Case No. S227270

IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, et al.
Respondent.

and

UNITED FARM WORKERS OF AMERICA, a labor union,
Real Party-In-Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F069419

OPPOSITION TO RESPONDENT'S PETITION FOR REVIEW

SAGASER, WATKINS & WIELAND PC
Howard A. Sagaser, Bar No. 072492
Ian B. Wieland, Bar No. 285721
Allie Wieland, Bar No. 285860
7550 North Palm Avenue, Suite 100
Fresno, California 93711
Telephone: (559) 421-7000
Facsimile: (559) 473-1483

Attorneys for Petitioner
TRI-FANUCCHI FARMS

Case No. S227270

IN THE SUPREME COURT OF CALIFORNIA

TRI-FANUCCHI FARMS,
Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD, et al.
Respondent.

and

UNITED FARM WORKERS OF AMERICA, a labor union,
Real Party-In-Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F069419

OPPOSITION TO RESPONDENT'S PETITION FOR REVIEW

SAGASER, WATKINS & WIELAND PC
Howard A. Sagaser, Bar No. 072492
Ian B. Wieland, Bar No. 285721
Allie Wieland, Bar No. 285860
7550 North Palm Avenue, Suite 100
Fresno, California 93711
Telephone: (559) 421-7000
Facsimile: (559) 473-1483

Attorneys for Petitioner
TRI-FANUCCHI FARMS

TABLE OF CONTENTS

I. STATEMENT OF ISSUES PRESENTED 1

II. INTRODUCTION 1

III. STATEMENT OF THE CASE 5

A. Tri-Fanucchi Farms and the United Farm Workers Union 5

B. The Proceedings Below 6

IV. REASONS FOR DENYING PETITION 10

A. The Court Did Not Exceed Its Authority 10

B. Unclean Hands, Laches and Other Equitable Defenses 15

C. The Court Applied the Correct Standard of Review 19

D. The Court's Decision Will Not Have Negative Public Policy Effects of State-Wide Impact 23

V. CONCLUSION 30

TABLE OF AUTHORITIES

NLRB Cases

Hershey Chocolate Corp.
(1958) 121 NLRB 901, 911 18
Road Materials, Inc.
(1971) 193 NLRB 990, 991 18

ALRB Cases

Ace Tomato Company, Inc.
(2010) 20 ALRB No. 7 16
Bruce Church, Inc. and United Farm Workers of America
(1990) 17 ALRB No. 1 ..... 17, 18
Lu-Ette Farms
(1982) 8 ALRB No. 91 ..... 17, 18
Nish Norian Farms
(1982) 8 ALRB No. 25 ..... 3, 17, 23
O. E. Mayou & Sons
(1985) 11 ALRB No. 25, at p. 12 17
Tri-Fanucchi Farms
(2014) 40 ALRB No. 4 ..... 2, 3, 4, 8, 9. 11, 12, 13, 14, 15, 19, 24, 26, 27
UFW AFL-CIO and California Table Grape Commission
(1993) 19 ALRB No. 15 16
Ventura County Fruit Growers, Inc.
(1984) 10 ALRB No. 45 18

Federal Cases

Phelps Dodge Corp. v. Labor Board
(1941) 313 U.S. 177, 194 2
Pioneer Inn Association v. NLRB
(1978) 578 F.2d 835, 839 18

State Cases

Camp v. Jeffer, Mangels, Butler & Marmaro,
(1995) 35 Cal.4th 620 16
Carian v. ALRB
36 Cal.3d at p. 674 22

TABLE OF AUTHORITIES

(Continued)

Bodinson Mfg. Co. v. California E. Com.
(1941) 17 Cal.2d 321 ..... 24, 28
F & P Growers Assn. v. ALRB
(1985) 168 Cal.App.3d 667 ..... 8, 10, 11, 12, 17
Highland Ranch v. ALRB
(1981) 29 Cal. 3d 848, 865 ..... 21, 22
Int'l Engine Parts, Inc. v. Feddersen & Co.
(1995) 9 Cal. 4th 606, 611 ..... 4, 13
J.R. Norton Co. v. ALRB
(1979) 26 Cal.3d 1, 29 ..... 2, 10, 11, 13, 28, 29
Karahadian Ranches v. ALRB
(1985) 38 Cal.3d 1, 16 22
M.B. Zaninovich, Inc.
(1981) 114 Cal.App.3d 669 22
Nish Noroian Farms v. ALRB
(1984) 35 Cal.3d 726, 745 ..... 3, 23
People ex rel. Lockyer v. Shamrock Foods Co.
(2000) 24 Cal.4th 415, 432 13
Sandrini Bros. v. ALRB
(1984) 156 Cal.App.3d 878, 885 ..... 20, 21
Topanga & Victory Partners v. Toghia
(2002) 103 Cal. App. 4th 775, 779 13

State Statutes

Labor Code § 1148 ..... 17, 25
Labor Code § 1160.3 12

I.

STATEMENT OF ISSUES PRESENTED

Both Tri-Fanucchi Farms ("Fanucchi") and the ALRB have petitioned for review of the Fifth District Court of Appeals published Decision. This Answering Brief only addresses the issues raised by the ALRB in its Petition as the other issues presented in the case are set forth in Tri-Fanucchi's Petition for Review.

1. Whether the Court of Appeal correctly held that the Agricultural Labor Relations Board ("ALRB" or "Board") prejudicially erred in awarding make whole relief against an employer who refused to bargain with a union that it believed in good faith had forfeited its status as bargaining representative of the bargaining unit it had completely abandoned for over 24-years, and immediately sought judicial review;

2. Whether the Court of Appeal exceeded its authority by failing to afford deference to the Board's determination that an award of make whole relief was appropriate where the Board's decision to impose make whole relief was based solely on a clearly erroneous legal conclusion.

II.

