F068526

No.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIFTH APPELLATE DISTRICT (FRESNO)

GERAWAN FARMING, INC.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent,

UNITED FARM WORKERS OF AMERICA,

Real Party in Interest.

On Appeal from the Agricultural Labor Relations Board
[39 ALRB No. 17]
ALRB Case No. 2013-MMC-003

1325 J. Street, Suite 1900
Sacramento, CA 95814-2944
Phone (916) 653-3699

PETITION FOR WRIT OF REVIEW OF ORDER OF AGRICULTURAL LABOR RELATIONS BOARD [39 ALRB No. 17] [LAB. CODE §1164.5] [STAY REQUESTED PURSUANT TO CAL. CIV. PROC. CODE §1071]

Related Appeal Pending
Service on Attorney General Required By Cal. R. Ct. 8.29(c)

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APPELLATE COURT WRIT PETITION INFORMATION SHEET

PETITIONER: Gerawan Farming, Inc.	CASE NUMBER:
RESPONDENT: Agricultural Labor Relations Board	2013-MMC-003

INSTRUCTIONS 1. This information sheet must be completed and inserted as page one of the petition for writ.
2. Exhibits must be tabbed or consecutively paginated with an index.

1. ☐ Trial is set for *(date)*:
2. The trial court order asserted to be erroneous was entered as follows:
   a. Title and location of court *(specify)*: ALRB, 1325 J Street, Suite 1900, Sacramento, CA 958414
   b. Date of each order *(specify)*: April 16, 2013, July 29, 2013, Aug. 21, 2013, Oct. 25, 2013, Nov. 19, 2013
3. ☐ Reason for delay in filing this petition *(specify)*:
4. The record filed or lodged in support of this petition includes a copy of the lower court
   a. [X] order.
   b. [X] pleadings.
   c. [X] motion with supporting and opposition papers.
   d. [X] reporter s transcripts.
   e. ☐ other *(specify)*: Other relevant portions of administrative record
5. The following record was not filed or lodged in support of this petition:
   a. Record *(specify)*: Entire administrative record
   b. Reason *(specify)*: Court will request record per CCP 1071 if it grants the writ (see also Labor Code Section 1164.5)
   c. Will be filed or lodged on *(date)*:
6. ☐ A petition concerning the subject of this petition was previously filed as follows:
   a. Title and location of court:
   b: Case number:
   c. Disposition:
7. ☐ A temporary stay order is requested pending the determination of the petition, and a court reporter s transcript will not be filed or lodged with the court before the stay order is decided.
   a. Real parties in interest ☐ have received ☐ have not received actual notice of the request for a stay order.
   b. A summary of all evidence concerning the matter of this petition and in support of the stay order is set forth *(include any testimony adverse to your petition)* ☐ in attachment 7b. ☐ as follows:
8. ☐ This petition seeks review of an order denying a motion to
   a. ☐ suppress evidence
   b. ☐ set aside an information
   AND
   c. defendant was arraigned on *(date)*:
   d. the trial court motion was
      ☐ made within 60 days following the date of the arraignment.
      ☐ not made within 60 days following the date of the arraignment for the reason set forth *(specify facts showing why defendant was unaware of any issue or had no opportunity to raise the issue of the motion)*
      ☐ in attachment 8d. ☐ as follows:
9. ☐ This petition seeks review of an order
   a. ☐ granting or denying a motion for change of venue
   b. ☐ denying a motion to quash service of summons
   c. ☐ granting or denying a motion to expunge notice of lis pendens
   AND
   d. ☐ written notice of the lower court order was served on (date):
   e. ☐ the lower court extended time to file this petition and a copy of the order is attached.
   f. ☐ other (specify):
10. I understand that the court must be advised of any matters affecting this petition which happen after the filing of this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 16, 2013

➤ _____
(SIGNATURE OF PETITIONER OR ATTORNEY)

(THIS FORM IS NOT REQUIRED FOR A PETITION FOR A WRIT OF HABEAS CORPUS)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with California Rules of Court 8.208 and 8.498(d), Petitioner Gerawan Farming, Inc. states that the following entities or persons have a financial or other interest in the outcome of this proceeding:

1. Gerawan Farming, Inc.
2. Gerawan Farming Partners, Inc.
3. Dan Gerawan
4. Mike Gerawan
5. Ray Gerawan
6. United Farm Workers of America

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PETITION

Pursuant to Labor Code section 1164.5, Petitioner Gerawan Farming, Inc. ("Gerawan" or the "Company"), hereby petitions for a writ of review directed to the Agricultural Labor Relations Board (the "Board" or the "ALRB") and Real Party-in-Interest United Farm Workers of America ("UFW" or the "Union") of the Board's November 19, 2013 Decision and Order, 39 ALRB No. 17 ("Order"), as well as a stay of the Order should this Court grant the Petition, or in the alternative, a stay pending the outcome of the decertification proceedings following the November 5, 2013 election discussed below.

The Order seeks to impose a collective bargaining agreement ("CBA") upon Gerawan and its workers under the "Mandatory Mediation and Conciliation" ("MMC") procedures set forth in Labor Code §1164 *et seq.* (the "MMC Statute").

Gerawan respectfully requests that the Court grant the Petition for Review and declare that the MMC Statute is unconstitutional or, in the alternative, that the Order is in excess of the Board's powers and the Board was without authority to enter the Order, that the Board did not proceed in the manner required by law, and that the Order was an abuse of discretion.

This Petition is related to the pending appeal in *Gerawan Farming, Inc. v. ALRB*, from the Superior Court for the County of Fresno, Case No. 13CECG01408. (*See* Gerawan Request for Judicial Notice, Ex. A (hereafter, "RJN").)

By this Verified Petition, Gerawan alleges:

I. INTRODUCTION

In July 1992, following a contested election in 1990, the UFW was certified by the Board as the exclusive bargaining representative of certain Gerawan employees. Over the next two decades, the UFW made no effort to negotiate a contract with Gerawan. Indeed, the Union does not dispute that it had no contact with Gerawan from early 1995 until just recently.

During this time, Gerawan transformed itself into an innovative grower recognized for its quality control, production, packing, and shipping processes. Gerawan is one of the largest employers in Fresno County, and pays on average the highest wages of any grower in the San Joaquin Valley. Its success depends on hiring, training, retaining, and rewarding its most productive workers.

On October 12, 2012, the UFW reappeared by sending a letter requesting negotiations with Gerawan. Gerawan agreed to meet with the UFW. There were ten negotiating sessions over four months. Tentative agreements were reached on some issues, but the UFW never made any economic proposals. In late March 2013, the Union filed a demand for "Mandatory Mediation and Conciliation" with the Board. On April 16, 2013, the ALRB ordered Gerawan into MMC. Over Gerawan's objections, the Board deemed the UFW's nearly 20-year absence irrelevant to its standing to demand MMC.

MMC is a compulsory arbitration process under which a mediator acting as an arbitrator dictates the terms of a CBA between a grower and a union. The MMC Statute authorizes the Board to adopt the mediator's report as a final order. The employer has no right to opt-out of this process. The employees have no right to ratify or reject the "contract" imposed upon them,

which here would require them to pay union dues or fees or lose their jobs. The MMC Statute empowers one man – here, labor mediator Matthew Goldberg – to write a complex and massive "agreement" between two private parties that would let it, have the force of law.

This procedure has no counterpart under federal labor law, which expressly forbids the imposition of contractual terms or concessions upon a private employer or a labor organization. Indeed, the concept of compulsory interest arbitration has typically been viewed by courts as constitutionally suspect and in all likelihood constitutionally defective. To Gerawan's knowledge, only one court has upheld the constitutionality of a compulsory interest arbitration statute which, by administrative decree, imposes a CBA on a private employer – a 2-1 decision by a panel in the Third District Court of Appeal, regarding this very statute**.** (*See Hess Collection Winery v. California Agr. Labor Relations Bd*. (2006) 140 Cal. App. 4th 1584.) In different contexts, similar statutory schemes have been found unconstitutional. (*See, e.g., Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal. App. 4th 119.)

In response to the UFW's reappearance and its claim to represent today's workers, Gerawan's employees initiated one of the largest sustained union decertification drives in California agricultural labor history. Following the Board's dismissal of the first decertification petition, some 1,500 workers walked off the job – an unprecedented protest against the ALRB and the UFW (Mr. Goldberg's CBA would ban such strikes). A second petition drive garnered some 2,600 worker signatures. After ruling that a majority of Gerawan's employees wanted an election to decertify the UFW, the Board held an election on November 5, 2013. The Board has temporarily impounded the ballots pending post-election objections and

challenges. Given this overwhelming support, it is highly likely that, once the votes are counted, the UFW will be decertified.

Despite the election, on November 19, 2013, the Board summarily adopted the mediator's report, and thus approved the proposed three-year CBA. Two days later, the UFW filed an enforcement action in Sacramento Superior Court, and unsuccessfully sought via *ex parte* application the immediate enforcement of the CBA. The Superior Court held that the CBA could not be enforced pending Gerawan's statutory right to seek review of the Order before this Court. (RJN, Ex. B.)

Courts cannot create and impose a contract between non-consenting parties. Nor can the Legislature. Yet the MMC Statute purports to do just that. Compulsory interest arbitration is inconsistent with the principle that binding arbitration is a matter of consent. But under the MMC Statute, a State agency has compelled a private employer into binding arbitration where there is ***no*** agreement between Gerawan and the UFW, and ***no*** evidence that the Union attempted good faith contract negotiations or that Gerawan resisted such negotiations. This statute empowers the State to impose a complex and massive "agreement" without due process safeguards or any way to avoid this coercive process. This violates constitutional rights, including freedom of contract, due process, and equal protection.

