IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS, Petitioner, v. AGRICULTURAL LABOR RELATIONS BOARD, Respondent, and UNITED FARM WORKERS OF AMERICA, Real Party in Interest.	)	Case No. S227270 (Fifth District Court of Appeal; Case No. F069419)

AGRICULTURAL LABOR RELATIONS BOARD'S REPLY BRIEF ON THE MERITS

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DATED: March 11, 2016
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INTRODUCTION

The Agricultural Labor Relations Act (the "ALRA" or "Act") was enacted to protect the right of agricultural employees to decide for themselves whether or not to be represented by a labor organization free from employer interference or coercion. The employees of Tri-Fanucchi Farms ("Tri-Fanucchi") exercised that right and selected the United Farm Workers of America (the "UFW") as their bargaining representative. They have never rescinded that selection and the UFW remains their certified bargaining representative. Yet, when the UFW demanded to bargain in 2012, Tri-Fanucchi refused. The Agricultural Labor Relations Board (the "ALRB" or "Board") found, and the Fifth District Court of Appeal (the "Court of Appeal") agreed, that Tri-Fanucchi's refusal to bargain violated the ALRA.

At issue in this case is the remedy chosen by the Board to expunge the effects of Tri-Fanucchi's violation of the Act and, specifically, the Board's determination that it was appropriate that Tri-Fanucchi make its employees whole for any lost wages they suffered as a result of the violation. Tri-Fanucchi's unlawful conduct has deprived, and three and a half years later continues to deprive, Tri-Fanucchi's employees of the wage increases and other benefits that would have been secured through collective bargaining. A decision by this Court is now necessary in order

that the Board may effectuate its remedy and make those employees whole for the losses they have suffered by reason of Tri-Fanucchi's unlawful conduct.

More fundamentally, this Court's decision is necessary in order to preserve the proper functioning of the statutory system created by the California Legislature to govern labor relations in California's vital agricultural industry. The Legislature, following the precedent of the National Labor Relations Act (the "NLRA"), created the ALRA as a comprehensive statutory scheme governing California's agricultural labor relations. To administer the Act, the Legislature created the ALRB, and vested it with primary and exclusive jurisdiction to adjudicate "unfair labor practice" claims arising under the Act and to formulate remedies designed to expunge the effects of unfair labor practices. The Legislature intended, and scores of decisions from this Court and the United States Supreme Court have held, that the ALRB's remedial determinations are subject only to limited judicial review. It is not the role of reviewing courts to second-guess the Board's remedial determinations. Rather, the Board's chosen remedies are to be upheld unless those remedies constitute a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act.

In reversing the Board's award of bargaining makewhole ("makewhole") in this case, the Court of Appeal failed to adhere to this

well-established standard of review. Rather than consider whether the Board's makewhole remedy advanced ends other than those that effectuate the policies of the Act, the Court of Appeal undertook a de novo review of the Board's order and found that the Board's conclusion was "wrong." Compounding its error, the Court then usurped the Board's role and proceeded to exercise the Board's exclusive remedial jurisdiction, rather than remanding the matter to the Board for further consideration as it should have done. In doing so, the court inappropriately formulated its own remedy for Tri-Fanucchi's unfair labor practice, determining it was appropriate that no makewhole be awarded in this case. In failing to adhere to its proper reviewing role, the Court of Appeal abrogated the Board's role as the specialized expert agency in this field and the proper deference owed the Board by a reviewing court.

In its answer brief, Tri-Fanucchi argues that the Court of Appeal's decision should be upheld. While conceding that a standard of limited review applies to review of the Board's remedial orders, Tri-Fanucchi argues that it was proper for the Court of Appeal to apply a de novo standard of review because the Court of Appeal's review was limited to a "legal conclusion" by the Board. Tri-Fanucchi, however, mischaracterizes the basis of the Board's makewhole award, as well as the nature of the issue before the Court of Appeal, which was not a "legal conclusion." Furthermore, even if the Board's makewhole award can be characterized as

makewhole was appropriate. [R. Op. at Br. pp. 24-41.][1] That standard, which for ease of reference will be referred to hereinafter as the "*Virginia Electric* Standard," requires that an ALRB remedial order be upheld "unless it can be shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act." (*Virginia Electric & Power Co. v. NLRB* (1943) 319 U.S. 533, 540; *Carian v. ALRB* (1984) 36 Cal.3d 654, 674.) [See R. Op. Br. at pp. 27-32.] Tri-Fanucchi concedes that the *Virginia Electric* standard governs review of ALRB remedial orders. [Pet. Ans. Br. at p. 27.]

Tri-Fanucchi argues that, because the Court of Appeal stated that it gave "due deference" to the Board on "ALRA policy issues," the Court of Appeal must have been "aware" of the proper standard of review. [Pet. Ans. Br. pp. at 30-31.] The issue, however, is not whether the Court of Appeal was "aware" of the proper standard of review but whether the Court of Appeal applied the standard. On this issue, Tri-Fanucchi effectively concedes that the Court of Appeal did not, in fact, apply the *Virginia Electric* standard. Rather, Tri-Fanucchi argues that the Court of Appeal was not required to apply that standard because its analysis was limited to consideration of the Board's "legal conclusion" that Tri-Fanucchi's litigation did not further the policies and

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purposes of the ALRA, and thus it was proper for the Court of Appeal to apply a de novo standard of review to that issue. [Pet. Ans. Br. at p. 30.]

As discussed below Tri-Fanucchi's argument has no legal merit and is based upon an incorrect reading of the Board's order.

