers were hired to help Foreman Mendoza's crew. (RT IV 126:15-19; 127:24-128:2; VII
2 84:24-85:9.) Ms. Jimenez testified that GM Macias told her and her co-workers that the other
3 workers were brought on to support their crew because there was going to be a lot of orders. (RT
4 I 38:23-25.) Owner Dighera testified that the four or five new workers were paid the same way
5 that Foreman Mendoza's crew was and that they did not complain about how they were paid.
6 (RT VII 88:5-23.) Those workers had comparable skills to the workers in Foreman Mendoza's
7 crew. (RT VII 86:11-18.) Owner Dighera also testified that in March 2017 there was enough
8 work for both Foreman Mendoza's crew and the other group of workers, and he needed more
9 people after Foreman Mendoza and his crew stopped working at Cinagro. (RT VII 93:4-9; 94:8-
10 11; 95:13-14; 102:13-18.)

11 **iii. Cinagro's explanation for the terminations shift repeatedly and is not**
12 **credible.**

13 Like sand on a beach, Cinagro's defense shifts in the breeze. At trial, GM Macias
14 testified that the workers did not show up to work on Monday, March 6. (RT VII 153:9-15.) ALJ
15 Soble asked Ms. Antonio what caused her to stop working at Cinagro, she replied, "They didn't
16 let us know where we should show up." (RT III 29:15-18.) ALJ Soble continued, "...do you
17 mean Victor Mendoza, or Rene, or someone different?" Ms. Antonio answered, "Victor told us
18 that Rene had said nothing until further notice." (RT III 29:19-23.) In order to evade
19 responsibility for the crew not showing up to work, GM Macias said at the hearing that he
20 offered Foreman Mendoza's crew weeding work on Monday, March 6, which they refused
21 because they do not like weeding. (RT VII 137:7-14; 143:9-13.) This, the latest of several
22 explanations put forth by Cinagro, is not credible.

23 On June 16, 2020, Cinagro pled that Charging Party and fellow crew members
24 "voluntarily quit their employment because their farm labor contractor employer failed to show
25 up for work and thereby left the Charging parties (sic.) without supervision." (Respondent's
26 Answer, p. 2, lines 12-14.) Six months later, during the Pre-Hearing Conference, Cinagro's
27 counsel stated that the "workers were unhappy and they left," some going to a nearby grower,
28 shortly after the Cinagro lost a pumpkin growing contract. (Pre-Hearing Conference Order dated

1 January 4, 2021, p. 3, lines 8-10.) Cinagro's Answer to the General Counsel's Amended
2 Complaint, filed just weeks later, does not mention a lost pumpkin contract or an employer who
3 failed to show for work. Cinagro's Amended Answer pleads simply "Charging Party and her
4 fellow crew members voluntarily quit their employment on March 4, 2017." (Respondent's
5 Answer to the Amended Complaint, p. 2, line 12 – p. 3. line 3.) When the sands settle, the grains
6 come to rest on the workers' alleged disdain for weeding, a fact not in any of Cinagro's
7 pleadings and not supported by any evidence except GM Macias' self-serving statement.

8 Cinagro's shifting explanations of what occurred are evidence that Cinagro's reasoning is
9 mere pretext. *Ranch No. 1, Inc.* (1986) 12 ALRB No. 21, p. 6 [belated introduction of a new
10 justification suggests the existence of an improper motive]; *Kawahara Nurseries, Inc.* (2014) 40
11 ALRB No. 11, p. 17 [shifting or inconsistent justifications constitute strong circumstantial
12 evidence of a forbidden motive.] Cinagro's false explanation is evidence that Cinagro's
13 reasoning is pretext. *The Garin Company* (1986) 12 ALRB No. 14, pp. 4-5 ["asserted reasons
14 either did not exist or were not in fact relied upon, thereby leaving intact the inference of
15 wrongful motive established by the General Counsel."] Eight witnesses—Foreman Mendoza,
16 Charging Party Jimenez, Ms. Duarte, Mr. Cruz, Ms. Antonio, Ms. Santiago, Ignacia Sanchez and
17 Maria Lauriano—testified that they were told either by GM Macias or Foreman Mendoza that
18 there was no further work. (RT I 73:17-19; II 14:11-14; 60:12-20; 136:1-3; III 63:17-21; IV 9:4-
19 10; 16:1-4; 132:16-25; 133:15-134:16; 134:24-135:22; VI 43:17-24; 101:25-102:6.)
20 Furthermore, Owner Dighera contradicted GM Macias on this key point. Owner Dighera testified
21 that in early March "there was always work, even later in March 2017." And he testified that
22 there was enough work for both Foreman Mendoza's crew and the other workers. (RT VII 93:4-
23 9; 94:8-11; 95:13-14.)