Gerawan respectfully requests that the Court grant its Petition, declare the MMC Statute unconstitutional, and vacate the Order. The Board exceeded its authority in directing the parties to MMC, given the UFW's abandonment of the bargaining unit, its failure to negotiate for the required one year before invoking MMC, and the absence of any evidence that Gerawan resisted CBA negotiations with a certified union.

Moreover, the pending vote count will likely remove the UFW as the certified bargaining agent, and thus nullify the CBA and moot this appeal. This underscores why review is necessary by this Court, if only to stop the MMC process pending conclusion of the election process.

Should this Court grant this Petition, Gerawan is entitled to a stay of proceedings as a matter of course. (*See* Cal. Civ. Proc. Code §§ 1071, 1072.) This Court should issue a stay to avoid the possibility of inconsistent rulings (*Lindemann v. Hume* (2012) 204 Cal. App. 4th 556, 567), and to allow the Board to decide issues "which are within its exclusive jurisdiction and subject to review only pursuant to the limits provided [by statute]." (*Fresno Unified Sch. Dist. v. Nat'l Educ. Assn*. (1981) 125 Cal. App. 3d 259, 274; *Ace Tomato Co., Inc. v. ALRB (UFW)* (Oct. 17, 2012, F065589) (staying MMC order following commencement of multiple and duplicative enforcement proceedings by Board and UFW against employer).)

II. ISSUES PRESENTED

1) Whether the Board acted in excess of its jurisdiction and violated the Labor Code by ordering Gerawan into MMC.
2) Whether compulsory arbitration under the MMC Statute violates the U.S. and State Constitutions by depriving Gerawan of property and liberty of contract without due process of law.
3) Whether the MMC's combination of mediation and adjudicative powers in one decisionmaker violates due process.
4) Whether the MMC Statute's delegation of near plenary legislative power to one private mediator violates separation of powers and the due process clauses under the U.S. and State Constitutions.

5) Whether the MMC Statute unconstitutionally strips Gerawan of its right to judicial review of the Order.
6) Whether the MMC Statute and the Order violates the equal protection clauses of the U.S. and State Constitutions.
7) Whether the Order violates the Contracts and Takings clauses of the U.S. and State Constitutions.
8) Whether the Board's determination to bar the public and Gerawan's workers from access to the "on-the-record" MMC proceedings violates the U.S. and state Constitutions and thus nullifies the Order.
9) Whether nine (9) terms adopted by the Order were arbitrary or capricious, not supported by evidence in the record, did not comply with the MMC Statute, or constituted an abuse of discretion.

III. PARTIES

1. Gerawan is a family-owned and operated farm. It is, and at all relevant times has been, a corporation duly organized and existing under the laws of the State of California, with its registered address at 7108 N. Fresno St., Suite 450, Fresno, California 93720, United States.

2. The ALRB is an administrative agency of the State of California created pursuant to the ALRA, with authority to refer parties to MMC and to issue orders imposing CBA terms pursuant to Labor Code §1164 *et seq*., with its address at 1325 J Street, Suite 1900, Sacramento, California 95814-2944, United States.

3. Gerawan is informed and believes, and on this basis alleges, that Real Party-in-Interest UFW is a labor union with its principal office at the address of 29700 Woodford-Tehachapi Road, Keene, California 93531, United States.

IV. JURISDICTION

4. This Court has jurisdiction to issue a writ of review pursuant to Labor Code §1164.5.

V. BACKGROUND

5. Gerawan is a family-owned farm based in the Fresno area and has operated since 1938. Today it is a market leader in the cultivation and sale of stone fruits and table grapes. Gerawan employs thousands of direct-hire workers, including those highly trained at cultivating, harvesting, and packing fruit. It annually employs thousands of workers through farm labor contractors. Gerawan's direct-hire employees are paid substantially more than the average industry wage. Many are compensated on a sliding scale based on quality and productivity under unique systems created by current Gerawan management. These practices are central to Gerawan's success. They have garnered the company numerous awards, including being named the number one stone fruit grower in California for the last decade and being recognized by the U.S. Department of Agriculture for superior quality control practices. (App'x 110.)

6. Gerawan's current prominence has been years in the making. Beginning in the 1980s, the company changed its business model by investing heavily in a "major quality focus." (App'x 744.) Over the years, the marketplace has recognized Gerawan as "the consistent quality supplier." (App'x 745.)

7. The company's success depends on its ability to recruit, train, and motivate its most productive workers. To achieve the "delicate balance" of quality and productivity, QC processes are integrated into every step of operations. (App'x 746.) High wages, good working conditions,

and open communications with management are integral to maintaining low employee turnover and consistently high quality. (App'x 747-49.)

8. Gerawan's QC process begins by giving workers daily instruction regarding that day's harvest conditions and corrects—in real time—problems in any individual worker's performance. (App'x 760-86; 944-46; 952-57.) Formal and informal corrective action procedures are designed to immediately address problems. (App'x 762-65; 953; *see also* App'x 945.)

9. For example, during grape season, Gerawan employs up to 1,400 pickers and 400 packers on any given day and an average of 880 and 300, respectively. (*Id*.) Pickers use individualized bar-coded stickers to mark each of their tubs so that if problems are found throughout the process that worker can be notified, receive additional training or instruction, and, if necessary, be given corrective action. (App'x 770-72.)

10. By holding each picker accountable, "quality improves, costs are lower, and worker's pride increases." (App'x 955.) Under this system, an average of less than 4% of pickers each day (about 30 to 35 pickers) are issued formal corrective actions; approximately 75% of those consist of either a written warning or a rest-of-the-day suspension, 15% are next-day suspensions, and 10% are multiple-day suspensions. (App'x 777-78.) These policies are administered consistently across crews; formal actions are electronically documented in the fields. (App'x 781-83, 945, 955-56.)

11. Gerawan harvests grapes selectively. Workers make three to five passes through each vineyard over the course of the season and harvest grapes only when ripe. (App'x 765-66.) Because the difficulty of picking, cleaning, and packing high-quality grapes varies during the season, and that worker pay is determined by yield, Gerawan continuously adjusts the piece

rate to meet a target of an average $13 to $15 per hour. (App'x 773-74.) All of this is both art and science, delicately balanced on a daily basis.

12. On July 8, 1992, following a contested run-off election in 1990, the UFW was certified by the ALRB as the exclusive representative for certain Gerawan employees. On or about July 21, 1992, the UFW sent Gerawan a letter requesting negotiations. Gerawan responded on August 13, 1992, accepting the Union's offer to begin negotiations. The Union did not provide a proposed CBA until November 22, 1994. It was incomplete, contained numerous conditions that did not relate to Gerawan's operations, and did not include wage proposals. (App'x 70-71.)

13. In February 1995, there was one brief, introductory meeting, at which the UFW promised to submit a revised proposal. It never did. Instead, the Union disappeared, not to be heard from again until late 2012. (App'x 70-71.)

14. On October 12, 2012 the UFW reappeared and claimed to be the bargaining representative of Gerawan's workers and that it was "hereby requesting negotiations." In a subsequent letter on October 30, 2012, the Union characterized its October 12 letter as a "first request" for negotiations. (App'x 56-60.)

15. Gerawan responded on November 2, 2012, expressing its intention to bargain in good faith, requesting an explanation for the UFW's long absence, and reserving its rights to challenge the Union's authority to represent its workers. (App'x 78-79.) The UFW stated that it had no legal obligation to explain its absence. (App'x 86).

16. The parties conducted ten bargaining sessions between January 17, 2013 and March 29, 2013. During that period, the UFW never made an economic proposal regarding wages. (App'x 66-67.)

17. On March 29, 2013, the UFW filed a declaration seeking MMC. Contrary to its own prior statement that its October 12 letter was a "first request" for negotiations, the UFW claimed that its October 12 letter was a "renewed demand" to bargain, presumably referring to something that happened in 1992. The Union claimed this satisfied the requirements of §1164(a)(1), which permits MMC 90 days after a "renewed" demand. (App'x 47.) Gerawan filed an answer on April 8, 2013; without a hearing or reasoned decision, the Board ordered Gerawan into MMC eight days later.

VI. STATUTORY AND REGULATORY FRAMEWORK

18. Under §1164 *et seq*., a certified labor union may file a declaration with the Board stating that the parties have not been able to reach an agreement and requesting that the Board order the parties to "mandatory mediation and conciliation" of their issues.

19. The declaration may be filed at any time at least 90 days after a renewed demand to bargain has been made by the labor organization if the declaration shows three requirements under §1164.11.

20. Upon issuance of an order directing MMC, the parties must select a mediator within seven days. The process of "mediation" includes the presentation of witnesses and discovery of documents. (Cal. Code Regs. tit. 8, §20406.) The mediator can communicate "informally" and off the record with the parties to "clarify or resolve issues." (§20407(a)(2).) At the conclusion of the mediation period, unless the parties mutually agree to extend the period for another 30 days, the mediator certifies that the mediation process has been "exhausted." (§1164(c).) The mediator, acting as an arbitrator, then has 21 days to file a report with the Board that

"resolves all of the issues between the parties" and establishes the "final terms" of a collective bargaining agreement. (§1164(d).)

21. A party may challenge the mediator's report by seeking Board review. (§ 1164.3(a).) The Board may either order review or adopt the mediator's report as "a final order of the board." (§1164.3(b), (d).)

22. A party may petition this Court within 30 days for a writ of review of that order. (§1164.5.)

23. This Court reviews, "on the basis of the entire record," whether (1) the "board acted without, or in excess of, its powers or jurisdiction," (2) the "board has not proceeded in the manner required by law," (3) "[t]he order or decision of the board was procured by fraud or was an abuse of discretion," or (4) "[t]he order or decision of the board violates any right of the petitioner under the Constitution of the United States or the California Constitution." (*Id.*)

VII. PROCEDURAL BACKGROUND

24. On April 16, 2013, the Board issued an order directing the parties to MMC. (App'x 164-68.)

25. The mediator was empaneled on May 2, 2013. He conducted several mediation sessions over a period of five months, which included off-the-record discussions as well as two days of "on-the-record" evidentiary hearings in which the mediator received evidence and made rulings on objections. (*See generally* App'x 670-942.) The mediator excluded workers from the mediation sessions and "on-the-record" hearings. The ALRB ruled that this exclusion was proper, even though there is no dispute that the transcript of the "on-the-record" proceedings is a public document. (App'x 232-41.)

