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Amicus Curiae In Support of Respondent Cinagro Farms, Inc.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: CINAGRO FARMS, INC., Respondent, And MARISOL JIMENEZ, Charging Party.	Case No.: 2017-CE-008-SAL **BRIEF OF BARSAMIAN & MOODY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT CINAGRO FARMS, INC., IN RESPONSE TO ADMINISTRATIVE ORDER NO. 2022-01**

Barsamian & Moody, A Professional Corporation, Attorneys at Law, files this brief as *amicus curiae* in support of Respondent Cinagro Farms, Inc. *Amicus curiae* is a California-based law firm representing hundreds of agricultural employers in the State of California and is filing this brief in response to *Cinagro Farms, Inc.* (Mar. 28, 2022) Admin. Order No. 2022-01 (the "AO").

In addition, *amicus curiae* supports and joins Respondent Cinagro Farms, Inc., in the positions and arguments it sets forth in its Respondent's Supplemental Brief In Response to the ALRB's Order re: Misclassification of Employees, dated May 27, 2022, and attached to this brief as exhibit A.

I. INTRODUCTION

The AO invited "briefs from the parties and interested amici to consider whether the misclassification of agricultural employees as independent contractors constitutes an unfair labor practice in violation of section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) and the scope of the remedies available to the Board in cases of misclassification." (AO, at p. 1.) Specifically, the AO invited any interested amici to file briefs addressing the following questions:

> (1) Is the ALRB bound by section 1148 to follow the National Labor Relations Board decision, *Velox Express, Inc.* (2019) 368 NLRB No. 61?
>
> (2) If the ALRB is not bound to follow *Velox Express*, should the Board adopt a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of section 1153, subdivision (a)?
>
> (3) If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, what is the scope of the Board's authority to assess civil penalties pursuant to section 226.8, if any?

(AO, at p. 2.)

This brief addresses each of these questions, individually and in more depth, in Section II, *infra*. For the reasons stated, it is our position that:

(1) The Board is bound by section 1148 to follow *Velox Express, Inc.* (2019) 368 NLRB No. 61, as applicable federal precedent;

(2) Assuming arguendo that the Board is not bound to follow *Velox Express*, the Board should *not* adopt a rule finding an agricultural employer's misclassification of

agricultural employees as independent contractors constitutes a per se violation of the Act because misclassification of agricultural employees as independent contractors is an expression of legal opinion, which is protected by Labor Code section 1155 and does not interfere with or restrain workers from engaging in protected activity; and

(3) In the event the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, the Board does *not* have any authority to assess civil penalties pursuant to section 226.8 because civil penalties are intended to punish the wrongdoer and the Board's authority under the Act is limited to remedial remedies that cannot be exercised punitively. (See *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 86 [stating that "damages and civil penalties have different purposes . . . . Damages are intended to be compensatory, to make one whole. . . . On the other hand, 'Civil penalties, like punitive damages, are intended to punish the wrongdoer and to deter future misconduct'" (internal citations omitted)].)

II. LEGAL ANALYSIS

A. Is the ALRB bound by section 1148 to follow the National Labor Relations Board decision *Velox Express, Inc.* (2019) 368 NLRB No. 61?

Yes, the Board is bound by section 1148 to follow *Velox Express, Inc.* (2019) 368 NLRB No. 61, as applicable federal precedent because the rationale of *Velox Express* is equally, if not more, relevant to California agricultural industries. Under the ALRA, applicable precedent includes all federal precedent, including the United States Supreme Court, federal appellate courts, and the NLRB. (*Arnaudo Brothers, LP v. ALRB* (2018) 22 Cal.App.5th 1213). To determine applicability, the ALRB must consider the respective issue's relatability or closeness to the federal precedent; California's compelling state interest over the issue; and whether the precedent is relevant to the unique problems of labor relations on California agricultural labor scene. (See *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848; see also, *Rigi Agricultural Services, Inc.* (1985) 11 ALRB No. 27; see also, *F & P Growers*

Assn. v. ALRB (1985) 168 Cal.App.3d 667).

In *Velox Express*, the NLRB held that an employer's misclassification of its employees as independent contractors, standing alone, is not a per se violation of Section 8(a)(1). This is significant because the NLRA excludes independent contractors from the definition of "employee" and thus excludes independent contractors from the NLRA's coverage. As such, one might argue, as the charging party in *Velox Express* did, that the misclassification of employees as independent contractors is a "per se" violation of the NLRA because misclassification "chills" concerted activity and interferes with the free exercise of employee rights under the NLRA. However, in *Velox Express*, the NLRB squarely rejected this theory because the NLRB found that a standalone misclassification is not coercive in any way. Specifically, the NLRB found that "it is a bridge too far . . . to conclude that an employer coerces its workers in violation of Section 8(a)(1) whenever it [mistakenly] informs them of its position that they are independent contractors . . . ." (*Velox Express, Inc.*, *supra*, 368 NLRB No. 61, slip op., at p. 7.)

