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19 STATE OF CALIFORNIA

20 AGRICULTURAL LABOR RELATIONS BOARD

21 In the Matter of:

22 CINAGRO FARMS, INC.,

23 Respondent,

24 and

25 MARISOL JIMENEZ,

26 Charging Party.

Case No.: 2017-CE-008-SAL

**GENERAL COUNSEL'S REPLY TO
RESPONDENT CINAGRO FARMS,
INC.'S BRIEF IN SUPPORT OF
EXCEPTIONS TO DECISION OF
ADMINISTRATIVE LAW JUDGE MARK
SOBLE**

Cal. Code of Regs., tit. 8, §20282

1 **I. INTRODUCTION**

2 The General Counsel of the Agricultural Labor Relations Board files this reply to
3 Respondent Cinagro Farms, Inc.'s ("Cinagro") exceptions to the Administrative Law Judge's
4 ("ALJ") Decision ("ALJD") issued on October 27, 2021. ALJ Mark Soble ("ALJ Soble")
5 correctly found that Cinagro violated Section 1153(a) of the Agricultural Labor Relations Act
6 ("Act") when it unlawfully terminated foreman Victor Mendoza's ("foreman Mendoza") crew
7 after they engaged in protected concerted activity. Cinagro's exceptions brief, failed to show that
8 the factual findings were not supported by a preponderance of the evidence. The General
9 Counsel respectfully requests that the Board uphold ALJ Soble's decision because Cinagro failed
10 to make the required showing.

11 **II. CINAGRO FAILED TO SHOW ANY REASON TO OVERTURN THE**
12 **WELL-REASONED ALJ DECISION**

13 At the Exceptions stage, the Board reviews the applicable law and evidence to determine
14 whether the factual findings are supported by a preponderance of the evidence. (Cal. Lab. Code
15 §1160.3) ALJ findings that are supported by credible evidence should be accorded great weight
16 and be rejected only on the basis of contrary evidence of "considerable substantiality." (*George*
17 *Arakelian Farms v. ALRB* (1980) 111 Cal.App.3d 258 citing *Lamb v. WCAB* (1974) 11 Cal.3d
18 274.) Respondent's exceptions cite no such evidence.

19 The Board will not disturb credibility resolutions based on demeanor unless the clear
20 preponderance of the evidence demonstrates they are in error. (*South Lakes Dairy Farm*, (2013)
21 39 ALRB No. 1, Citing to *United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3;
22 *P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544, enf'd (3d
23 Cir. 1951) 188 F.2d 362.) In instances where credibility determinations are based on things other
24 than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence
25 or absence of corroboration, the Board will not overrule the ALJ's credibility determinations
26 unless they conflict with well-supported inferences from the record considered as a whole. (*P.H.*
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1 *Ranch* (1966) 22 ALRB No.1; See *Rivera Vineyards* (2003) 29 ALRB No. 5, p. 3, fn. 3; *UFW*
2 (*Ocegueda*), supra; *S&S Ranch, Inc.* (1996) 22 ALRB No. 7, p. 4.)

3 **A. Cinagro Violated the Act When it Discharged Foreman Mendoza and His Crew.**

4 ALJ Soble found that Cinagro violated the Act when it discharged the crew. ALJ Soble
5 articulated his reasoning and credibility determinations. There is no justification for overturning
6 his findings. Respondent argued that foreman Mendoza's crew members quit their employment.
7 ALJ Soble rejected that argument because the preponderance of the evidence shows that
8 Respondent's general manager told the crew there was no more work for them until further
9 notice and did not call them back to work. Instead, based on the evidence presented at the
10 hearing, ALJ Soble correctly found that the crew "reasonably concluded they had been fired."
11 (ALJD p. 62.)

12 **B. ALJ Soble Correctly Determined Cinagro's Actions and Words Led Foreman**
13 **Mendoza and His Crew to Believe They Were Fired.**

14 ALJ Soble rejected Respondent's contention that foreman Mendoza's crew voluntarily
15 quit based on the circumstantial evidence presented at hearing, including the proximity of the
16 crew's complaints to their discharge, the lack of discipline or warnings about their work, the new
17 crew continuing to work, and the company's false testimony that the crew quit. (ALJD p. 62.)
18 Cinagro has not presented any credible evidence or arguments to support its contention that the
19 ALJ's decision conflicts with well-supported inferences from the record considered as a whole.
20 (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544, enf'd
21 (3d Cir. 1951) 188 F.2d 362.) The ALJ correctly found, based on the evidence as a whole that
22 Respondent's actions and words led foreman Mendoza and his crew to believe that Respondent
23 discharged them. (See *Abatti Farms, Inc. v. ALRB* (1980) 107 Cal.App.3d 317 (circumstantial
24 evidence is sufficient to establish unlawful discharge).)