26. On September 28, 2013, the mediator submitted his report purportedly resolving all the issues. (App'x 436-93.) Gerawan petitioned the Board to review the report. (App'x 500-67.) On October 25, 2013, without hearing, the Board remanded to the mediator as to six issues, and denied review with respect to all other issues. The mediator issued a second report on November 6, 2013. (App'x 603-04.) On November 19, the Board summarily adopted the mediator's report without holding a hearing, and without any reasoned statement. (App'x 660-62.)

27. ***After*** issuing the Order, the Board informed Gerawan that senior UFW officials, including UFW President Arturo Rodriguez, had engaged in prohibited *ex parte* communications with senior ALRB staff concerning the MMC and election proceedings ***prior*** to the issuance of the Order. (App'x 666-68; 668a-668e.) Gerawan objected to these communications, and asked the Board to vacate the Order. The Board has not responded. Gerawan hereby preserves all objections.

VIII. STATUS OF LEGAL PROCEEDINGS

28. On May 6, 2013, Gerawan filed a petition in the Fresno Superior Court for writ of administrative mandamus or, in the alternative, writ of mandate directing the ALRB to set aside its order compelling Gerawan to MMC, and a complaint for declaratory and injunctive relief, including claims that the MMC statute was facially unconstitutional. Gerawan moved for issuance of the writ and sought a stay of the MMC.

29. On September 26, 2013, the Superior Court, Hon. Donald S. Black, held that §1164.9 impermissibly stripped the Superior Court of original jurisdiction (Cal. Const., art. VI, sec. 10), to review orders of the Board. The court then denied Gerawan's petition for administrative

mandamus, holding that (i) the Board's April 16 order was not a final order, (ii) no hearing was required for such an order, and (iii) Gerawan's injury was speculative at the time and was not irreparable. Judge Black also denied the petition for writ of mandamus, holding that (i) the Board's April 16 order was discretionary in nature, (ii) Gerawan had not shown that the Board abused its discretion in ordering MMC, and (iii) Gerawan's constitutional challenges were premature and not yet ripe.

30. Gerawan filed a notice of appeal from the Superior Court's September 26 order. (RJN, Ex. A.) Gerawan shall seek consolidation of that appeal with this Petition.

IX. THE BOARD EXCEEDED ITS STATUTORY JURISDICTION IN REFERRING GERAWAN TO MMC.

31. The Board's determination to refer Gerawan into MMC exceeded its statutory authority. The Board disregarded as irrelevant the UFW's abandonment of Gerawan's workers, thereby abdicating its duties under the ALRA to revoke or limit the privilege it conferred upon the UFW, which the UFW forfeited by its disclaimer of interest in representing the bargaining unit.

32. The Board exceeded its statutory authority by compelling Gerawan into MMC without making the requisite determination that the "the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain." (§1164.11(a).) The Board ignored the UFW's admission that its "initial request" for negotiation occurred in October 2012, instead agreeing with the UFW's subsequent contention that its "initial demand" was made in July 1992. This finding ignores the fact that the UFW had not even tried, much

less "failed," to reach an agreement during any one year period. Indeed, the Union invoked MMC without making a single economic proposal, thus permitting the UFW to trigger arbitration after engaging in pretextual, bad faith "negotiations" for no purpose other than to run out the 90-day clock following its supposed **"**renewed demand**"** to bargain.

33. The Board exceeded its statutory authority by compelling Gerawan into MMC without making the requisite determination that Gerawan had committed an unfair labor practice relating to contract negotiations with a certified union. MMC is intended to address egregious cases of bad faith collective bargaining by employers. (§1164.11(b).) Gerawan never resisted negotiations with UFW after it was certified by the Board in 1992. The Board incorrectly determined that a 20-year-old unfair labor practice finding, unrelated to CBA negotiations, was sufficient to meet this requirement. (App'x 166; App'x 125-33.)

34. Gerawan has no plain, speedy, or adequate remedy in the ordinary course of law. The ALRB cannot grant Gerawan an adequate remedy for its injury, and refused to hear constitutional challenges to the MMC Statute. As the Board acknowledged in its Order, the California Constitution bars administrative agencies from declaring a state statute unconstitutional.

X. THE MMC STATUTE AND PROCESS ARE UNCONSTITUTIONAL.

35. Gerawan incorporates all previous paragraphs as if fully set forth below.

A. The MMC Process Impermissibly Seeks to Impose a "Contract" on Non-Consenting Private Parties.

36. The constitutionality of the right to collective bargaining under U.S. labor law is premised on the due process safeguard that neither a union nor an employer may be compelled to agree to a proposal or be required to make any concession. Such agreements must be voluntary. In this case, there is no agreement at all, only an arbitral decree of dubious constitutional validity.

37. The MMC Statute permits the State, through the Board and the courts, to impose a CBA on employers in the event no CBA is voluntarily reached. That is what the Board did here. It adopted the mediator's proposed CBA as its own order, even though Gerawan objected to many of the terms the Board now seeks to impose on it.

38. The Order dictates virtually every aspect of Gerawan's relationship with its workers, from wages and disciplinary procedures to seniority. The Order attempts to impose a business arrangement that fundamentally alters, and potentially destroys, the essential attributes of Gerawan's success and viability as one of the largest and innovative employers of agricultural labor in the San Joaquin Valley. Such State action, would supplant Gerawan's business judgment, and imposes via administrative fiat a contract based on what one decision-maker deems to be in the "best interests" of the grower and its employees.

B. The MMC Statute and Order Violates Gerawan's Due Process Rights.

39. MMC deprives Petitioner of due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and article I, section 7 of the California Constitution.

40. "Mandatory Mediation and Conciliation" is a statutory oxymoron. In reality, MMC is a compulsory process, whereby a party is compelled to mediate and adjudicate any "disputed terms" of a contract before one decision-maker. MMC requires the "mediator" to take evidence on-the-record, to make findings, and to issue a report that supports those findings based upon the evidence.

41. The MMC Statute requires the "mediator" to perform a mediation function, permitting *ex parte* communications with the respective parties for the purpose of inducing them to reach agreement.

42. The mediator here engaged in off-the-record and *ex parte* communications with both Gerawan and the UFW.

43. A proceeding in which a decision-maker engages in off-the-record or *ex parte* communications with one or more parties to a proceeding, where those contacts and the process are compulsory and not by consent, is inherently unfair and fails to guarantee the parties due process.

44. By Board regulation, neither the Board nor this Court can review *ex parte* or "off-the-record" communications with the mediator, even if those communications influenced his report. This violates due process and deprives Gerawan of adequate judicial review.

45. The MMC Statute forces Gerawan to enter into a collective bargaining arrangement without safeguards for a reasonable rate of return on its investment.

C. The MMC Statute Unconstitutionally Strips the Superior Court of Jurisdiction.

46. Labor Code §1164.9 provides that "No court of this state, except the court of appeal or the Supreme Court, to the extent specified in

this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the board to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the board in the performance of its official duties, as provided by law and the rules of court."

47. Article VI, §10 of the California Constitution provides that "The Supreme Court, courts of appeal, superior courts, and their judges . . . also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Further, article VI, §10 provides that "Superior Courts have original jurisdiction in all causes except those given by statute to other trial courts."

48. Section 1164.9 purports to strip the Superior Court the original jurisdiction over MMC proceedings. The California Constitution does not contain a provision conferring the power to withdraw such jurisdiction from the Superior Court in the case of actions of the Board.

49. This attempt to strip the original jurisdiction of the Superior Court violates the California Constitution and is therefore invalid. (*Chinn v. Super. Ct.* (1909) 156 Cal. 478, 480; *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 Cal. 640, 652.)

D. The MMC Statute Does Not Afford Adequate Judicial Review.

50. The MMC Statute permits only limited, discretionary review by the Board and the courts. There is no means whereby Gerawan is entitled, as a matter of law, to review of the mediator's decision on the merits. The Board may (but is not required to) review any objections to the terms of the contract dictated by the mediator. In this case, with one sentence, the Board summarily denied review as to most of Gerawan's

challenges, notwithstanding that Gerawan had set forth a prima facie case as to why these provisions were clearly erroneous, arbitrary and capricious, or in excess of the Board's authority.

51. Section 1164.5 provides for writ review by this court of the legal and factual findings of the mediator and Board on certain limited grounds, and further instructs that "[n]othing in this section shall be construed to permit the court to hold a trial de novo, to take evidence other than as specified by the California Rules of Court, or to exercise its independent judgment on the evidence." (§1164.5(c).) The lack of a means by which Gerawan may submit its constitutional claims to a judicial tribunal for independent judgment on the facts and law violates due process.

52. Gerawan has no assured means to secure any administrative or judicial review of the mediator's decisions in a manner consistent with due process.

E. The MMC Statute Impermissibly Delegates Legislative Authority.

53. The MMC Statute permits a private citizen to make policy applicable to thousands of agricultural employees. The statute lacks sufficient standards to guide the "mediator." It permits him to craft CBA terms based largely on his own personal sense of justice or what he deems to be good policy. This lack of standards prevents a reviewing court from determining whether the mediator abused his discretion or acted in an arbitrary or capricious manner.

54. Here, the mediator sought to impose terms on Gerawan such as wage increases and union dues and fees, notwithstanding that Gerawan already paid the highest wages in the industry. He did not base the wage

increase on any standard imposed by the Legislature. To the contrary, he based it on terms of a CBA for a different grower in a different business using economic terms he already had decided were not relevant to Gerawan.