INTRODUCTION

The California Legislature established the Agricultural Labor Relations Board ("ALRB" or "the Board") as the agency in charge of implementation and administration of the Agricultural Labor Relations Act

("ALRA"). It is well-established that the ALRB, as an administrative agency, is entitled to deference when interpreting policy in its field of expertise. (*J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 29 ("*J.R. Norton*"), citing *Phelps Dodge Corp. v. Labor Board* (1941) 313 U.S. 177, 194.) However, this deference is not without constraint. As this Court has recognized, "[i]t is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*J.R. Norton, supra,* 26 Cal.3d at p. 29.) The importance of judicial review as a "check on arbitrary administrative action" has long been recognized by this Court and the United States Supreme Court. (*Id.* pp. 33-34 [review of U.S. Supreme Court cases recognizing the importance of judicial review as a check on arbitrary administrative action in the context of federal labor legislation].)

In the present case, the Board asserts that the Court of Appeal exceeded its fundamental authority to ascertain the intent of the Legislature when it failed to afford deference to the Board's imposition of make whole relief against Fanucchi without even holding an evidentiary hearing. The Board conveniently overlooks the Court of Appeal's plain statement that it did give "all due deference to the Board regarding ALRA policy issues." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.) The Court of Appeal's determination that the Board prejudicially erred when it ordered make whole relief in this case was based on the Board's reliance on a *legal*

conclusion that the Court found "clearly wrong." (*Ibid.*) The Board's insistence that the Court of Appeal was obligated to defer to its remedial order, despite the Court of Appeal's finding that it was wrong as a matter of law, impairs the important interest of judicial review as a check on arbitrary administrative action.

The Board further asserts that the Court of Appeal failed to apply the applicable standard of review in reaching its decision that the Board prejudicially erred when it ordered make whole relief in this case. The Court of Appeal carefully considered the Board's argument and rejected it on the grounds that the Board's *legal conclusion* that Fanucchi's litigation of the abandonment issue did not further the policies and purposes of the ALRA was "clearly wrong." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.) The Court of Appeal's well-reasoned decision on this point is consistent with this Court's holding that courts may overturn the Board's remedial orders "only where those remedies are patently unreasonable under the statute." (*Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726, 745 ("*Nish Noroian*").) There is no reason for this Court to review the finding by the Court of Appeals that imposition of the make whole remedy against Tri-Fanucchi was wrong as a matter of law.

Petitioner does not identify any disagreement in the courts of appeal decisions that requires the attention of this court on the issues the ALRB seeks review. Instead, Petitioner strains to create a basis for review by

mischaracterizing the Court of Appeal's opinion as a "simple disagreement" with the Board's make whole assessment and that the Court of Appeal improperly took it upon itself to decide *de novo* whether the make whole remedy was appropriate. In contrast, the Court of Appeal, giving "all due deference to the Board regarding ALRA policy issues," found that its legal conclusion was "clearly wrong." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.) The Court of Appeal did not make an assessment of whether make whole relief was "appropriate." Instead the Court of Appeal found a clear legal error in the Board's reasoning used to support its conclusion that make whole was appropriate in this case. It is well within the Court of Appeal's jurisdiction as the reviewing court to independently determine the proper interpretation of a statute and the application of the interpreted statute to undisputed facts. (*Int'l Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal. 4th 606, 611.) Thus, there is no reason for this Court to review an issue that simply does not exist.

Petitioners have failed to show any error in the well-reasoned decision of the Court of Appeal in regards to rejecting the Board's assessment of make whole relief under the circumstances of this case. The Court of Appeal's determination that the Board prejudicially erred when it ordered make whole relief in this case was well within its authority and does not require review by this Court.

///

III.

STATEMENT OF THE CASE

A. Tri-Fanucchi Farms and the United Farm Workers Union

Tri-Fanucchi Farms ("Fanucchi") is a family-owned farming operation that has been operating in Kern County, California for decades. Fanucchi maintains approximately 35-year round employees and hires several hundred seasonal employees through various labor contractors.

In 1977, Fanucchi's agricultural employees elected UFW to be their collective bargaining representative. After UFW was certified as the employees' representative by the Board, the parties engaged in some initial bargaining sessions. After polling its employees and believing they no longer wanted UFW to represent them, Fanucchi refused to bargain with UFW in 1984 on the good faith belief that UFW no longer had majority support. UFW brought an unfair labor practices complaint and the Board held in UFW's favor. The Board's findings were ultimately affirmed by the California Fifth District Court of Appeal.

In 1988, Fanucchi informed UFW that it was willing to engage in bargaining and resume contract negotiations with UFW. UFW responded that it would arrange bargaining dates as soon as its negotiator returned from vacation. For reasons unexplained by UFW, UFW disappeared from the scene and no bargaining occurred for approximately twenty-four (24) years.

The next time UFW contacted Fanucchi was September 28, 2012, when UFW sent a letter demanding that bargaining be restarted and requesting certain information from Fanucchi. Fanucchi responded on October 19, 2012, advising UFW that it believed UFW's 24-year absence resulted in an abandonment of its status as the employees' bargaining representative, that Fanucchi was seeking judicial review of the issue, and that its refusal should be viewed as a "technical refusal to bargain" until such time as the issue of abandonment was addressed by the courts. At this time, Fanucchi's current workforce did not know UFW, did not select UFW to represent the workers' interests, and Fanucchi's employees had no reason to believe UFW represented them due to UFW's 24-year absence.

B. The Proceedings Below

On March 7 and April 16, 2013, UFW filed charges with the Board on the grounds that Fanucchi had allegedly engaged in unfair labor practices by refusing to bargain and by refusing to provide information relevant to bargaining. On September 5, 2013, the Board's general counsel ("General Counsel") filed a consolidated administrative complaint ("Complaint") against Fanucchi, arguing that Fanucchi's refusal to bargain and provide information constituted unfair labor practices in violation of the ALRA, Labor Code section 1153, subdivisions (1) and (e). Additionally, the General Counsel requested the Board award make whole relief against Fanucchi pursuant to the ALRA section 1160.3.