25 A discharge can be established, as it was here, when the employer's words or actions
26 would reasonably cause an employee to believe the company discharged them, and where the
27 employer fails to clarify its intent. (*Boyd Branson Flowers, Inc.* (1995) 21 ALRB No. 4.) A
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1 finding of a discharge does not require the use of formal words of firing. (*P & M Vanderpoel*
2 *Dairy*, (2014) 40 ALRB No. 8; See *NLRB v. Trumbull Asphalt Company of Delaware* (8th Cir.
3 1964) 327 F.2d 841.) It is sufficient that the words or actions of the Respondent would logically
4 lead a prudent person to believe that he was terminated. (*Id.*)

5 **C. The Evidentiary Record Supports The ALJ's Dismissal of GM Macias'**

6 **Testimony that He Offered Foreman Mendoza and His Crew Weeding Work.**

7 ALJ Soble determined that General Manager Rene Macias ("GM Macias") Macias was
8 not credible when he testified that he informed foreman Mendoza of available alternative work.
9 Respondent failed to present a clear preponderance of the evidence demonstrating that ALJ
10 Soble's credibility resolution was erroneous. (*South Lakes Dairy Farm*, (2013) 39 ALRB No. 1,
11 citing to *United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3; *P.H. Ranch*
12 (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544, enf'd (3d Cir. 1951)
13 188 F.2d 362.) In Respondent's exceptions brief, it continues to assert that GM Macias'
14 testimony was credibly and supported by the record. However, Respondent simply restates GM
15 Macias' and Owner Anthony Dighera's ("Owner Dighera") testimony and misstates the
16 evidence. Respondent disputes the photographs presented at the hearing were the new crew
17 working on March 6, 2017 but fails to address the payroll records demonstrating the new crew
18 did in fact work that day.

19 ALJ Soble correctly reasoned that GM Macias "disliked Victor and his crew" based on
20 GM Macias' demeanor, evidence, and the inconsistency of his testimony with that of Owner
21 Dighera's testimony. See *Vincent B. Zaninovich & Sons*, (2008) 34 ALRB No. 3 (the ALJ's
22 decision reflected the ALJ evaluated the testimony, the evidentiary record, discussed the
23 testimony in light of uncontested facts, and made individualized observations concerning each
24 witness's demeanor.) Respondent does not present any evidence that ALJ Soble's
25 determination of GM Macias' testimony conflicts with well-supported inferences from the record
26 considered as a whole. (See *P.H. Ranch* (1966) 22 ALRB No.1; See *Rivera Vineyards* (2003) 29
27 ALRB No. 5, p. 3, fn. 3; *UFW (Ocegueda)*, supra; *S&S Ranch, Inc.* (1996) 22 ALRB No. 7, p.

1 4.) Rather, the record supports ALJ Soble's credibility determination of GM Macias on this
2 point as it contains evidence that weeding work was not performed when GM Macias alleged he
3 offered it to foreman Mendoza. (General Counsel's Exhibit ("GCX") 6, 7, 8, 9, 10.) Respondent
4 failed to provide any evidence to support GM Macias' allegation that foreman Mendoza's crew
5 did not like to weed or clean plants, or that the new crew produced better quality work. Thus,
6 Respondent has provided no basis to overturn ALJ Soble's credibility determination of GM
7 Macias' testimony.

8 **D. The ALJ's Finding That Respondent Terminated Foreman Mendoza and His**
9 **Crew Because of The Workers' Protected Concerted Activity is Supported by**
10 **Credible Evidence.**

11 There is substantial credible evidence in the record to support the ALJ's finding that
12 Respondent terminated foreman Mendoza and his crew's employment because of the workers'
13 protected concerted activity. In summer 2016, farm labor contractor ("FLC") Mike's Farm Labor
14 ("FLC Mike's Labor") contracted with Cinagro. (ALJD p. 52.) The crew consisted of foreman
15 Mendoza, Marisol Jimenez, Hector Cruz, Yolanda Antonio, Rigoberto Perez, Maria Duarte, and
16 Maria Santiago. (ALJD p. 52.) A few months later, FLC Mike's Farm Labor transferred
17 foreman Mendoza and his crew to work for FLC Art's Labor Service ("Art's Labor"). (ALJD p.
18 52.) Around November 2016, FLC Art's labor reached an agreement for Cinagro to directly hire
19 foreman Mendoza's crew. (ALJD p. 52.) Foreman Mendoza's crew performed work for Cinagro
20 including, harvesting vegetables, and weeding the land. (Reporter's Transcript ("RT") IV 85:1-
21 10; V 39:18-23.) The crew typically worked Monday through Saturday. (ALDJ p. 52.)