The NLRB's reasoning in *Velox Express*—that "it is a bridge too far" to equate misclassification of employees with coercive activity—applies with even greater force in the context of the ALRA because the Act treats all agricultural workers as employees of the "agricultural employer" regardless of whether or not they are directly employed by that entity or an independent contractor. (See *Vista Verde Farms v. ALRB* (1981) 29 Cal.3d 307, 323 [discussing how "bargaining units [under the ALRA] should be established on a grower-wide (also referred to as an 'industrial' or a 'wall-to-wall') basis rather than among workers employed by a particular labor contractor. It was to achieve this result that the ALRA excluded farm labor contractors from the definition of agricultural employer."]; see also, *Henry A. Garcia Dairy* (2007) 33 ALRB No. 4 [finding that the ALRA provides for a broader definition of "employees," thus narrowing the scope of who can be considered an "independent contractor"].)

Therefore, the ALRA's unique treatment of agricultural workers employed by farm labor contractors completely mitigates the risk of a standalone misclassification interfering

with or restraining the free exercise of employee rights under the Act. Stated plainly, there is nothing unique about California agricultural that necessitates a rule that is different than the federal precedent set forth in *Velox Express*. Rather, the unique structure of the ALRA makes the *Velox Express* rule more applicable. This conclusion is further supported by an analysis of each finding that the NLRB offered in support of its holding in *Velox Express*.

First, the NLRB found that employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke Section 7 rights as doing so does not prohibit workers from engaging in Section 7 activity. An employer's mere communication of its opinion that its workers are independent contractors does not threaten any adverse consequences for engaging in protected activity. Similarly, such a communication does not promise any benefits for refraining from engaging in protected activity. Again, "it is a bridge too far" to equate such communication with coercion.

Second, the NLRB found an employer's communication of its classification of its workers as independent contractors as free speech activity protected under Section 8(c). NLRA Section 8(c) corresponds with and is almost identical to Labor Code section 1155. NLRA Section 8(c) states, in full:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

On the other hand, Labor Code section 1155 reads, in full:

> The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit.

There is no reason why an agricultural employer's free speech is entitled to any less protection than employer in non-agricultural industries covered by the NLRA.

Third, the NLRB cautioned against treating a standalone misclassification of

employees as an unfair labor practice given the difficulty employers face in applying varying federal, state, and local laws and regulations concerning the classification of workers. For example, the NLRB applies common law agency factors to the employee/independent contractor analysis. However, the NLRB noted that many states and localities apply different standards. (While the NLRB did not expressly identify California as one of those states; California does, in fact, utilize a different analysis to determine who is and is not an employee.) Thus, as the NLRB reasoned, finding a per se violation of the NLRA will have a chilling effect on the creation of independent contractor relationships as employers will be hesitant to communicate the classification with their workers due to prospective unfair labor practice charges filed against them.

Fourth, the NLRB held that finding a per se violation would improperly shift the burden of proof in unfair labor practice cases. The NLRA places the burden on the General Counsel to establish by preponderance of the evidence that a respondent has engaged in an unfair labor practice. (This is equally the case under the ALRA.) Currently, in order to prove an unfair labor practice based on misclassification of workers, the General Counsel's burden is to prove that the workers were employees. Next, the General Counsel's burden would be to prove that the employer's communication of the misclassification interfered with employees, rights under the NLRA. According to the NLRB, if misclassification is a per se violation, then the burden of proof will be impermissibly shifted to the employer to prove to that the workers were properly classified as independent contractors. This would be the same result under the ALRA.

Lastly, the NLRB warned that treating misclassification of employees as a per se violation would have far-reaching implications for the Board's treatment of other statutory exclusions, including supervisors and managers. Specifically, the NLRB found that:

> Neither [litigant] supporting a stand-alone misclassification violation have explained how the rationale for finding such a violation would not apply equally to an employer's misclassification of its employees as supervisors or any other category of workers excluded from the Act's coverage.

(*Velox Express, Inc.*, *supra*, 368 NLRB No. 61, slip op., at p. 10.) The NLRB further reasoned:

> We do not believe that the rationale for finding a stand-alone misclassification violation could be limited, in any principled manner, to independent-contractor misclassifications alone, and the implications of extending it to other statutory exclusions are significant.

(*Velox Express, Inc.*, *supra*, 368 NLRB No. 61, slip op., at p. 10.) The NLRB's reasoning applies equally to the California agriculture scene.

The NLRB's rationale for the rule set forth in *Velox Express* applies with equal, if not greater, force in the context of the ALRA. Certainly, there is no feature of California agricultural industries and its labor relations atmosphere that makes a different rule necessary or desirable. Therefore, for the foregoing reasons, the Board should find that *Velox Express* is binding and applicable precedent under Labor Code section 1148.

B. If the ALRB is not bound to follow *Velox Express*, should the Board adopt a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of section 1153, subdivision (a)?

Assuming arguendo that the ALRB is not bound to follow *Velox Express*, the Board should not adopt a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of the Act. The Board should not adopt such a rule for all of the reasons set forth in Section II.A of this brief. In the interest of brevity, *amicus curiae* will not repeat those reasons here.