A. Tri-Fanucchi's Argument, and the Court of Appeal's Conclusion, That the Board's Makewhole Award Was Based Solely on its Assessment of the Merits of Tri-Fanucchi's Defense is Flatly Contradicted by the Board's Written Decision

In its decision, the Court of Appeal concluded that the Board's decision was based "solely" on the Board's "legal conclusion or value judgment" that Tri-Fanucchi's litigation of an "abandonment" defense did not further the policies and purposes of the Act. (*Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079, 1097.) Tri-Fanucchi echoes this in its brief, arguing that the Board's makewhole award was based upon this "single legal conclusion." [Pet. Ans. Br. at p. 43.] The plain language of the Board's decision refutes this argument, particularly in the context of the issues that were raised and litigated before the Board.

In his decision, the Administrative Law Judge ("ALJ") awarded makewhole. [CR 163.] Under the Board's regulations, parties were entitled to file exceptions to the ALJ's decision. (Cal. Code Regs., tit. 8, § 20282, subd. (a).) Any matter not raised in exceptions is thereafter waived. (Cal. Code Regs., tit. 8, § 20282, subd. (d); *Lindeleaf v. ALRB* (1986) 41 Cal.3d 861, 869-870.)

Tri-Fanucchi's exceptions on the issue of makewhole asserted that makewhole should not have been awarded because: 1) Tri-Fanucchi was engaged in a good faith "technical refusal to bargain" bringing the case within the rule announced in *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, and 2) that the UFW and the General Counsel engaged in bad faith and/or dilatory conduct in the prosecution of the unfair labor practice case. [CR 181-186 (Exception Nos. 2, 8, & 13) & 198-199.]

In its decision, the Board dismissed Tri-Fanucchi's exceptions and affirmed the ALJ's award of makewhole, finding that the remedy was appropriate "under the circumstances presented in this case" and in light of the Board's review of the "facts and circumstances and the equities." [CR 407.] The Board's conclusion was based in large part on the fact that Tri-Fanucchi's principal defense was inapplicable to the ALRA under well-established Board precedent. [CR 405.] However, in addition to considering the facts, circumstances, and equities generally, the Board considered, and wrote specifically, on the two arguments asserted by Tri-Fanucchi as reasons why the Board should not award makewhole. The Board concluded that the *J.R. Norton* standard is not applicable to this case (a conclusion that Tri-Fanucchi now concedes was correct) and that, therefore, Tri-Fanucchi's good faith "do[es] not control" the decision as to whether to award makewhole. [CR 405.] The Board further found that the equitable considerations raised by Tri-Fanucchi did not warrant a conclusion that makewhole was not appropriate, but specifically stated

that, under different facts, such considerations could have justified declining to award makewhole notwithstanding the assertion of an invalid defense. [CR 406-407.] The Board's chairman believed this issue to be sufficiently important that he wrote a separate concurring opinion emphasizing the potential effect of dilatory conduct on the Board's ability to award makewhole. [CR 409-410.]

In concluding that the Board's makewhole award was based "solely" on the Board's conclusions as to the public interest in Tri-Fanucchi's assertion of the abandonment defense, the Court of Appeal not only failed to afford the Board's decision the "presumption of validity" to which it is entitled, the Court of Appeal also ignored the other factors cited in the Board's decision. Likewise, Tri-Fanucchi chooses to ignore the Board's statement that it reviewed and considered "the facts and circumstances and the equities of the case" as well as the Board's specific consideration of Tri-Fanucchi's argument that its (Tri-Fanucchi's) good faith should be given controlling weight.

Tri-Fanucchi's attempt to read out of the Board's decision the Board's consideration of equitable factors *raised by Tri-Fanucchi* is utterly unpersuasive. [Pet. Ans. Br. at p. 50.] In fact, Tri-Fanucchi's argument that the Board was "merely acknowledging and summarily dismissing [Tri-]Fanucchi's equitable arguments" is effectively an admission that the Board did, in fact, consider those arguments, even if the result reached was not the one Tri-Fanucchi favored. [Pet. Ans. Br. at p. 50.] Tri-Fanucchi's alternative argument that equitable considerations are not a proper part of the Board's makewhole assessment is

peculiar, given that Tri-Fanucchi argued before the Board that such considerations should have rendered makewhole inappropriate. [See CR 200 (arguing that dilatory conduct was relevant to the "totality of the employer's conduct" for makewhole purposes).] Tri-Fanucchi does not explain why a broad "facts and circumstances" analysis would not encompass equitable considerations. In any event, Tri-Fanucchi's argument is, once again, contrary to the case law, which confirms that the Board can and should consider equitable considerations when deciding whether to award makewhole. (*Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4 at pp. 25-26 (stating that the Board "must weigh the equities" as part of its makewhole analysis); *Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1395 ("the Board must consider the *equities* of the parties' positions in determining whether makewhole should be ordered." (emphasis in original).)

The conclusion reached by the Court of Appeal and argued by Tri-Fanucchi that the Board's makewhole award was based "solely" on the Board's assessment of the "abandonment" defense is indisputably erroneous. Rather than considering only that factor, the validity of Tri-Fanucchi's defense represented one factor within a broad, discretionary "facts and circumstances" analysis, the resolution of which was committed to the Board's primary and exclusive jurisdiction and subject to limited judicial review. Therefore, it was improper for the Court of Appeal to isolate one factor considered by the Board, treat it as a

"legal conclusion" and thereby subject the Board's makewhole determination to de novo review.