Fanucchi filed an answer to the Complaint on October 8, 2013. The Answer admitted to the underlying facts alleged in the Complaint, but as an affirmative defenses maintained that UFW had forfeited its representative status by completely abandoning the bargaining unit for 24-years, and had unlean hands. Fanucchi again asserted that its refusal to bargain was in good faith for the purpose of obtaining judicial review of the important labor relations issue of long-term union abandonment.

Before the scheduled hearing by the administrative law judge ("ALJ") on October 21, 2013, the General Counsel submitted a motion in limine requesting that all evidence related to Fanucchi's abandonment defense and unclean hands defense be excluded on the basis that those defenses are not recognized by Board precedent. The ALJ granted the motion in limine, which he treated as a motion to strike or a judgment on the pleadings related to Fanucchi's abandonment defense and related equitable defenses. Having rejected Fanucchi's asserted defenses to the duty to bargain, the ALJ addressed the merits of the Complaint, refused to allow Fanucchi to have an evidentiary hearing to cross-examine UFW subpoenaed witnesses or present evidence of Fanucchi's good faith, and held that Fanucchi's refusal to bargain and turn over information constituted unfair labor practices. The ALJ also found that Fanucchi's refusal to bargain as a means of seeking judicial review was not justifiable

in light of Board precedent, and thus awarded make whole relief against Fanucchi.

On November 20, 2013, Fanucchi filed with the Board 15 "exceptions" to the ALJ's decision. On April 23, 2014, the Board issued its decision[1] in agreement with the ALJ and finding that Fanucchi's refusal to bargain with the UFW and to provide information constituted violations of section 1153, subdivision (a) and (e). The Board denied Fanucchi's contention that UFW's complete abandonment was a defense to its duty to bargain, as well as similar equitable defenses such as unclean hands based on the 24-years of total inactivity by UFW.

The Board also held that make whole relief awarded against Fanucchi was proper. In arriving at its decision, the Board relied on the standard articulated in *F & P Growers Assn. v. ALRB* (1985) 168 Cal.App.3d 667 ("*F & P Growers*"). Specifically, the Board asserted that its task was to determine whether the public interest in the Employer's position outweighs the harm to the employees by its refusal to bargain. However, the Board failed to adhere to its duty to weigh these interests and merely concluded that because Fanucchi's position that the UFW had forfeited its status as bargaining unit by abandonment was contrary to Board precedent, Fanucchi's position cannot have furthered the policies and purposes of the ALRA. This was despite the fact that the Board had issued

[1] The Board's decision is reported at *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4.

vague and conflicting prior decisions on the abandonment defense and in other settings had recognized unclean hands as defense.

On May 23, 2014, Fanucchi filed a petition for writ of review to the California Court of Appeal, Fifth District seeking review of the Board's decision in *Tri-Fanucchi Farms, supra,* 40 ALRB No. 4. On February 10, 2015, the Fifth District Court of Appeal issued a writ of review.

The Court of Appeal affirmed the portion of the Board's decision that rejected Fanucchi's defenses to the duty to bargain and held that Fanucchi had committed unfair labor practices for refusing to bargain with UFW and refusing to provide information. The Court of Appeal reversed the make whole relief award imposed by the Board against Fanucchi. The Court held that Fanucchi's advancement of the abandonment defense plainly furthered the purpose of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue, and thus the Board prejudicially erred when it ordered make whole relief against Fanucchi.

On June 23, 2015, Fanucchi filed a Petition for Review with this Court seeking review of the Court of Appeals rejection of the abandonment and unclean hands defenses. (*Tri-Fanucchi Farms v. ALRB, et al.,* Case No. S227270.)

///

///

IV.

REASONS FOR DENYING PETITION

A. The Court Did Not Exceed Its Authority

In enacting the ALRA, the California Legislature provided the Board with authority to impose the unique make whole remedy pursuant to Labor Code section 1160.3 That section provides that when the Board determined an employer is guilty of an unfair labor practice ("ULP") for refusing to bargain in good faith, the Board may impose an order "requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and *making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain,* and to provide such other relief as will effectuate the policies of this part." (Lab. Code § 1160.3 [emphasis added].) This Court has emphasized that pursuant to the clear language of the statute, make whole relief is discretionary in nature and is to be applied only where the Board determines it is appropriate under the circumstances. (*J.R. Norton, supra,* 236 Cal.App.4th at pp. 37-38; *F & P Growers, supra,* 168 Cal.App.3d at pp. 680-682.)

The Board must consider the facts and circumstances of each unique case when determining whether or not make whole relief is appropriate. (*J.R. Norton, supra,* 236 Cal.App.4th at 37-38.) The Court of Appeal in *F*

& P Growers described the significance of its rejection of the Board's enforcement of a per se rule for imposing make whole relief:

> [E]ven though the employer may have had no right to be involved in deciding whether it would or would not bargain with the certified union, the Board still was required to examine the employer's conduct for particular facts and circumstances to see if the make whole remedy was appropriate. The fact that we now hold that the employer was required to bargain with the Union regardless of its good faith belief does not negate the discretionary nature of the make whole relief under the statute. Per se make whole relief does not inexorably follow where the employer refuses to bargain, where the employer has a good faith belief that the Union does not represent a majority of employees. Even though that belief is no defense for failure to bargain, the language of the statute is clear that the Board issue the make whole relief only when it "deems" the relief appropriate.

(*F & P Growers, supra*, 168 Cal. App. 3d at 681.)

