IRELL & MANELLA LLP
David A. Schwarz (159376)
Bruce A. Wessel (116734)
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199
DSchwarz@irell.com
BWessel@irell.com

GEORGESON, BELARDINELLI AND NOYES
C. Russell Georgeson (53589)
7060 N. Fresno Street, Suite 250
Fresno, California 93720
Telephone: (559) 447-8800
Facsimile: (559) 447-0747
crgdanelaw@sbcglobal.net

Attorneys for Plaintiff
Gerawan Farming, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

GERAWAN FARMING, INC., a California corporation,

Plaintiff,

vs.

CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, an administrative agency of the State of California; GENEVIEVE SHIROMA, an individual and Chairwoman of the Agricultural Labor Relations Board; CATHRYN RIVERA-HERNANDEZ, an individual and Board Member of the Agricultural Labor Relations Board; HERBERT O. MASON, an individual and Board Member of the Agricultural Labor Relations Board; J. ANTONIO BARBOSA, an individual and Executive Secretary of the Agricultural Labor Relations Board,

Defendants.

Case No. 13 CE CG 03374

COMPLAINT FOR DECLARATORY RELIEF

[U.S. CONST. AMEND. I; CAL. CONST. ART. I., §§ 2, 3; Code of Civil Procedure § 1060 et seq.; 42 U.S.C. § 1983]

Plaintiff Gerawan Farming, Inc. ("Gerawan" or the "Company") hereby alleges on personal knowledge, except where expressly noted as to particular allegations made on information and belief:

INTRODUCTION

1. A core principle of democratic self-governance is the right of the public and the press to observe government activities. "Secrecy in government," Justices Douglas and Black observed in the Pentagon Papers case, "is fundamentally anti-democratic, perpetuating bureaucratic errors." *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971). The First Amendment protects not only the dissemination but also the receipt of information, "since informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

2. California law follows and expands upon these federal constitutional principles. In 2004, California voters approved an amendment to Article 1, Section 3 of the California Constitution by an overwhelming majority (83.3%). This amendment is commonly known as "Proposition 59" or the "Sunshine Amendment." It was put on the ballot by a unanimous vote of both the California Senate and the Assembly and reflects the presumption that openness in government is the essential check "against the arbitrary exercise of official power and secrecy in the political process." *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 328-29 (2007). Article 1, Section 3(b)(1) states:

> The people have a right of access to information concerning the conduct of the people's business, and, therefore the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

3. These fundamental federal and state constitutional rights are violated by an August 21, 2013 Decision and Order of the California Agricultural Labor Relations Board (the "ALRB" or the "Board"), which barred the public, the press, and employees of Gerawan from attending on-the-record proceedings of a statutorily-imposed, non-voluntary process known as "Mandatory Mediation and Conciliation" or "MMC," imposed on Gerawan pursuant to Labor Code section 1164 *et seq*. of the California Agricultural Labor Relations Act. *Gerawan Farming, Inc.*, 39

ALRB No. 13 (August 21, 2013) (the "Order" or the "Exclusion of Workers Decision") (Attached as Exhibit A.). MMC is a compulsory, two-part process whereby one decision maker, in two different phases, mediates and, if that fails, takes evidence and testimony on-the-record to unilaterally write a collective bargaining agreement ("CBA"). The request to attend the on-the-record phase of these proceedings was made by a Gerawan farm worker, Lupe Garcia. The Board told Mr. Garcia that he was barred from attending the on-the-record proceedings. The ALRB has described its Order rejecting Mr. Garcia's request to sit and watch the testimony as the Board's "exclusion of workers" decision. *Gerawan Farming, Inc.*, 39 ALRB No. 16 (October 25, 2013).

4. The Exclusion of Workers Decision makes secret a process that will dictate wages and working conditions for thousands of agricultural workers including Mr. Garcia. Gerawan and its employees will be bound by this state-imposed contract, even though they never agreed to this process – it has been imposed on them by the state. Workers like Mr. Garcia will have no right to opt out of the contract and no right to vote on it. This makes the Exclusion of Workers Decision particularly unfair as it slams the door in the face of those directly affected by the MMC process – the workers themselves.

5. Letting farmworkers and the public attend the MMC on-the-record proceedings, proceedings where testimony is given under oath, would make the decision-making process more transparent and more legitimate in the eyes of the men and women who are directly affected. Openness is consistent with the constitutional presumption of public access. The Board offers no reason as to why secret proceedings are necessary because there is no reason for secrecy. There is no plausible justification for the self-evident contradiction of barring the public and workers from on-the-record proceedings in front of a state-mandated decision maker.

6. Gerawan hereby seeks a declaration that the Exclusion of Workers Decision violates the First Amendment to the United States Constitution and Article 1 of the California Constitution and a ruling that anyone, including Mr. Garcia and other Gerawan workers, can attend. Those proceedings are ongoing, as on October 25, 2013, the ALRB ordered resumed on-the-record proceedings on a limited number of issues.

THE PARTIES

7. Plaintiff Gerawan is, and at all times mentioned in the complaint was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business at 7108 N. Fresno St., Suite 450, Fresno, California. Gerawan is a family-owned and operated farm.

