IRELL & MANELLA LLP
David A. Schwarz (Cal. Bar No. 159376)
dschwarz@irell.com
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Telephone: (310) 277-1010
Facsimile: (310) 203-7199

Attorneys for Plaintiffs
Fowler Packing Company, Inc. and
Gerawan Farming, Inc.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FOWLER PACKING COMPANY, INC.; GERAWAN FARMING, INC.,

Plaintiffs,

v.

DAVID M. LANIER, in his official capacity as Secretary of the California Labor and Workforce Development Agency; CHRISTINE BAKER, in her official capacity as the Director of the Department of Industrial Relations; JULIE A. SU, in her official capacity as California Labor Commissioner,

Defendants.

Case No._____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR:

(1) VIOLATION OF U.S. CONST., AMEND. XIV AND CAL. CONST., ART. I, § 7;

(2) VIOLATION OF U.S. CONST., ART. I, § 10 AND CAL. CONST., ART. I, § 9; AND

(3) VIOLATION OF CAL. CONST., ART. IV, § 16.

INTRODUCTION

1. This is a constitutional challenge to the intentional and arbitrary legislative targeting of two San Joaquin Valley farmers, Fowler Packing Company ("Fowler") and Gerawan Farming, Inc. ("Gerawan"), for punishment via Assembly Bill 1513 ("AB 1513"), codified as Labor Code Section 226.2 *et seq*. Prior to the enactment of AB 1513, California had in place a system of penalizing companies that failed to provide compensation under applicable minimum wage requirements for rest, recovery, and meal periods, *i.e.*, "nonproductive time." By passage of this legislation, punishment was waived as to all non-compliant employers (with the exception of Plaintiffs), provided that the employers made payment of back wages for nonproductive time within a specified time period. The ostensible purpose of AB 1513 was to insure that workers were "made whole" promptly and to cause the resolution of pending wage and hour class actions by minimizing the risk of crippling penalty judgments caused by these litigations. As enacted, AB 1513 deliberately excluded Fowler and Gerawan.

2. Like other employers directly affected by AB 1513, Fowler and Gerawan are now defending themselves in class actions based on identical nonproductive time wage and hour claims. But unlike other similarly situated companies, Fowler and Gerawan were deliberately excluded from AB 1513's so-called "Penalty Relief Plan," carved out of the act's affirmative defense, and singled out for special punishment via *ad hoc* exceptions known and intended to apply specifically to them, and to them alone. In essence, the Legislature created an amnesty program for an entire class of California employers facing wage and hour class action suits, except for Fowler and Gerawan.

3. This targeting was intentional. AB 1513 was reverse-engineered via a last minute legislative "gut and amend" designed to punish Fowler and Gerawan. The targeting was in response to demands by the United Farm Workers of America ("UFW") that these growers be excluded from AB 1513's "safe harbor" provisions as the price for the UFW's non-opposition to this legislation. The UFW has been involved in a series of labor disputes with Fowler, which has been subject to UFW organizing drives, and with Gerawan, where its employees successfully

petitioned the California Agricultural Labor Relations Board (the "ALRB") for an election to decertify the UFW as their bargaining representative.[1]

4. While the UFW now publicly claims credit for the passage of AB 1513, it does not mention its role in carving out Fowler and Gerawan – and their employees – from the legislation, or the reasons behind its demand that these two growers be singled out for special punishment. But the author of AB 1513, Assembly Member Das Williams, admits that excluding Gerawan and Fowler from the bill's protection was part of a "pact" to keep the UFW from opposing the measure.

5. This targeting is also arbitrary. There was no non-discriminatory reason to exclude these two companies from AB 1513's statutory safe harbor. Both Fowler and Gerawan have been targeted by the UFW, and both are being sued by the General Counsel of the UFW, who is the attorney of record for plaintiffs in the wage and hour suits against both companies. The effect and intent of the UFW's efforts was to punish Fowler and Gerawan, albeit at the expense of the workers at these two companies. The statute exposes Fowler and Gerawan to a unique set of punishments in the form of the potential for massive statutory and civil penalties.