Where, as here, the employer's refusal to bargain is not a "technical refusal to bargain," [2] the Board is obligated to proceed under the analysis set forth in *F & P Growers* to determine whether make whole relief is

---

[2] A "technical refusal to bargain" occurs when an employer obtains judicial review of the validity of a representation election. (*J.R. Norton, supra,* 26 Cal.3d at 27.) In *J.R. Norton,* this Court held that when an employer engages in a technical refusal to bargain but loses the election challenge after seeking judicial review, the Board is required to evaluate whether to impose make whole relief under the following standard: "The Board must determine from the totality of the circumstances whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative has the election been properly conducted." (*Id.* at 39.) On Appeal, Fanucchi argued that it had engaged in a technical refusal to bargain and, thus, the Court should proceed under the *J.R. Norton* standard. The Court of Appeal ultimately rejected Fanucchi's argument and upheld the Board's reliance on the standard set forth in *F & P Growers, supra,* 168 Cal.App.3d at 682. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1095-1096.)

appropriate pursuant to Labor Code section 1160.3 (168 Cal.App.3d at 682.) The *F & P Growers* standard provides that the Board will "consider on a case-by-case basis the extent to which the public interest in the employer's position weighs against the harm done to the employees by its refusal to bargain. Unless litigation of the employer's position furthers the policies and purposes of the [ALRA], the employer, not the employees, should ultimately bear the financial risk of its choice to litigate rather than bargain." (*Ibid.*)

In the present case, as noted by the Court of Appeal, the Board failed to follow the standard approved in *F & P Growers*. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.) The Board's conclusion that an award of make whole relief was appropriate was based solely on its legal assessment that Fanucchi's abandonment defense "is contrary to over 30 years of Board precedent" and thus "cannot be said to further the policies and purposes of the ALRA." (*Ibid.,* citing *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, pp. 18, 20, fns. omitted.) In forming this conclusion, the Board failed to acknowledge the extraordinary 24-year absence and complete inactivity of the UFW.

The Court of Appeal concluded that the Board prejudicially erred when it ordered make whole relief against Fanucchi on the basis that the Board was "clearly wrong in its legal conclusion that Fanucchi's litigation efforts did not further the purposes and policies of the ALRA." (*Tri-*

Fanucchi, supra, 236 Cal.App.4th at 1097-1098.) The Court of Appeal explained that "[w]ith all due deference to the Board regarding ALRA policy issues," it is "[u]limately the courts that must ascertain the intent of the statue so as to effectuate the purpose of the law." (*Ibid.*)

Contrary to the Board's assertions, the Court of Appeal did not exceed its authority in reaching its determination that the Board prejudicially erred in awarding make whole relief against Fanucchi. As observed by this Court in *J.R. Norton, supra,* 26 Cal.3d at 29: "It is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law." Appellate Courts may *independently* determine the proper interpretation of a statue. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) Likewise, application of the interpreted statute to undisputed facts presents a question of law subject to independent appellate determination. (*International Engine Parts, Inc. v. Feddersen & Co., supra,* 9 Cal.4th at 611.) It is also well-established that matters presenting pure statutory and questions of law are subject to the appellate court's *de novo* review. (*Topanga & Victory Partners v. Toghia* (2002) 103 Cal. App. 4th 775, 779, *as modified on denial of reh'g* (Dec. 11, 2002).)

To put it plainly, the Appellate Court was not required to defer to the Board in deciding questions of statutory interpretation and legal evaluation. As noted by the Court of Appeal, its conclusion that the Board prejudicially

erred was based on its belief that the Board was "clearly wrong in its legal conclusion that Fanucchi's litigation efforts in this matter did not further the purposes and policies of the ALRA." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097-1098.) Seeing as the Appellate Court's holding addresses a question of statutory interpretation and legal conclusion, it cannot be held to have exceeded its authority.

The Board's insistence that the Court of Appeal was required to apply a deferential standard of review when reviewing a Board-ordered remedy is misplaced. The Board mischaracterizes the Court of Appeal's decision as a policy judgment. However, as demonstrated herein, the Court of Appeal's analysis is narrowly rooted in an analysis of statutory construction and the law. It does not invade the Board's domain of policy. The Court of Appeal never discussed whether the make whole remedy was "appropriate." Rather, the Court of Appeal found fault in the Board's legal evaluation that Fanucchi's litigation of the abandonment defense did not further the policies and purposes of the ALRA. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097.) In light of the fact that the Board's decision to impose make whole relief was based solely on this legal assessment[3], which

---

[3] The Board argues that the Board's determination that make whole was appropriate was based solely upon its assessment of the status of the abandonment defense was wrong. (Petition for Review, p. 22.) It argues that it considered Tri-Fanucchi's arguments that the ALJ had failed to take into account alleged delays and/or dilatory tactics on the part of the UFW and the General Counsel. (*Ibid.*) This is not true. The Board summarily rejected all of Fanucchi's equitable

the Court of Appeal believed to be wrong, the remedial order of make whole relief was reversed. Based on well-established standards of law, it is the courts that ultimately ascertain the intent of a statute so as to effectuate the purpose of the law, and thus the Court of Appeal did not exceed its authority in doing so.

B. Unclean Hands, Laches, and Other Equitable Defenses

The Board improperly summarily dismissed Fanucchi's exceptions based on equitable defenses, particularly unclean hands and laches, on the grounds that no prejudice had been shown by Fanucchi. This alone establishes that the Court of Appeals was correct in vacating the make whole remedy. This procedure utilized by the Board was entirely improper and unfair as Fanucchi was not allowed to present any evidence much less afforded any hearing to present evidence of these issues. Otherwise, Fanucchi would have been able to show prejudice and harm by the UFW's conduct. (CR 396-400.) The Board's position that Fanucchi did not establish any equitable defense because the ALJ did not allow Fanucchi to present any evidence is entirely offensive, meritless, and shows that the ALRB's Decision should be reversed and remanded with instructions allowing Fanucchi to have a fair hearing in this matter. Put another way, the Board's conduct in allowing the ALJ to prevent Fanucchi from

---

defenses and therefore cannot be held to have "weighed these considerations" in determining whether the make whole remedy was appropriate. (*Tri-Fanucchi Farms, supra,* 40 ALRB No. 4, pp. 19-20.)

submitting any evidence at a hearing and then affirming a decision in part based on the conclusion that the employer did not submit any evidence at the hearing is absurd, unconstitutional, and reversible error.