C. If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, what is the scope of the Board's authority to assess civil penalties pursuant to section 226.8, if any?

In the event the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, the Board has no authority to assess civil

penalties pursuant to section 226.8 because the Board's authority is limited to remedial purposes, not punitive ones. (See *J. R. Norton Co. v. ALRB* (1987) 192 Cal.App.3d 874, 908 [finding that "the Board's discretion in ordering affirmative action to remedy unfair labor practices 'is not unbounded'" and "must be exercised reasonably by the Board whose power to command affirmative action is remedial, not punitive"]; see also, *P & M Vanderpoel Dairy* (2018) 44 ALRB No. 4, 8 [stating that the Board's "authority is designed to achieve remedial, not punitive purposes"]; see also, *Pressroom Cleaners* (2014) 361 NLRB 1166.) Civil penalties, by definition, are punitive in nature and designed to punish. In *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, the California Supreme Court explained that "damages and civil penalties have different purposes . . . . Damages are intended to be compensatory, to make one whole. . . . On the other hand, 'Civil penalties, like punitive damages, are intended to punish the wrongdoer and to deter future misconduct.'" (*Id.*, at p. 86.)

Under the ALRA, the Board does not have the authority to order punitive remedies. Instead, the Board's authority is limited to remedial measures designed to restore employees to whole. (See *Gerawan Farming, Inc. v. ALRB* (2018) 23 Cal.App.5th 1129, 1164 [stating that "even though the Board's discretion in fashioning an appropriate remedy or remedies to redress unfair labor practices is broad, it is not without boundaries. Among other things, such discretion must be exercised reasonably, *not punitively*" (emphasis added).]

Therefore, even where an employer willfully misclassifies agricultural employees, the Board does not have the authority to assess civil penalties pursuant to section 226.8 or any other statute or regulation.

III. CONCLUSION

For the foregoing reasons, Barsamian & Moody, as *amicus curiae*, takes the following positions as to each of the inquires set forth in the Admin. Order No. 2022-01:

///

///

(1) Is the ALRB bound by section 1148 to follow the National Labor Relations Board decision, *Velox Express, Inc.* (2019) 368 NLRB No. 61?

Yes.

(2) If the ALRB is not bound to follow *Velox Express*, should the Board adopt a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of section 1153, subdivision (a)?

No.

(3) If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, what is the scope of the Board's authority to assess civil penalties pursuant to section 226.8, if any?

The Board has no authority to assess civil penalties pursuant to Labor Code section 226.8.

Respectfully submitted,

Dated: May 27, 2022

BARSAMIAN & MOODY
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By: _____
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Amicus Curiae In Support of Respondent Cinagro Farms, Inc.

Exhibit A

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SALINAS REGIONAL OFFICE

In the Matter of: CINAGRO FARMS, INC., Respondent, And MARISOL JIMENEZ, Charging Party.	CASE NO. 2017-CE-008-SAL RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE ALRB'S ORDER RE: MISCLASSIFICATION OF EMPLOYEES [Administrative Order No. 2022-01]

I. Preliminary Statement

Respondent, Cinagro Farms, Inc., respectfully files its Supplemental Brief in Response to the ALRB's Order RE: Misclassification of Employees dated March 28, 2022. [Copy attached]

The Agricultural Labor Relations Board ("ALRB" or "Board") issued Administrative Order No. 2022-01, on March 28, 2022. The Order invites Briefs from Parties and interested amici to consider whether the misclassification of agricultural employees, as independent contractors, constitutes an unfair labor practice in violation of Section 1153, subdivision (a) of the ALRA. The Order also seeks the scope of the remedies available to the Board in cases of

such a misclassification.

Respondent, Cinagro Farms, Inc., contends that an employer's stand-alone statement of misclassification does not violate the ALRA for the following reasons: (1) it was not an issue that was litigated in the underlying ULP hearing (Cinagro Farms, Inc., Case No. 2017-CE-008-SAL); (2) such a misclassification statement does not violate the ALRA because in cases where employees of a farm labor contractor are hired, they are deemed to be the statutory employees of the grower who hires them; (3) misclassification of employees as "independent contractors" is not, in fact, coercive and does not chill employee rights under the ALRA, as it does not prevent employees from engaging in Section 1152 activities; (4) an employer's statement of misclassification constitutes a statement **of legal opinion** protected under Section 1155 of the ALRA; and (5) finding such a violation improperly shifts the burden of proof in unfair labor practice cases under Section 1160.2 of the Act. [*Velox Express, Inc.* (2019) 368 NLRB No. 61]

First of all, the subject employees were all alleged to be "agricultural employees" in the General Counsel's Complaint, [General Counsel's Complaint, Section 8]. Secondly, Respondent admitted that they were "agricultural employees" in its Answer. [Respondent's Answer, Section 1] Third, both the General Counsel and Respondent stipulated that the workers were "agricultural employees" in the Parties' Stipulations of Fact not in Dispute, Section 13. Therefore, at no time was the legal status of the subject employees in issue as "independent contractors. Indeed, the General Counsel's Complaint at Section17 states: "Cinagro did not tell the discriminatees that they would be classified as independent contractors." Nor was there any worker testimony to the effect that they were informed they were "independent contractors". Therefore, there was no statement by the employer, communicated to the workers, concerning any alleged misclassification of these agricultural employees as "independent contractors". The foregoing facts, standing alone, make the ALRB's request for supplemental briefing moot, as there was no

coercive statement directed at the employees.