B. Even if it Were Proper for the Court of Appeal to Consider the Board's Assessment of the Public Interest in Tri-Fanucchi's Litigation of the "Abandonment" Defense in Isolation, it Was Erroneous for the Court to Treat That Assessment as a "Legal Conclusion"

Even if it were proper for the Court of Appeal to disregard the other factors examined by the Board and treat the Board's makewhole award as if it were exclusively predicated on the Board's assessment of Tri-Fanucchi's defense, it would still not be proper to treat that assessment as a "legal conclusion" for purposes of review. The Board was not merely assessing the validity of Tri-Fanucchi's "abandonment" defense. The Board was called upon to consider whether, and the extent to which, Tri-Fanucchi's advancement of that defense furthered the policies and purposes of the Act. The Board was required to exercise its exclusive jurisdiction over the crafting of appropriate remedies for violations of the ALRA and apply its subject matter expertise to this issue. It needed to consider the various, sometimes competing, policies and purposes underlying the ALRA. It was further called upon to evaluate Tri-Fanucchi's litigation of the "abandonment" defense in the context of the facts and circumstances presented by the particular case. Most fundamentally, the Board was required to determine whether makewhole was "appropriate" under the circumstances, a determination that is discretionary in nature and which is

explicitly assigned by statute to the Board's jurisdiction. (Lab. Code, § 1160.3 (makewhole to be awarded "when the board deems appropriate"); *J.R. Norton Co. v. ALRB, supra,* 26 Cal.3d 1, 38 (examining the legislative history of the makewhole remedy and noting its essentially discretionary nature.)[2]

In *Bixby v. Pierno* (1971) 4 Cal.3d 130, this Court cautioned against reviewing courts treating exercises of agency discretion as "questions of law" for courts to decide, thereby substituting their judgment for that of the agency. In *Bixby*, the issue involved the Legislature's delegation of broad authority to the Commissioner of Corporations to evaluate corporate recapitalization plans and to approve them where they were "fair, just, and equitable." (*Id.* at pp. 147-148.) In considering the role of a court reviewing such an evaluation by the Commissioner, this Court stated,

> The statutory discretion of the commissioner would be entirely abrogated were we to hold that the question of the fairness of securities transactions necessarily constitute questions of law for the courts to decide. By its very nature, the exercise of discretion requires the ability to choose between permissible alternatives. If the Legislature has conferred upon an administrative officer or agency the authority to apply such broad standards as the "fair, just and equitable" criteria

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[2] Tri-Fanucchi concedes that a makewhole determination is discretionary in nature. [R. Ans. Br. at p. 1.] Tri-Fanucchi argues in the introduction to its answer brief that the Board failed to exercise its discretion and awarded makewhole "simply because [Tri-Fanucchi] lost its appeal before the Board." [*Ibid.*] This is quite obviously incorrect, as the Board examined a number of factors beyond simply whether Tri-Fanucchi had refused to bargain without a valid defense.

> involved herein, the courts should not substitute their own judgment for that of the agency, but should uphold the administrative decision unless it is arbitrary, capricious, or fraudulent, having no reasonable basis in law or no substantial basis in fact.

(*Id.* at p. 148.)

In the case of makewhole determinations, the Legislature assigned primary and exclusive jurisdiction to the Board to devise remedies for violations of the Act and enacted a statute that specifically states that makewhole is to be awarded at the Board's discretion "when the board deems appropriate." (Lab. Code, § 1160.3.) As stated in *Bixby*, the Board's specialized function would be entirely abrogated if reviewing courts could treat the Board's discretionary remedial determinations as "legal issues" to be decided de novo on review.

C. Even With Respect to "Legal" Issues, the Board's Decisions Must be Upheld Where Its Interpretation of the ALRA is a "Reasonable" One

Even if it were proper for the Court of Appeal to treat the Board's makewhole award as based solely upon the Board's conclusion that Tri-Fanucchi's assertion of the "abandonment" defense did not further the policies and purposes of the Act, and even if it were correct to treat that as a "legal conclusion" (neither of which propositions the Board accepts), that would not mean that the Board's decision would be entitled to no deference. As the United States Supreme Court stated in the landmark *Garmon* decision, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary

interpretation and application of its rules to a specific and specially constituted tribunal . . . ." (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 242-243.) The special character of comprehensive labor relations statutes such as the NLRA and the ALRA means that the decisions of the agencies with jurisdiction over those statutes are afforded deference by reviewing courts, including with respect to statutory interpretation and other issues of law. (*NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 236 ("the balancing of the conflicting legitimate interests . . . to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."); *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 266 ("the [NLRB] has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' [citations] and its special competence in this field is the justification for the deference accorded its determination.") (bracketed material added).) While the cases confirm that the courts have the ultimate responsibility to construe the law, and sometimes describe their review of legal issues raised by agency decisions as "de novo," they have made clear that, even where review of an administrative decision involves a pure question of law, the agency's interpretation of the statute is accorded "great weight." (*Prentice v. Board of Administration* (2007) 157 Cal.App.4th 983, 989; *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 829 ("on an issue that implicates its expertise

in labor relations, a reasonable construction by the Board is entitled to considerable deference").)

In *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 859, this Court cautioned against "minimiz[ing] the significance to be accorded an administrative agency's interpretation of a statute within its sphere of expertise" and stated that, "[a]lthough the ultimate interpretation of legislation rests, of course, with the courts, both this court and the United States Supreme Court have recognized on numerous occasions that "[the] construction of a statute by the officials charged with its administration must be given great weight . . . ." (Bracketed material added.) Likewise, a federal appellate court stated that "[l]egal conclusions based upon the [NLRB's] expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference." (*NLRB v. Starbucks Corp.* (2d Cir. 2012) 679 F.3d 70, 77) (bracketed material added; internal punctuation omitted); *D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344, 349-350 ("[w]hile the NLRB's legal conclusions are reviewed de novo . . . its interpretation of the NLRA will be upheld 'so long as it is rational and consistent with the Act.'") (See also *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 799-800; *NLRB v. Hearst Publications, Inc.* (1944) 322 U.S. 111, 130-131.)[3]

[3] The deference afforded to the NLRB's interpretations of the NLRA is sufficiently strong that it may prevail "[e]ven if the legislative history

(Footnote continued....)