In the present case involving Fanucchi, more than 35 years have passed since the 1977 election and more than 24 years have passed from the time Fanucchi indicated a willingness to bargain in 1988 and when the UFW actually made a request to bargain in 2012. Such facts raise questions regarding the union abandoning its statutory duty to represent Fanucchi's employees and whether the UFW by requesting bargaining 35 years after the election and a 24 year period of abandonment has unclean hands. The courts have recognized that the unclean hands defense applies to all legal actions. *Camp v. Jeffer, Mangels, Butler & Marmaro*, (1995) 35 Cal.4th 620, 625-641.

In *Ace Tomato Company, Inc.* (2010) 20 ALRB No. 7 Admin. Order 2010, the Board recognized that the application of the unclean hands defense could be asserted as an equitable defense to enforcement and compliance with a Board's Order. (See also, *UFW AFL-CIO and California Table Grape Commission* (1993) 19 ALRB No. 15.)

Prior to the Fanucchi's case, there were no published California court decisions regarding the issue of abandonment under the Agricultural Labor Relations Act ("ALRA") or whether or not the ALRB should follow federal precedent on the issue of abandonment. In *Nish Norian Farms* (1982) 8 ALRB

No. 25, the ALRB rejected the employer's argument that the union had lost majority status and had abandoned its bargaining role. But, the California Supreme Court depublished the appellate decision upholding the ALRB's holding. In a later case, *F and P Growers Association v. ALRB* (1985) 168 Cal.App.3d 667, 214 Cal.Rptr. 355, the court did not address the abandonment issue and did not decide whether abandonment was a theory that would be recognized by courts under the ALRA. Because there are no published decisions concerning the issue of abandonment, Fanucchi maintained federal precedent provides guidance in this area. (Labor Code §1148.)

The Board's Opening Brief ignores critical aspects of the Board's prior decision in *Bruce Church, Inc. and United Farm Workers of America* (1990) 17 ALRB No. 1 where at page 9 the Board made the following observation:

> Rather than claiming that the Union abandoned the unit, Respondent asserts that the Union abandoned or evaded negotiations. Thus, it is not entirely clear if the Respondent's "abandonment" defense is intended to be analytically distinct from its dilatory and evasive bargaining conduct defense. In any event, as the ALJ observed, the Board has held that a Union remains the certified representative until decertified "or until the Union becomes defunct or disclaims interest in continuing to represent the unit employees . . ." (*Lu-Ette Farms* (1982) 8 ALRB No. 91, at p. 5) Moreover, the Board has defined abandonment as a showing that the Union was either unwilling or unable to represent the bargaining unit. (*O. E. Mayou & Sons* (1985) 11 ALRB No. 25, at p. 12, fn. 8.) (*Emphasis Added.*)

In *Bruce Church, Inc., supra*, 17 ALRB No. 1, the administrative law judge correctly noted at page 44 that the Board has recognized the existence of the abandonment defense. At page 44, the ALJ noted:

> Since, under our Act, employer petitions are not permitted, the claim of abandonment appears to be primarily a defensive

> weapon[4] in the refusal to bargain context, rather than one which permits an employer to require the union to prove it still represents a majority. However, whatever the ultimate scope of the defense under our Act may prove to be, the Board has clearly recognized its existence.

Moreover, in footnote 27, the ALJ in *Bruce Church* elaborated on the term "abandonment" as including an unwillingness to perform or a "disclaimer of interest."

> A word here is necessary about the proliferation of terms. Respondent is claiming "abandonment" and I will discuss the case in those terms. In *Lu-Ette Farms, supra*, the Board speaks of "defunctness" and of a union's "disclaiming interest" and it is not entirely obvious that these three concepts all denote the same thing.
>
> "Defunctness" implies physical impediment, specifically, moribundity; "abandonment" has less a sense of finality and more a sense of passivity to it; while "disclaimer" has a stronger, more active tone of renunciation than "abandonment". Despite these differences, as originally used by the NLRB, the concept of "defunctness" clearly had both the sense of "disabled," implied by the primary meaning of "defunct", and of passivity or unwillingness to perform, implied by the terms "abandonment" or "disclaimer of interest." See, *Hershey Chocolate Corp.* (1958) 121 NLRB 901, 911. And when our board considered the question of "abandonment" in *Ventura County Fruit Growers, Inc.* (1984) 10 ALRB No. 45, it used the word interchangeably with the word "defunct"; as did the *NLRB in Road Materials, Inc.* (1971) 193 NLRB 990, 991. See also, *Pioneer Inn Association v. NLRB* (1978) 578 F.2d 835, 839 where the Court characterizes the NLRB's use of "defunctness" and "inactivity" as interchangeable. Accordingly, I am treating the concepts as essentially the same.

Thus, under the above authorities, it was relevant for Fanucchi to show that in 1988 the employer was willing to negotiate with the UFW as indicated in TFF's letter dated May 25, 1988. It was also relevant to show the UFW's reply on June

---

[4] However, I take notice that our Board has previously revoked certifications because upon a finding of "defunctness." See, e.g., Case Nos. 79-RC-14-SM; 79-RC-10-SM; and 79-RC-9-OX. Thus, a claim of "defunctness" is not entirely defensive.

28, 1988 that the UFW would take up Fanucchi's willingness to bargain when its negotiator returned from vacation. Therefore, it is important to note that the reason for the 24-year absence was the fact that the UFW negotiator apparently took a 24-year vacation. This is relevant to show that the Union either abandoned or was unwilling or unable to represent the employees of TFF for 24 years.

The failure of the ALJ to allow examination of the persons most knowledgeable for the three subpoenas issued to the UFW prevented Fanucchi from admitting highly relevant evidence. The ALJ's denial of Fanucchi's request to examine the UFW witnesses prevented Fanucchi from discovering why the Union did not negotiate for 24 years and what contact the union had with any employees of the bargaining unit of Fanucchi during those 24 years. Such testimony was highly relevant to the issues of abandonment and the ALJ's failure to allow examination of the UFW witnesses was clear error. Thus, the make whole remedy invoked by the Board.