F. The Order Violates Gerawan's Equal Protection Rights.

55. The MMC Statute, by design, permits the Board to set different wages and other employment terms for different companies, without any requirement that there be a rational basis for the different treatment. Here, the Board singled out Gerawan for disparate treatment and applied, on an *ad hoc* basis, terms and conditions which bear no relation to employment, or which are arbitrary and without any evidentiary support as to the "corresponding" nature of wages, hours, or other terms found in comparable businesses.

56. The Order treats Gerawan differently from other growers without rational basis. For example, it increased Gerawan's base wage rate to $10.25/hour and dictated wage increases for the two following years, without any finding that this was comparable to industry wages and despite the mediator's finding that Gerawan's wages were already ***substantially higher than any comparable grower***, including any grower subject to a CBA. (App'x 489-93.)

57. The Order also forces Gerawan to pay the same $10.25/hour wage to independent farm labor contractors ("FLC") whom Gerawan neither employs nor controls, without any finding that Gerawan's competitors pay similar rates for such contract labor. (App'x 471-72.)

G. The Order Unconstitutionally Impairs Gerawan's Existing Contractual Obligations.

58. Gerawan entered into agreements with a number of FLCs that provide contract labor to supplement the work of Gerawan's employees. (App'x 549, 562-65.) Under these contracts, Gerawan agreed to pay FLC laborers $9/hour for the 2013 crop year, plus a commission to the FLC. (*Id*.)

59. The Order imposes on Gerawan a retroactive increase of $1.25/hour for each FLC laborer above the contracted price. Moreover, because the FLCs' commissions are a percentage of the wages paid, the FLCs may also demand increased commissions based on the retroactive wage increases.

60. The Order also requires retroactive wage increases for Gerawan's direct-hire employees. Gerawan offered its at-will employees a base wage of $10.00/hour, which they accepted. The Order requires an "across-the-board" wage increase as to all job classifications, retroactive to July 27, 2013. (App'x 489-93.) The Order also requires adjustments based on seniority and job classification. (*Id*.)

61. There is no showing that these increases are necessary for any reason, let alone justifiable contractual impairments under well-settled precedent.

H. The Order Is an Unconstitutional Taking Without Compensation.

62. The Order would require Gerawan to permit UFW representatives to have virtually unfettered access to its land – up to three hours per day, every day of the year. It prohibits Gerawan from locking out its workers in the event of a labor dispute. (*See* App'x 462, 472-74.) These

are *per se* takings involving the physical invasion of Gerawan's real property by third persons.

63. The Order would also work a confiscatory taking on Gerawan by requiring it to pay wages retroactively to its own workers and the workers employed by FLCs.

64. These provisions constitute an arbitrary transfer from employer to worker without any showing that this transfer would raise Gerawan's pay and benefits to a standard met by others in the market, let alone preserve labor stability or peace in the fields.

I. The Board Improperly Excluded Gerawan's Workers from the MMC Proceedings

65. The Board's decision to exclude Gerawan's employees from attending the on-the-record MMC proceedings violated both the First Amendment of the U. S. Constitution and Article I, §3(b) of the California Constitution by denying Gerawan and its workers the protections afforded by transparency and public scrutiny in government action. The Order should be declared void. (*See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1212; *McKee v. Orange Unified School Dist.* (2003) 110 Cal App. 4th 1310, 1319; *Delaware Coal. for Open Gov't, Inc. v. Strine* (3d Cir. 2013) 733 F.3d 510, 521.)

XI. THE ORDER WAS ARBITRARY AND CAPRICIOUS AND IN EXCESS OF STATUTORY AUTHORITY.

66. Gerawan incorporates all previous paragraphs as if fully set forth below.

67. The mediator's report contained nine contractual terms that were arbitrary and capricious. The mediator relied on contradictory,

nonexistent or clearly erroneous findings, or simply made determinations without any support.

68. The Board adopted the report as its Order without adequate (or any) review and in excess of its statutory authority.

XII. AUTHENTICITY OF CONCURRENTLY FILED EXHIBITS

69. All exhibits contained in the Appendix filed concurrently in support of this Petition are true and correct copies of original documents in the Proceeding below.

XIII. REQUEST FOR RELIEF

70. Petitioner respectfully asks this Court to:

i. Stay the Order pending review of the Petition;

ii. Issue a writ of review directed to the Board pursuant to Labor Code §1164.5, vacating the Order;

iii. Declare that the MMC Statute is unconstitutional;

iv. Enter any other appropriate relief as is just and proper.

VERIFICATION

I, **Dan Gerawan**, declare as follows:

I am the **president** of Gerawan Farming, Inc., petitioner in the above-entitled action. I have read the foregoing Petition and know its contents. The facts alleged in the Petition are within my own personal knowledge and I believe these facts to be true.

I declare, under the penalty of perjury, that the foregoing is true and correct and that this verification was executed on December 16, 2013, at Fresno, California.

Dan Gerawan

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE BOARD EXCEEDED ITS AUTHORITY AND ABUSED ITS DISCRETION IN ORDERING MMC.

A. The UFW's Abandonment Rebutted its Presumption of Majority Support and Deprives it of Standing to Invoke MMC.

The Board directed the parties to MMC despite the undisputed facts that (1) the Legislature intended MMC to address extreme instances of employer intransigence in collective bargaining; (2) the UFW had only recently returned to Gerawan after disappearing for nearly 20 years following its certification; and (3) Gerawan has never been found by the Board to have refused to engage in good faith CBA negotiations with any certified union.

Section 1164(a) requires that only certified labor organization may invoke MMC. In *Montebello Rose Co. v. ALRB* (1981) 119 Cal. App. 3d 1, this Court recognized a "presumption" that the labor organization continued to enjoy majority status after its initial certification year, but held that this presumption was "rebuttable." (*Id*. at 24.)

A labor union is a private entity to which the state, through certification, has granted monopoly power over employment opportunities. (*See Steele v. Louisville & Nashville R.R.* (1944) 323 U.S. 192, 200-03.) That grant of authority lasts only so long as the holder of the franchise meets the obligation in consideration of which the right was granted.[1] (*See County*

[1] The statutory grant of exclusive bargaining power given to a certified union is no different from any franchise to provide public services. (*See, e.g., J.I. Case Co. v. NLRB* (1944) 321 U.S. 332, 335.)

of Los Angeles v. S. Cal. Tel. Co. (1948) 32 Cal. 2d 378, 384; *County of Kern v. Pac. Gas & Elec. Co*. (1980) 108 Cal. App. 3d 418, 424, 426 (a grant of indeterminate gas and electric franchises valid only so long as the defendant provided adequate services to the public).) The Union's failure to perform its obligations abrogated its certification and rebuts the UFW**'**s presumptive status as representative of Gerawan's workers. (*Montebello*, 119 Cal. App. 3d at 29.) The neglect of those duties "serves to erode and undermine the right to be represented that is granted to employees." (*Dole Fresh Fruit Co.* (1996) 22 A.L.R.B. No. 4, at 17.) Abandonment is an extreme example of such "dilatory or evasive conduct" (*id*. at 18), and bars the Union from attempting to impose an agreement on Gerawan and its workers.

The Board has discretion to take remedial actions affecting a union's certification. (*See Harry Carian Sales* v. *ALRB* (1985) 39 Cal. 3d 209, 221.) Like its federal counterpart, the NLRB, it has been given the non-delegable power to grant or withdraw the certification of a union, and must exercise this discretion in making judgments (*cf. Garner v. Teamsters, Chauffeurs and Helpers Local Union* (1953) 346 U.S. 485, 490), especially in representational matters. (*See NLRB v. A. J. Tower Co*. (1946) 329 U.S. 324, 330).

The Board's refusal to recognize decades-long abandonment as a reason to rebut the Union's presumption of representative status contradicts the purposes of the Act and constitutes an abdication of the Board's statutory duty to "promote the rights of agricultural workers." **(***Perry Farms, Inc. v. ALRB* (1978) 86 Cal. App. 3d 448, 459.)

B. The Board's Interpretation of Section 1164.11 Was Clearly Erroneous.

To invoke MMC the UFW must show that "the parties have failed to reach an agreement for at least one year after the . . . initial request to bargain." (§1164.11(a).) The statutory reference to "failure" makes clear that the parties must actually ***try*** to reach an agreement for at least one year before the MMC process can be invoked. Nevertheless, by holding that a 1992 letter constituted the "initial" request to bargain, the Board interpreted the 12-month requirement as nothing more than a calendaring event whereby the Union can make such a request – and then disappear until it demands MMC.

When analyzing an agency's interpretation of a statute, this Court has "an obligation to ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Montebello*, 119 Cal. App. 3d at 24.) The best evidence of legislative intent is the plain language of the statute. **(***People v. Lopez* (2003) 31 Cal. 4th 1051, 1056.) "Courts may, of course, disregard even plain language which leads to absurd results or contravenes clear evidence of a contrary legislative intent." **(***Ornelas v. Randolph* (1993) 4 Cal. 4th 1095, 1105.)

Here, even if the plain language of the statute was not clear or unambiguous (one cannot fail if one does not try), the MMC Statute was intended to address the perceived problem of agricultural employers failing to bargain in good faith to reach collective bargaining agreements after certification. **(**Office of Senate Floor Analyses, SB 1156, 2002 Cal. Legis., at 3 (Aug. 30, 2002).) The law was meant to address "the most serious failings in the system when negotiations between growers and farmworkers cannot be resolved," and accordingly, "[t]he parties *must have attempted to*

negotiate for one year." **(**Governor's Message – Assembly Bill No. 2596, 6 J. of the Assembly 8827, 8999, 9000 (Oct. 1, 2002) (emphasis added).)