24 Unlike Cinagro's shifting explanation for its actions, Charging Party's foundation is
25 solid; neither she, nor her witnesses have changed or swayed from their testimony.

1 **F. Respondent failed to show that it would not have called Charging Party and**
2 **her co-workers to work even if they had not complained about the lack of**
3 **drinking water and paystubs.**

4 Once the General Counsel establishes a prima facie case that protected activity was a
5 motivating factor in an employer's decision to discharge an employee, the burden of persuasion
6 shifts to the employer to demonstrate that it would have taken the same adverse action in the
7 absence of such activity. *Wonderful Orchards, LLC* 46 ALRB No. 2, ALJD p. 13; *Martori*
8 *Brothers v. ALRB* (1981) 29 Cal.3d 721; *Wright Line* (1980) 251 NLRB No 150. The General
9 Counsel showed by a preponderance of the evidence that Charging Party and her co-workers
10 engaged in protected concerted activity, that Cinagro was aware of that activity, and that Cinagro
11 told them that there was no further work for them because of that activity. Respondent failed to
12 show that it would not have offered employment to Charging Party and her co-workers in March
13 2017 even if they had not engaged in protected concerted activity.

14 Respondent failed entirely in corroborating GM Macias' assertions. In fact, Owner
15 Dighera's testimony contradicted GM Macias' testimony on the central issue of whether there
16 was work available in March 2017. (RT VII 93:4-9; 94:8-11; 95:13-14.) Respondent also
17 asserted various conflicting theories about why Foreman Mendoza and his crew stopped working
18 at Cinagro—that they “voluntarily quit their employment because their farm labor contractor
19 employer failed to show up for work and thereby left the Charging parties (sic.) without
20 supervision,” [Respondent's Answer to Complaint, June 16, 2020, p. 2, Ins. 12-14.] that they
21 “were unhappy and they left,” after Cinagro lost a pumpkin contract [Pre-Hearing Conf. Order,
22 Jan. 4, 2021, p. 3, Ins. 8-10.] or, finally, at trial, that they had a disdain for weeding. (RT VII
23 144:17-20.)

24 GM Macias' allegations about the crew not wanting to weed is not grounded in any fact
25 and not supported by any evidence. GM Macias testified that on Sunday, March 5, that he told
26 Foreman Mendoza that there was only weeding work available on Monday, March 6. (RT VII
27 137:7-14.) Documentary evidence introduced by the General Counsel shows that no weeding
28 work was performed on Monday, March 6 and that newly hired workers performed work other
29 than weeding on that day. (GCX 6.) GM Macias testified that Foreman Mendoza's crew did not

1 like to weed. (RT VII 144:17-20.) Documentary evidence shows that Foreman Mendoza's crew
2 performed weeding work. (RX 1.) Judge Soble directly asked GM Macias if he told Foreman
3 Mendoza he was terminated, and GM Macias evaded answering directly by stating that he told
4 Foreman Mendoza that there was work for weeding and cleaning and that he thought that is why
5 Foreman Mendoza's crew did not want to go back. (RT VII 143:4-13.) Judge Soble followed up
6 and asked, "Did Mr. Mendoza ever tell you that the workers did not want to go back?" (RT
7 143:18-144:2) GM Macias did not directly answer the question. An adverse inference is
8 warranted here by the unexpected failure of GM Macias to testify regarding a factual issue upon
9 which he would likely have knowledge. *Flexsteel Industries*, 316 NLRB 745, 757-758.

10 GM Macias also testified that there was downturn in production and not enough work for
11 Foreman Mendoza's crew. (RT VII 137:7-14.) Respondent did not produce any documentary
12 evidence to support that claim. On the contrary, Respondent's owner testified that there was
13 sufficient work in March 2017 and there was enough work for both Foreman Mendoza's crew
14 and the other workers in March 2017. (RT VII 93:4-9; 94:8-11; 95:13-14.)