C. The Court Applied the Correct Standard of Review

The Board attacks the lower court's failure to apply a highly deferential standard of review to challenges to the Board's remedial orders at length. In doing so, the Board completely mischaracterizes the Appellate Court's opinion. The Court's decision to reverse the Board's make whole award in this case was based on its determination that the Board's *legal evaluation* that Fanucchi's litigation of the abandonment issue did not further the policies and purposes of the ALRA was *clearly wrong*. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097-1098.) The Court did not

substitute its own judgment for that of the Board. Instead, the Court of Appeal's ruling turned on the Board's legal evaluation of the intent of the statute to effectuate the purpose of the law. (*Ibid.*)

The cases that the Board relies upon to support its position are not helpful. The Board cites to multiple decisions of the United States Supreme Court in the context of the National Labor Relations Act ("NLRA") that support its position that courts must give administrative agency's vested with the discretion to devise remedies to expunge the effects of violations of the statute "great deference" and that the agency's determinations regarding appropriate remedies are to be given "controlling weight" except where such remedies are "manifestly contrary to statute." (Petition for Review, pp. 13-17.) However, none of those cases stands for the proposition that a court must give deference to an agency's clearly wrong legal conclusion relied upon to formulate such remedies.

The Court of Appeal's ruling does not disrupt California precedent that recognizes that the discretion to formulate remedies to expunge the effects of ULPs is vested with the Board. Take for example, *Sandrini Bros. v. ALRB* (1984) 156 Cal.App.3d 878, 885 ("*Sandrini Bros.*"), a case the Board relies on to support its assertion that the Court of Appeal was obligated to give the Board's remedial order "great deference." At issue in *Sandrini Bros.* was an ALRB remedial order for an employee that had committed ULPs to pay the affected employees backpay with interest to be

computed according to the same interest rate used by the NLRB, which at the time exceeded the 10 percent interest limitation on court judgments set forth in the California Constitution. (*Id.* at 881.) The employer sought review on the issues of whether the Board's remedial measure was punitive and/or unconstitutional. (*Ibid.*) Although the *Sandrini Bros.* court did acknowledge that "the power to fashion and order backpay and other remedies is vested with the regulatory agency alone, not in the courts of the state," the court did not give "great deference" to the Board's remedial order. (*Id.* at 885.) Instead, the Fifth District Court of Appeal spent significant efforts discussing statutory construction and policy to reach the final conclusion that the constitutional interest rate is inapplicable to the Board's remedial orders. (*Id.* at 885-888.) Although the *Sandrini Bros.* court ultimately enforced the Board's order, it did not do so without first evaluating the statutory and legal questions at issue.

In *Highland Ranch v. ALRB* (1981) 29 Cal. 3d 848, 865, another case cited by the Board, an employer challenged a "limited back pay" remedial order imposed by the Board. This Court took it upon itself to determine "the propriety of the ALRB's remedial order." (*Id.* at 862.) In doing so, this Court did not give "great deference" to the Board's remedial order, but instead issued a well-reasoned opinion based on an analysis of similar remedies awarded by the NLRB. (*Id.* at 862-865.) The *Highland*

Ranch court concluded that the ALRB had acted within its remedial authority in following federal precedents. (*Id.* at 865.)

The Court of Appeal's ruling in this case does not conflict with this Court's ruling in *Karahadian Ranches v. ALRB* (1985) 38 Cal.3d 1, 16 (*"Karahadian"*). In *Karahadian,* the employer challenged the language of the Board's remedial order as "overly broad." (*Id.*) This court acknowledged its previous holding in *Carian v. ALRB, supra,* 36 Cal.3d at 674, which held the Board's remedial powers are broad and that a remedial order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the Act." (*Karahadian, supra,* 38 Cal.3d at 16.) In analyzing whether the Board's remedy was within the Board's discretion, this Court relied on facts and evidence in the record to support the Board's remedial order. (*Ibid.*) This Court's analysis did not turn on whether the Board had made a "clearly wrong" legal conclusion. (*Ibid.*)

In *M.B. Zaninovich, Inc.* (1981) 114 Cal.App.3d 669, the Court found that the mailing, reading and educational remedies of the ALRB's proposed order were overbroad and punitive. The Court also found that a remedial cost was excessive and struck the mailing and reading requirements.

Contrary to the Board's assertions, the Court of Appeal did apply the applicable standard of review to the Board's award of make whole relief.

The Board insists that under what it refers to as "a highly deferential standard of review for remedial orders," courts "can interfere only where those remedies are patently unreasonable under the statute." (*Nish Noroian Farms v. ALRB* (1984) 35 Cal.3d 726, 745 ("*Nish Noroian*".) The Court of Appeal concluded that the Board was "clearly wrong in its legal conclusion that Fanucchi's litigation effort in this matter did not further the purposes and policies of the ALRA." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1097-1098.) The Board fails to explain how this determination by the Court does not meet the "patently unreasonable" standard described in *Nish Noroian.*

As demonstrated herein, the Court of Appeal applied the correct standard of review to support its conclusion that the Board prejudicial erred when it ordered make whole relief in this case. The Board has failed to manufacture an issue for review on this basis.

D. The Court's Decision Will Not Have Negative Public Policy Effects Of State-Wide Impact

The Board's sweeping assertions that the Court of Appeal's ruling "in essence" holds that regardless of settled Board law on a matter, an issue cannot be considered settled until there is a reported court of appeal decision on that issue ignores the Court's analysis as a whole. (Petition for Review, p. 19-20.) Instead, the Court of Appeal's well-reasoned analysis on the make whole remedy rests on the long established rule of statutory construction that "[u]ltimately, it is the courts that must ascertain the intent

of a statute so as to effectuate the purpose of the law." (*Tri-Fanucchi, supra,* 236 Cal.App.4th at 1098.)