By determining that the UFW had no obligation to engage in any effort to negotiate, the Board contradicted this statutory purpose, supplanting it with an irrational reading of the law.

It also clearly erred by holding that two ULP decisions concerning events ***pre-dating*** the 1992 certification of the UFW justified imposing MMC on Gerawan. The Board has never found that Gerawan resisted CBA negotiations with the UFW or committed a ULP concerning any interaction with a certified union. The Board contradicted its own precedent **(***Pictsweet* (2003) 29 ALRB No. 3, at 9) and exceeded its authority. (*See Cadiz v. Agric. Labor Relations Bd*. (1979) 92 Cal. App. 3d 365, 378 (issuing a writ of mandamus to the Board because "[t]he ALRB has no authority to overrule the legislative determination").)

II. THE MMC STATUTE INTERFERES WITH STATUTORY AND CONSTITUTIONAL FREEDOM OF CONTRACT PROTECTIONS.

A. As Numerous U.S. Supreme Court Cases Have Held, Collective Bargaining is Predicated on Preservation of the Parties' Freedom to Contract.

The National Labor Relations Act of 1935 ("NLRA") provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." (29 U.S.C. §158(d).) Section 8(d) was adopted by Congress in 1947. It recognizes the freedom of parties to enter into contract terms (or not).

Prior to the adoption of Section 8(d), the Supreme Court recognized this same point and its constitutional origins. In *NLRB v. Jones & Laughlin*

(1937) 301 U.S. 1, the Supreme Court upheld the NLRA against a constitutional due process challenge. Addressing "Questions under the due process clause and other constitutional restrictions," (*id*. at 43) the Court wrote: "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever." (*Id*. at 45.) This safeguard has been repeatedly cited as the basis for protecting the voluntary nature of collective bargaining agreements. In *H.K. Porter Co. v. NLRB* (1970) 397 U.S. 99, 101, the Court held that the right to resist concessions meant that the employer did not have to accept a dues check-off provision:

> The Board**'**s remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. ***One of these fundamental policies is freedom of contract.*** While the parties' freedom of contract is not absolute under the Act, ***allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premises on which the Act is based--private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.***

(*Id.* at 108 (emphasis added) (footnotes omitted).) *H.K. Porter* relied on numerous Supreme Court cases, including *NLRB v. American Nat'l Ins. Co*. (1952) 343 U.S. 395, 404, where the Court said: "[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

When California adopted the ALRA it was aware of and followed Section 8(d) and its constitutional underpinnings. Thus, Labor Code section 1155.2(a) provides that the law "does not compel either party to agree to a

proposal or require the making of a concession." This provision was not changed by the MMC Statute. More importantly, the constitutional basis of the freedom of contract in the labor context, identified in *Jones*, remains a core part of labor law. California too recognizes the importance of "freedom of contract" in labor law. (*See Chavez v. Sargent*, 52 Cal. 2d 162, 186 ("freedom of contract" is "essential" to labor negotiations) (*disapproved on other grounds in Petri Cleaners, Inc. v. Auto. Emp., Laundry Drivers & Helpers Local No. 88* (1960) 53 Cal. 2d 455, 475); *see also* Cal. Lab. Code § 923 ("Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees.").)

B. The MMC Statute Unconstitutionally Interferes with Freedom to Contract.

By directing the State to impose a forced contract on an *ad hoc* basis, the MMC Statute is currently the only law in the United States that allows a government agency to set contract terms between a private, for-profit employer and a union through what *Hess* termed "compulsory interest arbitration." This is antithetical to the stated goal of collective bargaining, the essence of which is "that either party shall be free to decide whether proposals made to it are satisfactory." (*Porter*, 397 U.S. at 104 (quotations omitted).) The MMC Statute is an extreme and improper exercise of the State's police power, and violates Gerawan's constitutional rights.

In *Charles Wolff Packing Co. v. Court of Indus. Relations* (1923) 262 U.S. 522, the U.S. Supreme Court struck down the Kansas Industrial Relations Act, which gave a three-judge industrial court the power to set wages, among other things. Holding that the law unconstitutionally

interfered with the parties' freedom to contract by dictating the "wages and other terms" of individual contracts, the Court stated that the Kansas act:

> curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. [citation] While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances.

(*Id*. at 534; *see also Dorchy v. Kansas* (1924) 264 U.S. 286; *Charles Wolff Packing Co. v. Court of Indus. Relations* (*Wolff II*) (1925) 267 U.S. 552, 569 (the Industrial Relations Act imposed a system of "compulsory arbitration" that "infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment") (collectively, "*Wolff*").)

Hess never discusses *Jones & Laughlin* or *Porter*, where freedom of contract is central. It dismissed the *Wolff* cases by claiming them to be a "bygone relic" of the *Lochner* era, but the holding of *Wolff* (as applied to compulsory interest arbitration of a CBA) has never been rejected by the Supreme Court. And *Wolff* is often cited by modern courts when discussing non-consensual binding arbitration. (*See Mount St. Mary's Hosp. v. Catherwood* (1970) 26 N.Y.2d 493, 500, 503; *see also Healy v. Onstott* (1987) 192 Cal. App. 3d 612, 616 (the constitution requires *de novo* review of arbitral determination); *Bayscene,* 15 Cal. App. 4th at 131 (same).)

There is no question that MMC does not allow *de novo* review by a court. It says: "nothing in this section shall be construed to permit the court

to hold a trial *de novo*." The Legislature intentionally chose to structure the MMC Statute in an unconstitutional manner. The holdings of *Healy* and *Bayscene*, which are consistent with the result in *Wolff*, support striking down the MMC Statute regardless of the continuing vitality of *Wolff*.

III. THE MMC COMPULSORY ARBITRATION PROCEDURES VIOLATE DUE PROCESS.

A. Absent Adequate Due Process Safeguards, Compulsory Arbitration Violates Liberty and Property Rights Under the U.S. and State Constitutions.

As *Wolff* and its progeny make clear, binding arbitration is a matter of consensual agreement, not government compulsion. (*See AT & T Technologies, Inc. v. Commc'ns Workers of Am*. (1986) 475 U.S. 643, 648-49 (citation omitted) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *see also Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal. 4th 223, 236.)[3]

Hess ignores this basic touchstone, though the point is made by the very case it relies upon in the first substantive section of the majority opinion. (*See* 140 Cal. App. 4th at 1596 (citing *Inlandboatmens Union of the Pacific v. Dutra Group* (9th Cir. 2002) 279 F.3d 1075, 1080, n.5 ("There must be a clear agreement between the parties to impose interest arbitration.")).)

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[3] Some courts have upheld compulsory interest arbitration for *public* employees or nonprofit hospitals, given their "profound public interest" and "dependence on governmental subsidies", as well as the unique status of such employees under the law, including their inability to strike. (*See Mount St. Mary's Hosp.*, 26 N.Y.2d at 499; *see also City & Cnty. of San Francisco v. Evankovich* (1977) 69 Cal. App. 3d 41; *Fairview Hosp. Ass'n v. Pub. Bldg. Serv. & Hosp. & Institutional Emp. Union* (1954) 241 Minn. 523.)

In *Bayscene*, the Court of Appeal struck down a city ordinance which required binding arbitration for mobile home park rent disputes. *Bayscene* undertakes a thorough analysis of binding arbitration schemes, recognizing that the drastic nature and disfavored status of such laws, which normally exist only in extraordinary circumstances and where the determination is not binding or final.

Bayscene begins with the observation that "[b]oth federal and state courts have recognized that access to the courts by persons forced to settle their claims through the judicial process is a fundamental right not to be denied absent a countervailing state interest of overriding significance." Explicitly relying on *Wolff Packing*, the court held that mandatory arbitration deprives parties of property and liberty of contract under the constitution absent adequate due process protections, including "meaningful" judicial review. (15 Cal. App. 4th at 130.)

Bayscene therefore reached two conclusions regarding the rent ordinance before it. As a threshold matter, it noted that "[a]s required by law," the law correctly provided that owners must be afforded a "just and reasonable return on their property." **(***Id*. at 134.) Nonetheless, *Bayscene* struck down the ordinance because it only provided for review on the basis of "fraud, corruption, or other misconduct of a party or the arbitrator." **(***Id*.) Thus, it violated due process. (*Id*. at 135.)

At its base, due process means that no person can be subject to an individualized proceeding in which he or she stands to lose a protected interest without sufficient procedures to ensure that the governmental action is fundamentally fair. The first of these is the provision of a neutral decision-maker. The second is the right to a full and fair administrative hearing on matters of fact and law necessary to the final resolution of the

case. The third is the opportunity for judicial review. (*See generally Mathews v. Eldridge* (1976) 424 U.S. 319, 349.) The MMC Statute provides none of these safeguards.

B. MMC Impermissibly Combines "Mediation" and "Adjudication" Functions in One Decision-Maker.

Under MMC, a party is forced to submit to a hybrid mediation/ arbitration process in which the decision-maker is expected to engage in "off-the-record" or *ex parte* settlement communications and then adjudicate the dispute. The coercive, hybrid process violates due process.

The fairness of mediation is predicated on the voluntary nature of the process (*Travelers Casualty and Surety Co. v. Superior Ct*. (2004) 126 Cal. App. 4th 1131, 1140), and the absolute inadmissibility of communications made in the course of mediation. (Evid. Code §§1119, 1121*; see also Cassel v. Superior Court* (2011) 51 Cal. 4th 113, 118-19.)

During the MMC, the mediator engages in *ex parte* or "off-the-record" discussions whereby the parties share their best offers to settle the dispute voluntarily. At the same time, the mediator is required to obtain "on-the-record" evidence in an arbitration setting, where the parties present their conflicting positions as to critical terms and conditions of the CBA.