8. Defendant ALRB is an administrative agency of the State of California, created pursuant to the Agricultural Labor Relations Act, California Labor Code §§ 1140 *et seq*. (the "Act"). Its address is 1325 J Street, Suite 1900, Sacramento, California 95814-2944, United States. Under certain circumstances, the Act provides that the ALRB may order agricultural employers and labor organizations certified as bargaining agents into the MMC process. The decision challenged here as unconstitutional was made by the ALRB on August 21, 2013.

9. Defendant Genevieve Shiroma is Chairwoman and member of the Board. She is being sued in her official capacity.

10. Defendant Cathryn Rivera-Hernandez is a member of the Board. She is being sued in her official capacity.

11. Defendant Herbert O. Mason is a member of the Board. He is being sued in his official capacity.

12. Defendant J. Antonio Barbosa is the Executive Secretary of the Board, appointed by the ALRB to perform its duties. *See* Lab. Code § 1145. Gerawan is informed and believes, and on that basis alleges, that in that capacity, Barbosa executes the ALRB's directives in enforcing Labor Code section 1164, *et seq.* He is being sued in his official capacity.

13. At all relevant times, Gerawan is informed and believes, and on this basis alleges, that each of the individual defendants has been the agent or employee of the Board, and has acted within the course and scope of such agency or employment.

JURISDICTION AND VENUE

14. The Court has subject matter jurisdiction pursuant to Article VI of the California Constitution.

15. Venue in this Court is proper pursuant to Code of Civil Procedure Sections 393(b) and 401(1) because Gerawan has its principal place of business in the County of Fresno and was and is being injured by the acts and omissions of the Defendants in the County of Fresno.

16. The Court has authority to grant declaratory relief pursuant to California Code of Civil Procedure Section 1060 *et seq*.

FACTUAL BACKGROUND

A. Gerawan Is Compelled Into MMC By Board Order.

17. On April 16, 2013, the ALRB compelled Gerawan into MMC proceedings, pursuant to a demand by the United Farm Workers of America ("UFW" or the "Union"). *Gerawan Farming, Inc.*, 39 ALRB No. 5 (April 16, 2013).

18. MMC is a compulsory, two-part process which requires one decision maker to mediate and, if mediation fails, write a collective bargaining agreement ("CBA") based on sworn testimony that is presented to him and where witnesses are subject to cross-examination. This mediator/arbitrator is empowered to dictate every term of the contract between a labor organization and the agricultural employer and its workers – including how much the workers are paid and whether they must be fired if they refuse to pay dues to the union.

19. MMC is non-consensual. MMC proceeds whether or not the employer participates in the process. If the employer refuses to participate, the labor organization may select the decision maker, who is directed to dictate the final terms of the contract based on the presentation of that one party. Lab. Code § 1164(b); Cal. Code Regs. tit. 8, § 20407(a)(1). This intentionally coercive framework bolsters the power of the sole decision maker.

20. The employer and its workers have no right to reject or accept this contract. The workers will not know the terms of the CBA until after the "record" is closed and the "final terms" of the agreement have been dictated by the decision maker. Because of the Exclusion of Workers Decision they do not know what was advocated or requested during the proceedings or the subject matter of witness testimony or evidence presented to the decision maker.

21. The process does not guarantee any Board review or judicial appeal from the mediator's decision. The Act establishes discretionary Board review on limited grounds.

22. There are two distinct parts to the MMC. The first part is the mediation process. The second part of the process begins when the mediator certifies that "the mediation process has been exhausted" and the mediator becomes the decision maker in a compulsory, on-the-record arbitration. Lab. Code § 1164(c). The Board held that the on-the-record proceedings (the "OTR Proceedings") are to be conducted in secret.

23. A California appellate court has called this second phase of the MMC "compulsory interest arbitration." *Hess Collection Winery v. California Agricultural Labor Relations Board*, 140 Cal. App. 4th 1584 (2006) ("*Hess*"). It is a non-consensual arbitration because there is no agreement between the parties to arbitrate. Indeed, the process, by statute, can only be invoked when the parties have failed to reach any agreement at all. The Legislature has imposed this mandatory process on the employer, its employees, and the union by force of law. In the OTR Proceedings, the decision maker "is acting as a legislator, fashioning new contractual obligations" and thus what takes place during the OTR Proceedings is, according to *Hess*, "quasi-legislative" because it involves the "creation of new rules for future application." *Id*. at 1597-98.

24. During this second phase of the MMC, the mediator conducts on-the-record proceedings. The mediator administers oaths, hears sworn testimony, allows for cross-examination of witnesses, and receives and admits evidence. The mediator, now acting as the decision maker, is required to issue a report to the ALRB resolving disputed issues based on the sworn testimony and evidence received at that hearing (the "Report").

25. The regulations implementing the MMC make clear that only the portions of the proceedings that are on-the-record may support the mediator's findings and conclusions. Cal. Code Regs. tit. 8, § 20407(a)(2). Unlike off-the-record communications, the OTR proceedings are not confidential. *Id*.

