## IN THE SUPREME COURT OF CALIFORNIA

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

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Deputy

## ANSWER TO PETITION FOR REVIEW

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DATED: July 13, 2015
#[1816]

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The Agricultural Labor Relations Board (the "ALRB" or the "Board") hereby files its answer to the petition for review filed by Tri-Fanucchi Farms ("Tri-Fanucchi") in the above-captioned case. Tri-Fanucchi challenges a decision of the Fifth District Court of Appeal (the "Court of Appeal"), which affirmed the Board's rejection of Tri-Fanucchi's "abandonment defense" to the duty to bargain under the Agricultural Labor Relations Act (the "ALRA" or the "Act").[1] For the reasons that will be shown herein, Tri-Fanucchi has shown no basis for this Court to grant review.

## INTRODUCTION

In 1975, the California Legislature enacted the ALRA in order to foster stability in California's agricultural labor relations, to protect the right of agricultural employees to, among other things, designate representatives of their own choosing, and to eliminate employer interference in the exercise of the rights guaranteed by the Act.[2] (Lab. Code, § 1140.2; *Kaplan's Fruit & Produce Co., Inc.* (1977) 3 ALRB No. 28 pp. 3-4.) The ALRA was explicitly modeled on its federal equivalent,

[1] The Court of Appeal's decision is reported at *Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079.

[2] The ALRA is codified at Labor Code section 1140 et seq. Hereinafter, references to "employees" refer to agricultural employees.

the National Labor Relations Act (the "NLRA").[3] However, in order to achieve the policy objectives stated above, the Legislature deliberately diverged from the language of the NLRA in the critical area of the designation and removal of labor organizations as the bargaining representatives of employees.[4] Instead, in view of the needs of California's agricultural labor policy, the Legislature drafted the Act to exclude employers from even peripheral participation in the selection and removal of bargaining representatives. (*F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 676-677.) Both the Board and the Courts have recognized that, in doing so, the Legislature opted in favor of employees' collective choice and generally eliminated forms of selection and removal of bargaining representatives that did not flow from the results of secret ballot elections among employees. This means that procedures such as voluntary recognition by an employer and, more relevant for the purposes of this case, withdrawal of recognition by an employer based on loss of majority support, while permissible under the NLRA, are not available to employers under the ALRA. (*Ibid.*) Subject to narrow exceptions not present here,

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[3] The NLRA is codified at 29 U.S.C. section 151 et seq. and is administered by the National Labor Relations Board (the "NLRB"). By statute, precedents of the ALRA are to be followed by the ALRB provided those precedents are applicable. (Lab. Code, § 1148.)

[4] Although the Act uses the term "labor organization," such an organization is frequently known as a "union."

the ALRA effectuates employee choice by certification of representative status via secret ballot election alone, and, by that same legislative policy, unions remain certified as exclusive representative of the employees until removed by employees through a secret ballot election.

Pursuant to these established and judicially confirmed rules, the Board has for decades held that an employer may not unilaterally withdraw recognition from a certified union based upon a claim that the union has been inactive or absent for a period of time.[5] The Board's rejection of this type of "abandonment" claim required no extension of the established rules of law applicable to certification and removal of bargaining representatives. The Board properly applied the established principle that unions are to be certified and decertified by employees through the election process and not through the unilateral action of employers purporting to act on employees' behalf but, in reality, taking the representation decision out of employees' hands.

Thus, the decision of the Court of Appeal affirming the Board's rejection of the abandonment defense presented by Tri-Fanucchi in this case did not represent the establishment of any new rule of law, nor did it represent an extension of previously established and settled legal principles.

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[5] A claim of this type asserted by an employer as a defense to the duty to bargain with the certified union is frequently referred to as an "abandonment defense."

Rather, for the reasons described above, the Court of Appeal's decision merely confirmed what had already been established by decisions of the Board and judicial decisions: that the representation choice is to be exercised by employees and not employers.

Tri-Fanucchi's arguments that this Court should grant review in this case do not withstand scrutiny. Tri-Fanucchi attacks the Board decision upheld by the Court of Appeal as incorrectly decided. However, as the Court of Appeal explicitly recognized, the Board's precedent on abandonment directly furthers the legislative purposes underlying the Act, and is consistent with the language of the Act as well as prior judicial opinions construing the Act. Tri-Fanucchi argues that the Court of Appeal should not have shown deference to the Board's interpretation of the ALRA because that interpretation altered or amended the ALRA. [Tri-Fanucchi Petition for Reviewp. 13.] As the Court of Appeal correctly observed, the Board's interpretation of the ALRA is entitled to great deference, and the court properly followed that established principle. Moreover, as the Court of Appeal found, the Board's decision did not alter the ALRA, but was entirely consistent with it.

Tri-Fanucchi erroneously claims that the Court of Appeal misconstrued its own prior decision in *Montebello Rose Co. v. ALRB* (1981) 119 Cal.App.3d 1 and Petitioner strains to find "conflict" between *Montebello Rose* and the Fourth District Court of Appeal's decision in *F&P*

*Growers Assn. v. ALRB, supra,* 168 Cal.App.3d 667 when, in fact, these decisions are in harmony. Contrary to Tri-Fanucchi's erroneous characterization of the case, *Montebello Rose* was not called upon to address, and did not address, the manner in which a union's certification may be terminated. It did, however, hold that, while a certification's effect of creating an irrebuttable presumption of continued majority support terminates after a period of time, the duty to bargain created by the certification is continuing in nature. (*Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, 23-24 & 29-30.) *F&P Growers* addressed the issue of whether an employer may unilaterally terminate its continuing duty to bargain by asserting that the certified union lost the support of a majority of employees and agreed with the Board that the Legislature intended to preclude employers from interfering in the process of removing unions by unilaterally withdrawing recognition. The Court of Appeal correctly applied the principles reflected in both these cases to hold that withdrawal of recognition based upon an abandonment theory is similarly precluded.