In *NLRB v. City Disposal Systems, Inc., supra,* 455 U.S. 822, the United States Supreme Court rejected the argument that no deference should be given to the NLRB when the issue was "essentially a jurisdictional or legal question concerning the coverage of the Act," stating that "[w]e have never . . . held that such an exception exists to the normal standard of review of Board interpretations of the Act." (*NLRB v. City Disposal Systems, Inc., supra,* 465 U.S. 822, 830, fn. 7.) Rather, "[w]here the Board's construction of the Act is reasonable, it should not be rejected merely 'because the courts might prefer another view of the statute.'" *Pattern Makers' League v. NLRB* (1985) 473 U.S. 95, 114 (quoting *Ford Motor Co. v. NLRB* (1979) 441 U.S. 488, 497.) (See also *Fall River Dyeing & Finishing Corp. v. NLRB* (1987) 482 U.S. 27, 42 (holding that the NLRB's interpretation of the NLRA is upheld where it is "rational and consistent with the Act").)

The difference between the correct application of the deference owed to the Board's decisions, even on legal issues, and the treatment of the Board's makewhole award by the Court of Appeal in this case is stark. This is particularly so given that the instant case involves the application of the Board's remedial authority, where "the breadth of agency discretion is, if anything, at zenith . . . ." (*Fallbrook Hospital Corp. v. NLRB* (D.C. Cir. 2015) 785 F.3d 729,

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(Footnote continued)
arguably pointed toward a contrary view." (*Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 500.)

735.) The Court of Appeal afforded no deference whatsoever to the Board's conclusion that Tri-Fanucchi's litigation position did not further the policies and purposes of the Act. The decisions of this Court and the United States Supreme Court demonstrate that this was clear error.

The Board's conclusion that, Tri-Fanucchi's advancement of its "abandonment" defense did not further the policies and purposes of the Act, given that there was settled Board authority holding that defense inapplicable to the ALRA, was a reasonable one. Accordingly, the Board's decision should have been upheld even if the Court viewed it as a "legal conclusion." However, this Court ultimately need not reach that issue because, as discussed above, the Board's determination that an award of makewhole was appropriate was not a "legal conclusion," but rather an exercise of the Board's discretionary remedial authority based upon a "facts and circumstances" analysis that included not only the Board's assessment of the litigation of the "abandonment" defense, but also the arguments against makewhole advanced by Tri-Fanucchi. The Board's decision was not a "patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act," and should have been upheld under the proper standard of review.

II. TRI-FANUCCHI FAILS TO JUSTIFY THE COURT OF APPEAL'S DECISION TO ASSUME THE REMEDIAL AUTHORITY OF THE BOARD AND UNDERTAKE ITS OWN EVALUATION OF THE APPROPRIATENESS OF MAKEWHOLE

In its opening brief, the Board demonstrated that the Court of Appeal did not merely reverse, under an improper standard of review, the remedial determinations of the Board concerning makewhole. The Court of Appeal went on to improperly assume the Board's remedial authority and determine that an award of makewhole was not appropriate in this case. [R. Op. Br. at pp. 38-41.] Tri-Fanucchi argues that the Court of Appeal did not, in fact, do this. Tri-Fanucchi is incorrect and fails to rebut the inevitable conclusion that the Court of Appeal's assumption of the Board's authority was improper.

A. The Court of Appeal's Decision Unmistakably Demonstrates That the Court Made Policy and Remedial Determinations Reserved to the Board's Exclusive Jurisdiction

Tri-Fanucchi argues that the Court of Appeal "never made a policy determination as to what conduct furthers the policies and purposes of the Act." [Pet. Ans. Br. at p. 31.] That is simply false. The Court of Appeal's concluding statement that it was reversing the Board's makewhole award was preceded by the following statement: "Fanucchi's advancement of this litigation ***plainly furthered the broader purposes of the ALRA*** to promote greater stability in labor relations by obtaining an appellate decision on this important

[abandonment] issue." (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1098 (emphasis and bracketed material added.)

As Tri-Fanucchi itself admits, the purpose of judicial review of ALRB orders is to ensure that the agency does not act in a manner that is arbitrary or irrational [Pet. Ans. Br. at p. 27], not to replace the judgment of the agency with that of the court on matters within the agency's exclusive jurisdiction. Yet, it is clear the Court of Appeal substituted its judgment for that of the agency. The Court of Appeal identified and considered discretionary factors such as the purported novelty of Tri-Fanucchi's defense, the allegedly controversial nature of the Board's precedent, and the extent to which Tri-Fanucchi's litigation was "helpful," and found that these factors favored a conclusion that Tri-Fanucchi's litigation advanced *one of* the underlying policies of the ALRA (labor relations stability). Given that the result of the Court of Appeal's decision would be that no makewhole would be awarded, the Court of Appeal implicitly found that these factors outweighed any other competing factors (such as the harm done to employees by being denied the benefits of collective bargaining or the public interest favoring resolution of representation matters by employees without employer interference) and that a makewhole remedy was not "appropriate" within the meaning of Labor Code section 1160.3.[4]

[4] Tri-Fanucchi contends that there is no indication that the Court of Appeal engaged in any weighing of competing interests. [Pet. Ans. Br. at p. 45.] Even if this were true, it would only mean that the Court of Appeal

(Footnote continued....)