22 **i. The Crew Engaged in Protected Concerted Activity When it Complained**
23 **Several Times From November 2016 Through February 2017 About Missing**
24 **Paystubs and Deductions.**

25 Cinagro incorrectly classified foreman Mendoza's crew as vendors and did not make the
26 required deductions or withholdings for taxes and insurance. (ALDJ p. 53.) The crew first
27 complained about the missing deductions and paystubs after they received their second check
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1 from Cinagro. (RT IV 106:8-23.) GM Macias told foreman Mendoza and his crew that Cinagro
2 would resolve the issue. (RT II 7:21-8:21.)

3 In December 2016, workers again complained to foreman Mendoza who relayed their
4 concerns to GM Macias. (RT II 127:15-19, 129:6-11; III 96:6-12.) Then in February 2017,
5 foreman Mendoza organized a meeting with GM Macias and the crew to discuss the lack of
6 paystub and deductions with GM Macias. (RT I 48:18-49:1; IV 111:17-25.) The workers
7 complained to GM Macias and expressed the urgency of their requests. (RT II 129:6-23, 130:1-5;
8 III 97:22-98:1.) GM Macias told the workers that Respondent was "on it" and in the process of
9 changing the paystubs. (RT II 130:7-8, 134:17-23; III 98:2-4.) GM Macias said he gave their
10 message to "the boss," and that "the company was working on getting them paystubs." (RT II
11 134:19-23; RT III 100:9-19.)

12 **ii. Owner Dighera Knew About the Workers' Complaints.**

13 Each time the workers complained about the paystub issue the company supervisors told
14 them Cinagro was working on it. (ALJD p. 53.) Foreman Mendoza and his crew complained to
15 Owner Tony Dighera ("Owner Dighera") about the lack of itemized deductions and he told them
16 that Cinagro was "not set up for this" and that Cinagro "would get it as quickly as [Respondent]
17 could." (RT VII 65:10-14, 65:23-66:2.) Owner Dighera suspected that his payment method was
18 illegal and was apprehensive of the problems arising from paying the workers as vendors. (ALDJ
19 p. 53.) Still, as of the time of the hearing, Cinagro has continued to pay workers as vendors.
20 (ALDJ p. 53.)

21 **iii. Cinagro Hired a Second Crew Shortly Before It Discharged Foreman**
22 **Mendoza's Crew.**

23 Around February 20, 2017, Cinagro hired a new crew shortly before it discharged
24 foreman Mendoza and his crew. (ALJD, pp. 56.) Foreman Mendoza's crew complained about
25 the paystub issue close in time to Respondent's hiring of the new crew. (RT I 48:18-49:1; IV
26 111:17-25.) The ALJ correctly found that the new crew performed similar type of work as
27 foreman Mendoza's crew. (ALJD p. 56.) Cinagro paid the new crew the same way as foreman
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1 Mendoza's crew, but the new crew did not complain about the missing paystubs or deductions.
2 (RT VII 88:5-23.)

3 **iv. Respondent Misrepresented to Foreman Mendoza's Crew That There Was**
4 **Insufficient Work and Never Called Them Back to Work Despite Work**
5 **Being Consistently Available.**

6 The evidence demonstrates GM Macias sent foreman Mendoza and his crew home early
7 on March 4, 2017 and told foreman Mendoza there was no work (ALJD p.56.) The next day,
8 Sunday, March 5, 2017, GM Macias again told foreman Mendoza there was no work for him and
9 his crew until further notice. (ALJD p. 56.) On Friday, March 10, foreman Mendoza picked up
10 his and his crew's paychecks from GM Macias. (RT V 9:14-25, 11:21-24, 135:3-22.) GM Macias
11 told foreman Mendoza that he did not know when he would have work for foreman Mendoza
12 and his crew and asked foreman Mendoza to inform his crew it was their last day worked. (RT V
13 135:3-136:2.)

