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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CINAGRO FARMS, INC., Respondent, and MARISOL JIMINEZ, Charging Party.	Case No. 2017-CE-008-SAL **AMICUS BRIEF OF UFCW WESTERN STATES COUNCIL AND TEAMSTERS JOINT COUNCIL 7**

The Amici are United Food and Commercial Workers Western States Council ("the Western States Council") and Teamsters Joint Council 7 ("Joint Council").

The UFCW Western States Council is a chartered body within the United Food and Commercial Workers International Union, made up of local unions who represent more than 200,000 workers in California, Arizona, and Nevada throughout the food chain from agriculture, packing sheds, distribution, manufacture, warehousing, food storage, and retail sales. UFCW locals have been representing agricultural workers in California since the 1940's and have extensive first-hand experience organizing in the fields both before and since the passage of the Agricultural Labor Relations Act ("the ALRA" or "the Act"). They are also thoroughly familiar

with the wide range of laws, regulations, and industry practices at all levels of the food chain that protect the health and safety of workers and the general public.

UFCW Local 5, a local affiliated with the Western States Council, has statewide jurisdiction over agricultural employees. It has a long history, including its predecessor locals, of representing agricultural employees since the 1940's. Other locals who are affiliated with the Western States Council have been organizing agricultural employees, particularly in the cannabis industry.

Teamsters Joint Council 7 represents approximately 100,000 members in 20 local unions in California and Nevada. Its affiliated local unions have been representing agricultural workers and employees engaged in the food processing industry throughout Northern California and Nevada for over 75 years. Currently, the Joint Council and its affiliates Teamsters Local 853, Teamsters Local 856, Teamsters Local 890, and Teamsters Local 948 represent over 19,000 members employed as agricultural workers and in the food processing industry. Organizing agricultural workers under the ALRA has been and continues to be of central importance to the Joint Council.

The Amici are very familiar with the Agriculture Labor Relations Act and with the independent contractor problems. The Amici are also very familiar with the independent contractor problems specifically among agricultural workers. Having long engaged in organizing under the Act, Amici possess unique insight into the challenges involved in independent contractor problems and representing farm workers throughout California.

The Amici offer their perspectives, rooted in years of farm worker organizing, on the legality of independent contractors and the abuse of independent contractors by agricultural employers.

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1. The ALRB should choose not to follow the National Labor Relations Board decision in *Velox Express, Inc.* (2019) 368 NLRB No. 61

The ALRB is not bound by California Labor Code section 1148[1] to apply *Velox* because section 2775 governs over misclassification issues under the ALRA. Section 2775 is the codification of AB 5 after a long struggle by Amici and others to establish a meaningful standard for determining employee and independent contractor status. (*Dynamex v. Superior Court* (2018) 4 Cal.5th 903.)

Section 2775 is specific: it intentionally adopts the ABC test to define independent contractors. Section 2775 applies to the entire Labor Code. (§ 2775, subd. (b)(1).) The ALRA is also codified in the Labor Code, so section 2775 already applies to the ALRB's adjudication of cases regarding status of individuals as contractors. Under section 2775, an agricultural worker is an independent contractor only when three conditions are met: they must be free from the control and direction of the hiring entity; perform work that is outside the usual course of the hiring entity's business; and must customarily engage in an independent business of the same nature. (§ 2775, subd. (b)(1).)

By comparison, the NLRA excludes independent contractors from the Act's definition of employee, 29 U.S.C. § 152(3), but the statute is completely silent on how to determine whether a worker is an employee or an independent contractor. Instead, to determine whether a worker is an employee or independent contractor, the NLRB currently applies eight (8) factors using a totality of the circumstances analysis, and "through a prism of entrepreneurial opportunity." (*Velox*, *supra*, 368 NLRB No. 61 at p. 2 & fn.8.) Section 2775 rejects this approach.[2] Therefore, *Velox* is virtually irrelevant.

When the Legislature passed section 2775, it affirmatively rejected the possibility that section 1148 authorized (or required) the ALRB to apply any test other than the test established by section 2775.