The Court of Appeal's ruling is supported by well-established precedent that has been long recognized by this Court. The fundamental role of courts in ascertaining the intent of the Legislature was addressed head on in *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321. Cognizant of the general rule that "administrative interpretation of a statute will be afforded great respect by the courts and will be followed if not clearly erroneous," this Court recognized that an administrative interpretation is "tentative" and "makes no pretense at finality." (*Id.* at p.326.) This Court further asserted that it was the duty of the court "when such as question of law is properly presented, to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction." (*Ibid.*)

In *J.R. Norton, supra,* 26 Cal.3d at 29, this Court reviewed the Board's blanket rule for imposing the make whole remedy. While recognizing the principle "that an administrative agency is entitled to deference when interpreting policy in its field of expertise," this Court again emphasized that "[i]t is fundamental to statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Ibid.*)

The Court of Appeal's analysis draws on multiple different grounds to determine that Fanucchi's litigation efforts furthered the purpose and policies of the ALRA. First, the Court recognized that although the Board's prior decisions held that "a prolonged period" of union absence or inactivity did not create an abandonment defenses to the employer's duty to bargain, no appellate court had decided that specific issue until Fanucchi sought judicial review. (*Ibid.*) The Appellate Court also recognized that despite the Board's prior decisions, the question of an appellate court would rule when confronted with over 24 years of union absences and complete inactivity was far from certain, especially "since such extreme dereliction would seem antithetical to ALRA policies of having actual employee representation and promoting the collective bargaining relationship." (*Ibid., fn.* 12) Third, the Court of Appeal noted that the UFW abandonment of bargaining units is not limited to the present case, but is a recurring problem. (*Ibid.*) Additionally, the abandonment defense has been routinely recognized under the National Labor Relations Act. Thus, one of the issues is whether the ALRB failed to apply applicable NLRB precedent as mandated by California Labor Code § 1148. It was against this backdrop that the Court concluded that judicial review of complete and long-term abandonment "was reasonable necessary and helpful to all parties, including both unions and agricultural employers, for the beneficial purpose of clarifying and/or confirming" an area of law that was "to a significant

degree unsettled and controversial." (*Ibid.*) Thus, the Court's legal conclusion that Fanucchi's advancement of a complete and long-term abandonment defense furthered the broader purposes of the ALRA does not "in essence" hold that the status of the abandonment defense could only become settled through a reported judicial decision. (Petition for Review, pp. 20-21.)

The Board tries to manufacture an issue for review by claiming that the Court of Appeal's decision somehow "threatens to eviscerate the Board's statutory mandate to serve as the expert agency with primary responsibility to formulate remedies for the effects of ULPs." (Petition for Review, p. 21.) The Court of Appeal decision does no such thing. Nowhere in the ruling does the Court of Appeal state, nor can it be inferred, that the Board cannot develop a body of law in its expertise and rely upon that law. What the Court of Appeal decision does state is that the courts – not the Board –ascertain the true meaning of a statute finally and conclusively. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at p. 1098.)

The Board attacks the Court of Appeal's ruling at length on the grounds that the Court's ultimate rejection of the Fanucchi's abandonment defense cannot be reconciled with its conclusion that the status of the abandonment defense was unsettled and controversial until Fanucchi advancement of this litigation. (Petition for Review at pp. 23-27.) The Board's opinion as to whether the Court of Appeal's ruling regarding the

make whole remedy is consistent with the Court's ruling rejecting Fanucchi's abandonment defense does not demonstrate the need for Supreme Court review.

The Board also criticizes the Court of Appeal's references to the UFW's "egregious" inactivity and "extreme dereliction" of its statutory responsibilities for over 24-years. (Petition for Review, p. 26-27.) The Board argues that these statements reflect a misapprehension by the Court of Appeal of the limits of Board authority under the ALRA. (*Ibid.*) The limits to Board authority were not at issue in this case, and therefore the Fifth District Court of Appeal's understanding of that authority is of no significance. Further, it is not a function of the Supreme Court to ensure that each and every Court of Appeal have a clear understanding of the limits to the Board's authority, but to "secure uniformity of decision and to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

The Court of Appeal relied on the general overall policy of the ALRA to promote "greater stability in labor relations" in concluding that Fanucchi's litigation of the abandonment issue furthered the policies and purposes of the ALRA. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at p. 1098.) While it is true that there are other important purposes that the Act seeks to further, the Court of Appeal relied on this broader purpose of the ALRA to support it legal conclusion. The Board's assessment that there are other

equally or more important purposes that the Act seeks to further is of no significance and does not undermine the Appellate Court's ruling.

Further, the fact that the Board disagrees with the Appellate Court's legal conclusion that Fanucchi's advancement of this litigation furthers the broad purpose of ALRA to promote greater stability in labor relations does not create a question of law requiring review by the Supreme Court. As demonstrated herein, contrary to the Board's assertions, the Court of Appeal's ruling does not upend the Board's role as the agency with primary and exclusive jurisdiction to administer the ALRA. Instead, the Court of Appeal's ruling is consistent with California Supreme Court precedent holding that it is the courts who state the meaning of a statute finally and conclusively. (*Bodinson Mfg. Co. v. California E.Com., supra,* 17 Cal.2d at p. 326; *J.R. Norton, supra,* 26 Cal.3d at p. 29.) The opinion does not signal to employers and unions throughout the state that they may refuse to bargain or otherwise comply with the Board's orders by asserting the lack of an appellate decision on the "specific issue" as a bar to an award of the make whole remedy. The Court of Appeal decision does not rest on the sole consideration that there was no final and conclusive court ruling of the abandonment defense. (*Tri-Fanucchi, supra,* 236 Cal.App.4th at p. 1097-1098.) Instead, the Court of Appeal's analysis expressly stated that it considered other factors in this case, such as circumstances of "such long-term union absence and egregious inactivity," the fact that UFW

abandonment of bargaining units is a recurring problem, and that judicial review of the issue of abandonment was reasonably necessary and helpful to all parties concerned. (*Id.* at p. 1098.) The Court of Appeal's well-reasoned analysis does not undermine stability in labor relations.

The Board's attack on the Appellate Court's analysis in this case is both insubstantial and undeserving of this Court's review. The Court of Appeal's ruling is well within its jurisdiction to review Board decisions and determine the law. As this Court has recognized, the role of judicial review of Board decisions plays the important role of providing a necessary "check on arbitrary administrative action." (*J.R. Norton, supra,* 26 Cal.3d at p. 33.)