14 Without explaining the relevance of its argument, Respondent asserts that the General
15 Counsel did not establish that foreman Mendoza's crew had seniority or preferential treatment
16 over the new crew. (Respondent's Exceptions Brief, p. 3.) Respondent fails to explain why such
17 a finding would be relevant and appears to misunderstand the importance of the ALJ's findings
18 in this regard. The reason these facts are important is because they show that GM Macias
19 inaccurately represented that work was not available and never contacted any member of
20 foreman Mendoza's crew about available work after March 4, 2017, which reasonably led the
21 workers to conclude Respondent terminated them. (ALJD p.58.)

22 The preponderance of the evidence supports the ALJ's determination that the new crew
23 worked Monday, March 6, was off on Tuesday, March 7, and returned to work on Wednesday,
24 March 8. (ALJD p. 57; GCX 6). Additionally, one of the workers testified he saw GM Macias
25 standing in the field with the other workers. (RT 13:23-14:6.) Owner Dighera acknowledged that
26 there was enough work for foreman Mendoza's crew and the other crew and that "there was
27 always work, even later in March 2017." (ALJD p. 57; RT VII 93:4-9, 94:8-11, 95:13-14.)
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1 v. **Respondent Consistently Communicated With The Crew Through Foreman**
2 **Mendoza and Relied On Him To Relay Information to The Crew.**

3 The General Counsel provided ample evidence that Cinagro relied on foreman Mendoza
4 to communicate work assignments to the crew. (RT IV 77:15-23, 78:21-22.) GM Macias
5 informed foreman Mendoza where to send the crew the following day unless it rained. (RT V
6 14:2-3, 14:13-14.) On March 4, 2017, the crew's last day, GM Macias informed foreman
7 Mendoza his crew would go home early. (ALJD p. 56; RT III 58:8-9; IV 130:21-131:24.) On
8 that last day, one of the workers in foreman Mendoza's crew cut her finger and required medical
9 treatment. (ALJD p. 56.) The ALJ correctly inferred it is "possible that the worker injury further
10 amplified the company's concern that the lack of paystubs, insurance deductions and tax
11 withholding could essential come back to bite them." (ALJD p. 57.)

12 The next day, Sunday, March 5, 2017, GM Macias asked foreman Mendoza to inform his
13 crew that there was no work for him and his crew until further notice. (ALJD p. 56.) Foreman
14 Mendoza relayed that information to his crew. (ALJD p. 56.)

15 On Wednesday, March 8, GM Macias called foreman Mendoza and instructed him to
16 pick up his and his crewmembers' paychecks on Friday. (RT IV 133:15-134:5.) During this call,
17 foreman Mendoza told GM Macias that he knew the new crew worked on Monday, March 6 and
18 GM Macias denied it. (RT IV 134:6-10.) On Friday, March 10, foreman Mendoza picked up his
19 and his crew's paychecks from GM Macias. (RT V 9:14-25, 11:21-24, 135:3-22.) GM Macias
20 told foreman Mendoza that he did not know when he would have work for foreman Mendoza
21 and his crew and asked foreman Mendoza to inform his crew it was their last day worked. (RT V
22 135:3-136:2.)

23 GM Macias was short with foreman Mendoza and did not offer or his crew work. (ALJD
24 p. 58.) Foreman Mendoza thanked GM Macias for the checks and for the job because he
25 understood that Cinagro discharged him and his crew. (RT IV 136:3-5, 147:24-148:4.) Foreman
26 Mendoza distributed the checks to all but two workers and told the crew what GM Macias said
27 about there being no more work until further notice. (ALJD p. 58; RT IV 136:6-140:2.) Even if
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1 foreman Mendoza mistakenly informed his crew that Cinagro discharged them, the conveying of
2 this mistaken information had a coercive effect on the employees, giving rise to a violation of the
3 ALRA section 1153. (*Superior Farming v. ALRB* (1884) 151 CalApp.3d 100.)