6. Though the UFW takes credit for "protect[ing] pay for all piece rate farm workers," the UFW's demand that AB 1513 target two growers for punishment also delays, and puts at risk, any potential recovery by workers in the litigations filed by its General Counsel against Fowler and Gerawan. These employees are stripped of the benefits of AB 1513 accorded to other, similarly situated farm workers in this State. Unlike workers who might obtain prompt payment of back wages by employers who opt for the protections afforded under AB 1513's amnesty program, the workers represented by the UFW's General Counsel in these class actions obtain no protection as a result of this "pact" between the UFW and the Legislature. For these workers, the Legislature's

[1] Gerawan also successfully challenged the constitutionality of the so-called "Mandatory Mediation and Conciliation" procedures under the California Agricultural Labor Relations Act. The 2002 "MMC" statute was championed by the UFW as a means to force companies into contracts with the union and to impose dues and agency fees on workers. That statutory scheme was invoked in 2013 by the UFW to impose an ALRB-ordered collective bargaining "agreement" on Gerawan and its workers. In May, 2015, the Court of Appeal struck down this law. *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 236 Cal.App.4th 1024 (2015), *petition granted* (Aug. 7, 2015).

promise to Governor Jerry Brown that piece-rate workers would receive "larger and more timely back pay recoveries than could be expected through litigation" is a false promise. (Letter to Governor Brown from Assembly Member Williams, at 1 (Sept. 14, 2015)) (Attached hereto as Exhibit 1). AB 1513 does not secure for the Fowler and Gerawan employees complete or timely payment of back wages, as intended under Labor Code Section 226.2(b), notwithstanding the desire of both Fowler and Gerawan to make such payments, if, like others, they are relieved of unanticipated statutory penalties and damages.

7. As to Fowler and Gerawan, AB 1513's unequal treatment serves only the illegitimate end of targeting two growers, both of which have a history of paying the industry's highest wages and providing the best working conditions. No rational legislative purpose was articulated, or can be stated, for excluding these employers and their workers from the protections otherwise offered similarly situated employers and employees.

8. The author of AB 1513, Assembly Member Williams, called these targeted exclusions part of a "grand compromise," and labeled Fowler and Gerawan as "potential bad actors" not deserving of equal protection under the law, creating a unique statutory scheme targeting two companies. In making these determinations, the Legislature inflicted extraordinary reputational injuries upon Fowler and Gerawan and imposed "punishment" within the meaning of the Bill of Attainder Clauses of the United States and California Constitutions.

9. While AB 1513 has the effect and purpose of singling out Fowler and Gerawan in all but name, any legislative act that applies to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial is prohibited by the Constitution. Such conduct is prohibited whether or not the targeting was intended to punish one person, or all members of a group to which he belongs. *United States v. Lovett*, 328 U.S. 303, 315 (1946). These "carve outs" are naked preferences – punitive by design, retributive in effect, and contrary to both the purpose of the act itself and basic safeguards under our Constitution: "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

10. Fowler and Gerawan ask this Court to declare that the challenged provisions of Section 226.2 are unconstitutional and permanently enjoin their enforcement. This would expand the law's protection to Gerawan and Fowler, but otherwise leave the law unchanged.

PARTIES

11. Plaintiff FOWLER PACKING COMPANY, INC. is a California corporation with headquarters located in Fresno, California. Fowler is a family-owned grower, packer, and shipper of fresh produce. Fowler is one of the largest growers, packers, and shippers of fresh produce in the United States. It employs 400 full-time workers and around 2,500 seasonal employees in any given year.

12. Plaintiff GERAWAN FARMING, INC. is a California corporation with headquarters located in Fresno, California. Gerawan is a market leader in the cultivation and sale of stone fruits. It is a family-owned business and has been in operation since 1938. It employs as many as 10,000 seasonal employees in any given year.