Nevertheless, the ALRB is engaged in a furtive effort to demonstrate that an employer's stand-alone statement misclassifying workers as "independent contractors" may constitute a violation of the Section 1153(a) of the ALRA by seeking to reject the Trump Administration's NLRB decision in *Velox Express, inc.* (2019) 368 NLRB No. 61 as applicable NLRA precedent.[1]

The ALRB purports to extend its protective jurisdiction to farmworkers by arguing that misclassification of employees as "independent contractors" is a serious violation of California law and "presents important issues under the Act." [ALRB Order at p. 2] Without defining what those important issues are under the ALRA, the ALRB goes on to request the following issues be briefed:

1. Is the ALRB bound by Section 1148 to follow National Labor Relations Board decision *Velox Express, Inc.* (2019) 368 NLRB No. 61?
2. If the ALRB is not bound to follow *Velox Express*, should the Board a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of Section 1153, subdivision (a)?
3. If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, what is the scope of the Board's authority to assess civil penalties pursuant to labor [Section 226.8], if any?

As will be demonstrated hereafter, none of the foregoing issues have any application under the Cinagro Farms case, as well as under the Agricultural Labor Relations Act. Therefore, the Board should withdraw its **sua sponte** Administrative Order, as the agricultural workers of

[1] The former NLRB General Counsel under the Biden Administration attempted to establish a general rule that such statements violate Section 8(a)(1)[1153(a)] of the NLRA, but his position was overruled in *Velox*, supra. [See, NLRB Advice Memo dated December 18, 2015 in Pacific Transportation, Inc. Case No. 21-CA-150875 (Region 21-Los Angeles) at pages 8-12]

Cinagro were, as a matter of law, treated as statutory employees of Cinagro who directly retained their services. [Section 1140.4(c)] These employees were never informed that the company considered them as "independent contractors." [General Counsel's Complaint, Section 17]

II. Factual Record in the Underlying Cinagro Farms, Inc. Case

In Cinagro Farms, Inc., Chief Administrative Law Judge, Mark R. Soble, issued a decision[2] finding that six agricultural employees of the employer, Cinagro Farms, Inc., had been terminated from their employment for engaging in protected concerted activity. [IHED: at p. 64] One of the grounds asserted as alleged protected concerted activities involved employee complaints that their payroll checks were not accompanied by a wage statement showing tax deductions. [IHED: p. 18-19]

At the outset of the hearing, parties agreed to the following procedural and substantive facts:

1. General Counsel's Complaint at Section 8, alleged that all six workers were "statutory agricultural employees under the ALRA."
2. The employer's Answer to the Complaint admitted that all six of the agricultural employees were statutory agricultural employees under the ALRA. [Section 1.]
3. Joint Parties' Stipulation of Facts not in Dispute, at Section 13, stipulate that: "At all material times, Cinagro employed Ms. Jimenez, Hector Vasquez, Maria Duarte, Maria Santiago, Yolanda Antonio and Rigoberto Perez for agricultural workers as defined in Section 1140.4(b) of the Act." [Emphasis added]

Therefore, there is no dispute that the subject employees were not "independent contractors." At all times material in the proceeding, all six workers of the company were

[2] The ALJ's decision is currently before the ALRB on Exceptions. [8 CCR § 20282]

considered "agricultural employees." There was no worker testimony that disputed their employment status.

The employer's accountant testified that she informed the owner that the failure to deduct withholding taxes would mean that the employee's were **treated** as if they were "vendors" or "independent contractors". The meaning of this was not communicated to the workers. [Hearing Transcript, Volume 5, pages 127-129]

Nevertheless, the Board's Order states: "The lack of deductions and information accompanying the employees' paychecks derives from Cinagro's classification of the crew as independent contractors, rather than employees. [Board's Order at p. 2] The above conclusion was derived from the testimony of the company's accountant, Barbara Ito, in response to why payroll taxes not deducted for these workers. The accountant considered them to be vendors or independent contractors, rather than employees, only because the employer did not want them to have tax deductions from their employee paychecks. [Id.] She did not explain to the owner what the employees would need to do at the end of the year. Thus, they had no knowledge of their tax status. [Id.] While this practice was troubling from a State and Federal taxation standpoint, it should not be construed to mean that Cinagro considered them to be **bona fide** "independent contractors." Nor was this ever conveyed to the workers. Yet, the ALRB has precipitously taken an erroneous leap to conclude that Cinagro might consider these workers as independent contractors, thereby prompting its Administration Order No. 2022-01!