15 An employer may not simply present a legitimate reason for its action. Rather, it must
16 persuade by a preponderance of evidence that the same action would have been taken in the
17 absence of the protected conduct. *Wonderful Orchards, LLC* 46 ALRB No. 2, ALJD p. 13.
18 Respondent failed to meet its burden of showing that it would have not offered Foreman
19 Mendoza's crew work even if the workers had not complained about the lack of drinking water
20 and paystubs.

21 **G. The Agricultural Labor Relations Act protects Foreman Mendoza because**
22 **Cinagro fired him to eliminate his crew because of their protected concerted**
23 **activity.**

24 The Act protects Foreman Mendoza because his discharge was the means by which
25 Cinagro unlawfully discriminated against its employees. *Ruline Nursery* (1981) 7 ALRB No. 21,
26 p. 11. Supervisory personnel are not customarily afforded protections under the Act because a
27 supervisor serves at the will of the employer and can be discharged at any time, for any reason,
28 without violating the Act. *Id.* at pp. 8-9. Exceptions to the general rule arise where the discharge

1 of a supervisor would run counter to the Act's underlying philosophy. *Sequoia Orange, Co.*
2 (1985) 11 ALRB No. 21, ALJD p. 92.

3 There are three instances where a supervisor's discharge may constitute a violation of the
4 Act. *Ruline Nursery* (1981) 7 ALRB No. 21, p. 9. One instance is when a supervisor is
5 discharged for refusing to engage in activities proscribed by the Act, and another instance is
6 when a supervisor is discharged for having engaged in conduct designed to protect employee
7 rights, such as giving testimony adverse to the employer in an ALRB proceeding. *Id.* at pp. 10-
8 11. The third instance is when the discharge is the method the employer uses to unlawfully
9 discriminate against its employees. *Id.* at p. 11. Here, Foreman Mendoza's termination was a
10 violation of the Act because it was the method by which Cinagro terminated his crew's
11 employment after they engaged in protected concerted activity.

12 A prima facie case is made when the employees' tenure is expressly conditioned on the
13 continued employment of their supervisor, the employees engaged in protected concerted
14 activities, and their supervisor was discharged as a means of terminating the employees because
15 of their concerted activity. *Ruline Nursery* (1981) 7 ALRB No. 21, p. 11, citing *Pioneer Drilling*
16 *Co., Inc.* (1967) 162 NLRB 918; *Krebs and King Toyota, Inc.* (1972) 197 NLRB 462; *VADA of*
17 *Oklahoma, Inc.* (1975) 216 NLRB 750.⁴¹

18 In *Sequoia Orange*, the Foreman hired and oversaw a citrus harvesting crew. The
19 Foreman informed his crew where to work each day and generally ensured the work was done
20 properly. The workers in his crew complained to the Foreman twice about the amount of fruit
21 available to pick at one ranch and asked him to talk to the supervisor about a rate increase.
22 *Sequoia Orange, Co.* (1985) 11 ALRB No. 21, ALJD pp. 86-87. The Foreman relayed their
23 concerns and request for a rate increase to the supervisor. The supervisor went out to the ranch,
24 and the Foreman told him "that the people were asking for a raise and that the fruit was very
25 bad." The supervisor responded, "...no. There is no more raise. There is no more work for you
26 [in the plural, thus meaning the crew.]" *Id.* at ALJD p. 87. The Foreman relayed the message to

27 ⁴¹ The present case is distinguishable from *Ruline Nursery* because the discriminatees' employment at
28 Cinagro was conditioned on the continued employment of Foreman Mendoza. In *Ruline Nursery*, the workers'
continued employment was independent of their foreman's and the foreman was terminated for cause.

1 his crew that there would be no raise, and that they were all dismissed. *Id.* at ALJD p. 88. The
2 supervisor did not speak with the crew and tell them to remain, and he did not go to the field to
3 speak with the workers because he assumed that “once the foreman had been discharged, the
4 crew would not remain.” *Id.* at ALJD p. 94. The Board found that the Foreman was afforded the
5 protections of the Act and his discharge was a violation of the Act. *Sequoia Orange, Co.* (1985)
6 11 ALRB No. 21. The facts of the instant case are analogous.