This undermines the neutrality of the decision-maker and the decision-making process. First, it creates the inherently coercive dynamic whereby a party understands that the mediator may compel terms not agreed to by either party. This "settle, or else" dynamic infects the entire process, whereby a party is, in effect, coerced into making concessions for fear that the adjudication of the same term may yield a worse result.

Second, the purpose of the mediator's privilege is to insulate the decision-maker from learning the parties' private settlement positions. But

the MMC process inverts these protections by creating a structurally-biased procedure whereby the mediator ***is*** the decision-maker who obtains privileged communications, and then adjudicates any terms still in dispute. Whatever the mediator learns "off-the-record" has the danger, and certainly the appearance, of biasing the mediator's determination of the CBA. It is not possible for the mediator to banish all recollection of those communications. Indeed, during one MMC session, the mediator admitted he couldn't recall whether a certain event had occurred on-the-record or off-the-record. (App'x 689 ("Well, again, as I stated, I don't know whether it was involved in an off-the-record discussion or an on-the-record discussion, this sort of stuff just takes us in a direction we don't really want to go.").)

Third, in arbitrations as well as judicial proceedings, *ex parte* communications are presumed to inject bias into the decision making process, and are to be avoided. (Cal. R. Ct. 3.820(b); *Maaso v. Singer* (2012) 203 Cal. App. 4th 362, 375 (affirming vacating an arbitration award based on *ex parte* communications between the neutral arbitrator and the party arbitrator, holding that such communications "undermine the fairness and integrity of the arbitration process").) Yet MMC allows and encourages *ex parte* communications, thus violating fair process and creating an appearance of bias, whether or not prohibited under regulations. (*See Sangamon Valley v. Television Corp. v. United States* (D.C. Cir. 1959) 269 F.2d 221, 224.)

C. The MMC Statute Strips Private Parties of the Right to Judicial Review of State-Imposed Contracts.

1. The MMC Statute Precludes Admissibility or Judicial Review of "Off-the-Record" or *Ex Parte* Mediation Communications.

Judicial review presumes the ability of the parties to present, and the court to consider, the substantive communications in the underlying proceeding. This review is impossible where the record does not disclose the evidence and communications that may have influenced the decision. (*See United Steelworkers of Am. v. Marshal* (D.C. Cir. 1980) 647 F.2d 1189, 1215 (noting "general concern that whenever the record fails to disclose important communications that may have influenced the agency decision maker, the court cannot fully exercise its power of review").)

But under MMC, "off-the-record" communications are subject to the limitations on admissibility and disclosure (Evid. Code §1119(a)-(c)) and "shall not be the basis for any findings and conclusions in the mediator's report." (Cal. Code. Regs. tit. 8, §20407(a)(2).) These communications are obviously not a part of the record that may be reviewed in evaluating a "mediator's" decision. They are "absolutely" barred from any discovery.[5] Cross-examination of the mediator is prohibited under the Board's regulations. (Cal. Code Regs. tit. 8, §20407(a)(2); *see also Hess Collection Winery* (2003) 29 ALRB No. 6 at 7.) It is also foreclosed by "simple notions of due process," since the mediator cannot defend himself without violating the mediation confidentiality statutes. (*Cf. Solin v. O'Melveny & Myers*

[5] The MMC Statute does not contain any "express statutory exception" to §1119 that would permit a court to obtain a communication protected by the mediator's privilege. (*Cassel***,** 51 Cal. 4th at 124.)

(2001) 89 Cal. App. 4th 451, 463, 467 (dismissing malpractice action which could not be resolved without breaching the attorney-client privilege).)

Accordingly, once rendered, the mediator's decision is effectively immunized from a challenge based on the (mis)use of confidential information, or the failure to consider relevant (albeit confidential) information, in reaching his decision. This leaves the aggrieved party with no practical means to overturn the findings of the mediator, and no ability of the court to conduct any judicial review of communications immunized from discovery or admissibility.

2. The MMC Statute Fails to Provide Sufficient Guidance for Meaningful Review.

The *Hess* majority stated that the MMC Statute offered sufficient judicial review because it provided for review of whether the Board acted in excess of its jurisdiction or abused its discretion, which is all the judicial review "that is constitutionally required." (140 Cal. App. 4th at 1601.) Yet the Board's review of the mediator**'**s report is both discretionary and limited; and there is no right of appeal, or *de novo* review, of the Order. Nor does the statute itself provide any meaningful standard to conduct such a review, or permit the Superior Court to review ***any*** such orders; a critical due process safeguard under the California Constitution. (Lab. Code §1164.9.)

The *Hess* dissent correctly noted the illusory nature of this "judicial review." As Justice Nicholson noted, the statute's requirement that the mediator's report be "supported by the record" (*id.* §1164(d)) was "virtually meaningless in the context of drafting a collective bargaining agreement." (140 Cal. App. 4th at 1612.) Because the MMC Statute lacked sufficient standards to guide the mediator, "there is no way to determine whether the

facts found by the mediator support the decision unless one knows what basic public policy the mediator must vindicate." (*Id*.)

For example, a CBA that was "supported by the record" – because it copied a term found in another CBA – could nonetheless bankrupt the employer or impose great hardship on the employees. (*Id*.) Due to this lack of standards, no reviewing court could ever determine whether a mediator had abused his discretion. Nor could it determine whether a term in another CBA was "clearly erroneous." (Lab. Code §1164.3(a).)

Such review is illusory and violates due process. (*Bayscene*, 15 Cal. App. 4th at 134.)

D. MMC Violates Due Process and the Takings Clause by Depriving the Employer With No Exit from Compulsory Arbitration or Any Safeguards to Secure a Reasonable Rate of Return.

Bayscene emphasized that the compulsory arbitration scheme in question "must "provide [ ] . . . [mobile home] park owners with a 'just and reasonable return on their property.'" (15 Cal. App. 4th at 134 (citing *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129).) *Birkenfeld* struck down a Berkeley Charter Amendment that imposed "a blanket rollback of all controlled rents" and would prohibit any adjustments in maximum rents except under a unit-by-unit procedure which, the court determined, was unworkable. (*Id*. at 136.) Although the law required a reasonable rate of return, the Court held that it did not provide adequate safeguards to reasonably allow the rent board to adjust rents to allow for such a return. (*Id*. at 170-71.) Accordingly, the Court invalidated the law.

In the context of public utility regulation, the U.S. Supreme Court has set out constitutional limitations on the ratemaking power of the national

government to guard against the risk of confiscation that arises if the rates in question are not high enough to allow for recovery of the fixed investments in the enterprise. (*See Fed. Power Comm'n v. Hope Natural Gas* (1944) 320 U.S. 591.) While these rules leave regulators of public utilities, like the mediator, some discretion in making these calculations, they do not grant unchecked power to set up a rate schedule that fails to allow the company to recover sufficient revenues to avoid operating at a loss.

The U.S. Supreme Court has recognized that a collective bargaining agreement "may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules of service." (*J.I. Case*, 321 U.S. at 335.) MMC forces Gerawan to enter into a collective bargaining arrangement without providing any exit right or mechanism that secures Gerawan "a just and reasonable return" on its extensive investment in all aspects of its business operations. (*Birkenfeld*, 17 Cal. 3d at 165.) It fails to meet the constitutional guarantee that property shall be taken from its owner only on payment of just compensation. (*See Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 819 ("The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. . . ."); *see also Bayscene*, 15 Cal. App. 4th at 134 (affirming that by law, a regulation under the police power must allow for a just and reasonable return).)

IV. MMC UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY TO A SINGLE, PRIVATE MEDIATOR.

A legislative body may not delegate its authority in a manner that "(1) leaves the resolution of fundamental policy issues to others or (2) fails to

provide adequate direction for the implementation of that policy." (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal. 3d 184, 190; *see also Clean Air Constituency v. State Air Resources Bd*. (1974) 11 Cal. 3d 801, 816–817 ("An unconstitutional delegation of power occurs when the Legislature confers upon an administrative agency the unrestricted authority to make fundamental policy determinations.") (citations omitted).)

In *Birkenfeld,* the California Supreme Court held that a statutory rent control scheme provided sufficient guidance to a rent board, based on a clear, statutory nexus with the purpose of the law, which was intended to avoid rapidly rising rents while providing landlords with a just and reasonable return on their property. As the Court stated, the stated policy necessarily "implie[d] a standard of fixing maximum rent levels at a point that permits the landlord to charge a just and reasonable rent and no more." **(**17 Cal. 3d at 168.)

Hess held that the criteria set forth in the statute, including the "corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements," were "sufficiently concrete to provide lawful guidance to the mediator and the Board" (140 Cal. App. 4th at 1607) when considered together with the stated legislative purpose to "ensure a more effective collecting bargaining process," to "ameliorate the working conditions" of agricultural employees, and to ensure "stability" in the agricultural industry**.** (*Id.* at 1605.)

But such standards are meaningless "unless one knows what basic public policy the mediator must vindicate." (*Hess,* 140 Cal. App. 4th at 1612.) Unlike in *Birkenfeld,* where a nexus existed between the legislative purpose and rent levels, so that the proper standard for determining rent

levels was necessarily implied, the MMC Statute provides no nexus between the Act's legislative purpose and the provided criteria. That the policy of the ALRA is to encourage collective bargaining gives no clue as to what certain terms of a CBA – for example, wage levels, discipline procedures, or hiring – should be.

Accordingly, the MMC Statute grants the mediator the unfettered discretion to impose his personal sense of justice on employers. In doing so, at best he acts "in the way that arbitrators customarily act, not according to established criteria but according to the ideas of justice or of expedience of the individual arbitrators," that is, with a "tendency to compromise and be guided in part by expediency as distinguished from objective considerations and real right . . . ." (*State v. Traffic Tel. Workers' Fed'n of N. J.* (1949) 2 N.J. 335, 354.)