13. Defendant DAVID M. LANIER is Secretary of the California Labor and Workforce Development Agency ("the Secretary"). The Secretary has the power of general supervision over the operations of each department, office, and unit within the Labor and Workforce Development Agency, including the Department of Industrial Relations and the Office of the California Labor Commissioner.

14. Defendant CHRISTINE BAKER is the Director of the California Director of Industrial Relations ("the Director"). The Director is charged with enforcing provisions of Section 226.2 of the California Labor Code. The Director also has supervisory authority over the Office of the California Labor Commissioner.

15. Defendant JULIE A. SU is the California Labor Commissioner ("the Commissioner"). The Commissioner is charged with enforcing California wage laws, including Section 226.2 of the California Labor Code.

16. The relief requested in this action is sought against each Defendant in his or her official capacity as agents of the State of California, the California Labor and Workforce Development Agency, the California Department of Industrial Relations, and the Division of Labor Standards

Enforcement, all public entities under 42 U.S.C. § 1983 .

JURISDICTION AND VENUE

17. This case arises under the Constitution of the United States and 42 U.S.C. § 1983. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

18. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because Plaintiffs face injury within this district, a substantial part of the events giving rise to the claim occurred in this district, and all Defendants reside in the State of California.

FACTUAL ALLEGATIONS

I. Background

19. Historically, California employers who compensated workers by piece-rate or task (rather than by a fixed hourly wage) relied on averaging workers' total compensation to satisfy California's minimum wage requirements. An employer would remain in compliance with the law so long as it assured that the employees' average hourly compensation equaled or exceeded the required minimum hourly rate. This "averaging formula" was consistent with the approach that federal courts had adopted in interpreting various federal minimum wage statutes.

20. In *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013), and *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013), the California Courts of Appeal held that California's minimum wage laws require workers to be compensated separately for each individual hour on the job. *Gonzalez* held that workers who are compensated by the piece or task must also be paid for each hour of nonproductive time. Nonproductive time consists of hours that the employee spends at work but not earning piece-rate compensation (*e.g.*, time spent attending meetings, training, or waiting for work). In *Bluford*, the court held that piece-rate workers must also be compensated separately for rest, recovery and meal periods.

21. *Gonzalez* and *Bluford* exposed California employers to unanticipated and potentially crippling wage and hour class action litigation. Post-*Gonzalez* and *Bluford*, employers who believed in good faith that their payment practices were consistent with the law faced the potential for retroactive liabilities for unpaid wages and substantial statutory penalties and attorneys' fees.

II. AB 1513

22. To address the change in the law and its attendant consequences, AB 1513 codified the *Gonzalez* and *Buford* decisions and also created a safe harbor if back wages are paid promptly. As described by its author, Assembly Member Williams, the bill "clarifies and settles the pay requirements for piece-rate workers for mandated rest and recovery breaks and other nonproductive time going forward." Under Section 226.2(a)(1), employees must be compensated for "rest and recovery periods and other nonproductive time separate from any piece-rate compensation." (Ex. 1 at 1.)

23. AB 1513 also addressed the serious and unforeseen consequences of these decisions as to pending wage and hour claims by providing a "short window of time for employers to make back wage payments to workers for rest and recovery breaks and other nonproductive time, in exchange for relief from statutory penalties and other damages." (Ex. 1 at 1.) This was to address, among other things, concerns that the *Bluford* and *Gonzalez* decisions "may generate significant litigation and administrative workload for employers, the courts, and the Labor Commissioner, in actions to recover back wages and penalties." (*Id.*)

24. Under Section 226.2, employers are given an "affirmative defense" where the employer pays its employees for previously uncompensated or undercompensated nonproductive or rest and recovery time. That provision states:

> Notwithstanding any other statute or regulation, the employer and any other person shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226, based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015 . . . .

25. According to the author of the legislation, this safe harbor gives employers an incentive to promptly compensate their employees for unpaid nonproductive time while enabling them to avoid the potentially catastrophic consequences of litigation wage and hour disputes:

> This litigation [over unpaid nonproductive time] will be costly and there is significant uncertainty whether workers will recover back pay, and when

> that may occur. As such, there is a strong desire among employee and employer representatives to resolve back wage claims and set compensation standards going forward with future litigation.