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[1] All subsequent references are to the California Labor Code unless otherwise indicated.

[2] The NLRB's definition of independent contractor doesn't comply with the test established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.

Section 1148 does not require that all NLRA precedent be followed. Rather, it limits the application to those circumstances where it is "applicable." As a result, section 1148 results in the application of NLRB common law only where the ALRA's provisions mirror the NLRA's. (*Vessey & Co. v. ALRB* (1989) 210 Cal.App.3d 629, 643.) Because section 2775 effectively repudiates the NLRB's common law definition of independent contractors, *Velox* is not an "applicable precedent" within the meaning of section 1148. (*Ibid*.) Conversely, there is no "mirror" provision that would even trigger section 1148. Consequently, the ALRB is not bound to follow NLRB precedent based on the language in section 1148.

In addition, there are rules of statutory construction which support this conclusion. "A specific statute upon a subject controls over a general provision." (*Div. of Labor Law Enforcement v. Moroney* (1946) 28 Cal.2d 344, 345.) Section 1148 is general: it applies NLRB common law where the ALRA's provisions mirror the NLRA's. Section 2775 is specific: it creates a definition of employee to be used throughout the Labor Code. Consequently, section 2775 controls over section 1148.

Moreover "the Legislature is deemed to be aware of existing laws…in effect at the time legislation is enacted and to have enacted and amended statutes in light of such decisions as have a direct bearing on them." (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) This means that when the Legislature passed section 2775, it knew about section 1148, and about the circumstances in which it applies. When section 2775 became law, it eliminated the possibility that section 1148 could apply to the ALRB's adjudication of independent contractor allegations.

Lastly, "[t]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d 222, 230.) The Legislature intended section 1148 to apply to provisions modeled on the NLRA. The Legislature intended section 2775 to apply to the entire Labor Code. To harmonize these provisions, section 2775 must control the ALRB's analysis of independent contractors.

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Were the ALRB to instead incorrectly apply section 1148 and read *Velox* into the ALRA, it would not harmonize these provisions. Instead, it would represent the impermissible act of "add[ing] provisions to what is therein declared in the [law's] definite language [and simultaneously] disregard[ing]…its expressed provisions." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799, citing *People ex rel. Bledsoe v. Campbell* (1902) 138 Cal. 11.)

When the Legislature passed section 1148, it was to ensure that the ALRB consistently applied provisions that are common to the ALRA and the NLRA. When the Legislature passed section 2775, it was to establish a definition for independent contractors in agricultural labor as well as other occupations throughout the state. For both sections 1148 and 2775 to remain compatible, valid, operable, and in harmony, the ALRB must apply section 2775 to determinations of employment status. Section 1148 only applies when provisions of the ALRA parallel the NLRA. That is not the case here. The ALRA's analysis of contractor status begins and ends with section 2775 of the Labor Code.

Accordingly, because they address two different issues and circumstances, we don't accept the premise that section 2775 and section 1148 are in conflict. However, even if they were, the later in time legislation supersedes the earlier legislation when the enactments cannot be reconciled. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960.) Here, section 1148 was codified in 1975. By comparison, section 2775 was codified in 2020. As a result, the more recent enactment (section 2775) is required to be applied to questions regarding employment status. By extension, *Velox* cannot apply.

2. <u>The Board should adopt a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of Labor Code section 1153, subdivision (a)</u>

The Board should adopt a rule finding an agricultural employer's misclassification of agricultural employees constitutes a per se violation of Labor Code section 1153. The Legislature has already proscribed willful misclassification: it constitutes a per se violation of section

226.8.[3] Because the ALRA is contained within the Labor Code, it follows that the ALRB should adopt a rule consistent with other portions of the Labor Code. In the agricultural context, however, misclassification under section 2775 is inherently willful, and misclassification should therefore be consistently treated as a per se unfair labor practice.