This is an unconstitutional expansion of delegated governmental authority to make basic policy based on one person's unfettered judgments as to what constitutes the "best interests" of an employer and its workers**,** and is impermissible under the law. (*See People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd*. (1952) 110 Cal. App. 2d 696, 700 (statute that gave an administrative officer "uncontrolled and unguided power to determine an average [tax deduction] rate entirely of his own selection" was void as an unlawful delegation of legislative power).)

V. THE MMC STATUTE VIOLATES THE EQUAL PROTECTION CLAUSES OF THE U.S. AND STATE CONSTITUTIONS.

Legislative classifications must, at a minimum, be "rationally related to a legitimate governmental purpose." (*Bd. of Supervisors v. Local Agency Formation Com*. (1992) 3 Cal. 4th 903, 913 (quoting *City of Cleburne v.*

Cleburne Living Ctr., Inc. (1985) 473 U.S. 432, 446).) The court must conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals." (*Hays v. Wood* (1979) 25 Cal. 3d 772, 786; *see id.* at 787 ("'[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.'" (*quoting Railway Express v. New York* (1949) 336 U.S. 106, 112-13 (Jackson, J., concurring).)

Unquestionably, the State has the right to establish a minimum wage for all employers or for all employers in a particular industry. But the State cannot constitutionally set different minimum wages for different companies. Because the MMC Statute by design, among other things, sets different minimum wages for different companies, it must be struck down as unconstitutional.

Indeed, the whole point of the MMC Statute is to single out one employer and create a special set of rules for that employer alone. Justice Nicholson explains: "Here, the discrimination – that is holding Hess and no other agricultural employer, to the terms of a private legislator's decision – is intentional because the mediator has no power to extend the enactment to other agricultural employers." (140 Cal. App. 4th at 1616.) This scheme is "the very antithesis of equal protection." (*Id*.)

The *Hess* majority assumes that the requirements of the statute "reasonably insure that contracts of different employers will be similar." (*Id*. at 1604.) But nothing in the statute requires different arbitrators writing different contracts for different companies to make them the same. Nor does the statute contain any mechanism that would make this objective attainable.

Even if this Court concludes that the Statute does not violate equal protection violation on its face, the Order denied Gerawan equal protection. Mr. Goldberg acknowledged that Gerawan already pays on average the highest wages among all of its competitors. (App'x 491.) Yet he imposed a wage *increase*. (*Id*. at 492-93.)

Hess made clear that the statute satisfied equal protection scrutiny only because it required the Board to use the *same* standards for all similarly situated agricultural employers. Arbitrarily singling out Gerawan for a wage increase bears no rational relationship to the goal of increasing effective collective bargaining industry-wide. (*See Cleburne*, 472 U.S. at 449-50.)

VI. SPECIFIC TERMS OF THE MMC CONTRACT VIOLATE GERAWAN'S CONSTITUTIONAL RIGHTS.

A. The Retroactive Wage Increases Violate the Contract Clauses of the United States and California Constitutions.

The Contract Clause of the U.S. Constitution provides: "No State shall … pass any … Law impairing the Obligation of Contracts." (U.S. Const., Art. I, §10.) (*Accord* Cal. Const., Art. I, §9 ("A … law impairing the obligation of contracts may not be passed.").) The Order violates both of these provisions.

In assessing whether a statute violates the Contract Clause, "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." (*Allied Structural Steel v. Spannaus* (1978) 438 U.S. 234, 244-45; *see also Union Oil Co. v. Moesch* (1979) 88 Cal. App. 3d 72, 77; *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 309-10 (holding that law eliminating contractual cost-of-living wage increases for public employees was invalid under the Contract Clause).)

Here, the Order interferes with Gerawan's employment contracts with both its direct-hire employees and FLCs who supply a significant portion of Gerawan's labor. (App'x 549, 562-65.) For the latter, it retroactively increases wages by $1.25/hour (roughly 14%). The former, although at-will employees, performed under completed employment contracts, wherein Gerawan offered a wage which the workers accepted by performing. The Order impairs this closed and completed contractual arrangement by requiring a retroactive "across-the-board" wage increase**.** (App'x 492-93.) It also requires adjustments based on seniority and job classification. (*Id*.)

This negation of Gerawan's contracts falls squarely within the prohibition of the Contract Clause. The wage provisions in these agreements are "the very heart of" those contracts. (*Sonoma County*, 23 Cal. 3d at 308-09.)

B. The Order Violates the Takings Clauses of the U.S. and California Constitutions.

The Takings Clause of the Fifth Amendment of the U.S. Constitution states: "nor shall private property be taken for public use, without just compensation." (U.S. Const., Amend. V.) The California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation … has first been paid to, or into the court for, the owner." (Cal. Const., Art. I, §19.) The Order violates both provisions.

The U.S. Supreme Court has recognized that a confiscation of money may constitute a taking. (*Brown v. Legal Foundation* (2003) 538 U.S. 216, 235 (citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 and quoting *Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156); *see also Koontz v. St. Johns River Water Mgmt. District* (2013) __ U.S.

__, 133 S. Ct. 2586, 2596 (conditioning a development permit on the permit-seekers' agreement to pay for expensive conservation work in an unrelated property was an unconstitutional taking); *Webb's Fabulous Pharms. v. Beckwith* (1980) 449 U.S. 155 (holding that the state's appropriation of interest earned on an interpleader fund amounted to a taking).) California law is in accord. (*Action Apartment Ass'n v. Santa Monica Rent Control Board* (2001) 94 Cal. App. 4th 587 (reversing judgment on demurrer and holding that allegations of government confiscation of excessive interest payments was sufficient to state a takings claim).)

Here, the Order forces Gerawan, if it wants to continue using its property as farmland (its only practical use), to increase its payroll expenses, change its promotion and seniority policies, and so on. Gerawan must pay increased wages and benefits, including payments retroactive to July 27, 2013, to realize the value of that property. Gerawan faces a choice to either comply or lose by government fiat the value of its property. The Order therefore amounts to an improper exaction directly linked to Gerawan's farmland, which is considered a taking after *Brown* and *Koontz*.

VII. CERTAIN PROVISIONS OF THE MMC CONTRACT ARE ARBITRARY AND CAPRICIOUS.

In the nine (9) contractual terms set forth below, the mediator relied on nonexistent or clearly erroneous findings of fact, or simply made determinations without any support. Despite these infirmities, the Board adopted the Report as its Order. In doing so, it acted in excess of its statutory authority.

A. Article 1: Recognition.

The mediator determined that the first sentence of Article 1, Section 1 of the CBA should read:

> The Company recognizes the Union as the sole and exclusive labor organization representing all of the agricultural employees . . .

(App'x 442.)

The Board blindly adopted this decision, eviscerating Gerawan's right to challenge the standing of the UFW to represent the employees it abandoned for 20 years. But Section 1 of the mediator's proposed CBA is unrelated to the terms and conditions of employment under §1164.3(a)(1) and is arbitrary. (App'x 441-42.) The parties both proposed that Gerawan would not be required to "recognize" the UFW. The mediator "resolved" this undisputed issue by requiring recognition.

The mediator ignored the law regarding the definition and clarification of bargaining units when he rejected Gerawan's proposal that the Board resolve such disputes. The UFW argued such disputes should go immediately to arbitration. But because the ALRB only defers to, but is not bound by, an arbitrator's decision, any such decision would likely result in a bargaining unit clarification petition being filed with the ALRB by one of the parties. This would result in delays and duplication.

B. Article 2: Union Security.

The mediator accepted the UFW's proposal for a so-called "Union Security" clause, which requires that workers must pay union dues or agency fees to the UFW or be terminated. (App'x 447.) Because this provision

includes terms unrelated to the wages, hours and working conditions under §1164.3(a)(1), except insofar as it necessitated a wage increase to cover the cost of the union dues/fees that the employees must now bear**,** it is clearly erroneous, arbitrary, and capricious.

The mediator was well aware of the union abandonment (App'x 446), yet determined that the employees – given no opportunity to ratify the "agreement" – must pay dues for representation or lose their jobs. The U.S. Supreme Court questioned the entire concept of agency shop provisions in *Knox v. Service Employees International Union, Local 1000* (2012) 567 U.S. ___, 132 S.Ct. 2277, and in this case, the concept is not only questionable, it is completely unjustified. The Board failed to apply any standard of review and without discussion allowed this provision, though even Mr. Goldberg, noting the UFW's abandonment, recognized that "the imposition of membership fees to support an organization that most of the employer's employees had little if anything to do with would appear to be a bit of an overreach." (App'x 446).

C. Article 4: Length of Service.

The mediator adopted the Union's "seniority rights" proposal, reasoning it was "common to labor agreements and rewards employee loyalty." (App'x 453.) But the mediator relied on an unsupported finding that Gerawan does not consider one's length of service and ignored Gerawan's evidence to the contrary. Gerawan has always considered an employee's past service, or length of service, as one factor in employment decisions. (*See generally* App'x 753-804; 944-46.)

In addition, Gerawan never required an employee to continue working without a break in service in order to have his or her past service be

the controlling factor in employment decisions. Gerawan considers whether an employee is seasonal or not, and what the circumstances may have been for any break in service. Employees have been free to come and go as they please without suffering repercussions, so long as work is available when they return. (App'x 310.) No credible evidence was offered by the UFW, or any explanation as to why this standard practice was unacceptable.

The length of service requirement affects the relative freedom of Gerawan employees, including the ability to leave during the season to work for other employers on short-term harvesting operations, such as the raisin harvest, and to return to work at Gerawan without any loss of status or entitlement to work. (*See* App'x 753-804; 944-46.) They also can take time off during the work day, or take whole days off, without having to provide any reason. (*Id*.) While the mediator attempted to retain some of this flexibility in other areas, such as Leaves of Absence, the application of the mediator's imposed Section 4 would cause employees to lose credit for past employment. (App'x 453.) The mediator made his determination solely on his impression that seniority systems are common in labor agreements, implicitly refusing to consider why Gerawan's practices served it and its employees well for many years. His decision was arbitrary and capricious, and based on clearly erroneous findings of fact. (App'x 450.) The Board failed to follow the applicable standards of review in summarily approving these provisions.