(Ex. 1 at 1.)

III. AB 1513's "Carve Outs"

26. Two companies were carved out of the safe harbor. Section 226.2(g)(2)(A) states that the affirmative defense does not apply to any nonproductive wage and hour claim that was "asserted in a court pleading prior to March 1, 2014." This carve out would exclude Gerawan from the statutory amnesty provided other employers sued after the *Gonzalez* and *Bluford* decisions because it was sued by the General Counsel of the UFW about three weeks before the March 1, 2014 cut-off. *Amaro v. Gerawan Farming, Inc*, No. 1:14-cv-00147-DAD-SAB (E.D. Cal.) (Feb. 3, 2014).

27. A second carve out (Section 226.2(g)(5)) excludes "[c]laims for paid rest or recovery periods or pay for other nonproductive time that were made in any case filed prior to April 1, 2015, when the case contained by that date an allegation that the employer had intentionally stolen, diminished, or otherwise deprived employees of wages through the use of fictitious worker names or names of workers that were not actually working." But for this April 1, 2015 carve out, Fowler would be protected by AB 1513's statutory safe harbor, as it was not sued by the General Counsel of the UFW until March 17, 2015 – more than one year after the March 1, 2014 "safe harbor" date. *Aldapa v. Fowler Packing Company, Inc.*, No. 1:15-cv-00420-JAM-SAB (E.D. Cal.) (filed Mar. 17, 2015). This so-called "fictitious worker" or "ghost worker" carve out excludes any employer from the protections of the affirmative defense where it is *alleged* to have used fictitious worker names in order to deprive employees of wages.

28. Section 226.2(g) singles out Fowler – and no other grower – for differential treatment. Under this carve out, the affirmative defense is not available to Fowler, even if a judge or jury were to later find that the ghost worker allegations in this lawsuit are without merit.

29. A third carve out (also contained in Section 226.2(g)(2)(A)) eliminates the affirmative defense as to claims "asserted in an amendment to a claim that relates back to a court pleading filed prior to March 1, 2014, and the amendment or permission for amendment was filed prior to

July 1, 2015." As with the ghost worker carve out, this exception would penalize a grower otherwise within the safe harbor based solely on the addition of an allegation relating to nonproductive time violations. This carve out would have applied to Delano Farms Company ("Delano"), a third agricultural employer sued by plaintiffs represented by the General Counsel of the UFW, provided the plaintiffs were granted leave to amend their complaint to add nonproductive time allegations. *Arredondo vs. Delano Farms Company*, No. 1:09-cv-01247-MJS (E.D. Cal.) (filed July 17, 2009).

30. As with the Gerawan and Fowler carve out dates, the selection of this July 1, 2015 cut-off was not by happenstance: On June 22, 2015 – more than six years after the filing of the complaint, but only one week before the July 1, 2015 cut-off – the *Arredondo* plaintiffs filed leave to amend their complaint to add nonproductive time allegations. While the court denied that request in October 22, 2015, the choice of the July 1, 2015 cut-off was evidently selected to exclude one grower – Delano – if and when leave to amend the complaint was granted.

31. These are the only three pending wage and hour class actions filed by the General Counsel of the UFW in the prior seven years involving nonproductive time claims. Each of these three growers has been involved, or is currently involved, in labor disputes with the UFW.

32. Each of these carve outs were tailored to eliminate the protections of the affirmative defense as to three growers, all of whom had been sued in wage and hour class actions brought by the same lawyer. Nothing in the text of Section 226.2 or its legislative history explains their existence or legislative purpose, or accounts for the otherwise arbitrary selection of the three cut-off dates.