B. Tri-Fanucchi's Arguments That the Court of Appeal Had the Authority to Find Makewhole Not Appropriate Rather than Remanding the Matter to the Board Are Unpersuasive

Tri-Fanucchi argues that, with the Court of Appeal having cast aside the Board's conclusion that Tri-Fanucchi's litigation did not further the policies and purposes of the Act, there was no need for the Court of Appeal to remand the matter to the Board for further proceedings consistent with its decision. However, even if the Court of Appeal were correct to reverse the Board's policy conclusions concerning Tri-Fanucchi's litigation of the "abandonment" issue, that would not necessarily dictate a conclusion that makewhole was not appropriate. Rather, it would be necessary to determine, assuming that Tri-Fanucchi's litigation furthered the policies and purposes of the Act, whether any other facts, circumstances, or policy considerations sufficiently weighed in favor of makewhole so as to make an award appropriate. As discussed in the Board's opening brief,[5] and as further discussed below, the appropriate way to resolve such issues would have been to remand the matter to the Board to allow it to

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(Footnote continued)
impermissibly determined that makewhole was not appropriate without even applying the correct legal standard to the issue (the *F&P Growers* standard). Tri-Fanucchi also contends that the Board itself failed to weigh the competing interests, relying only on its conclusion with respect to the "abandonment" defense. [Pet. Ans. Br. at p. 47.] This is not true, as discussed above. However, even if it were true, the required result would be for the case to be remanded to the Board to enable it to weigh those interests (as discussed in the following section).

[5] See Respondent's Opening Brief at pages 38-39.

carry out its role as the expert agency with primary and exclusive jurisdiction over remedying violations of the ALRA. That the Court of Appeal did not remand the matter shows that the Court of Appeal necessarily, and improperly, assumed the Board's jurisdiction and decided the makewhole issue for itself.

Tri-Fanucchi cites *Pandol & Sons v. ALRB* (1979) 98 Cal.App.3d 580, 590 for the proposition that the ALRA itself "makes no provision" for remand to the Board once a court of appeal has accepted review. Tri-Fanucchi, however, omits the remainder of that decision's analysis finding that courts do have the authority to remand matters to the Board where appropriate. (*Id.* at pp. 590-591.) In fact, the decision recognizes the "need for the reviewing court to remand cases to the Board for further proceedings [which] ***results from the division of functions between the Board and the court*** . . ." (*Id.* at p. 591 (emphasis and bracketed material added).) Indeed, the decision characterizes the idea that a court would fail to remand a case and, instead, take on a function assigned to the Board as "repugnant" to the Act. (*Id.* at p. 591, fn. 6.)

The concepts discussed in *Pandol* were applied by the United States Supreme Court in *Sure Tan, Inc. v. NLRB* (1984) 467 U.S. 883. In that case, the appellate court modified an NLRB remedy by requiring that reinstatement offers be drafted in Spanish and be delivered in a way that verified receipt. (*Id.* at p. 905.) The United States Supreme Court found that, while the modifications appeared unobjectionable and even trivial, "[i]f the court believed that the Board had erred in failing to impose such requirements, the appropriate course was to

remand back to the Board for reconsideration" because "[s]uch action best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." (*Ibid.* (internal citations and punctuation omitted).)

In re Prather (2010) 50 Cal.4th 238, a decision by this Court involving judicial review of administrative parole determinations, is also illuminating. That case, like the instant one, involved discretionary authority, namely the authority of the California Board of Parole Hearings ("Parole Board") to release prisoners on parole, which was "vested in the [agency], not the courts" and was, therefore, subject to limited judicial review. (*Id.* at 254 (bracketed material added).) In one of the two cases at issue in the decision, the reviewing appellate court, having rejected the Parole Board's basis for denying parole, ordered that the prisoner in question be granted parole. (*Id.* at 248.) This Court reversed, holding that the reviewing court's decision "to dispense entirely with any further evaluation" by the Parole Board "materially infringe[d] upon the Board's discretion to make parole decisions on the basis of all relevant information, and thereby improperly circumscribe[d] the Board's statutory directive." (*Id.* at 255 (bracketed material added).)

As this Court explained in *Prather*, a reviewing court must take care not to infringe on the statutory authority of the agency out of judicial restraint and respect for the intent of the Legislature. This limited scope of judicial review and the corresponding deferential standard of review is a function of separation

of powers principles. (*In re Prather, supra*, 50 Cal.4th 238, 254; Cal Const., art. III § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").) Although the separation of powers doctrine does not necessarily prohibit one branch from taking actions that might affect those of another branch, "the doctrine is violated when the actions of one branch defeat or materially impair the inherent functions of another branch." (*Ibid.* (internal citations and punctuation omitted).) As shown in *Prather*, a reviewing court's failure to limit itself to the proper scope of review of an agency decision may violate the separation of powers doctrine. (*Id.* at p. 257.)

That the Court of Appeal failed to adhere to the properly limited scope of review is shown by the fact that the Court of Appeal made policy and other determinations that are within the ALRB's exclusive jurisdiction and, after reversing the Board on a discrete, purportedly "legal" issue, did not remand the matter for further consideration by the Board but proceeded to issue a decision that effectively made the determination that makewhole was not appropriate under the circumstances. Accordingly, the Court of Appeal's decision should be reversed.

