STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRI-FANUCCHI FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	Case No. 2013-CE-008-VIS 2013-CE-014- VIS 40 ALRB No. 4 ORDER DENYING RESPONDENT'S APPLICATION FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE'S ORDER DENYING APPLICATION TO TAKE DEPOSITIONS Admin. Order No. 2022-04 (August 22, 2022)

On June 9, 2022, respondent Tri-Fanucchi Farms (Tri-Fanucchi) filed an application to take the depositions of Dr. Phillip Martin (Dr. Martin) and the person(s) most knowledgeable of Creal & Creal, an Accountancy Corporation (Creal) in this unfair labor practice case, which is currently in compliance. Dr. Martin and Creal had been retained by the General Counsel in this matter to assist in the development of a makewhole specification concerning the bargaining makewhole remedy ordered by the Agricultural Labor Relations Board (ALRB or Board) for Tri-Fanucchi's unlawful refusal to bargain with the certified union, the United Farm Workers of America. (See *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.)

On July 21, 2022, administrative law judge John McCarrick (the ALJ) issued an order denying Tri-Fanucchi's application to take the depositions, finding that Tri-Fanucchi failed to establish "special circumstances" justifying the depositions under Board regulation 20246[1] and rejecting Tri-Fanucchi's claim that it had a constitutional due process right to take the depositions.

On July 26, 2022, Tri-Fanucchi filed with the Board an application for special permission to appeal the ALJ's order pursuant to Board regulation 20242, subdivision (b). The General Counsel of the ALRB filed a reply opposing the application on August 5, 2022. We deny Tri-Fanucchi's application.

Board regulation 20242, subdivision (b) states that "[n]o ruling or order [of an administrative law judge] shall be appealable, except upon special permission from the Board . . .." Applications for special permission to appeal must set forth the moving party's "position on the necessity for interim relief and on the merits of the appeal" and shall include declarations if the facts are in dispute. (Board reg. 20242, subd. (b).)

In *Premiere Raspberries, LLC* (2012) 38 ALRB No. 11, the Board set forth the standard it would apply when evaluating whether to hear special appeals of interim orders. Consistent with the "final judgment" doctrine applied by most appellate bodies, the Board has recognized that "the Board's ALJs can best exercise their responsibility to issue rulings of law left to their discretion if the Board does not repeatedly intervene to second-guess their prejudgment rulings." (*Premiere Raspberries, LLC, supra*, 38 ALRB

[1] The Board's regulations are codified at California Code of Regulations, tit. 8, § 20100 et seq.

No. 11, p. 7.) The standard adopted by the Board "limit[s] Board review of interlocutory rulings sought pursuant to Regulation 20242(b) to those that cannot be addressed effectively through exceptions filed pursuant to Regulations 20282 or 20370(j) . . .." (*Id*. at p. 11.) This standard was intended to "strike the proper balance between judicial efficiency and providing an avenue of review of rulings that would otherwise be effectively unreviewable on appeal." (*Ibid*.)

The denial of Tri-Fanucchi's application to take depositions in this matter is not an issue that would be "effectively unreviewable" such that it cannot be addressed effectively through the exceptions process. After issuance of any decision and recommended order by the ALJ, if Tri-Fanucchi believes its interests in this matter were adversely effected by not being allowed to conduct the pre-hearing depositions it may raise such claims in exceptions once the matter is transferred to the Board and, if it establishes that the denial was erroneous and prejudicial, the Board may order such further proceedings as are necessary.[2] This approach is consistent with the general rule in California that an order denying discovery is an interlocutory order that is not immediately appealable but must be raised on appeal from the final judgment on the merits. (*Curtis v. Superior Court* (2021) 62 Cal.App.5th 453, 463-464 ["[g]enerally, discovery orders are not appealable. . . .The rationale for this rule is that in the great

[2] Indeed, Tri-Fanucchi may prevail before the ALJ or otherwise elicit at hearing the testimony and evidence it seeks from the witnesses, in which case its objections now would appear to be rendered moot. (See *Bokat v. Tidewater Equipment Co*. (5th Cir. 1966) 363 F.2d 667, 672; *Chicago Automobile Trade Association v. Madden* (7th Cir. 1964) 328 F.2d 766, 769.)

majority of cases the delay due to interim review is likely to result in harm to the judicial process by reason of protracted delay . . .and discovery orders may be reviewed on appeal from a final judgment on the merits"].)[3]

Tri-Fanucchi's application for special permission to appeal the ALJ's July 21, 2022 order denying its application to take the depositions of Dr. Martin and Creal is DENIED.

DATED: August 22, 2022

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lighstone, Member

Cinthia N. Flores, Member

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[3] This conclusion also applies to the ALJ's rejection of Tri-Fanucchi's claim to have a constitutional due process right to depose the witnesses. The National Labor Relations Board has rejected similar due process arguments where a respondent's attempts to conduct pre-hearing depositions have been denied, including in compliance cases. (*Tualatin Electric, Inc*. (2000) 331 NLRB 36, 40; *David R. Webb Co*. (1993) 311 NLRB 1135, 1135-1136.) In any event, Tri-Fanucchi may still raise such claims on exceptions, if necessary, and we appropriately may consider them then. (*ALRB v. Superior Court* (1994) 29 Cal.App.4th 688, 695-696; *California Coastal Farms, Inc. v. Doctoroff* (1981) 117 Cal.App.3d 156, 162 [party was required to exhaust administrative remedy by raising alleged due process violation with the ALRB before seeking writ relief in superior court], citing *Vapor Blast Manufacturing Co. v. Madden* (7th Cir. 1960) 280 F.2d 205, 209; see also *United States v. Rey* (5th Cir. 1981) 641 F.2d 222, 223-224 [holding that due process claims are generally subject to the ordinary rule against interlocutory appeals]; *United States v. Kouri-Perez* (1st Cir. 1999) 187 F.3d 1, 14 ["appellate courts frequently turn away interlocutory appeals involving the weightiest constitutional questions . . .. Thus, if appellants' due-process rights were violated, there is no reason to assume they cannot be fully vindicated on final appeal"].)