4 **v. The Crew Sought Work Because They Reasonably Believed They Were**
5 **Fired.**

6 A worker who reasonably believes she was fired does not relinquish her claim to
7 employment by accepting substitute employment with a new employer. (*Bates Paving & Sealing,*
8 *Inc.* (2016) 364 NLRB No. 46.) The ALJ correctly found that workers from foreman Mendoza's
9 crew sought alternative employment on Monday March 6, 2017 because they were uncertain
10 whether work had ended at Cinagro. (ALJD p. 57.) On that day, crew members saw workers
11 harvesting at Respondent's Moorpark Ranch and took photographs of what they saw and called
12 GM Macias. (ALJD p. 57.) One of the workers called GM Macias to ask whether the other crew
13 was working, and GM Macias denied it. (ALJD p. 57.) The workers shared what they saw and
14 heard with the other crew members. (ALJD p. 57.)

15 **vi. Cinagro Did Not Reach Out to Clarify That the Crew Was Not Fired.**

16 In its exceptions Respondent alleges Cinagro's failure to recall foreman Mendoza's crew
17 was not retaliatory because the crew had already obtained "more favorable alternative
18 employment." (Respondent's Brief In Support of its Exceptions, p. 11.) However, again
19 Respondent fails to provide case law to support its position. Cinagro had a duty to clarify the
20 status of the crew's employment once it became aware workers from foreman Mendoza's crew
21 sought alternative employment and filed an unfair labor practice charge stating they were fired.
22 (*Brunswick Hospital* (1982) 265 NLRB 803, 810 (finding employers have the duty to clarify they
23 did not intend to fire a worker who reasonably believed they were fired).)

24 The record demonstrates foreman Mendoza thanked GM Macias for the checks and for
25 the job because he understood that Cinagro discharged him and his crew. (RT IV 136:3-5,
26 147:24-148:4.) Shortly after, GM Macias became aware that some of foreman Mendoza's crew
27 started working at a nearby blueberry ranch. (ALJD p. 58.) Instead of reaching out to clarify the
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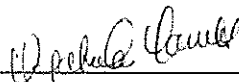
1 workers were not terminated, Owner Dighera called one of the blueberry ranch owners to ask
2 whether crew members were working there after he received the workers unfair labor practice
3 charge on March 13, 2017, (ALJD p. 59.) Despite knowing workers alleged Respondent
4 terminated foreman Mendoza and his crew, Owner Dighera did not call foreman Mendoza or his
5 crew back to work or clarify that Cinagro did not terminate his and his crew's employment. (RT
6 ALJD p. 60.) In fact, Cinagro hired additional workers. (RT VII 102:17-18.)

7 **III. CONCLUSION**

8 The General Counsel proved by a preponderance of the evidence that Cinagro violated
9 the Act when it discharged foreman Mendoza and the workers in his crew for complaining about
10 the manner in which Cinagro paid them. Respondent failed to show that the ALJ's factual
11 findings were not based on well-supported inferences from the record as a whole and did not
12 present any evidence to overturn ALJ Soble's credibility determinations. Therefore, the General
13 Counsel respectfully requests that the Board uphold ALJ Soble's Decision that Cinagro
14 committed an unfair labor practice when it discharged foreman Mendoza's crew in violation of
15 the Agricultural Labor Relations Act.

16
17 Dated: December 13, 2021

18 Respectfully submitted,
19 AGRICULTURAL LABOR RELATIONS BOARD
20 JULIA MONTGOMERY
21 General Counsel

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24 Gabriela Correa
25 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 Monterey. I am over the age of eighteen years and not a party to the within entitled action. My business address is: ALRB, 342 Pajaro Street, Salinas, California, 93901.

On **December 13, 2021**, I served a copy of the within **GENERAL COUNSEL'S REPLY TO RESPONDENT CINAGRO FARMS, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE MARK SOBLE** in Case Name: **CINAGRO FARMS, INC., 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

Via E-File: Santiago Avila-Gomez Executive Secretary Agricultural Labor Relations Board 1325 J Street, Suite 1900 Sacramento, CA 95814 E-File: efile@alrb.ca.gov	Via Electronic and Certified Mail: Robert P. Roy Ventura County Agricultural Association 916 W. Ventura Blvd. Camarillo, CA 93010 E-Mail: rob-vcaa@pacbell.net Certified Mail No. 7018 1830 0001 0041 8697
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GENERAL COUNSEL'S REPLY TO RESPONDENT CINAGRO FARMS, INC.'S BRIEF IN SUPPORT OF
EXCEPTIONS TO DECISION OF ALJ MARK SOBLE
CINAGRO FARMS, INC.-2017-CE-008-SAL

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Executed on December 13, 2021, at Salinas, California. I certify (or declare) under penalty of perjury that the foregoing is true and correct.



Monica Ortiz