26. The Report establishes the final terms of a "collective bargaining agreement" between the parties. Lab. Code § 1164(d). The on-the-record proceedings comprise the "official record" upon which the mediator establishes the final terms of a CBA. Cal. Code Regs. tit. 8, § 20407. The findings and conclusions of the Report must "be supported by the record" of the OTR Proceedings. Lab. Code § 1164(d). The mediator is required to cite evidence "in the

record" that supports his findings and conclusions. Cal. Code Regs. tit. 8, § 20407. Off-the-record communications shall not be the basis for any findings and conclusions in the Report. Once completed, the Report, together with the "official record of the proceedings," must be transferred by the mediator to the Board. *Id*. A party may request the Board to review any provision in the Report. The Board may, in the exercise of its discretion, review such a request to determine whether the mediator's determinations were arbitrary, capricious, or clearly erroneous in light of the evidence adduced during the on-the-record phase of the MMC. As with the on-the-record portion of the proceedings, the Board's review is indisputably a matter of public record.

B. <u>The Board Denies Gerawan Employee Lupe Garcia's Petition To Intervene In The MMC Proceedings.</u>

27. On June 10, 2013, Lupe Garcia, a long-term Gerawan farm worker, asked the mediator, Matthew Goldberg, for permission to attend and participate in MMC proceedings. Gerawan supported Mr. Garcia's request; the UFW did not. Mr. Goldberg sided with the UFW, and barred Mr. Garcia (and roughly 15 other Gerawan farm workers) from attending. The mediator told Mr. Garcia the proceedings were confidential, and that he was not a "party" to the proceedings.

28. On July 10, 2013, Mr. Garcia asked the Board for permission to intervene in the MMC proceedings. Gerawan supported his motion to intervene. The UFW again objected, claiming that the Union (and its hand-picked "negotiation committee" of Gerawan workers) was the exclusive bargaining representative of all of Gerawan's agricultural employees, including Mr. Garcia.

29. Mr. Garcia's Petition for Intervention raised serious issues as to the fairness and transparency of the MMC proceedings, as well as whether the UFW could adequately represent the interests of all of Gerawan's employees. Mr. Garcia asserted that the Union handpicked several employees to join it in the mediation phase, without informing other Gerawan employees of the pendency of the MMC process, or requesting their input and participation. More fundamentally, Mr. Garcia alleged that the UFW had done nothing to protect Gerawan's workers or to attempt to negotiate, in good faith, a contract with Gerawan for the last 20 years. He

challenged the UFW's standing to represent Gerawan's workers, or to invoke the MMC proceedings, based on the Union's two-decade abandonment and the inherent conflict of interest between the Union's position and demands and Mr. Garcia's rights of free association and due process.

30. The Board sided with the UFW, and against Mr. Garcia. It dismissed Mr. Garcia's Petition to Intervene, and held that Gerawan "lacked standing" to assert the legal rights of Mr. Garcia and other members of the public to attend the OTR Proceedings. *Gerawan Farming, Inc.*, 39 ALRB No. 11 at 8 (July 29, 2013).

C. <u>The Board Denies Mr. Garcia's Request To Attend The OTR Proceedings.</u>

31. On August 2, 2013, Mr. Garcia asked the Board for permission to attend the OTR Proceedings. In making this request, Mr. Garcia did not assert a right to force disclosure of confidential information. He did not ask to invade in anyway the decision-making process of government officials. He simply asked to be permitted to sit and observe in silence the on-the-record process whereby the terms of his employment would be addressed.

32. The OTR Proceedings ordered by the ALRB took place on August 8, 2013, at the Double Tree Hotel in Modesto, California and on August 19, 2013, at the Hilton Airport in Oakland, California. Witnesses testified under oath at both proceedings and were examined and cross-examined by counsel for Gerawan and the UFW, and questioned by the mediator, Matthew Goldberg. Mr. Goldberg presided over both days of the OTR Proceedings.

33. The ALRB denied Mr. Garcia's request on August 21, 2013. The Order (39 ALRB No. 13), now ALRB precedent, determined that neither Mr. Garcia nor any Gerawan worker, member of the press, or the public has any right to attend the OTR Proceedings.

34. On or about September 28, 2013, Mr. Goldberg issued his "Mediator's Report to the Board" in which, among other things, he claimed to set the wages for Mr. Garcia for the next three years, establish rules for the workplace governing his rights on a wide variety of topics, and set seniority rules that would affect his day-to-day working conditions. Mr. Goldberg made these so-called "quasi-legislative" decisions based on the two days of secret testimony and argument that he heard in two different hotel rooms. But because Mr. Garcia was denied the right to attend

the proceedings, he has no way of knowing what really transpired in the hotel rooms in August (other than to read the transcript, which does not include everything that happened, such as discussions in Spanish, and does not convey anything about the tone and demeanor of the witnesses or the decision maker). On October 25, 2013, the ALRB remanded the matter to Mr. Goldberg for further proceedings.

D. The Order Violates Federal And California Constitutional Rights Of Free Speech And Public Access To On-The-Record Agency Proceedings.

35. The U.S. and California constitutions require that on-the-record proceedings be open to the public. The ALRB disagrees. Even though the "official record" and the mediator's Report are public, as is the Board's review of the "official record," the ALRB has ruled that these so-called "quasi-legislative" OTR Proceedings must take place in secret.