7 **i. The discriminatees’ employment was conditioned on the continued**
8 **employment of Foreman Mendoza.**

9 As in *Sequoia*, Foreman Mendoza hired his own crew, informed the crew members where
10 they would work on any given day, and oversaw the crew’s work. (RT II 120:4-16; IV 77:15-23;
11 V 30:16-19.) Foreman Mendoza was solely responsible for ensuring that his crew showed up to
12 work each day. (RT IV 77:24-78:7.) Supervisor Macias was not in the field every day, only
13 going out every two to three days. (RT IV 86:14-17.) Supervisor Macias relied on Foreman
14 Mendoza to instruct his crew where to work, how to perform the work and to ensure the crew’s
15 daily output. (RT IV 77:15-23; 79:22-25; 85:22-86:13.)

16 Foreman Mendoza and most of the discriminatees began working together for farm labor
17 contractor Mike’s Labor before working at Cinagro. (RT IV 76:20-25.) While at Mike’s Labor,
18 Foreman Mendoza took his crew to Art’s Labor Service. (RT IV 77:7-14; V 30:6-15; 31:6-9.)
19 While working with Art’s Labor Service, the crew performed work for various growers,
20 including Respondent. (RT V 72:15-73:11; 73:17-74:6.) All of the discriminatees—Marisol
21 Jimenez, Hector Cruz Vasquez, Yolanda Antonio, Rigoberto Perez, Maria Santiago, and Maria
22 Duarte—worked under Foreman Mendoza before going to work at Cinagro and, together, went
23 to work at Cinagro via Foreman Mendoza.⁴² In November 2016, Cinagro had no forepersons and

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25
26 ⁴² When Respondent hired Foreman Mendoza’s crew, GM Macias placed two long standing employees into
27 his crew. Respondent treated these two employees different than Foreman Mendoza’s crew. For instance, GM
28 Macias personally gave them their final paychecks and, later, rehired one of them. (RT VI 106:5-8; 116:6-11; VII
136:6-11.) Records show in the week preceding the termination, those two workers worked harvesting collards on
February 22-24 while nobody else in Foreman Mendoza’s crew, nor the other group, did. (GCX 12 CFI011006-
CFI011007 compare to rest of pages in this exhibit.)

1 wanted to expand its workforce. Cinagro hired Foreman Mendoza, and, in turn, hired his crew.⁴³
2 (RT V 30:6-15; 31:6-9.)

3 Upon receiving their second paychecks from Cinagro, the crewmembers asked Foreman
4 Mendoza why the checks looked different, and why they did not also receive paystubs. (RT IV
5 106:8-23.) Foreman Mendoza, like the foreman in *Sequoia Orange*, acted as the conduit between
6 the employer and the crew members. He contacted GM Macias, who went to the field and
7 explained that Cinagro hired the workers directly, would continue paying them the same way as
8 Art's Labor Service, and asked them to be patient and wait for paystubs. (RT IV 79:3-21.) None
9 of the workers asked questions at that meeting or made comments because, as in *Sequoia*
10 *Orange*, they relied on Foreman Mendoza as their spokesperson. (RT IV 80:1-6.) As Foreman
11 Mendoza continued to receive complaints and requests for more information from his
12 crewmembers, he was faced with a decision. He could either attempt to use his position of power
13 in relation to the crew to quash the complaints and attempt to silence the crew or he could relay
14 the complaints and requests that GM Macias go out to the field to address the crewmembers'
15 concerns. He chose the latter.

16 **ii. Cinagro discharged Foreman Mendoza as the means to discharge the**
17 **workers in his crew because of their protected concerted activity.**

18 Cinagro rid itself of workers who complained about the illegal way it paid its workers by
19 ridding itself of Foreman Mendoza. *Pioneer Drilling* (1967) 162 NLRB 918, 924. In *Sequoia*
20 *Orange*, the Board found "that the retention of individual crewmembers was dependent on the
21 continued retention of their individual foreman due to the circumstances surrounding the
22 discharge of the foreman." *Sequoia Orange, Co.* (1985) 11 ALRB No. 21, ALJD p. 94. After the
23 foreman was told of his termination, no one from his crew remained at the work site to await
24 further orders. The Board found that the supervisor assumed that once the foreman had been
25 discharged, the crew would not remain; in other words, the employer knew that eliminating the

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27 ⁴³ The facts in the present case are even more indicative that the workers' continued employment was
28 conditioned on the employment of the foreman than in *Sequoia Orange* because Foreman Mendoza assembled and
hired his crew *before* he brought them to Cinagro, whereas the foreman in *Sequoia Orange* hired his crew after
joining *Sequoia Orange* and there is no evidence in the record that they had worked together previously.