D. Article 9: Discipline and Discharge.

The mediator adopted the Union's proposal that employees could be disciplined and discharged only for "just cause" (App'x 465), despite having made no findings of fact that would support such a radical change to

Gerawan's business practices. This decision was based on nothing other than the mediator's unfettered judgment as to what was "typical" in other CBAs, but failed to consider whether those employers shared many of Gerawan**'**s distinctive and successful employment practices. No finding was made that Gerawan's current system was problematic; the only evidence before the mediator was that the existing policies were essential to Gerawan's viability and a reason why it paid higher wages than any comparable grower. (App'x 462-67.) Gerawan has had effective disciplinary and corrective action procedures that have served management and the employees well over the past 20 years. (App'x 753-804; 944-46.) Not once has the UFW suggested that the existing practices are problematic or unfair. Gerawan did not have any unfair labor practice charges filed against it between the UFW's disappearance in 1995 and the UFW's reemergence in October 2012.

Gerawan provided unrebutted evidence as to why the disciplinary standards proposed by the UFW should not be adopted. This included expert testimony on human resources, systems management, and quality control. (App'x 753-86; 807-24; 944-46; 952-57.)

The mediator's determination that Gerawan must notify a shop steward before taking any disciplinary action was also based on clearly erroneous findings of fact, and is arbitrary and capricious, because it does not take into account the necessity for immediate corrective actions which are an essential part of Gerawan's quality control systems. (App'x 466; 952-57.)

E. Article 16: FLCs.

The mediator determined that the "wages, hours, and other terms and conditions of employment" contained in the CBA should also be applied to

FLC workers. (App'x 471.) This determination is based on clearly erroneous findings of fact regarding the contractual relationship between Gerawan and FLCs, and is arbitrary and capricious. The Board abused its discretion, failed to apply the proper standard of review, and failed to consider the facts presented during the MMC.

The UFW's position on FLC workers was inconsistent. Although it stressed its belief that FLC employees cannot be ignored and should be treated the same as any other employees, its own proposals restricted the FLC employees' ability to work unless all direct-hire employees are working first. (App'x 470.)

In fact, groups of employees in all types of bargaining units overseen by the ALRB or NLRB, are treated differently. Gerawan submitted several current UFW agreements which exclude FLC employees from all or part of the agreement, especially with regard to economic terms. Two of the UFW's own proffered agreements contained provisions excluding at least some FLC employees from any coverage under the agreements. (App'x 531.) There are a host of other CBAs which range from excluding FLC employees completely to excluding them from coverage under particular portions of the agreements, such as wages and benefits, and disciplinary procedures. There was nothing wrong with Gerawan's proposal to exclude FLC workers from the CBA, and that proposal rationally distinguished between direct-hire employees and the more casually employed FLC employees. (App'x 471.)

For some employers, the only source of labor for the employer is through the retention of FLCs. In others, the employers do not use FLC workers at all. Gerawan is evidently the first employer during the "modern era" of MMC cases where the vast majority of the labor force is direct-hire, while FLC employees are secured in some (but not all) years, and even then

for different durations of time. Gerawan is not dependent on FLC employees, and the relationship is that of casual employment.

The UFW did not provide any evidence for its assertion that the Affordable Care Act, which treats FLCs as separate and independent employers, would impact the benefits provided by Gerawan to FLC employees. Nor did it justify its proposed setting of wage rates for FLC employees under the CBA, which constitutes a change in the way Gerawan contracts with farm labor contractors and ignores the fact that FLC employees work for other employers through the year in different seasons and commodities, both before and after they work for Gerawan.

F. Article 23: Waiting and Standby Time.

The mediator's determination that the Union's proposal for waiting and standby time provided the same level of wages as provided by law is clearly erroneous. (App'x 478.) The Department of Industrial Relations' Wage Order No. 14 (http://www.dir.ca.gov/IWC/IWCArticle14.pdf) does not provide that waiting or standby time be compensated at the average hourly rate from piece-rate earnings from the day before. The provisions of Sections 1 and 2 of this Article should only obligate Gerawan to pay what is required under the law for waiting and standby time. The Board failed to apply the standards of review to a clear and specific error.

G. Article 24: Bonus.

The mediator lowered the eligibility thresholds for bonus pay for Gerawan's workers despite the fact that Gerawan's bonus benefits already exceed those of its competitors. (App'x 482.) This determination to lower the eligibility thresholds for the achievement of bonus pay is arbitrary and

capricious and conflicts with the mediator's own factual findings. Gerawan's bonus benefits, which are an important part of its entire economic package, were already above that provided by its competitors, as was shown during the mediation. (App'x 962.) The Board failed to address the conflict between the mediator's findings of fact and his ultimate determination, and failed to apply the correct standards of review.

H. Article 28: Duration.

A three-year duration for the CBA was arbitrary and capricious in light of the mediator's findings concerning the Union's extended abandonment of the workers. Given the facts here, a one-year agreement is the most logical beginning for any relationship between these parties. Moreover, open shop provisions should be adopted during that period. Such an introductory period allows for the Union to reintroduce itself to the employees (the vast majority of whom did not work at Gerawan 23 years ago when the election took place) and actually perform the services for which it expects to be paid through mandatory dues and fees assessments. Economics, the Affordable Care Act, immigration and other transitional unknowns for the next several years also provided a basis for a limited introductory agreement term.

I. Wages.

The mediator dictated the following wage rates throughout the course of the CBA:

Effective Date	**Wage Rate**
7/27/13	$10.25

3/15/14	$10.75
3/15/15	$11.25

(App'x 493.)

The mediator's determinations to give *any* wage increases in 2013, to further increase wages in the second and third years, to adopt the Union's length of service wage adjustments, and to adopt the Union's proposed new job classifications, are arbitrary and capricious given the mediator's acknowledgement that Gerawan had already given large increases for 2013, before the mediation even commenced. (App'x 492-93.) Moreover, after expressly rejecting any reliance on the economic terms of CBAs submitted by the UFW (App'x 438-39), the mediator then cited wages in one of these contracts – for a boutique vineyard in Northern California – to *support* a wage increase. (*Id*. at 491). Despite the mediator's direction to make an economic proposal nearly a month earlier, the UFW delayed making any economic proposal until July 21, 2013, and made an even later proposal for medical insurance. (App'x 336.) This created an impossible task for Gerawan to address in the few days available during the MMC, despite its best efforts.

The Union's wage and benefit proposals were based on mere speculation that there "might" be a labor shortage, for which it offered no evidence. Gerawan established that it was already paying well above its competitors by a significant amount. (App'x 459-60.) Gerawan had given its employees a 10% increase in March 2013, even though it was already paying more than the rest of the industry. (App'x 490.)

The mediator's decision that wage increases should be made retroactive to July 27, 2013 is also arbitrary and capricious, given that the

mediator notified the parties on May 1, 2013 that he would not even be able to begin the mediation until the end of July 2013. (App'x 488.) Although the mediator's expressed intent is to keep the employees from suffering from his own delay, he placed the burden of that delay on Gerawan, notwithstanding the Union's delay in waiting until late July to make its first economic proposal. (App'x 336.) The Board failed to consider the uncontested facts of the UFW's abandonment and the chronological record of the mediation conducted by the mediator.

The mediator also adopted, without any explanation or factual finding, the UFW's proposal for a near-complete overhaul of the method for setting wage rates within job classifications by introducing a seniority-based hierarchy for wage rates. (App'x 492.) The mediator ignored other factors that Gerawan has used, and its employees have relied upon, for determining wage rates. These other factors include an employee's experience and ability to perform the job. The UFW did not provide any evidence or testimony to support such an extensive change, nor did it even explain its reasoning for the particular levels within the classifications. No such seniority-based system exists in any of the three collective bargaining agreements with other growers the UFW proffered in support of its positions. Finally, the UFW did not provide any evidence or testimony concerning its proposal to add job classifications.

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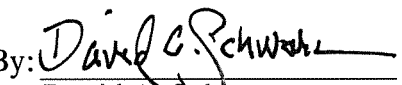
VIII. CONCLUSION

The Petition should be granted, and a writ should issue vacating the Order.

Dated: December 16, 2013

Respectfully submitted,

IRELL & MANELLA LLP
David A. Schwarz

By: 
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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), I certify that the attached Petition for Writ of Review and Memorandum of Points and Authorities was produced on a computer using the Microsoft Word 2010 word processing program. According to the word count feature of that program, the text of this Petition (excluding the cover information, table of contents, table of authorities, certificate of interested entities or persons, this certificate of word count, and signature blocks) consists of 13,974 words.

Dated: December 16, 2013

IRELL & MANELLA LLP

Michael Behrens

PROOF OF SERVICE

BY FEDEX

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On December 16, 2013, I served the foregoing document described as **PETITION FOR WRIT OF REVIEW OF ORDER OF AGRICULTURAL LABOR RELATIONS BOARD [39 ALRB No. 17] [LAB. CODE §1164.5]** on each interested party, as follows:

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☒ (BY OVERNIGHT DELIVERY SERVICE) I served the foregoing document by FedEx, an express service carrier which provides overnight delivery, as follows. I placed a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed, as set forth above, with fees for overnight delivery paid or provided for.

☒ (BOX DEPOSIT) I deposited such envelopes or packages in a box or other facility regularly maintained by the express service carrier.

☐ (CARRIER PICK-UP) I delivered such envelopes or packages to an authorized carrier or driver authorized by the express service carrier to receive documents.

Executed on December 16, 2013, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Virginia Chow
(Type or print name)

Virginia
(Signature)