The reason section 2775 renders misclassification inherently willful is because it is a factual determination that the employer must prove, at the outset of an employment relationship, in order to classify a worker as an independent contractor. Section 2775 squarely places the burden on the hirer to prove independent contractor status. (§ 2275, subd. (d).) Particularly relevant to the agricultural context, the employer has to prove that the laborer they plan to hire has "take[n] the usual steps to establish and promote his or her business – for example through incorporation, licensure, advertisements routine offerings to provide the services of the independent business to the public, or to a number of potential customers." (*Dynamex*, *supra*, 4 Cal.5th at pp. 962-964.)

This is a fact-intensive inquiry with the burden of proof on the hiring entity. This looks nothing like the *Velox* majority's premise that misclassification is a "legal opinion" applying the NLRB's common law misclassification test. (*Velox*, *supra*, 368 NLRB No. 61.) Because an agricultural employer must simply ascertain whether their worker meets this prong of the ABC test before classifying them as a contractor, there are few – if any – circumstances under which agricultural misclassification is anything but willful.

The incentive for employers to misclassify is significant because of the cost of workers compensation insurance, taxes, and the application of various provisions of the Labor Code, Government Code and other regulations of employment. That is why the Legislature imposed the burden of proof on the hiring entity rather than the reverse. This is inarguably an effort to make it

[3] There are over 50 statutes enforceable by the Labor Commissioner which prohibit retaliation for exercising rights under the Labor Code. (See Dept. of Industrial Relations, Laws that Prohibit Retaliation and Discrimination, at <https://www.dir.ca.gov/dlse/howtofilelinkcodesections.htm#:~:text=Labor%20Code%20section%20230(e)%20prohibits%20an%20employer%20from%20discharging,actual%20knowledge%20of%20the%20status> [as of May 24, 2022].)

clear that misclassification is unlawful for many purposes. It must be unlawful for the purposes of the ALRA.

The ALRB should, therefore, hold that misclassification inherently interferes with the protected activity contemplated by NLRA, on which the ALRA is modeled. The legal test for interference is whether employer conduct would, "*from the perspective of employees*" reasonably tend to interfere in the exercise of protected rights. (*Velox*, *supra*, 368 NLRB No. 61 at p. 16, original italics.) This is an objective test. This test also takes into account the "employer's [conduct] in the context of its labor relations setting." (*NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 617 [as cited in *Velox*, *supra*, 368 NLRB No. 61 at p. 16 (conc. & dis. opn. of McFerran)].)

In the agricultural setting, the employer must determine at the outset whether their employee has "*independently* made the decision to go into business for himself or herself." (*Dynamex*, *supra*, 4 Cal.5th at p. 962, original italics, citing *Borello*, *supra*, 48 Cal.3d 341 at p. 354.) The worker knows whether they meet this test. The employer has a duty to know. If the employer then misclassifies the worker, the worker "would reasonably have understood that [the employment] agreement excludes them from the protected status of 'employees' under the Act." (*Velox*, *supra*, 368 NLRB No. 61 at 17.) In the agricultural context, it is next to impossible to ever conceive of a situation where a field worker is an independent contractor. Any misclassification must be deemed almost irrefutably intentional misclassification.

This conclusion is bolstered by the widespread use of the farm labor contractor regime. Farm labor contractors are the hiring entity and are more closely regulated than other labor brokers. (See, e.g., §§ 1682-1699.) They do not hire independent contractors and are presumed to know the difference.

In sum, all misclassification of agricultural workers is intentional under section 2775 and *Dynamex*. Intentional misclassification constitutes a per se violation of section 226.8 because the ALRB should adopt rules consistent with the Labor Code, which, by its very nature is designed to protect workers. (See, e.g., *Donohue v. AMN Services* (2021) 11 Cal.5th 58, 66.) It should

hold that all misclassification of agricultural workers is a per se violation of section 1153. The appropriate make whole remedies should be imposed in all cases.