36. The Board determined that the OTR Proceedings should be held behind closed doors because the "public interest" is not served by "public presence" during the proceeding. *Gerawan Farming, Inc.*, 39 ALRB No. 13. By this reasoning, any legislative body could constitutionally decide to meet in secret by simply professing a belief that "public presence" at a meeting was not in the "public interest." The ALRB has given no reason why farmworkers cannot watch a proceeding where their wages, hours, and conditions of employment are being considered in a State-mandated, on-the-record proceeding before a neutral decision maker. Instead, the three board members of the ALRB have just decided that secrecy is better than openness. That is not their choice to make.

37. The Board recognized that the issue raised by Mr. Garcia was of constitutional importance to all Gerawan workers and the public. It noted that whether Mr. Garcia and the public have a right of public access to MMC proceedings "presents an issue of first impression which, if left unresolved, could potentially result in the deprivation of constitutionally protected rights." Having framed the question as significant, it then denied Mr. Garcia and Gerawan the right to insist that self-evidently public, on-the-record proceedings not take place behind closed doors.

38. The mandate of the Sunshine Amendment directs agencies and courts to construe narrowly any law limiting the right of access and to construe broadly any law which furthers "the people's right of access." The Board advances the absurd characterization of OTR Proceedings to shield them from public scrutiny. Thus, the Board contends that the MMC are "not proceedings of a state body" because Board members do not sit in an "official capacity" during MMC proceedings or even attend them. Order at 9. Setting aside the indisputable public nature of a statutory on-the-record proceeding, the Board avoids the fact that the entire MMC proceeding is dictated and subject to review by a "state body." MMC is compelled by Board order, adjudicated under statutory authority granted to the Board to appoint and empower the mediator to dictate the "final terms" of a Board-ordered CBA, and governed by a legislative delegation of authority to the Board to prescribe the MMC process, the scope of the mediator's authority, and the power of the Board to review the OTR Proceedings that must, by statute, form the basis of the Report.

39. The Sunshine Amendment requires that the Board make "findings demonstrating" the necessity for secrecy over the constitutional presumption of access. Cal. Const. art. 1, sec. 3(b)(2). Instead, the ALRB acted as if secret governmental proceedings are the norm in California: "We do not see how public access would play a significant positive role in the functioning of the MMC." Order at 7. The ALRB thus adopted a constitutionally-backward rule that proceedings are to be open only when the ALRB concludes that allowing public access would play "a significant positive role" in the process, and otherwise they should be closed.

40. Gerawan also challenged the Board's closed-door decision. The Board refused to hear Gerawan, claiming that it "lacked standing to assert the legal rights of others." As with any citizen of the State of California, Gerawan has a constitutional right of access to government proceedings, and standing to insist that its workers, the press, and the public may attend such proceedings. While the vindication of that right is particularly compelling where, as here, it is Gerawan that has been subjected to a process cloaked in and tainted by secrecy, Gerawan has the right to attend any OTR Proceeding, whether or not it is the party compelled into the process.

41. Gerawan has standing to raise these points because it has an interest in seeking vindication of its right, and that of the public, to know the process by which the ALRB determines state-imposed contracts with profound and expansive impact on agriculture in the State of California. Gerawan is not excepted from the California Constitution's guarantee that **"***the people***"** of this State have the right of public access. Furthermore, as Gerawan has been compelled to participate in the MMC process that could result in a government-imposed collective bargaining "agreement," the Company has a concrete and actual interest in ensuring that the proceedings are open to public scrutiny, so that interested persons can observe the process first hand, and therefore has standing to insist that the process be open to the public in accordance with the law. Gov't Code § 6259 (providing **"***[a]ny person* may institute proceedings for injunctive or declarative relief" under the Public Records Act); *id.* § 11130 (providing same remedies for "any interested person" to enforce the Bagley-Keene Open Meeting Act). Gerawan is uniquely situated to demand compliance with the constitutional and statutory guarantee of open meetings that have a direct and immediate impact on its rights.

42. Traditionally, legislative hearings where the public testifies are open to the public. Given the Board's characterization of the OTR Proceedings as "quasi-legislative," they should be open as well. The Board's observation that labor "negotiations" are not public, while irrelevant to the unique and coercive aspects of the MMC proceedings, ignores the fact that the OTR Proceedings are not negotiations. Indeed, the OTR Proceedings take place only after negotiations have failed to produce an agreement, the mediation phase of the MMC is deemed "exhausted" by the mediator, thus leaving to his determination any "disputed issues" via OTR Proceedings.

43. Although it is not Gerawan's burden to justify the presumption of public access or to prove the value of open proceedings, there are obvious benefits to public scrutiny of a process that will dictate the livelihood of Gerawan and thousands of its workers. The process is irrevocably tainted where interested persons are prohibited from participating in, or even observing, the OTR Proceedings. The employees of any farmer compelled into MMC will have to live with the terms and conditions imposed by a mediator. The stated goal of the MMC is to promote "stability" in the agricultural industry. That goal can only be advanced if those most

directly impacted by the mediator's decisions are permitted to observe the process. Instead, the workers know that they have been subjected to a secret process which yields a contract that they cannot ratify or avoid. The parties, the lawyers, and the decision maker would likely behave differently if the sunshine of public access was present. As some aspects of the process are designed to harmonize pay and conditions from workplace to workplace, allowing other employers and other unions to attend might facilitate the positive conclusion of other negotiations. The benefits of public access are many. The costs of secrecy are great.