Finally, the Court of Appeal's decision that Fanucchi's advancement of this litigation "plainly furthered the broader purpose of the ALRA to promote greater stability in labor relations by obtaining an appellate decision on this important issue" does not undermine other public policy goals of the ALRA.

The Board strains to create a basis for review by asserting, without basis, that the Court of Appeal opinion encourages employers to commit ULPs and litigate certification disputes rather than bargain. (Petition for Review, p. 33-34.) The well-reasoned opinion narrowly holds that under the larger backdrop of the facts specific to this case, Fanucchi's advancement of litigation of the abandonment issue furthered the broader purposes of the ALRA to promote greater stability in labor relations. The

Court of Appeal decision provides much needed clarification and confirmation of the law rejecting the abandonment defense to an employer's duty to bargain under the ALRA. As noted by the Court of Appeal, the UFW appears to have abandoned a number of bargaining units for long-periods of time, and thus, the Court's ruling here will foreclose on any questions as to whether the employer can assert an abandonment defense. The Court of Appeal's ruling does not undermine important public policy goals of the ALRA that would necessitate review by this Court.

V.

CONCLUSION

The Board's Petition for Review should be denied. The Board does not even attempt to argue that review by this Court is necessary "to secure uniformity of decision" in the lower courts. (Cal. R. Ct. 8.500(b)(1).) To the contrary there are numerous published appellate decisions that overturn or modify the remedies sought to be imposed by the Board. Nor has the Board identified any important legal questions that require this Court's attention. (Cal. R. Ct. 8.500(b)(2).) Instead, the Board dedicates a majority of its Petition of Review attacking the Court of Appeal's analysis of the make whole remedy as incorrect and asserting that its conclusions were "erroneous." The Board's assertions that the Appellate Court erred in its

reversing the Board's make whole order does not warrant Supreme Court Review of that issue.

As demonstrated herein, the Court of Appeal did not exceed its authority in reaching its determination that the Board prejudicially erred in awarding make whole relief against Fanucchi. The Appellate Court was not required to defer to the Board in deciding questions of statutory interpretation and legal evaluation. It is settled law that the courts ascertain the ultimate intent of a statute so as to effectuate the purpose of the law.

Additionally, the Court of Appeal applied the correct standard of review in making its determination that the Board prejudicially erred when it ordered make whole relief in this case. The Court of Appeal's conclusion was based on its determination that the Board's legal evaluation was clearly wrong and that Fanucchi's litigation of the abandonment issue did further the policies and procedures of the ALRA was clearly wrong. The standard of appellate review in cases involving purely legal and statutory review is de novo. Further, the Court of Appeal's determination that the Board's legal conclusion was clearly wrong justifies the Court's interference in the ALRB's remedies assessments.

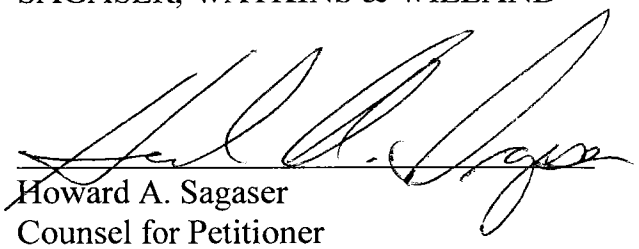
Finally, the Board fails to demonstrate how the Court's decision in this case will have negative public policy effects. There is simply no room in the Court's narrow ruling to support an inference that the Board cannot develop a body of law in its expertise and rely upon that law to issue

remedial orders. Instead, the Court of Appeal decision merely clarifies and confirms the law in the limited context of the abandonment defense.

For the foregoing reasons, the ALRB's Petition for Review of the make whole remedy should be denied.

Dated: July 13 2015

SAGASER, WATKINS & WIELAND

By: 

Howard A. Sagaser
Counsel for Petitioner
TRI-FANUCCHI FARMS

PROOF OF SERVICE

(Code of Civil Procedure § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 7550 North Palm Avenue, Suite 100, Fresno, California 93711.

On July 13, 2015, I served the following document described as **OPPOSITION TO RESPONDENT'S PETITION FOR REVIEW**, on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

☒ **BY MAIL**: I deposited such envelope in the mail at Fresno, California. The envelope(s) was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presume invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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

Executed on July 13, 2015, at Fresno, California.

Mehgan Ferreira

SERVICE LIST

Sent Via U.S. Priority Mail:
Silas Shawver (SBN 241532)
Agricultural Labor Relations Board
Visalia Regional Office
1642 West Walnut Avenue
Visalia, California 93277-5348
Facsimile: (559) 627-0985

Attorneys for Real Party in Interest, Agricultural Labor Relations Board

Sent Via U.S. Priority Mail:
Sylvia Torres-Guillen (SBN 164835)
General Counsel
Agricultural Labor Relations Board
1325 J Street, Suite 1900-A
Sacramento, California 95814
Facsimile: (916) 653-8750

Sent Via U.S. Priority Mail:
Antonio Barbosa
Executive Secretary
Agricultural Labor Relations Board
1325 J Street, Suite 1900-A
Sacramento, California 95814
Facsimile: (916) 653-8750

Sent Via U.S. Priority Mail:
Mario Martinez
Martínez Aguilasocho & Lynch, APLC
P.O. Box 11208
Bakersfield, Ca. 93389-1208
Facsimile: (661) 840-6154

Sent Via Electronic Service:
Court of Appeal
Fifth Appellate District

Sent Via FedEx Overnight:
Supreme Court of California *(8 copies)*
350 McAllister Street
San Francisco, CA 94102

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 7,810 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: July 13, 2015

SAGASER, WATKINS & WIELAND PC

By: Howard A. Sagaser

Howard A. Sagaser
Ian B. Wieland
Allie Wieland
Attorneys for Petitioner,
TRI-FANUCCHI FARMS