1 foreman would eliminate the crew. The supervisor did not speak with the crew and tell them to
2 remain despite what had happened to the foreman. *Id* at ALJD pp. 93-93.

3 Here, the evidence leads to the same conclusion. GM Macias knew that terminating
4 Foreman Mendoza's employment was the means to rid Cinagro of the discriminatees. Foreman
5 Mendoza and his crew came to Cinagro as a package and would leave the same way. GM Macias
6 made no effort to communicate with each discriminatee to let them know that there was no more
7 work because, as in *Sequoia Orange*, he knew that eliminating Foreman Mendoza would
8 eliminate all the workers in his crew. Furthermore, they would get the message, because
9 Foreman Mendoza was the sole conduit through which Cinagro communicated all information to
10 the crew. GM Macias did not give the workers their final checks, nor did he attempt to
11 communicate with each one individually to let them know about when they would be called back
12 to work. Ms. Antonio and Mr. Perez called GM Macias twice and he refused to answer their
13 calls. (RT II136:13-17; III 62:9-17.) He left the distribution of the final paycheck to Foreman
14 Mendoza and relied on him to advise the workers they no longer had jobs at Cinagro, except for
15 the two longtime Cinagro employees that GM Macias placed into Foreman Mendoza's crew at
16 the beginning of the crew's employment. (RT V 135:3-136:2; VI 106:5-8.) This is further
17 evidence that Cinagro viewed Foreman Mendoza as the conduit of his crew's complaints,
18 meaning the workers he brought with him to Cinagro, the Charging Party and others. Foreman
19 Mendoza's discharge was a necessary part of Cinagro's retaliation against Charging Party and
20 her co-workers because of their protected concerted activity. The discriminatees could
21 reasonably believe that their discharges were effectuated as a result of "a chain of events set in
22 motion by the crew's concerted protests" about the paycheck stubs. *Id* at ALJD p. 96.

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1 **H. CONCLUSION**

2 For the foregoing reasons, Respondent violated the Act when it fired Foreman Mendoza
3 and the workers in his crew because together, they complained about Cinagro's many workplace
4 violations.

5 Dated this 12th day of May 2021, at Oxnard, California.

6
7 AGRICULTURAL LABOR RELATIONS BOARD
8 JULIA L. MONTGOMERY
9 General Counsel

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11 JESSICA ARCINIEGA
12 Assistant General Counsel
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State of California
Agricultural Labor Relations Board
PROOF OF SERVICE
(8 Cal. Code Regs. § 20164)

I am a citizen of the United States and a resident of the County of Ventura. I am over the age of eighteen years and not a party to the within entitled action. My business address is: ALRB, 1901 Rice Avenue, Suite 300, Oxnard, California, 93030. On **May 12, 2021** I served a copy of the within **GENERAL COUNSEL'S POST HEARING BRIEF** in Case Name: **Cinagro Farms, Inc.**; Case Number: **2017-CE-008-SAL** on the parties in said action, in the following manner:

By Electronic File: The above-referenced documents were e-filed today to the following parties at the listed e-file address; and

By Electronic mail: The above-referenced document was e-mailed to the following parties at the listed e-mail addresses.

By U.S. Certified mail: The above referenced document was mailed to the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oxnard, California; and

| <u>Via E-File:</u> | <u>Via Electronic Mail:</u> |
|--|--|
| Santiago Avila-Gomez Executive Secretary Agricultural Labor Relations Board 1325 J Street, Suite 1900 Sacramento, CA 95814 E-File: efile@alrb.ca.gov | Mark R. Soble Chief Administrative Law Judge Agricultural Labor Relations Board Mark.Soble@alrb.ca.gov |
| <u>Via Certified Mail:</u> Marisol Jimenez 1201 W. Gonzalez Rd., Apt. 30 Oxnard, CA 93033 Certified Mail No: 70200640000075704648 | Robert P. Roy Ventura County Agricultural Association 916 W. Ventura Blvd. Camarillo, CA 93010 E-Mail: rob-vcaa@pacbell.net |
| | Julia Montgomery General Counsel Agricultural Labor Relations Board 1325 J Street, Suite 1900 Sacramento, CA 95814 E-Mail: julia.montgomery@alrb.ca.gov |

Executed on May 12, 2021, at Oxnard, California. I certify (or declare) under penalty of perjury that the foregoing is true and correct.


Sheila L. Fountain