Tri-Fanucchi claims that the Board and the Court of Appeal failed to apply NLRB precedent that, according to Tri-Fanucchi, supports its abandonment theory. However, Tri-Fanucchi cites no NLRB decisions in support of its argument. Furthermore, NLRB precedent on withdrawal of recognition is not "applicable" on this question given the critical difference between the ALRA and the NLRA concerning selection of the exclusive

representative due to the particular nature of California agricultural labor relations, a difference long recognized by the Board and the courts. (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 678.) Indeed, Tri-Fanucchi conceded in its opening brief to the Court of Appeal that its abandonment theory is a mere subspecies of the loss of majority support defense that has been held inapplicable under the ALRA. Finally, even under Petitioner's unsupported claim that the NLRA applies in this case, an employer may not rely on union inactivity to withdraw recognition where, as here, the employer challenges the union's status only after the union has reasserted its bargaining rights by demanding to bargain. (*Spillman Co.* (1993) 311 NLRB 95; *Ventura County Fruit Growers, Inc.* (1985) 10 ALRB No. 45).)

Lastly, Tri-Fanucchi erroneously claims that the Court must accept review to prevent "discord" between the ruling in this case and another decision issued by the same Court of Appeal the same day involving the ALRB and Gerawan Farming, Inc. (*Gerawan Farming, Inc. v. ALRB* (2015) 236 Cal.App.4th 1024.) In the *Gerawan* decision, the Court of Appeal held that an employer, faced with a union's invocation of the Act's "Mandatory Mediation and Conciliation" ("MMC") processes, could assert abandonment to negate one of the statutory prerequisites for referral to MMC. (*Id.* at p. 1064.) The Court concluded, in the context of the MMC challenge in that case, a scenario not present here, that abandonment could be asserted notwithstanding its unavailability as a defense to

the duty to bargain because MMC proceedings are removed from the bargaining process. (*Id.* at pp. 1058-1059.) The Board disagrees with that ruling and has petitioned for review of the *Gerawan* decision, including the Court of Appeal's holding on abandonment in the context of MMC proceedings. In any event, the ruling in the *Gerawan* case simply has no applicability to this case because the Court of Appeal expressly limited its ruling in that case to the issue of asserting abandonment in the context of MMC proceedings, a context not present in this case.

For these reasons, as will be more fully explained below, Tri-Fanucchi's arguments are without merit and the Court should not accept review.

## FACTUAL AND PROCEDURAL BACKGROUND

The factual background of this case is discussed in the Court of Appeal's decision, Tri-Fanucchi's petition for review, and the Board's own petition for review in this case and the Board will not burden the Court with a full recitation of the facts. Here, the essential facts are as follows.

The UFW is the certified bargaining representative of Tri-Fanucchi's employees. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1085.) Tri-Fanucchi claims, and it will be assumed, for the purposes of this Court's review, that between 1988 and 2012 the UFW was inactive vis á vis

Tri-Fanucchi and Tri-Fanucchi's employees.[6] (*Id.* at p. 1086.) In 2012, the UFW demanded to bargain and Tri-Fanucchi refused, asserting its abandonment theory. (*Ibid.*)

In ruling on an unfair labor practice complaint issued by the ALRB's General Counsel, an administrative law judge (the "ALJ") found Tri-Fanucchi's refusal to bargain to be unlawful, citing established Board precedent rejecting abandonment as a basis for refusing to bargain. (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1086-1087.) The Board rejected Tri-Fanucchi's exceptions and affirmed the ALJ's decision. Tri-Fanucchi sought review and the Court of Appeal upheld the Board's decision with respect to abandonment, finding that the Board's precedential rulings on the abandonment issue were "consistent with how California appellate courts have construed the ALRA. (*Id.* at p. 1092 (citing *Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1 and *F&P Growers Assn. v. ALRB, supra,* 168 Cal.App.3d 667).) The Court of Appeal further found that the abandonment defense was "clearly analogous to the loss of

[6] The Administrative Law Judge who heard the case decided the case via a dispositive motion and, accordingly, the facts that Tri-Fanucchi sought to prove (*i.e.*, a 24-year period of UFW inactivity) were assumed to be true.

majority support" that was rejected in *F&P Growers*.[7] (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1093.)

## LEGAL ARGUMENT

### I. TRI-FANUCCHI'S ARGUMENT THAT THE BOARD'S ABANDONMENT PRECEDENT IS AN UNREASONABLE INTERPRETATION OF THE ALRA CANNOT BE ACCEPTED AS THE BOARD'S PRECEDENT IS CONSISTENT WITH THE POLICIES AND PURPOSES OF THE ALRA AS WELL AS EXISTING JUDICIAL PRECEDENT

Tri-Fanucchi presents the Court of Appeal's decision on abandonment as a new chapter in California agricultural labor relations. However, the Court of Appeal's opinion, in fact, merely affirms principles that have been long-recognized by the Board and the courts. As readily acknowleged by the Court of Appeal, the Board's holdings rejecting the abandonment defense are longstanding. The Board's decisions, and the Court of Appeal's affirmation of the Board's precedent on this issue, do not represent a departure from, or even an extension of, firmly established legal principles derived from the statutory language and underlying legislative intent of the ALRA. The Court of Appeal's decision merely confirms what was already known as a result of decades of Board precedential rulings, as well as rulings of the courts of appeal: that under

[7] While upholding the Board's abandonment precedent, the Court of Appeal reversed the Board's award of makewhole under Labor Code section 1160.3 (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1094-1098.) The Board has petitioned for review of this aspect of the Court of Appeal's decision.

the ALRA, the right to select or remove unions is placed in the hands of employees and not their employers. Thus, as will be shown below, Tri-Fanucchi's argument that the Board precedent upheld by the Court of Appeal "eviscerates ALRA policy" or improperly amends or expands the scope of the ALRA is baseless.