IV. The Targeted Nature Of The Carve Outs

33. AB 1513 was not the first legislative attempt to address the retroactive impact of *Gonzalez* and *Bluford*. On or about August 28, 2014, draft legislation (the "2014 Draft Legislation") (attached hereto as Exhibit 2) was proposed near the end of the legislative session to address the consequences of these decisions and to enable prompt payment of back pay to workers without the risks of punitive penalties or the uncertainties of litigation. As with AB 1513, the 2014 Draft Legislation create an affirmative defense for any employer sued for nonproductive

time wage and hour violations. It provided amnesty from the penalties and liabilities as to any employer sued after July 1, 2013, *i.e.*, a date after which both *Gonzalez* and *Bluford* became final. And, as with AB 1513, the 2014 Draft Legislation provided a window for employers to provide back pay for previously uncompensated or undercompensated wages. This draft contained none of the special carve outs found in AB 1513. The 2014 Draft Legislation was never formally introduced.

34. Legislative efforts to address *Gonzalez* and *Bluford* resumed in 2015. As initially introduced on or about March 5, 2015, AB 1513 proposed the repeal of Labor Code provisions that required the Commission on Health and Safety and Workers' Compensation to undertake a series of studies on workers' compensation insurance. The bill made no mention of piece-rate compensation.

35. On or about August 27, 2015, a new version of the bill was introduced. This "gut and amend" iteration bore no resemblance to the initial legislation. It contained all of the carve outs targeting Gerawan and Fowler, as well as Delano.

36. The transmogrification of the bill was engineered in closed negotiations between the representatives of the Labor and Workforce Development Agency, and certain employer groups and labor unions, including the UFW. The initial draft revision of the bill was circulated privately among these negotiators sometime during the late Spring or Summer of 2015. This draft codified the *Gonzalez* and *Bluford* while creating an affirmative defense to the retroactive impact of these decisions as to any complaint filed after March 1, 2014, *i.e.*, three weeks after the General Counsel of the UFW filed suit against Gerawan. Instead of making the affirmative defense available to all employers who were sued after the *Gonzalez* and *Bluford* decisions became final (as was proposed in the 2014 Draft Legislation), AB 1513 removed protection in any suit containing claims of unpaid nonproductive time that was filed before March 1, 2014 – eight months after *Gonzalez* and *Bluford* became final. This cut-off was intended to exclude Gerawan in all but name.

37. The draft legislation was further revised through closed-door negotiations immediately prior to its introduction as a "gut and amend" bill in late August, 2015. The version which emerged from these negotiations on August 27, 2015 contained two changes specific to two

agricultural growers. The first change was the addition of the ghost worker carve out (*i.e.*, the Fowler carve out). The second was the addition of the exclusion of complaints, otherwise protected by the affirmative defense, that were amended before July 1, 2015 to add nonproductive time claims (*i.e.*, the Delano carve out).

38. As amended, AB 1513 was presented to the Legislature on August 27, 2015. This was sixteen days before the close of the legislative session at September 12, 2015. The last-minute nature of the sweeping amendments to the bill led Senator Holly Mitchell to comment during a September 3, 2015 hearing before the Senate Labor and Industrial Relations Committee that "with all of this new language swirling" about "not only is the ink wet there's no ink on the paper on some of these issues that have been surfaced that are . . . core, fundamental issues."[2]

V. The Punitive Intent And Effect Of The Fowler And Gerawan "Carve Outs"

39. As explained above, Section 226.2(g) contains three statutory cut-off dates, denying "Penalty Relief" protection against claims for unpaid nonproductive time in any suit that: (1) was filed prior to March 1, 2014; (2) was filed prior to (but not *after*) April 1, 2015 in a suit that contains a bare allegation that the employer used ghost workers; or (3) contains an amendment alleging nonproductive time claims filed before July 1, 2015 and relates back to a suit filed before March 1, 2014. Each of these cut-offs correspond almost to the day with a lawsuit or amendment filed by counsel representing the plaintiffs, who is also the General Counsel for the UFW.