FIRST CAUSE OF ACTION

For a Declaration that the Board's August 21, 2013 Decision and Order (39 ALRB No. 13) Is Unconstitutional (U.S. Const. Amend. I)

44. Plaintiff Gerawan realleges and incorporates herein by reference paragraphs 1 through 43 as though set forth in full.

45. Under California Code of Civil Procedure Section 1060, Plaintiff is an interested person entitled to declaration relief addressing its rights and duties and resolving the actual controversy between Gerawan and Defendants as to the constitutionality of the Board's August 21, 2013 Decision and Order (39 ALRB No. 13).

46. An actual controversy now exists between the parties, in that Plaintiff Gerawan contends that Defendants' actions and refusals to act violate Gerawan's right of public access to on-the-record MMC proceedings. California Labor Code Section 1164 establishes procedures known as Mandatory Mediation and Conciliation, in which an agricultural employer is required to engage in mandatory mediation and compulsory interest arbitration with a certified labor organization, resulting in a report that "resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement."

47. That report, issued by a single mediator and subject to limited Board review, "shall be supported by the record." Lab. Code § 1164(d); Cal. Code Regs. tit. 8, § 20407(a)(2) ("All evidence upon which the mediator relies in writing the report required by section 1164, subdivision (d) shall be preserved in an official record . . . ."). Pursuant to the regulations implementing the MMC process, the mediation requires parties to "provide the mediator with a

detailed rationale for each of its contract proposals on issues that are in dispute, and shall provide on the record supporting evidence to justify those proposals." 8 C.C.R. § 20407(a)(1). While the regulations require the decision to be based solely on findings and conclusions derived from evidence on-the-record, portions of the process may be deemed off the record. *Id*. § 20407(a)(2). Only those communications declared to be off the record are "subject to the limitations on admissibility and disclosure provided by Evidence Code section 1119, subdivisions (a) and (c)." *Id*.

48. Through the Board's August 21, 2013 Order, the Defendants have refused to open the on-the-record MMC proceedings between Gerawan and the UFW to any nonparties, including Gerawan workers, the press, and the public at large. The Defendants' refusal is not supported by any sufficient government interest in protecting a more important value and is not narrowly tailored to serve any such interest.

49. The Defendants' actions violate Gerawan's rights under the First Amendment of the U.S. Constitution to free speech and the right to petition Government for redress of grievances. The denial of these rights has caused and is causing Gerawan on-going injury.

50. Pursuant to California Code of Civil Procedure Section 1062.3, this action "shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence may be given by law."

SECOND CAUSE OF ACTION

For a Declaration that the Board's August 21, 2013 Decision and Order (39 ALRB No. 13) Is Unconstitutional (Art. I, §§2 and 3 of the California Constitution)

51. Plaintiff Gerawan realleges and incorporates herein by reference paragraphs 1 through 50 as though set forth in full.

52. Under California Code of Civil Procedure Section 1060, Plaintiff is an interested person entitled to declaration relief addressing its rights and duties and resolving the actual controversy between Gerawan and Defendants as to the constitutionality of the Board's August 21, 2013 Decision and Order (39 ALRB No. 13).

53. An actual controversy now exists between the parties, in that Plaintiff Gerawan contends that Defendants' actions and refusals to act violate Gerawan's right to public access to on-the-record MMC proceedings, its rights of free speech, and its right to petition government for redress of grievances.

54. Through the acts and refusals to act described above, the Defendants have violated Gerawan's constitution right of public access under Art. 1 of the California Constitution.

55. Defendants have no adequate reason that would justify the closure of the MMC proceedings in contravention to the California Constitution.

56. Pursuant to California Code of Civil Procedure Section 1062.3, this action "shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence may be given by law."

THIRD CAUSE OF ACTION

For Relief for Violation of Federal Constitutional Rights by Defendants Shiroma, Rivera-Hernandez, Mason, and Barbosa (42 U.S.C. § 1983)

57. Plaintiff Gerawan realleges and incorporates herein by reference paragraphs 1 through 56 as though set forth in full.

58. Defendants Shiroma, Rivera-Hernandez, Mason, and Barbosa, in acting or refusing to act as described above, deprived Plaintiff Gerawan of its rights, privileges or immunities secured by the First Amendment to the United States Constitution.

59. In violating Plaintiff Gerawan's rights as set forth above, Defendants Shiroma, Rivera-Hernandez, Mason, and Barbosa acted under color of state law and denied public access to official, on-the-record MMC proceedings.

60. As a direct and proximate result of the violation of the constitutional right to public access, Gerawan has suffered injury as alleged in this Complaint and is entitled to relief under 42 U.S.C. §§ 1983, 1988.

PRAYER FOR RELIEF

1. For a declaration that the Board's August 21, 2013 Decision and Order (39 ALRB No. 13) holding that the on-the-record MMC proceedings are not open to the public is unconstitutional under the U.S. and California Constitutions.
2. For a declaration that the MMC proceedings conducted pursuant to the Board's April 16, 2013 Decision and Order (39 ALRB No. 5) are null and void.
3. For preliminary and permanent injunctive relief.
4. For damages, costs, and attorneys' fees incurred herein, as provided for by applicable law, including 42 U.S.C. § 1988.
5. For such further and additional relief as the Court may deem just and proper.