III. THE COURT OF APPEAL'S CONCLUSION THAT THE STATUS OF THE "ABANDONMENT" DEFENSE WAS UNSETTLED IS INCORRECT AND DISTORTS THE LEGISLATIVE INTENT CONCERNING THE ROLE OF THE ALRB

A. The Board Was Entitled to Rely Upon Its Own Settled Precedent to Conclude That Tri-Fanucchi's Litigation of an "Abandonment" Defense Did Not Further the Policies and Purposes of the ALRA

As discussed at length in the Board's opening brief, the Legislature established the ALRB as an expert agency with primary and exclusive jurisdiction to adjudicate unfair labor practice claims and to devise remedies for violations of the ALRA. [R. Op. Br. at pp. 24-26.] The Legislature intended that, as a general rule, the Board's orders would be final with respect to matters within the Board's jurisdiction subject only to limited judicial review to act as a check against arbitrary conduct by the Board. In its decision, the Court of Appeal accepted that, to the extent that there was settled authority that the "abandonment" defense was not a valid defense to the duty to bargain under the ALRA, the litigation of that defense would not further the policies and purposes of the Act. However, the Court of Appeal held that the Board's decisional precedent, no matter how well-established, was categorically insufficient to render the status of the "abandonment" settled. Rather, only a published judicial decision could render the issue sufficiently settled to support the Board's conclusion that assertion of the defense did not advance the policies and purposes of the Act.

Tri-Fanucchi, expanding on the Court of Appeal's erroneous reasoning, argues that Board decisions, and the legal and policy conclusions stated therein, are "not binding or final" until upheld by an appellate court and, therefore, for the Board to treat its own precedent as settled is "necessarily . . . erroneous." [Pet. Ans. Br. at p. 40.] Tri-Fanucchi's principal authority for this position is a case that does not stand for the proposition. Tri-Fanucchi repeatedly cites *Bodinson Manufacturing Co. v. California Employment Commission* (1941) 17 Cal.2d 321 ("*Bodinson*") for the proposition that administrative precedent is not "binding or final" absent judicial approval. The case does not so hold. The issue in that case was whether an unemployment insurance statute, which did not explicitly provide for judicial review of Employment Commission decisions, precluded judicial review, making the Commission's decisions final in all respects. (*Id.* at pp. 325-326.) This Court rejected that proposition, holding that the courts' constitutionally vested authority to interpret statutes meant that the statute must be construed to permit judicial review of Commission decisions as to matters of statutory interpretation. (*Ibid.*) It was in this context that the Court stated that an administrative decision on a matter of statutory interpretation "makes no pretense at finality." It is not "final" because it is subject to judicial review, in contrast to, for example, issues of fact, which may be accorded finality

at the administrative level.[6] (See, e.g., Lab. Code, § 1160.8 (ALRB factual findings supported by substantial evidence are "conclusive").)

In fact, *Bodinson* confirmed both the limited nature of judicial review of administrative decisions and the deference to be paid to such decisions, even with respect to issues of law. The decision states that, while an agency's legal conclusions are subject to judicial review, the "administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous." (*Bodinson, supra*, 17 Cal.2d 321, 325.) Furthermore, the Court confirmed that it "would of course be highly improper for this court to substitute its opinion for that of an administrative agency on matters which were properly entrusted to the agency to decide" and that reversal of the Commission was only proper because, accepting as established all conclusions entrusted to the Commission's exclusive jurisdiction, it was clear that there was "no statutory authority" for the Commission's decision. (*Id.* at p. 331.) Likewise, in *Gibson v. Unemployment Insurance Appeals Board* (1973) 9 Cal.3d 494, 498, the other case cited by Tri-Fanucchi, this Court stated that the decisions of the agency in question "represent a settled administrative construction of the statute which

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[6] Of course, the decisions that the Board relied upon in concluding that the status of the "abandonment" defense was settled were no longer subject to appellate review and, in some cases, had been upheld by reviewing courts. (See *Joe G. Fanucchi & Sons / Tri-Fanucchi Farms,* (1986) 12 ALRB No. 8, which was upheld in an unpublished decision of the Court of Appeal.)

must be given great weight." Indeed, this Court's use of the term "settled" to describe established administrative precedent, runs counter to Tri-Fanucchi's contention that the Board's precedent can never be regarded as settled absent a published judicial decision. The fallacy of Tri-Fanucchi's position is shown by the following contradiction: This Court's decisions have repeatedly confirmed that the appellate courts, and this Court itself, are to give the Board's interpretation of the Act "great weight" and are to follow that interpretation as long as it is reasonable. Yet, Tri-Fanucchi argues, and the Court of Appeal held, that the *Board itself* was not permitted to rely on *its own settled interpretation of the Act* when deciding whether Tri-Fanucchi's assertion of the "abandonment" defense furthered the policies and purposes of the Act. (See *Communications Workers of America v. Beck* (1988) 487 U.S. 735, 769, fn. 6 (rejecting appellate construction of NLRA that "contradicts the [NLRB's] settled interpretation of the statutory provision" because "[w]here the [NLRB's] construction of the Act is reasonable, it should not be rejected merely because the courts might prefer another view of the statute.") (bracketed material added; internal punctuation omitted).)