40. The last minute "gut and amend" of the bill created, in the words of Senator Jeff Stone, the danger of "delaying or eliminating" public scrutiny of legislative action. He stated during a September 3, 2015 Senate Labor and Industrial Relations Committee hearing that AB 1513 "pick[s] winners and losers" by design and constitutes a "rushing to judgment" that would "arbitrarily disqualify for safe harbor [protection] one company [Fowler] based on an allegation rather than a conclusion that they did in fact do something in a capricious, targeted, and unlawful way. I think that the courts need to adjudicate that before we come to a decision on that."

41. At that same hearing, Senator Hannah-Beth Jackson acknowledged the "unusual

[2] A video of this hearing may be found at http://calchannel.granicus.com/MediaPlayer.php?view_id=&clip_id=3191&meta_id=103629

nature" of AB 1513's affirmative defense, but supported it based on her view that the retroactive nature of the statute must "be fair to everybody" and that "there should not be this penalty aspect that's going to put a lot of people out of business. That's not the purpose." Though the effect, if not the "purpose," of Section 226.2(g) was to target Fowler and Gerawan for punishment, these sections were left undisturbed.

42. On October 10, 2015, Governor Brown signed AB 1513 into law.

43. The author of Section 226.2, Assembly Member Williams, has publicly acknowledged that the carve outs were included to secure the support of the UFW, who insisted that Gerawan and Fowler be excluded from the bill's protections. A Sacramento Bee article from September 30, 2015, entitled "How Jerry Brown and farmers settled a major wage dispute," explained this arrangement as follows:

> In the waning days of the recently concluded legislative session, the Brown administration, business and labor officials emerged from dozens of hours of private meetings and conference calls with a plan to resolve a festering dispute over pay for farmworkers and other low-wage laborers in California.
>
> The solution, passed in a bill on the Legislature's final day, reflected a multimillion dollar compromise: In exchange for back payments to thousands of employees for rest periods and other work hours, farmers would receive protection from lawsuits – and potentially far stiffer penalties – for past failure to pay.
>
> ***
>
> Yet the compromise came at a cost. To keep the United Farm Workers union from opposing the measure, the pact included exemptions effectively excluding Fresno County's controversial Gerawan Farming operation and Fowler Packing Co., among other growers, from the bill's protection from existing litigation.
>
> Those carve-outs were necessary to maintain the support of labor, [Assembly Member] Williams said.
>
> ***
>
> Gerawan has been the subject of UFW animosity for a bruising case over employee representation. Mario Martinez, a lawyer for the union, is among attorneys listed on class-action lawsuits against both Gerawan and Fowler.

Neither the UFW nor Martinez responded to requests for comment.[3]

44. According to the Sacramento Bee, "Williams said of exemptions in the bill that 'there has to be a cutoff at some point, and no matter what the cutoff point is, somebody's going to be left out.' But Williams, a Santa Barbara Democrat, acknowledged concern among negotiators about Gerawan and Fowler." (Ex. 3 at 2.) He explained that this disparate treatment, based on pretextual and arbitrary line drawing, was justified because Gerawan and Fowler may be guilty of some unspecified and unproven illicit activity. As he put it, "'[f]rom my perspective, if we're going to create a grand compromise that helps most growers and helps most workers, you don't want to let it get blown up because there's somebody who's a potential bad actor.'" (*Id.*)

45. Assembly Member Williams' conclusion that "potential bad actors" could be singled out for punishment was not based on a judicial determination of guilt. Nothing in the legislative record indicates that Gerawan and Fowler are any different from all other employers who were granted amnesty from the penalties, fines, damages, and other punitive aspects of the California Labor Code. Instead, without having had the benefit of any judicial proceeding in which they could defend themselves, Gerawan and Fowler have been unfairly attainted with the label of "bad actors" by legislative decree.

46. The statement of presumptive guilt of Gerawan also suggests a retributive motivation, given Gerawan's resistance to efforts by the UFW and the ALRB to impose a MMC contract – one that would have netted millions of dollars in employee dues and fees to the UFW. As to Fowler, no legitimate explanation may be offered as to why a case filed after the March 1, 2014 cut-off (but *before* April 1, 2015) should be excluded from the amnesty provided other employers based on a bare ghost worker allegation, or why an identical complaint, filed *after* April 1, 2015, would be protected under the affirmative defense. The only plausible (and illegitimate) explanation is to create subject Fowler to this unique punishment.