### A. California Agricultural Labor Policy, as Established in Statute and Case Law, Supports the Board's Abandonment Precedent

In enacting the ALRA, the Legislature expressly stated the policy goal of allowing California's agricultural employees to have a free, collective voice in choosing an exclusive representative for purposes of collective bargaining. Labor Code section 1140.2 states that it is "the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing . . ." and "to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . ."

The ALRA tracks in most respects the statutory language of the NLRA. (*United Farm Workers of America* (2014) 40 ALRB No. 6 at p. 7.) However, in drafting the statutory language dealing with the selection and removal of bargaining representatives, the Legislature deliberately diverged from the language of the NLRA.

Under the NLRA, an employer may voluntarily recognize and bargain with a union without the union having prevailed in an NLRB-conducted election. (*General Box Co.* (1949) 82 NLRB 678, 679; *Cobb Theatres, Inc.* (1982) 260 NLRB 856, 859.) In contrast, the ALRA explicitly makes it an unfair labor practice for an employer to bargain with a union that has not attained certification under the ALRA's election procedures. (Lab. Code, § 1153, subd. (f); *Nish Noroian Farms* (1982) 8 ALRB No. 25 p. 13.)

Likewise, under the NLRA, an employer may file a petition seeking an election when one or more unions present a claim to be recognized. (29 U.S.C. § 159(c)(1)(B).) No such procedure is available under the ALRA. Only employees or unions acting on employees' behalf may petition for elections under the ALRA. (Lab. Code, § 1156.3, subd. (a); *F&P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 674-675.)

In interpreting the ALRA, the Board has recognized that "[b]y these important differences the California legislature has indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of the Board." (*Nish Noroian Farms, supra*, 8 ALRB No. 25 p. 13.) An appellate court has agreed that the differences between the ALRA and the NLRA in the area of union recognition "show a purpose on the part of the Legislature to prohibit the employer from being an active participant in determining which union it shall bargain with in cases arising under the ALRA." (*F&P Growers Assoc. v. ALRB, supra*, 168

Cal.App.3d 667, 676.) It is within this context of express legislative intent to preserve the right of employees to choose their own representatives free of employer interference that the Board's precedents on abandonment arise.

Based upon the Legislature's clear intent to eliminate employer involvement in the selection of bargaining representatives, the Board has long held, with judicial approval, that, just as employers are prohibited from being active participants in the process of selecting a bargaining representative, they are also prohibited from playing an active role in the removal of a bargaining representative. In *Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, the Court of Appeal adopted Board precedent, holding that the duty to bargain under the ALRA is a continuing one. Following this, in *Nish Noroian Farms*, the Board held that, in contrast to the rule under the NLRA, which permits employers to withdraw recognition from a certified union that has lost the support of a majority of employees, under the ALRA, "[o]nce a union has been certified it remains the exclusive collective bargaining-representative of the employees in the unit until it is decertified or a rival union is certified." (*Nish Noroian Farms, supra*, 8 ALRB No. 25 at p. 14.) This has become known as the "certified until decertified" rule.

One result of the "certified until decertified" rule is that an employer may not withdraw recognition from a union based upon evidence that the union has lost the support of a majority of employees, which an employer may do under the NLRA. In *F&P Growers Association v. ALRB*, the Court upheld the Board's

rejection of the loss of majority defense and the Board's "certified until decertified" doctrine upon which it was based. The employer in that case argued that the ALRB was required to follow the then-prevailing rule applied by the NLRB that permitted withdrawal of recognition of a certified union based upon a good faith doubt as to its continuing majority status.[8] The Court found that, while the ALRB is required to follow NLRA "applicable precedents" under Labor Code section 1147, NLRA precedent on withdrawal of recognition was not "applicable" because of the significant differences between the ALRA and the NLRA in the area of employer participation in the process of certifying and decertifying unions, as noted above. (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 676-677.) The Court concluded that "it does appear that the Legislature's purpose in enacting the ALRA was to limit the employer's influence in determining whether or not it shall bargain with a particular union" and that allowing the good faith doubt defense would "give the employer influence over those matters in which the Legislature clearly appears to have removed employer influence." (*Ibid.*)

In its analysis distinguishing the ALRA from the NLRA model, the Court noted the particular conditions that prevail in California's agricultural industry,

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[8] The NLRB has subsequently modified its rule to allow withdrawal of recognition in the unfair labor practice context only where the union has actually lost majority support. (*Levitz Furniture Co. of the Pacific, Inc., (2001)* 333 NLRB 717, 717.)

including rapid employee turnover, seasonal employment, and a workforce featuring a large percentage of non-native and/or non-English speaking employees, and held that these factors supported the conclusion that "[a]pplying the NLRA defense would fail to respond to the particular needs of the California agricultural scene." (*Id.* at p. 677.) The Court rejected the contention that, due to the seasonal nature of their employment and (presumed by the employer) illiteracy, employees could not effectively exercise their right to decertify a union and required action by the employer to remove an unwanted union. The Court responded that, "[t]he clear purpose of the Legislature is to preclude the employer from active participation in choosing or decertifying a union, and this certainly overrides any paternalistic interest of the employer that the employees be represented by a union of the present employees' own choice." (*Ibid.*)