Dated: October 28, 2013

IRELL & MANELLA LLP
David A. Schwarz

GEORGESON, BELARDINELLI AND NOYES
C. Russell Georgeson

By: C. Russell Georgeson
C. Russell Georgeson
Attorneys for Plaintiff Gerawan Farming, Inc.

EXHIBIT A

Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GERAWAN FARMING, INC. Employer, and UNITED FARM WORKERS OF AMERICA Petitioner.	)	Case No. 2013-MMC-003 39 ALRB No. 13 (August 21, 2013)

DECISION AND ORDER

On July 10, 2013, Lupe Garcia ("Garcia"), an employee with Gerawan Farming, Inc., ("Gerawan) filed a "Petition for Intervention" with the Agricultural Labor Relations Board ("ALRB" or "Board") in the above-captioned case. Pursuant to the Board's July 12, 2013 Administrative Order 2013-26, Gerawan and the United Farm Workers of America ("UFW") filed responses to the petition on July 19, 2013. In its response, Gerawan attempted to raise an issue on Garcia's behalf: Whether Garcia and other individual employees of Gerawan, as well as the public, had a First Amendment right to attend the Mandatory Mediation and Conciliation (MMC) proceedings between Gerawan and the UFW, the certified bargaining representative for Gerawan's employees. We declined to reach the issue because Gerawan lacked standing to assert the legal rights of Garcia and other members of the public. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 11 at p. 8.)

On August 2, 2013, Garcia filed a petition for reconsideration asking the ALRB to decide, *inter alia*, whether the public, including Garcia and other Gerawan employees, has the right to attend "on the record" MMC proceedings under article I, section 3 (b) of the California Constitution and the First Amendment of the United States Constitution. We deny Garcia's motion for reconsideration because it does not meet the standard for granting reconsideration. We grant reconsideration *sua sponte*, however, because the issue raised by Garcia – whether Garcia and the public have a right of public access to MMC proceedings under the federal and state constitutions – presents an issue of first impression which, if left unresolved, could potentially result in the deprivation of constitutionally protected rights.

Although the Board's regulations provide for motions for reconsideration in unfair labor practice and representation proceedings (Cal. Code Regs., tit. 8, §§ 20286(c) and 20393(c), respectively) and do not expressly provide for review of a Board interlocutory order in a MMC proceeding, we will treat the petition for reconsideration as a motion for reconsideration subject to the same standard of review as motions for reconsideration under the relevant regulation sections cited above.

Standard for Hearing a Motion for Reconsideration

We recently restated in *South Lakes Dairy Farms* (2013) 39 ALRB No. 2, that the standard for hearing a motion for reconsideration of a Board decision is that the moving party show *extraordinary circumstances*, i.e., an intervening change in the law or evidence previously unavailable or newly discovered. (*South Lakes Dairy Farms* (2013) 39 ALRB No. 2 at p. 2.) As we stated in the decision, "[t]he standard does not

contemplate hearing on reconsideration issues argued for the first time absent a compelling reason as to why they were not raised and/or fully argued previously." (*Id.* at p. 4.) Likewise, this is not a case where a motion for reconsideration would have been Garcia's only option for Board review of this issue. (See generally *Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100.) Garcia could have raised the issue in the Petition for Intervention but did not. Despite the fact that Gerawan did raise the issue, the issue was not properly before the Board because Gerawan lacked standing to assert the legal rights of others.

Right of Public Access to "On the Record" MMC Proceedings

Garcia argues that there is a right of public access to the MMC proceedings at issue under both the First Amendment of the United States Constitution as well as under article 1, section 3(b) of the California Constitution. Garcia cites *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, and *Delaware Coalition for Open Government v. Strine* (D. Del. 2012) 894 F.Supp.2d 493, for the proposition that the First Amendment provides a right of access to civil trials and proceedings in general and to quasi-arbitration procedures specifically. We find both cases to be inapposite on their facts with respect to a right of public access under the First Amendment.

In *Press-Enterprise Co. v. Superior Court*, the United States Supreme Court decided whether there was a general First Amendment right of access to preliminary hearings in criminal cases conducted in California. In holding that there was, the Court noted that the California Supreme Court had concluded that the First Amendment was not implicated because the proceeding was not a criminal trial, and that

the First Amendment question could not be resolved solely on the label given an event, "trial" or otherwise, particularly where the preliminary hearing functioned much like a full-scale trial. *(Press-Enterprise Co. v. Superior Court* of *Cal.* (1986) ("*Press-Enterprise II"*) 478 U.S. 1 at p. 7.)