The significance of whether these six agricultural employees might considered as independent contractors was never litigated in the proceeding nor was it likely to have been done in light of the fact that all six employees were considered as bona fide agricultural workers of Cinagro, not independent contractors. These employees were provided tools and equipment by the employer; field sanitation units and water were provided by the employer; weekly paychecks

were provided in accordance with Labor Code Section 205; rest and meal periods were taken in accordance with IWC Wage Order 14-2000; and supervision was provided by the employer. None of these workers were provided with Forms 1099 which is an indicia of an independent contractor relationship. Thus, Cinagro had complete control over the working conditions of these workers, unlike in a usual independent contractor relationship.

It has long been established in **ARLB** precedent that issues not raised or litigated during the underlying unfair labor practice proceeding cannot be relitigated later before the ALRB. [F&P Growers Association (1984) 10 ALRB NO. 28 (Slip Opinion at p. 2, fn. 2); C. Mondavi & Sons dba Charles Krug Wine (1977) 5 ALRB No. 53 (Slip Opinion at pp. 2-3)]

Nevertheless, in a good faith attempt to address the Board's misplaced concerns on the issue of whether an employer's stand-alone misclassification of statutory employees as "independent contractors" would rise to the level of a Labor Code Section 1153(a) violation, Cinagro submits the following legal arguments.

III. Legal Analysis

A. Is the ALRB bound by Section 1148 to follow the National Labor Relations Board decision, *Velox Express, Inc.* (2019) 368 NLRB No. 61?

Labor Code Section 1148 of the ALRA requires the Board to follow applicable NLRA precedents. [See, e.g., ALRB v. Superior Court (Pandol Bros.) (1976) 36 Cal. 3d 392, 413]] With respect to the matter of *Velox Express, Inc.*, the NLRB held that an employer's stand-alone misclassification of statutory employees as "independent contractors", does not rise to the level of a Section 8(a)(1) [Section 1153(a)] violation.

Prior to reaching its decision in *Velox,* supra, the NLRB sent out an invitation to all NLRB practitioners, amici, and members of the public on February 15, 2018, requesting amicus briefs on the issue of whether misclassification of an employee under the NLRA constitutes a violation

of Section 8(a)(1) of the NLRA. Like the ALRB Order, the NLRB asked the following question: "Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors as a violation of Section 8(a)(1) of the Act." The NLRB received an over-whelming number of amicus briefs on this issue. [Velox, supra, at 368 NLRB No. 61, at fn.2] Thereafter, after an exhaustive legal analysis of the legal briefs of all the amici, the NLRB issued its landmark opinion "...declining to hold that an employer's misclassification of its employees as independent contractors, standing alone, violates the Act..." [referring to Section 8 (a)(1)]

The question before the ALRB, however, is whether *Velox* is "applicable" NLRA precedent to be applied by the ALRB. In order to resolve this issue, it should be noted that unlike the Agricultural Labor Relations Act, independent labor contractors under the National Labor Relations Act are specifically excluded entirely as employees under the Act. [See, e.g., Section 2(3) of the NLRA]

On the other hand, under the ALRA, farm labor contractors, who are also independent contractors in their own right, lose that independent classification when they are employed directly by an agricultural employer. In such instances, the employees of the farm labor contractors are deemed the employees of the agricultural employer who employs them for all purposes under the Act. [See, e.g., Labor Code Section 1140.4(c); Tenneco West, Inc.)1977) 3 ALRB No. 92 (Slip Opinion, p. 5 and fn. 2)]

As the *Velox* decision indicates, Section 2(3) of the NLRA excludes independent contractors from the definition of "employee" and thus from the Act's coverage. [*Velox* at p. 9] Moreover, the party asserting independent-contractor status has the burden of proving such status. [See, e.g., BKN, Inc. 333 NLRB 143, 144 (2001)] Applying the common law agency test found in NLRB v. United Insurance Company of America, 390 US 254, 256 (1968), the *Velox*

Board held that the drivers were employees under the Act, but there was no violation of Section 8(a)(1) of the Act for the employer's stand-alone misclassification of his statutory employees as independent contractors. [Velox, supra, at 4, 11]

On the other hand, in Cinagro, the owner never asserted publicly that the six agricultural harvest employees were independent contractors. Indeed, the entire evidentiary record proves that they were, indeed, statutory **agricultural employees** under the Act. The Board in *Velox Express, Inc.*, reached the correct conclusion on the status of the workers as statutory employees, but the significant ruling in *Velox* was its determination that an employer's stand-alone statement misclassifying statutory employees as independent contractors is not a violation of Section 8(a)(1) of the Act. As noted above, the only reason why the term "independent contractor" was raised in the ALRB's Order is due to the assertion that the six agricultural workers were considered as "vendors" or "independent contractors" by the employer's outside accountant in her testimony. However, her opinion was never communicated to these workers! Nor did the owner make such an assertion to the workers. [Transcript No. 5, at p. 127:15-21]

(i) Velox is applicable legal precedent under Section 1148

In *Velox*, the NLRB recognized three distinct arguments in support of its holding that an employer's, stand-alone, misclassification of statutory employees as independent contractors does not constitute a violation of the NLRA, and by extension the ALRA.