The Board's decisions rejecting abandonment as a defense to refusal to bargain allegations are grounded in the "certified until decertified" doctrine, which is itself based on the certification and decertification provisions of the ALRA and the policies underlying them. In fact, as Tri-Fanucchi concedes, the abandonment defense is merely a subset of the "good faith doubt" defense that the Board, with judicial approval, has long rejected. [Petitioner's Opening Brief to Court of Appeal ("Pet.Op.Br.") p. 15 ("abandonment is a narrow theory within the broader area of good faith doubt . . .")]; (*F&P Growers v. ALRB, supra*, 168 Cal.App.3d 168, 678 ("we hold the particular NLRA precedent herein inapplicable and the agricultural employer may not raise a 'good faith doubt of

majority support.'").) Accordingly, the Board has clearly and repeatedly held that, because unions remain certified until decertified, an employer under the ALRA may not refuse to bargain with a certified union based upon a claim that the union was inactive or absent for a period of time. (*O.E. Mayou & Sons* (1985) 11 ALRB No. 25, *Bruce Church, Inc.* (1991) 17 ALRB No. 1, *Dole Fresh Fruit Co., Inc.* (1996) 22 ALRB No. 4, *Pictsweet Mushroom Farms* (2003) 29 ALRB No. 3 *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5; *Arnaudo Bros., LP* (2014) 40 ALRB No. 3 p. 14.)

That the Board's precedents on abandonment are consistent with the ALRA and the legislative intent is confirmed by the Legislature's subsequent tacit approval of those precedents. "The Legislature is presumed to be aware of a long-standing administrative practice" and where the Legislature "makes no substantial modifications to the act, there is a strong indication that the administrative practice is consistent with the legislative intent." (*Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1257 (internal punctuation omitted).) Each year, during the decades that the Board has applied the "certified until decertified" rule and the rule rejecting the abandonment defense, the Legislature has declined to invalidate that precedent by amending the ALRA.

Furthermore, in 2002, the Legislature amended the Act to add MMC. (Lab. Code, § 1164, et seq.) MMC is a procedure that applies when a union has been certified but no first contract has been reached. Either the union or the employer may request referral to mediation to resolve bargaining issues in an

effort to reach a contract. If, in proceedings before the mediator, the parties do not reach a contract, the mediator is empowered to resolve any unresolved issues on which the parties were not able to reach agreement in a report, which ultimately becomes the parties' first collective bargaining agreement.[9]

By the time MMC was enacted, the Board's "certified until decertified" rule and the Board's rejection of the abandonment defense were already well-established. Yet, in enacting MMC, the Legislature placed no limitation on the age of the certification in question and no requirement that there has been continuous bargaining. (Lab. Code, § 1164.11.) In fact, examination of MMC's legislative history indicates that the Legislature passed MMC in large part to address the problem of longstanding certifications where the parties had never reached an initial contract.[10] Thus, despite the opportunity to do so, the

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[9] As noted above, in *Gerawan Farming, Inc. v. ALRB*, decided the same day as this case, the Court of Appeal ruled MMC unconstitutional and held, on alternative grounds, that an employer, faced with a request for referral to MMC, should be permitted to raise "abandonment" to establish that the statutory prerequisites for referral to MMC were not met. That ruling was made in the context of MMC, not present here, and, in fact, confirmed that abandonment is not a defense to the continuing duty to bargain. The Board has petitioned for review of the Court of Appeal's decision in that case. (*Gerawan Farming, Inc. v. ALRB*, Case Nos. S227243 & S227250.)

[10] See Office of Assembly Floor Analysis, third reading of Senate Bill 1156 (2001-2002 Reg. Sess,), August 31, 2002, page 7; Office of Assembly Floor Analysis, concurring in Senate Amendments of Assembly Bill No. 2596 (2001-2002 Reg. Sess.) August 31, 2002, pages 7-8, wherein proponents of MMC argued that the bill was necessary because employees "have waited for years" and "continue to languish without the negotiated contracts they have elected to secure."

Legislature has never acted to amend the Act to allow an abandonment defense to the duty to bargain, which bolsters the conclusion that the Board's precedent in this area is consistent with the legislative intent.

The Board's precedent on abandonment, and the Court of Appeal's decision upholding that precedent, directly promotes the interlocking legislative purposes of preserving employee free choice and eliminating employer interference therewith by prohibiting employers from refusing to bargain based on union inactivity and ensuring that the authority to choose whether to remove a certified union remains where the Legislature placed it: in the hands of represented employees. Furthermore, the Board's holdings on abandonment did not require the Board to create any novel legal principle. Rather, those holdings flow directly from the principle that the duty to bargain is a continuing one and that under the ALRA unions remain certified until decertified by the affected employees. As discussed above, these principles have already been judicially approved. (*Montebello Rose Co. v. ALRB, supra*, 119 Cal.App.3d 1; *F&P Growers Assn. v. ALRB, supra*, 168 Cal.App.3d 667.) Accordingly, while the Court of Appeal's decision was the first published decision on the specific issue of abandonment, the decision falls well within the bounds of established law. Review by this Court is unnecessary.

### B. The Board's Abandonment Precedent and the Court of Appeal's Decision Upholding that Precedent are Consistent with Established Law, Contrary to Tri-Fanucchi's Arguments

As shown above, the Board's precedent on abandonment, and the Court of Appeal's affirmation of that precedent, is consistent with the statutory language of the ALRA, the legislative policies underlying the Act, and the judicially approved, long-standing interpretation of the Act. Tri-Fanucchi's arguments to the contrary are without merit.

Tri-Fanucchi argues that the legislative policy protecting employee choice is threatened when a union, after a long period of absence, demands to bargain with an employer. [Tri-Fanucchi Petition for Review p. 14.] Tri-Fanucchi complains that, in such situations, "the employer is required to bargain with the long-term absent union, whether the employees want the union's representation or not" [*Id.* at p. 15.] This is incorrect, for, as Tri-Fanucchi acknowledges, the Act gives employees the right to remove a certified union, if that is their desire, through a decertification election. Therefore, if employees do not desire representation by the certified union, the employees are empowered to exercise that right.