B. The Court of Appeal's Decision Failed to Account for the Existence of Appellate Precedent Upholding the Principles on Which the Board's Rejection of the "Abandonment" Defense Was Based

Even if the Court of Appeal were correct to regard the Board's precedent standing alone as being incapable by itself of settling the status of the

"abandonment" defense, the Court of Appeal's opinion failed to account for the fact that, as the Court of Appeal itself stated, the Board's rejection of the "abandonment" defense represented an application of principles established in appellate precedent. In *Kaplan's Fruit & Produce Co., Inc.* (1977) 3 ALRB No. 28 at pp. 2-3, the Board held that the duty to bargain created by certification is ongoing in nature and "contains no time limit." In *Montebello Rose Co., Inc. v. ALRB* (1981) 119 Cal.App.3d 1, 29-30, a court of appeal upheld the Board's analysis of the continuing nature of the duty to bargain. In the instant case, the Court of Appeal acknowledged that the *Montebello Rose* decision supports the conclusion that the duty to bargain created by a certification "*continues* until that union is replaced or decertified by a subsequent election." (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1092 (emphasis in original).) The principles discussed in *Kaplan's Fruit* and upheld in *Montebello Rose* were applied in the *F&P Growers* case to uphold the Board's rejection of the "good faith doubt / loss of majority support" defense as being inconsistent with the Act and the underlying legislative intent. (*F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 674-676.) The Court of Appeal recognized that the "abandonment" defense is "clearly analogous" the "loss of majority support" defense rejected in *F&P Growers*. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1093.) Indeed, Tri-Fanucchi itself conceded in its briefing before the Court of Appeal that its "abandonment" defense is simply a

permutation of the "loss of majority support" defense. [Petitioner's Opening Brief to the Court of Appeal at p. 15.]

The Court of Appeal stated that the Board's holdings rejecting the "abandonment" defense are "consistent with how California appellate courts have construed the ALRA" and, in this conclusion, the Court of Appeal was clearly correct. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1092.) However, in considering the makewhole issue, the Court of Appeal erroneously failed to recognize and give effect to the fact that cases such as *Montebello Rose* and *F&P Growers* uphold the very principles that undergird the Board's holdings on "abandonment" and that, therefore, the Board's conclusion that the "abandonment" issue was settled is supported not only by Board precedent, but appellate precedent as well. Indeed, even if there had been no Board precedent on "abandonment," the appellate cases cited above would have dictated the result reached by the Board. In this context, the Court of Appeal's conclusion that an appellate decision was necessary to "clarify" or "settle" the law must be rejected as erroneous.

C. Tri-Fanucchi's Contention That "Abandonment" Is a "Proper Defense" to the Duty to Bargain Under the ALRA Should Be Disregarded

Tri-Fanucchi argues that an "abandonment" defense to the duty to bargain based upon labor organization inactivity should be recognized under the ALRA. [Pet. Ans. Br. at pp. 32-34.] That contention, however, is irrelevant to the

analysis of whether the Board's makewhole award was proper. Bargaining makewhole is a remedy for an unlawful refusal to bargain. (Lab. Code, § 1160.3.) Tri-Fanucchi's argument that its defense should have been accepted goes to the issue of whether an unfair labor practice was committed, not the remedy for the violation. Tri-Fanucchi's argument is not relevant to the issue of whether, given that Tri-Fanucchi's refusal to bargain was unlawful, the Board's remedial determination was proper.[7]

D. Tri-Fanucchi's Contention That the Board's Previous Decisions Recognized Inactivity-Based Withdrawal of Recognition is Incorrect

Tri-Fanucchi argues that a pair of Board decisions from the 1990s, *Bruce Church, Inc.* (1990) 17 ALRB No. 1 ("*Bruce Church*") and *Dole Fresh Fruit Co.* (1996) 22 ALRB No. 4 ("*Dole Fresh Fruit*"), recognized labor organization inactivity as a defense to the duty to bargain. To the extent that Tri-Fanucchi is arguing that these cases show that the Board's precedent on labor organization inactivity was "unsettled," the cases do not stand for the propositions argued by Tri-Fanucchi.

The Board has long held, with judicial approval, that the duty to bargain created by certification is continuing in nature and contains no time limitation. (*Kaplan's Fruit & Produce Co., Inc., supra*, 3 ALRB No. 28 at pp. 2-4;

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[7] Tri-Fanucchi does argue, in connection with its own petition for review, that its refusal to bargain with the UFW was lawful. The Board explained in its answer brief why those arguments lack merit.

Montebello Rose Co., Inc. v. ALRB, supra, 119 Cal.App.3d 1, 29-30.) Following these principles, the Board holds that labor organizations, once certified by employees, remain certified until such time as they are decertified by employees (known as the "certified until decertified" rule). (*Nish Noroian Farms* (1982) 8 ALRB No. 25 at p. 13.) The two exceptions to this rule are disclaimer of interest (the deliberate and unequivocal relinquishment of the certification by the labor organization) and defunctness (the institutional death of the labor organization). (*Lu-Ette Farms, Inc.* (1982) 8 ALRB No. 91 at pp. 4-5.)

In *Bruce Church* and *Dole Fresh Fruit,* the Board referred to "abandonment" being established when the labor organization is "unwilling or unable to represent the bargaining unit, alternatively phrased in *Bruce Church* as the labor organization having "left the scene altogether." (*Bruce Church, supra,* 17 ALRB No. 1 at p. 10.) However, those cases, particularly *Dole Fresh Fruit,* make clear that "unwillingness or inability" to represent refers to the two recognized exceptions to the "certified until decertified" rule; disclaimer and defunctness, and not to an inactivity-based defense to the duty to bargain. Thus, in *Bruce Church* the Board rejected the employer's inactivity-based defense, holding that "a Union remains the certified representative until decertified or until the Union becomes defunct or disclaims interest . . ."[8] (*Id.* at p. 9.)

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[8] Tri-Fanucchi, as it has in other briefing in this case, liberally quotes from the decision of the ALJ in the *Bruce Chuch* case without signaling to the Court that it is quoting the ALJ and not the Board. [See Pet. Ans. Br. at

(Footnote continued....)