First, the NLRB ruled that the misclassification of employees as independent contractors is not, in fact, coercive and does nor chill employee right under the NLRA, as it does not prevent employees from engaging in Section 7 (Section 1152) activities.

"It does not threaten with adverse consequences for [engaging in protected activity] or promise them benefits if they refrain from doing so. Employees may well disagree with their employer, take the position that they are employees and engage in union or other

protected activities. If the employer responds with threats, promises, interrogations, and so forth, then it will have violated Section 8(a)(1), but not before."

Secondly, the NLRB found that important policy concerns weigh against finding a stand-alone misclassification violation. First, to form a legal opinion as to its workers' status under the Act, the employer is charged with the task of applying a complex common law agency test. Reasonable minds can, and do, disagree about independent contractor status when presented with the same factual circumstances. Also, once a classification decision is made by the employer it **must** be communicated to its workers. An employer must communicate it belief that its workers are independent contractors to satisfy this factor. Otherwise, if the Board were to establish a stand-alone misclassification violation, it would penalize employers for taking this step whenever the employer's belief turns out to be mistaken.

Lastly, the Board agreed with the amici that a stand-alone statement of misclassification would improperly shift the burden of proof in unfair labor practice cases. By way of example, a General Counsel could simply **allege** employee status, and the employer would have the burden of proving that the workers were independent contractors, which would effectively place on the employer the burden of proof that it did not violate the Act. This would be contrary to Section 10(b) [Section 1160.2)] of the Act. Each of the foregoing explanations of the *Velox* Board apply equally under the ALRA.

All of the above explanations in *Velox* apply equally to the ARLA. Thus, having demonstrated that *Velox* is, indeed, applicable legal precedent under Labor Code Section 1148, Cinagro, contends that there is no need to further analyze the Board's remaining questions. Nevertheless, Cinagro will engage in this intellectual invitation.

B. <u>If the ALRB is not bound to follow *Velox Express*, should the Board adopt a ruling finding an agricultural employer's misclassification of agricultural employees as</u>

independent contractors constitutes a per se violation of Section 1153(a)?

Assuming, solely arguendo, that *Velox* may not be applicable precedent under Section 1148 of the Act, the express statutory language of the ALRA actually *prevents* an agricultural employer from classifying workers as independent contractors, especially in the case of a farm labor contractor's employees.

Labor Code Section 1140.4(a), states in pertinent part: "(c) The term "agricultural employer" … shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined in Section 1682 and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part. [Emphasis added]

Clearly, in drafting of the definition of the term "agricultural employer", it was the intent of the Legislature to require that agricultural employees of an independent farm labor contractor are considered to be the agricultural workers of the employer hiring their services, in all respects, under the Act. [Id.]

Therefore, because of this unique language in the ALRA, a farm labor contractor's employees cannot be considered to be "independent contractors" because, as a matter of law, they are deemed to be the agricultural employees of the employer who hires their services even if the employer intentionally attempts to misclassify them. Such a willful misclassification would have no legal effect, as explained in *Velox*, supra, as it is not coercive, nor does it chill employee rights under Section 1152 of the ALRA.

Here, Cinagro Farms, did not attempt to classify its six harvest employees as independent contractors. Having stipulated with the General Counsel and agreed that they were agricultural employees, there were no reason under which Cinagro Farms could have designated them to be "independent contractors". Rather, the company merely failed to take required withholding taxes

from its employees' paychecks. This action did not convert these agricultural workers into "independent contractors", nor was there any public statement to that effect by the employer.

Once again, there are no conceivable circumstances under which an agricultural employer who hires a farm labor contractor could conclude or misclassify these statutory agricultural workers as "independent contractors".

In the case of direct-hire employees who perform agricultural functions as defined in Section 1140.4(a); IWC Wage Order 14-2001, Section 2, as statutory "agricultural employees", their status as an employee is generally undisputed. It is difficult to envision what limited circumstances could arise that would force an agricultural employer to misclassify field employees as "independent contractors" unless the employees presented themselves to the employer as independent contractors. [See, e.g., S.G. Borello & Sons, Inc. v. Department of Industrial Relations 48 Cal. 3rd 361 (1989); see also, Milky Way Dairy (2003) 29 ALRB No. 4 (applying S.G. Borello to determine whether secondary agricultural employees were independent contractors or employees.)]

In light of the substantial control over wages and working conditions exhibited by Cinagro in the present case, and most importantly the stipulation of the parties and acceptance of the subject workers as "agricultural employees"[3] and the failure of the General Counsel to litigate the issue by merely amending the Complaint, the classification status of the subject workers cannot not be misconstrued. Thus, a misclassification statement, standing alone, on their status as independent contractors could not be coercive and chill the exercise of their rights under Section 1152 of the ALRA.

C. If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, what is the scope of the Board's authority to assess civil penalties pursuant to Section 226.8 if any.