In an attempt to avoid the reality that its employees are vested with the authority to remove the UFW if they so wish, Tri-Fanucchi proffers, without support, that its employees may be ill equipped to exercise their collective right to file a decertification petition and thus require the benevolent intercession of

their employer to make the 'correct' choice for them. Tri-Fanucchi claims that, in cases where a union has been absent, employees are at a "great disadvantage" because they have "no relationship with the union to base a decision on whether or not to seek decertification." This argument ignores that the Legislature drafted the ALRA so as to require elections within expedited time-frames to meet the realities of working in agriculture. When a petition to certify a union is filed, an election is to be held within seven days and, if there is strike activity, the election is to occur *within 48 hours* of the filing of the petition. (Lab. Code, § 1156.3, subd. (b).) Thus, the Legislature contemplated that employees would make representation choices without necessarily having an extended period of time to form a "relationship" with the union in question.[11] More importantly, contrary to Tri-Fanucchi's argument, the employees in this case *have* had ample opportunity to determine whether to decertify the UFW. In September 2012, the UFW demanded to bargain with Tri-Fanucchi and requested information. In the nearly three years since that time, no decertification petition has been filed although one could have been filed at any time.[12] This is so, although Tri-

[11] Furthermore, to the extent that employees believed that the UFW had been negligent in representing them during the period of inactivity, and wished to remove the UFW on that basis, there would be no need to establish a "relationship" with the UFW to do this.

[12] Tri-Fanucchi contends that, were the employees to file a decertification petition, it is "likely" that the UFW would file a petition for MMC and the "result" would be the implementation of an MMC contract. This is speculation piled upon speculation. No MMC request has been filed in this

(Footnote continued....)

Fanucchi has refused to bargain with the UFW for the entire period, which conduct is recognized as generally having a corrosive effect upon union support. (*J.R. Norton Company, Inc.* (1984) 10 ALRB No. 42 at p. 14.)

There is no basis for Tri-Fanucchi to contend that the absence of a decertification petition in this case reflects the inability of employees to file one, as opposed to, for example, a belief among employees that their interests would be better served by union representation and a collective bargaining agreement rather than having terms and conditions of employment set unilaterally by Tri-Fanucchi. Tri-Fanucchi's purported concern that its employees may not wish for representation by the UFW, a concern not supported anywhere in the record of this case, is misplaced, and its proposed remedy, which would allow Tri-Fanucchi to make the choice concerning union representation for the employees, is inconsistent with the ALRA. In fact, Tri-Fanucchi's true complaint is that its employees have not done what it wishes they would do: decertify the UFW. Furthermore, the types of arguments made by Tri-Fanucchi in this case have been made by employers in the past, and have been soundly and properly rejected. Thus, in *Auciello Iron Works v. NLRB* (1996) 517 U.S. 781, 790, the

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(Footnote continued)
case and the operation of the MMC statutes *vis 'a vis* the Act's election procedures is not at issue in this case. However, it should be noted that, in the *Gerawan* case, which Tri-Fanucchi cites, a decertification election was, in fact, held and no MMC contract has been implemented to date. (*Gerawan Farming, Inc. v. ALRB, supra,* 236 Cal.App.4th 1024, 1040.)

United States Supreme Court stated that a labor agency, such as the ALRB here, is "entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." In *Montebello Rose,* the Court of Appeal cited with approval the Board's statement that, in assessing the continuing nature of the duty to bargain, the "balance to be struck is between the employees' right to reject the incumbent union and the need for stability in bargaining relationships. *The employer's 'right' not to bargain is no part of the equation.*" (*Montebello Rose Co., Inc. v. ALRB, supra,* 119 Cal.App.3d 1, 25 (quoting *Kaplan's Fruit & Produce Co., Inc., supra,* 3 ALRB No. 28 at p. 4) (emphasis supplied).) Finally, in *F&P Growers v. ALRB*, the court rejected as "paternalistic" those arguments, raised by Tri-Fanucchi here, based on the premise that agricultural employees are incapable of exercising their right to remove an unwanted union. (*F&P Growers Assoc. v. ALRB, supra,* 168 Cal.App.3d 667, 677.)

Tri-Fanucchi accuses the Board of acting arbitrarily in recognizing that certifications may terminate through union disclaimer of interest (the affirmative act by a union of unequivocally relinquishing its certification) and union defunctness (the institutional death of the certified union) while not permitting the abandonment defense. However, neither of these exceptions to the "certified until decertified" rule calls upon *the employer* to assess the quality of representation provided by the certified union or the degree of employee support

for the union and take it upon itself to initiate the termination of the bargaining obligation. Given that the ALRA was enacted for the express purpose of eliminating employer interference in the selection of bargaining representatives, the distinction is not arbitrary, but mandated by the Act.

## II. TRI-FANUCCHI'S ARGUMENT THAT THE COURT OF APPEAL SHOULD NOT HAVE AFFORDED A DEFERENCE TO THE BOARD'S INTERPRETATION OF THE ALRA STANDS IN CONTRAST TO FIRMLY ESTABLISHED PRECEDENT

Tri-Fanucchi argues that the Court of Appeal erroneously afforded deference to the Board's precedents on abandonment. There is no need for this Court to accept review because the appropriateness of judicial deference to the Board's interpretation of the ALRA is a firmly established principle, as reflected in the decisions of this Court. The Board has primary and exclusive jurisdiction over unfair labor practices and was established as a body with expertise in agricultural labor relations. (Lab. Code, § 1160.9; *Rivcom Corp. v. ALRB* (1983) 34 Cal.3d 743, 771 fn. 25 ("where a dispute concerns activities arguably protected or prohibited by the labor relations statute, the Board, not the courts, has primary jurisdiction."); *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60 (recognizing ALRB's "exclusive jurisdiction" over unfair labor practices); *Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 346 (recognizing the Board's status as an expert agency whose "findings within that field carry the authority of an expertness which courts do not possess and therefore must respect").) While the courts have the ultimate responsibility to

interpret the law, it is well-established that the Board's interpretation of the ALRA is to be afforded great deference and is to be upheld provided it is reasonable. (*San Diego Building Trades Council v. Garmon* (1959) 359 U.S. 236, 242-243; *Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 259. Thus, the Board's construction need not be the only way to interpret the ALRA, nor even the best way, but provided the construction is a reasonable one, the Board's interpretation must be upheld. (*Holly Farms Corp. v. NLRB* (1996) 517 U.S. 392, 409, citing *Sure-Tan, Inc. v. NLRB* (1984) 467 U.S. 883, 891.