In determining whether there was a qualified First Amendment right of access, the Court applied what has become known as the "experience and logic" test, i.e., whether the place and process have historically been open to the press and general public, and whether public access plays a significant positive role in the functioning of the particular process in question. (*Press-Enterprise II, supra,* 478 U.S. at p. 8). The court concluded there was indeed a qualified First Amendment right of public access because preliminary hearings of the type conducted in California had traditionally been accessible to the public, and public access to criminal trials and the selection of jurors was essential to the proper functioning of the criminal justice system. The court found that California preliminary hearings were sufficiently like a criminal trial to justify public access for the same reasons. (*Press-Enterprise II, supra,* 478 U.S. at pp. 10-12). The "experience and logic" test has been applied to non-judicial proceedings as well. (See *Leigh v. Salazar* (9th Cir. 2012) 668 F.3d 1126 (reversing a district court's grant of a preliminary injunction restricting viewing of the Bureau of Land Management's horse gather for failure to conduct the *Press-Enterprise II* analysis to determine whether horse gathers were traditionally open to the public and whether public access plays a positive role in the functioning of a horse gather); *Whiteland Woods, L.P. v. Township of West Whiteland* (3d Cir. 1998) 193 F.3d 177 (holding that appellant had a First Amendment right of access to

a planning commission meeting under *Press-Enterprise II* but limitations on videotaping did not violate appellant's right of access).

Garcia cites both *NBC Subsidiary* and *Delaware Coalition for Open Government* as precedent for the proposition that, under the "experience and logic" test of *Press-Enterprise II*, the Board is compelled to allow public access to MMC proceedings.

In *NBC Subsidiary (KNBC-TV)*, the California Supreme Court held that the First Amendment right of access to trials encompassed civil proceedings, noting that no case to which the court had been cited or of which it was aware suggested or held that the First Amendment right of access as articulated by the U.S. Supreme Court did not apply, as a general matter, to ordinary civil proceedings. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of Los Angeles*, 20 Cal. 4th 1178, pp. 1208-1209.) The California Supreme Court noted that the high court's opinions in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501 ("*Press-Enterprise II")* and *Press-Enterprise II* suggested that the First Amendment right of access extended beyond the context of criminal proceedings and encompassed civil proceedings. (*Id.* at pp. 1207-1208.)

In *Delaware Coalition for Open Government v. Strine*, the U.S. District Court for the District of Delaware addressed the issue of a First Amendment right of access to a confidential arbitration proceeding established by Delaware law in its Court of Chancery, giving the Court of Chancery the power to arbitrate business disputes when the parties request a member of the Court of Chancery or other person authorized under court

rules to arbitrate a dispute. In concluding that the Delaware proceeding, although labeled arbitration, was essentially a civil trial, the court noted that a Chancellor, and not the parties, selected the judge who would hear the case; the same rules governing discovery in the Chancery Court applied to the arbitration; a sitting judge presides over the proceeding; and that the judge found facts, applied the relevant law, determined the obligations of the parties, and then issued an enforceable order. (*Delaware Coalition for Open Government v. Strine* (D. Del. 2012) 894 F. Supp. 2d 493, 502-503.)

Similarly, Garcia argues that the MMC process is intended to vindicate public rights and is not purely a commercial dispute between two private parties. Public access, Garcia argues, would promote the integrity of the process. Garcia is correct that the MMC process is not purely a commercial dispute between two private parties. Indeed, MMC is not a "non-consensual adjudication" as Garcia argues, nor is it a dispute resolution proceeding in the traditional sense of resolving legal claims and rights between parties; it is the imposition of a labor contract negotiation as a result of a bargaining impasse and, as such, bears no resemblance to the civil trial proceedings addressed in *NBC Subsidiary* or the court-conducted and voluntary arbitration procedures addressed in *Delaware Coalition for Open Government.*

MMC is a quasi-legislative proceeding invoked not to resolve the legal claims of parties, but to force negotiations (mediation) that, if unsuccessful, result in a binding contract imposed on the parties (binding interest arbitration). Likening it to civil trials or court-conducted arbitration for the purpose of finding a First Amendment right of

access is unavailing, and resort to the "experience-logic" analysis of *Press-Enterprise II* is required.

MMC is more akin to a labor contract negotiation, albeit a mandatory one once invoked by one of the parties, and we know of no tradition of labor contract negotiations being open to the public, even those involving public employees. We do not see how public access would play a significant positive role in the functioning of MMC or any type of labor contract negotiation for that matter.

The purpose of the MMC process is to build a labor negotiation relationship between the parties not only to accomplish the creation of the first contract, but to further negotiations between the parties in the future. As noted by the California Court of Appeal in *Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal. App. 4th 1584, "It would thus appear that the legislative purpose is to change the attitudes toward collective bargaining by compelling the parties to operate for at least one term with either a collective bargaining agreement or the functional equivalent of a collective bargaining agreement. The Legislature hopes that employers who have been resistant to collective bargaining will learn that collective bargaining can be mutually beneficial." (*Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal. App. 4th 1584, 1600.) During labor contract negotiations, strategic compromises are often made that further the goals of achieving a contract and building a labor negotiation relationship. These compromises would not be made with the prospect of real-time publicity of those compromises and demands for explanations prior to the conclusion of negotiations. "[L]abor negotiations are conducted in private in order that negotiators may speak freely

without fear of offending their constituencies and reach compromises without appearing to be weak." (Benjamin S. Duval, Jr., *The Occasions of Secrecy* (1986) 47 U. Pitt. L. Rev. 579, 669.)