[3] See facts at page 2, lines 15-27 and page 3, line 1.

The answer to the above question quite simply is that there are no civil penalties provided under the Agricultural Labor Relations Act for such violations. The ALRB lacks subject matter jurisdiction to award civil penalties for violations of the Act. Labor Code Section 226.8 referred to in the Board's Order arises under the jurisdiction of the Division of Labor Standards Enforcement (Labor Commissioner and the Labor Workforce Development Agency). These agencies are Legislatively mandated to deal with violations of the California Labor Code. Private civil actions can also be processed under the California Labor Code and the Private Attorney General Act of 2004 to obtain wage penalties for agricultural workers and statutory attorney's fees. [See, Labor Code Sections 2699.3; Section 218.5]

The only alternative, if any, to obtain civil penalties for misclassification of employees would be for the General Counsel's office to refer agricultural workers who have experienced such violations of the Labor Code to the DLSE or LWDA, after their discovery during the ALRBS's investigation of an unfair labor practice charge. Those administrative agencies have subject matter jurisdiction to deal with such remedies, as do the California courts!

In the present case, the employees' complaints about the employer's failure to make statutory tax withholding deductions from each of the six employees' weekly paychecks constituted protected concerted activities under the Act. Thus, an employer's retaliation or discrimination based upon employees' engaging in such protected activity can only be remedied under the ALRA in terms of a "cease and desist order", or a reinstatement and backpay order, if employees are terminated from their employment. Otherwise, the ALRB is without subject matter jurisdiction to address the imposition of civil penalties. Clearly, the ALRB is precluded from imposing "punitive" remedies, such as civil penalties, under the ALRA. [See, e.g., Virginia Electric & Power Co. v. ALRB (1943) 319 U.S. 533, 540 (a Board's order is invalid when it is shown to be a "patent attempt to achieve ends other than those which can fairly be said to

effectuate the policies of the Act.")]

Moreover, the ALRB lacks the authority to award compensatory damages to the affected employees. [See, e.g., UFW v. ALRB (1995) 41 Cal. App. 4th 303, citing to Peralta Community College Dist. v. FEHA (1990) 52 Cal. 3d. 40, 51]

As an ancillary issue, it should be noted that the failure to take statutory payroll deductions in February of 2017 up until the employees' loss of employment on March 3, 2017, is beyond the statute of limitations for the DLSE or the LWDA to consider. [See, California Civil Code of Procedure, Section 338(a) (an action upon the liability created by statute other than a penalty or a forfeiture is three years).] Therefore, no remedy at law currently exists with regard to the issues raised in the Board's Question No. 3 above for the employees in the Cinagro litigation before the Board.

IV. Conclusion

For all the foregoing reasons, Cinagro Farms, respectfully submits that Board is without jurisdiction to take any action under Questions No. 1, 2 and 3 above.

DATED: May 26, 2022

Respectfully submitted,

BY: /Robert P. Roy/
Robert P. Roy
Michael P. Roy
Attorneys for Respondent
Cinagro Farms, Inc.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CINAGRO FARMS, INC., Respondent, and MARISOL JIMENEZ, Charging Party.	Case No. 2017-CE-008-SAL ORDER REQUESTING SUPPLEMENTAL BRIEFING RE: MISCLASSIFICATION OF EMPLOYEES Administrative Order No. 2022-01 (March 28, 2022)

ORDER

The Agricultural Labor Relations Board (ALRB or Board) has decided to invite briefs from the parties and interested amici to consider whether the misclassification of agricultural employees as independent contractors constitutes an unfair labor practice in violation of section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) and the scope of the remedies available to the Board in cases of misclassification.[1]

This case is before the Board on exceptions filed by both the General Counsel and respondent Cinagro Farms, Inc. (Cinagro) to the decision and recommended order issued by Chief Administrative Law Judge Mark R. Soble (ALJ). Insofar as is relevant here, the ALJ concluded Cinagro violated section 1153, subdivision (a) by terminating a

[1] The Act is codified at Labor Code section 1140 et seq. Subsequent statutory citations are to the Labor Code unless otherwise indicated.

crew of workers for engaging in concerted activity protected under the Act. Specifically, the employees complained to Cinagro about their paychecks not including proper paystubs after Cinagro directly hired the employees. The employees' paychecks lacked various statutorily required information and deductions, such as taxes and social security. (See § 226.) The lack of deductions and information accompanying the employees' paychecks derives from Cinagro's classification of the crew as independent contractors rather than employees. Indeed, the record evidences a practice by Cinagro of misclassifying agricultural employees as independent contractors from at least the time of the underlying events at issue in this case, beginning in 2016, to the time of the hearing before the ALJ in February 2021.