Tri-Fanucchi argues that the Board's abandonment precedent was entitled to no deference because it varies or enlarges the terms of the ALRA and, therefore, exceeds the scope of the authority conferred by the Legislature. [Tri-Fanucchi Petition for Review p. 18 (citing *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429).] Tri-Fanucchi does not explain how the rejection of the abandonment defense varies or enlarges the terms of the ALRA. Certainly, there is no provision of the Act that *requires* acceptance of the abandonment defense. To the contrary, as shown above, several provisions of the Act support the Board's longstanding view that allowing an employer to refuse to bargain based on alleged abandonment is inconsistent with the statute and its legislative purpose. Furthermore, to the extent that the abandonment defense is neither expressly permitted, nor expressly prohibited by specific statutory language, the policy issue lies within the realm of administrative application, which the

Legislature has vested in the Board. Thus, as the Supreme Court stated in reference to the NLRB,

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.
>
> (*Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177, 194.)

Tri-Fanucchi's argument that the well-established rule affording deference to the Board's construction of the ALRA should have been disregarded by the Court of Appeal on the ground that the Board's decision altered or amended the ALRA is wholly without merit. Not only does Tri-Fanucchi fail to identify any statutory provision that was altered by the Board's decision, the Board's decision is entirely consistent with the statute, which the Court of Appeal necessarily found in its review. Thus, the Board's interpretation of the Act was entitled to deference, as the Court of Appeal correctly recognized.

## III. TRI-FANUCCHI'S ARGUMENT THAT THE COURT OF APPEAL MISCONSTRUED CASE LAW IS INCORRECT AND THERE IS NO "SPLIT IN AUTHORITY" TO BE RESOLVED BY THIS COURT

Tri-Fanucchi incorrectly argues that the Court of Appeal misconstrued its own prior decision in *Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, and further argues that the Fourth District Court of Appeal's later decision in *F&P Growers v. ALRB* conflicts with *Montebello Rose*. However, Tri-Fanucchi misstates the holding of *Montebello Rose* and misapprehends the harmonious relationship of the cases. There is no "split in authority" to be resolved by this Court.

*Montebello Rose* involved the interpretation of Labor Code section 1155.2, subdivision (b), which provides that the Board "may extend [a union's] certification for up to one additional year, effective immediately upon the expiration of the previous 12-month period following initial certification." It was argued that this provision implied that a certification automatically expired for all purposes after one year (or two years if extended). (*Montebello Rose Co. v. ALRB, supra,* 119 Cal.App.3d 1, 23.) The Board had previously rejected this interpretation, stating in *Kaplan's Fruit & Produce Co., Inc., supra*, 3 ALRB No. 28 that a certification has two distinct aspects. First, the certification creates a duty to bargain, which "contains no time limit." (*Id.* at pp. 2-3.) Second, the certification creates a temporary bar to challenging to the union's status as bargaining representative (known in some contexts as the "certification bar").

(*Id.* at p. 3.) This bar, which has the effect of creating an irrebuttable presumption of majority support, lapses after the time period stated in Labor Code section 1155.2, subdivision (b), after which point the presumption is a rebuttable one. (*Id.* at pp. 3-4.) The court in *Montebello Rose* adopted the reasoning of *Kaplan's* and held that an employer's duty to bargain with the certified union continues beyond the period of the certification bar. (*Montebello Rose Co., Inc. v. ALRB, supra*, 119 Cal.App.3d 1, 30-31.)

It is clear that the issue presented to the court in *Montebello Rose* was the limited issue of whether the duty to bargain with a certified union automatically terminated at the conclusion of the certification bar. The court did not address the precise nature of the continuing duty to bargain or the ways that the duty to bargain may or may not come to an end. Yet, Tri-Fanucchi seizes on the court's reference to NLRB precedent on the certification bar and the post-bar rebuttable presumption of continuing majority support to argue that the court was, in effect, adopting NLRB precedent on withdrawal of recognition in full, including the availability of defenses such as loss of majority support and abandonment. However, to hold that the ALRB follows the NLRB rule that the presumption of continued majority support changes from irrebuttable to rebuttable after the expiration of the certification bar is not to say that the ALRB must recognize every defense to the duty to bargain recognized under NLRB precedent. To the contrary, as explained above, based upon the ALRA's particular statutory text, the legislative intent, and the character of California agricultural labor relations

the Board reasonably and properly concluded that employers under the ALRA were to be denied the ability to interfere in issues of representation by asserting loss of majority and other similar grounds as bases for withdrawing recognition and that unions remain "certified until decertified."