Furthermore, in *Dole Fresh Fruit*, the Board held that, to the extent that it relied on labor organization inactivity, "'abandonment' . . . could not itself be a valid defense under the ALRA." (*Dole Fresh Fruit, supra*, 22 ALRB No. 4, at p. 10.) The Board further held that it "could not recognize the concept of 'abandonment' beyond that already present in Board case law, i.e., where certified labor organizations become inactive by becoming defunct or by disclaiming interest in continuing to represent the bargaining unit" and that "[i]n all other circumstances, certified bargaining representatives remain certified until decertified by the employees themselves." (*Id.* at p. 15.)

Accordingly, the *Bruce Church* and *Dole Fresh Fruit* decisions, despite their use of the term "abandonment," do not recognize an inactivity-based defense to the duty to bargain as Tri-Fanucchi contends. The relevance of these decisions to the present matter is that they constitute part of the line of decisions in which the Board has held that inactivity by a labor organization, regardless of

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(Footnote continued)
pp. 35-36.] In its *Bruce Church* decision, the Board clearly stated that it was upholding the ALJ only to the extent that the ALJ's decision was consistent with the Board's own decision. (*Bruce Church, Inc., supra*, 17 ALRB No. 2, at p. 2.) Not only is it improper for Tri-Fanucchi to cite ALJ opinions that were not adopted by the Board, it is particularly improper for Tri-Fanucchi to misleadingly present them to this Court as if they were statements of the Board itself.

the duration of such inactivity, does not permit an employer to withdraw recognition or otherwise refuse to bargain with a certified labor organization.[9]

IV. TRI-FANUCCHI'S CONTENTION THAT THE BOARD'S MAKEWHOLE AWARD REPRESENTS "PUNISHMENT" FOR SEEKING APPELLATE REVIEW IS INCORRECT

Tri-Fanucchi argues that an award of makewhole punishes it for seeking to bring a purportedly unsettled issue before the Court of Appeal. Tri-Fanucchi completely misrepresents the basis of the Board's makewhole award in arguing that the award was "imposed . . . for seeking [an] appeal[] of important public policy questions." [Pet. Ans. Br. at p. 1.] Makewhole was awarded *because Tri-Fanucchi violated its employees' rights under the Act* and because any public interest in Tri-Fanucchi's position before the Board did not outweigh the harms caused by Tri-Fanucchi's unlawful conduct. Tri-Fanucchi's argument and the Court of Appeal's holding that the Board should have declined to award makewhole because of the potential benefits of appellate review of the Board's order ignores the fact that, at the time that the Board issued its makewhole award it did not know, and could not have known, whether Tri-Fanucchi would actually seek appellate review. Tri-Fanucchi's argument reduces to the proposition that

[9] For decisions issued since *Dole Fresh Fruit* rejecting the type of inactivity-based defense litigated by Tri-Fanucchi in this case, see *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3, at pp. 5-6, *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, at p. 3, and *Arnaudo Brothers, LP* (2014) 40 ALRB No. 3 at p. 10. To the extent that *Bruce Church* and *Dole Fresh Fruit* could be read as potentially recognizing an inactivity-based defense, which would not represent a correct reading of those cases, these more recent decisions settled that issue.

the Board should have left Tri-Fanucchi's employees without a remedy for their financial losses caused by Tri-Fanucchi's unlawful conduct because Tri-Fanucchi might (but might not) seek appellate review and that review might (but might not) result in a published opinion on the "abandonment" issue. Tri-Fanucchi was not "punished" for seeking appellate review. The Board's makewhole award was issued before the Board could have known whether Tri-Fanucchi would seek review and applied whether or not review was sought.

CONCLUSION

In *United States Marine Corp. v. NLRB* (1989) 944 F.2d 1305, 1314, a federal appellate court, after reviewing the familiar authority setting forth the limited role of a court reviewing an NLRB decision, noted that "[t]he faithful application of these principles requires a great deal of judicial restraint" and requires acknowledgement that the legislative body "has decided to vest primary responsibility for the implementation of [legislative policy] in the NLRB and not in this court." (Bracketed material added.) Those principles apply equally to the role of an appellate court reviewing an order of the ALRB. Unfortunately, in this case the Court of Appeal failed to adhere to these principles. As a result, the Court of Appeal strayed from the proper inquiry into whether the Board's makewhole award represented a "patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act" and proceeded to assume

the remedial authority of the Board by evaluating whether the Board's conclusions were "wrong" and determining for itself that an award of makewhole was not appropriate.

In order to uphold the legislative intent that the ALRB serve as the expert agency with primary and exclusive jurisdiction over remedying unfair labor practices, the ALRB respectfully submits that the Court should reverse that portion of the Court of Appeal's decision that reverses the ALRB's award of bargaining makewhole in this case.

DATED: March 11, 2016

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), the undersigned hereby certifies that the Agricultural Labor Relations Board's Reply Brief on the Merits contains 8,187 words according to the word count function included in Microsoft Word software with which the brief was written.

DATED: March 11, 2016

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Tri-Fanucchi Farms v. ALRB
S227270

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

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

On **March 11, 2016**, I served the within AGRICULTURAL LABOR RELATIONS BOARD'S REPLY BRIEF ON THE MERITS on parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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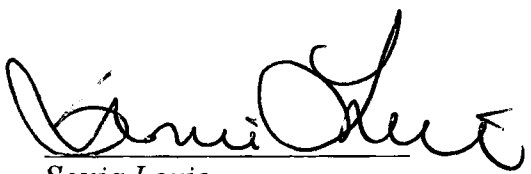
Executed on **March 11, 2016**, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.



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