Misclassification of employees as independent contractors is a serious violation of California law and presents important issues under our Act. Accordingly, the parties and any interested amici are invited to file briefs addressing the following questions:

> (1) Is the ALRB bound by section 1148 to follow the National Labor Relations Board decision, *Velox Express, Inc.* (2019) 368 NLRB No. 61?
>
> (2) If the ALRB is not bound to follow *Velox Express*, should the Board adopt a rule finding an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a per se violation of section 1153, subdivision (a)?
>
> (3) If the Board finds an agricultural employer willfully misclassified agricultural employees as independent contractors, what is the scope of the Board's authority to assess civil penalties pursuant to section 226.8, if any?

The parties and any interested amici shall file briefs not exceeding 20 pages in length on or before May 27, 2022. The parties (but not amici) may file responsive briefs not exceeding 30 pages in length no later than June 13, 2022. No other briefs will be

accepted. Motions for extensions of time will not be granted absent extraordinary circumstances. All briefs shall be filed with the Board electronically pursuant to Board regulation 20169 (Cal. Code Regs., tit. 8, § 20169). The parties and amici are reminded to serve all case participants. The Board will make available on its website information regarding this case and a list of case participants.

DATED: March 28, 2022

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

Cinthia N. Flores, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE
(Code Civ. Proc., §§ 1013a, 1013b, 2015.5.)

Case Name: CINAGRO FARMS, INC., and,
MARISOL JIMENEZ.

Case No.: Case No. 2017-CE-008-SAL

I am a citizen of the United States and am employed in the County of Sacramento. I am over the age of 18 years and not a party to the within entitled action. My business address is 1325 J Street, Suite 1900-B, Sacramento, California 95814.

On March 28, 2022, I served the within **ADMINISTRATIVE ORDER 2022-01** on the parties in the above-entitled action as follows:

- **By Email** to the parties pursuant to Board regulation 20169 (Cal. Code Regs., tit. 8, §20169) from my business email address lori.miller@alrb.ca.gov:

  Robert P. Roy — Rob-VCAA@PacBell.net
  General Counsel
  Michael P. Roy — Mike-VCAA@PacBell.net
  Ventura County Agricultural Association
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  Julia L. Montgomery
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  Assistant General Counsel — Gabriela.Correa@alrb.ca.gov
  ALRB Oxnard Sub-Regional Office
  1901 N. Rice Avenue, Suite 300
  Oxnard, CA 93030-7912

- **By Certified Mail** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, with return receipt requested, in the United States mail at Sacramento, California, addressed as follows:

  Marisol Jimenez
  508 North Hill Street, #10
  Oxnard, CA 93033

  Certified Mail No.: 7021 0950 0001 2191 1627

Executed on March 28, 2022, at Sacramento, California. I certify under penalty of perjury that the foregoing is true and correct.

Lori A. Miller
Lori A. Miller
Legal Secretary

PROOF OF SERVICE

I, Aggie Salanoa, declare as follows:

I am a citizen of the United States, employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the within action; my business address is: 916 W. Ventura Blvd., Camarillo, CA 93010.

On May 26, 2022, I served the attached:

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE ALRB'S ORDER RE: MISCLASSIFICATION OF EMPLOYEES
[Administrative Order No. 2022-01]
[Case No. 2017-CE-008-SAL]

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

By Certified Mail: The above-referenced documents were mailed to the specified 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 Camarillo, California; and

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

DISTRIBUTION LIST

Santiago Avila-Gomez Executive Secretary Agricultural Labor Relations Board 1325 J Street, Suite 1900 Sacramento, CA 95814 E-File: Efile@alrb.ca.gov	Julia Montgomery, General Counsel Agricultural Labor Relations Board 1325 J Street, Suite 1900A Sacramento, CA 95814 E-Mail: julia.montgomery@alrb.ca.gov
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 27, 2022, at Camarillo, California.

Aggie Salanoa

PROOF OF SERVICE

Cinagro Farms, Inc.
(ALRB Case No. 2017-CE-008-SAL; Admin. Order No. 2022-01)

I, Catherine Gallegos, declare as follows:

I am a citizen of the United States and a resident of the County of Fresno. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 1141 West Shaw Avenue, Suite 104, Fresno, California 93711-3704.

On May 27, 2022, I served the within document(s) described as:

- **BRIEF OF BARSAMIAN & MOODY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT CINAGRO FARMS, INC., IN RESPONSE TO ADMINISTRATIVE ORDER NO. 2022-01**

on each of the interested parties in this action, as addressed and by the method of service indicated below, and as stated on the attached service list.

☒ **BY MAIL:** I am familiar with my employer's practice for the collecting and processing of correspondence for mailing with the United States Postal Service. I served the foregoing document(s) by placing a true copy of the foregoing document(s) in a sealed envelope with postage thereon fully prepaid, with return receipt requested, in the United States mail, at Fresno, California.

☐ **BY UPS OVERNIGHT DELIVERY:** I served the foregoing document(s) by personally delivering a true copy of the foregoing document(s) to a facility regularly maintained by United Parcel Service, a delivery service carrier, with delivery fees paid or provided for.

☒ **BY ELECTRONIC MAIL ("E-MAIL"):** I served the foregoing document(s) by e-mailing a true copy of the foregoing document(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 27, 2022, at Fresno, California.

Catherine Gallegos

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