The Board's policy-making in this area does not negate the principle that the presumption of continued majority support is a rebuttable one. The Board's rulings merely limit the ways in which the presumption may be rebutted. Consistent with the legislative intent, the Board's rulings affirm the primacy of the secret ballot election as the means for establishing that a union no longer enjoys the support of a majority of employees.[13] For the same reasons, the decision in *F&P Growers v. ALRB* did not treat the rebuttable presumption as having "no legal significance" as Tri-Fanucchi claims. Rather, it upheld the Board's precedent that the Legislature intended to eliminate employer interference in the selection and removal of bargaining representatives, thus allowing an employer to assert good faith doubt / loss of majority as a basis for

[13] Although most of the decisions on rebuttal of the presumption of majority support under the NLRA deal with employer withdrawal of recognition based on asserted loss of majority support, the NLRB has stated that a union's loss in a representation election constitutes a form of rebuttal of that presumption. (*Williams Enterprises, Inc.* (1993) 312 NLRB 937, 942 (noting that the "ordinary presumption of continuing majority support" can be rebutted via the union's loss in a representation election.).) And see *CPS Chemical Co., Inc. v. NLRB* (3rd Cir. 1998) 160 F.3d 150, 155 (stating that petitioning for an election is one of the ways to test the presumption of continued majority support).

unilaterally terminating the bargaining obligation (or rebutting the presumption of continued majority support) was inconsistent with the legislative intent. (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667, 676-677.)

Thus, *F&P Growers* is entirely consistent with *Montebello Rose*. Tri-Fanucchi's efforts to manufacture a purported "split in authority" between those cases and between *Montebello Rose* and the Court of Appeal's decision in this case by misconstruing the holding of *Montebello Rose* should be rejected.[14]

## IV. TRI-FANUCCHI INCORRECTLY ARGUES THAT THE BOARD AND THE COURT OF APPEAL SHOULD HAVE APPLIED NLRA PRECEDENT, BUT, EVEN HAD THAT PRECEDENT BEEN APPLIED, TRI-FANUCCHI'S DEFENSE WOULD HAVE FAILED

Throughout its petition, Tri-Fanucchi asserts that the Board and the Court of Appeal should have followed NLRB precedent, which, according to Tri-Fanucchi, recognizes abandonment as a defense to the duty to bargain. However, Tri-Fanucchi does not cite a single NLRB decision in support of its argument. Thus, Tri-Fanucchi has utterly failed to support its argument that the Board and the Court of Appeal erred by failing to apply (unspecified) NLRB precedent.

Furthermore, Tri-Fanucchi conceded in its opening brief to the Court of Appeal that its abandonment defense is merely a permutation of the good faith

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[14] Tri-Fanucchi also argues that *F&P Growers* was wrongly decided. Tri-Fanucchi did not assert this claim before the Board or before the Court of Appeal and this contention, asserted for the first time before this Court should not be considered. (Cal. Rules of Court, Rule 8.500(c).) In any event, for the reasons discussed in this answer, the case was clearly correctly decided.

doubt/loss of majority defense. However, as discussed previously, the Board has found that defense to be inapplicable under the ALRA and the court in *F&P Growers v. ALRB* agreed. (*F&P Growers Assoc. v. ALRB, supra*, 168 Cal.App.3d 667.) Now, this Court of Appeal has agreed as well. (*Tri-Fanucchi Farms v. ALRB, supra*, 236 Cal.App.4th 1079, 1092-1093.)

Moreover, even if NLRB precedent were to be applied, Tri-Fanucchi's claim would necessarily fail because the NLRB has held that, to the extent that evidence of a period of union activity is relevant to a determination of whether the union lost the support of a majority of employees, the union may 'cure' a period of inactivity by reasserting its bargaining rights, after which any evidence of inactivity becomes irrelevant as a matter of law. Thus, in *Spillman Co., supra*, 311 NLRB 95, the union reasserted its bargaining rights after a period of inactivity. After this reassertion, the employer withdrew recognition, citing the union's prior inactivity. (*Id.* at p. 97.) The NLRB rejected the employer's claim finding that "the Union's reassertion of its bargaining rights . . . negated any inference to be drawn from the preceding period of inactivity." (*Id.* at pp. 95-96.) Likewise, in *Pioneer Inn Associates* (1977) 228 NLRB 1263, 1264, the NLRB held that, to defeat a claim that a union has become defunct through a period of inactivity, the union "need only show that it is willing and able to represent the covered employees at the time its status is called into question." The Ninth Circuit Court of Appeal upheld the NLRB's decision. (*Pioneer Inn Associates v. NLRB* (9th Cir. 1978) 578 F.2d 835, 839-840.) (See also *Whisper*

*Soft Mills, Inc. v. NLRB* (9th Cir. 1985) 754 F.2d 1381, 1387 ("An employer may rebut that presumption [of majority support], so as to withdraw recognition, by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status *at the time the employer refused to bargain.*) (bracketed material and emphasis supplied).) The ALRB itself has held that, even if it were to apply NLRB law on abandonment, once a previously inactive union reasserts its bargaining rights, an abandonment defense becomes an impossibility. (*Ventura County Fruit Growers, Inc., supra,* 10 ALRB No. 45 pp. 7-8; *Dole Fresh Fruit Co., Inc., supra,* 22 ALRB No. 4 p. 8; *Arnaudo Bros., LP, supra,* 40 ALRB No. 3 at p. 12 fn. 3).).

Tri-Fanucchi has failed to even cite the authority it claims the Board and the Court of Appeal erroneously failed to follow, it has admitted that its abandonment claim falls within the class of claims whose inapplicability to the ALRA has been judicially confirmed, and, even if NLRB precedent were applied, Tri-Fanucchi's claim would fail as a matter of law. Accordingly, it is clear that the Court of Appeal's decision was correct and no review is required.

## V. THE COURT OF APPEAL'S HOLDING RECOGNIZING AN "ABANDONMENT" DEFENSE TO MMC IN THE *GERAWAN* DECISION, WHILE INCORRECT, DOES NOT CONFLICT WITH ITS HOLDING ON ABANDONMENT IN THIS CASE

Tri-Fanucchi presents the strained argument that this Court's review is necessary due to "discord" between the Court of Appeal's decision in this case and the decision issued the same day by the same court in *Gerawan Farming,*

*Inc. v. ALRB*. This argument fails as well. While the *Gerawan* decision is incorrectly decided, even if its correctness is assumed for the sake of argument, the facts and holding of that case are entirely distinct from the facts and holding of this case. Thus, the *Gerawan* ruling provides no basis whatsoever to review the Court of Appeal's decision in this case.