3. If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, the Board has the authority to assess civil penalties pursuant to Labor Code section 226.8

The ALRA authorizes the Board to grant make-whole relief when it determines that a party has engaged in unfair labor practices. (*Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, citing section 1160.3.) Accordingly, if willful misclassification is a per se unfair labor practice, then the Board has the discretion to authorize this make-whole relief. Section 226.8 supports this proposition, because it does not "limit any rights or remedies otherwise available at law." (§ 226.8.) The Labor and Workforce Development Agency may assess civil penalties, but this does not remediate the damage to the worker – nor does it impede the Board's power to remediate that damage.

"The drafters of the ALRA intended to broaden, not diminish, the ALRB's remedial authority as compared to the NLRB." (*Tri-Fanucchi*, *supra*, 3 Cal.5th at p. 1168, citing *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 865.) Further, "the breadth of agency discretion is…at its zenith…when fashioning…policies, remedies, and sanctions." (*Ibid.*, citing *Fallbrook Hospital v. NLRB* (D.C. Cir. 2015) 785 F.3d 729, 735.) It follows, then, that the ALRB has the discretion to implement a make-whole remedy because misclassification would be a per se unfair labor practice under section 2775. Importantly, this make-whole remedy must include more than just wages or compensation.

When an employer misclassifies a worker, the employer evades its responsibility to provide other benefits. This includes paying worker's compensation insurance or any out of pocket costs the worker who is misclassified incurs after a workplace injury. (§ 3700 et seq.) This also includes sick leave pursuant to section 245.5 et seq. and, where appropriate, the pay out of vacation accruals. Misclassification also strips employees of their rights under the Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). These are limited examples of the statutes that protect workers, but not independent contractors, such that

misclassified employees have been under compensated and deprived of mandated benefits. In short, the broad remedial authority permits the Board to fashion a per se make whole remedy, and the Board will need to assess "the particular facts and circumstances of each case" to establish what that make-whole remedy entails. (*Tri-Fanucchi*, *supra*, 3 Cal.5th at p. 1170, citing *F&P Growers v. ALRB* (1985) 168 Cal.App.3d 667, 680.)

Put differently, the scope of benefits that each agricultural employer provides depends on the facts and circumstances of the case. There are statutory requirements, for example, such as worker's compensation and FMLA, but there is no legal obligation to provide paid vacation. (S*uastez v. Plastic Dress Up* (1982) 31 Cal.3d 774.) Consequently, adopting a per se make whole remedy does not divest the Board of its duty to use discretion. To the contrary, it would still require the Board to use discretion to determine the nature and scope of the remediation.

4. <u>Conclusion</u>

Section 2775 controls over section 1148 because the former is specific and the latter is general. Section 2775 controls over section 1148 because the latter only applies when the ALRB adjudicates cases where the ALRA "mirrors" the NLRA. Section 2775 does not mirror the NLRA because the NLRA does not define what constitutes an independent contractor – the NLRB uses a common law test which even differs from the pre-section 2775 test. Lastly, because the Legislature enacted section 2775 later than section 1148, the former controls over the independent contractor issue.

Due to the fact-intensive inquiry of section 2775, and the labor-relations context of agricultural labor, misclassification is inherently willful. Accordingly, the Board should hold that it is a per se unfair labor practice. Lastly, because of the broad remedial authority of the Board, and the express language of section 226.8, the Board should implement a per se make-whole remedy that takes into account the particular facts and circumstances of each case.

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The ALRB should hold that misclassification is inherently willful in the agricultural context.

Dated: May 27, 2022

WEINBERG, ROGER & ROSENFELD
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By: DAVID A. ROSENFELD

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CERTIFICATE OF SERVICE

I am a citizen of the United States, employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1375 55th Street, Emeryville, CA 94608.

On May 27, 2022I served the attached:

AMICUS BRIEF OF UFCW WESTERN STATES COUNCIL AND TEAMSTERS JOINT COUNCIL 7
[Case No. 2017-CE-008-SAL]

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

By Certified Mail: The above-referenced document were mailed to the specified party in said action, by plaing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Emeryville, CA; and

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

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I certify under penalty of perjury that the above is true and correct. Executed at Emeryville, California, on May 27, 2022.

Denise Taylor