Additionally, unlike the arbitration in *Delaware Coalition for Open Government*, a Board order enforcing a contract pursuant to MMC is not self-enforcing; in the event the parties refuse to comply, the Board must seek judicial enforcement of any such order to force compliance by the parties. Applying the "experience-logic" test of *Press-Enterprise II*, we conclude that there is no First Amendment right of access to the Board's quasi-legislative proceeding known as MMC.

Garcia also argues that a right of public access to MMC proceedings exists under article I, section 3, subdivision (b) (1) of the California Constitution, which states in relevant part:

> (b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

Garcia also cites the Bagley-Keene Open Meetings Act, Government Code section 11120 et seq., which also applies to meetings of state bodies.

Article I, Section 3, subdivision (b) (2) of the California Constitution provides:

> (b) (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that

> limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

Subdivision (b) of section 3 of article I was added to the California Constitution in 2004 by Proposition 59. Proposition 59 has been interpreted as "enshrining in our state Constitution the public's right to access records of public agencies," but having little impact on the construction of the Public Records Act. (*BRV, Inc.* v. *Superior Court of Siskiyou County* (2006) 143 Cal.App.4th 742, pp. 750-751.) Similarly, Proposition 59 has little impact on the construction of the Bagley-Keene Open Meeting Act which preceded it.

MMC proceedings are not a proceeding of a state body. The Bagley Keene Open Meeting Act, Government Code section 11121, defines "state body" as, *inter alia*, a board, commission, or similar multimember body of the state created by statute or required by law to conduct official meetings. (Gov. Code § 11121, subd. (a).) No ALRB Board member sits in an official capacity during MMC proceedings or even attends them. Although Garcia correctly notes that Evidence Code sections relating to confidentiality in mediation do not apply to the final interest arbitration phase of the MMC process, *Hess Collection Winery* (2003) 29 ALRB No. 6 at 8, it does not stand to reason that the interest arbitration phase, or any phase of MMC, for that matter, is open to the public as a meeting of a state body.

When we look to the procedures allowing for the appointment of a mediator upon the declaration of an impasse by public agency and employee organizations (Gov. Code § 3505.2), public schools and their employees (Gov. Code § 3548 et seq.), and in

higher education employer-employee negotiations (Gov. Code §3590 et seq.), we see no provision for public participation. For the reasons stated previously, we do not think the public interest in the process of reaching an agreement as to the terms of a collective bargaining agreement is served by public presence during that process.

For the reasons set forth above, Garcia's Motion for Reconsideration is hereby DENIED.

DATED: August 21, 2013

Genevieve A. Shiroma, Chair

Cathryn Rivera-Hernandez, Member

Herbert O. Mason, Member

CASE SUMMARY

GERAWAN FARMING, INC. Case No. 2013-MMC-003
(United Farm Workers of America) 39 ALRB No. 13

Background

On July 10, 2013, Lupe Garcia ("Garcia), an employee with Gerawan Farming, Inc. ("Gerawan") filed a petition for intervention with the Agricultural Labor Relations Board ("ALRB" or "Board") in this matter. Pursuant to Administrative Order 2013-26, Gerawan and the United Farm Workers of America ("UFW") filed responses, and in its response, Gerawan attempted to raise on Garcia's behalf the issue whether Garcia and other employees, as well as members of the public, had a First Amendment right of access to Mandatory Mediation and Conciliation ("MMC") proceedings between Gerawan and the UFW. The Board declined to reach the issue because Gerawan lacked standing to assert the legal rights of Garcia and other members of the public. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 11). On August 2, 2013, Garcia filed a petition for reconsideration asking the ALRB to decide, *inter alia*, whether the public, including Garcia and other Gerawan employees, has the right to attend "on the record" MMC proceedings under Article I, Section 3(b) of the California Constitution and the First Amendment of the United States Constitution.

Board Decision

Although the Board's regulations do not provide for motions for reconsideration of a Board interlocutory order in an MMC proceeding, the Board treated the petition for reconsideration as a motion for reconsideration subject to the same standard of review as motions for reconsideration in unfair labor practice and representation proceedings. The Board denied Garcia's motion for reconsideration on the grounds that it did not meet the standard for hearing a motion for reconsideration as reiterated in *South Lakes Dairy Farms* (2013) 39 ALRB No. 2, to wit: The moving party must show extraordinary circumstances, i.e., an intervening change in the law or evidence previously unavailable or newly discovered. The Board noted that this was also not a case where a motion for reconsideration would have been Garcia's only option for Board review of the case, as Garcia could have raised the issue in the Petition for Intervention.

The Board granted reconsideration *sua sponte* because the issue raised, if left unresolved, could potentially result in the deprivation of constitutionally protected rights. The Board held that there was no right of access under the First Amendment of the United States Constitution. Applying the "experience and logic" test from the U.S. Supreme Court's decision in *Press-Enterprise Co. v. Superior Court of California* (1986) 478 U.S. 1, the Board held that MMC proceedings are more like labor contract negotiations and that there is no tradition of labor negotiations being open to the public, nor did public access play a significant positive role in the functioning of MMC or any type of labor contract negotiation. The Board held that there was no right of public access under Article I, Section 3 (b) of the California Constitution because Article I, Section 3(b) had little impact on the construction of the Bagley-Keene Open Meeting Act, which applies to meetings of state bodies. MMC proceedings are not meetings of state bodies.

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