*Gerawan Farming, Inc. v. ALRB* involved the application of the ALRA's MMC provisions. (Lab. Code, § 1164 et seq.) Under MMC, the employer or the union may invoke the process and, provided that certain prerequisites set forth in the statute are met, the parties will be referred to MMC. (Lab. Code, § 1164 subd. (a).) One of the statutory prerequisites that must be met is that the union must be "certified as the exclusive bargaining agent . . ." (*Ibid.*)

For reasons not germane to this case, the Court of Appeal held that the MMC statutes were unconstitutional. (*Gerawan Farming Inc. v. ALRB, supra,* 236 Cal.App.4th 1024, 1065-1076.) However, the Court of Appeal issued an alternative holding finding that, even if MMC were constitutional, an employer faced with potential referral to MMC must be allowed to establish "abandonment" by the union to negate the statutory prerequisite that the union be "certified as the exclusive bargaining agent."

The correctness or incorrectness of the Court of Appeal's recognition of an abandonment defense to MMC in *Gerawan Farming, Inc. v. ALRB* is not at

issue here.[15] Nevertheless, even were it to be assumed, *arguendo*, that the Court of Appeal's holding on abandonment in the MMC context were correct, that holding has no impact whatsoever on the instant case, as the Court of Appeal itself made clear.

The basis of the Court of Appeal's conclusion in *Gerawan Farming, Inc. v. ALRB* that abandonment could be asserted as a defense to a referral to MMC was that MMC proceedings do not constitute collective bargaining. Thus, the Court of Appeal stated that "since the MMC process differs materially from bargaining and is largely a post-bargaining process, the employer's continuing duty to bargain is not an impediment to our recognition of the employer's ability to raise, at that stage, a defense that the union forfeited its representative status by abandonment." (*Gerawan Farming Inc. v. ALRB, supra,* 236 Cal.App.4th 1024, 1058-1059.) The Court of Appeal explicitly stated that its recognition of MMC abandonment did *not* extend to situations where the duty to bargain was involved. (*Id.* at 1058 ("The rule that an employer must continue to bargain in good faith with the originally certified union is not affected or impaired by allowing an employer to raise the issue of abandonment in response to a request

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[15] The Board believes that the Court of Appeal's holding in *Gerawan Farming, Inc. v. ALRB* is incorrect and has filed a petition for review in this court challenging both the abandonment holding and the Court of Appeal's holding on the constitutionality of MMC, which petition for review is currently pending. (*Gerawan Farming, Inc. v. ALRB*, Case Nos. S227243 & S227250.)

to commence the MMC process.").) Indeed, Gerawan conceded, and the Court of Appeal agreed, that, even if Gerawan established that "abandonment" on the part of the UFW precluded referral to MMC, Gerawan's duty to bargain would continue in force. (*Id.* at 1054.)

The Court of Appeal went so far as to take the step of confirming the inapplicability of its rationale in *Gerawan Farming, Inc. v. ALRB* to the instant case. The Court of Appeal confirmed that its recognition of the viability of an abandonment defense applied to the "limited context" of defending against an MMC request and that the basis for its recognition was that MMC was "not a mere extension of voluntary bargaining but is a distinct legal procedure" and, therefore, "the continuing duty to bargain was not an obstacle to raising abandonment at that stage." (*Tri-Fanucchi Farms v. ALRB, supra,* 236 Cal.App.4th 1079, 1084-1085.) In contrast, the Court of Appeal stated, Tri-Fanucchi was not asserting a defense to an MMC request but "simply *refused to bargain.*" (*Ibid.* (emphasis in original).)[16]

Thus, Tri-Fanucchi's claim that the Court of Appeal's decision in the instant case creates "discord" that must be resolved by this Court is unfounded. The rationale of the *Gerawan* decision rests on the premise that the general rules

[16] See also page 1064 of the *Gerawan* decision, in which the Court of Appeal stated that "we have reached this holding within the peculiar context of this case—namely, the employer's ability to defend a union's MMC request. Our opinion is intended to be limited to that context."

pertaining to the duty to bargain under the ALRA, which preclude the abandonment defense, do not apply to MMC because referral to MMC essentially terminates collective bargaining. While that premise, and the conclusions drawn by the Court of Appeal are reversible error, even were they to stand, they simply have no application to this case.

## CONCLUSION

For the foregoing reasons, the Board respectfully submits that review of the portion of the Court of Appeal's decision affirming the Board's rejection of Tri-Fanucchi's abandonment defense is not necessary.

DATED: July 13, 2015

Respectfully submitted,

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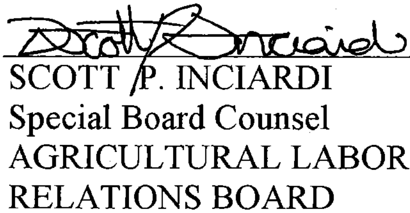
## CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), the undersigned hereby certifies that the Agricultural Labor Relations Board's Petition for Review contains 8,371 words according to the word count function included in Microsoft Word software with which the brief was written.

DATED: July 13, 2015



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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 **July 13, 2015**, I served the within **PETITION FOR REVIEW** 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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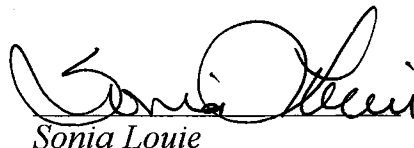
Executed on **July 13, 2015**, at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.



*Sonia Louie*