47. Given that the purpose of AB 1513 is to protect employers who make good faith efforts

[3] How Jerry Brown and Farmers Settled a Major Wage Dispute, The Sacramento Bee, (Sept. 30, 2015), http://www.sacbee.com/news/politics-government/capitol-alert/article37129500.html (Attached as Exhibit 3).

to comply with reporting and minimum wage requirements under California law, the legislative badge of infamy attached to Fowler is no less troubling, particularly given that it was Fowler – not the class action plaintiffs or the UFW – which discovered, investigated, and redressed the alleged ghost worker violations before any lawsuit was filed against it.

48. Fowler did what the State of California would want any responsible employer to do. It set up a confidential employee hotline, so that workers could report unfair labor practices. When it received a tip that one crew boss was illegally padding the employee rolls, it immediately investigated the charge, reviewed its payroll records, terminated the supervisor, and made whole every worker whose pay check was short-changed due to the actions of one rogue employee. Yet the Parnagian Family, which has operated Fowler for three generations, and has never been found by the State of California to have committed a single unfair labor practice, is now singled out for punitive treatment by the Legislature based on this charge alone.

49. While Gerawan and Fowler were carved out of the safe harbor provisions, another employer, AT&T, was given a special benefit so as to extend protections as to its newly-acquired subsidiary, DirecTV. Prior to AB 1513's passage, AT&T acquired Direct TV, which had been embroiled in piece-rate wage and hour litigation. Section 226.2's compensation and reporting requirements went into effect on January 1, 2016. The law, however, gives AT&T until April 30, 2016 to bring DirecTV into compliance. Under Section 226.2(a)(3)(C), the April 30, 2016 extended deadline applies to any employer who (I) "was acquired by another legal entity on or after July 1, 2015, and before October 1, 2015"; (II) "employed at least 4,700 employees in this state at the time of the acquisition"; (III) "employed at least 17,700 employees nationwide at the time of the acquisition"; and (IV) "was a publicly traded company on a national securities exchange at the time of acquisition."

50. This eleventh-hour amendment was added to suit AT&T's acquisition of DirecTV, and only AT&T. As reported by the Sacramento Bee, this was a "custom-tailored benefit for one telecommunications company, AT&T. The bill grants the company extra time to program payroll systems to comply with the law. The company, a major donor to Brown's political causes, recently acquired DirecTV, a company facing litigation over piece-rate pay." (Ex. 3 at 3.)

According to Assembly Member Williams, the special benefits accorded AT&T were necessary to "'put out some brush fires'" that "'can kind of blow things up.'" (*Id.*)

FIRST CLAIM FOR RELIEF

Violation Of The Right To Equal Protection

51. Fowler and Gerawan incorporate Paragraphs 1 to 50 as if set fully forth herein.

52. Sections 226.2(g)(2) and 226.2(g)(5) violate the Equal Protection Clause of the Fourteenth Amendment to United States Constitution and Article 1, Section 7 of the California Constitution. These provisions target Gerawan and Fowler for disparate treatment without a rational basis.

53. Section 226.2(g)(2)'s carve out for lawsuits filed before March 1, 2014 was specifically targeted at Gerawan.

54. Section 226.2(g)(2)'s March 1, 2014 cut-off date is arbitrary and does not advance the purposes of statute. In fact, it is antithetical to these purposes. Section 226.2 was intended to bring certainty to California's piece-rate compensation laws. It was also meant to benefit employers and employees by offering a quick and fair resolution to otherwise expensive, lengthy, and uncertain litigation. The March 1, 2014 cut-off does neither. As a result of this provision, the full extent of Gerawan's obligation to compensate its employees for past unpaid wages remains unresolved, as does the ability of workers to obtain the potential benefits accorded to other workers under AB 1513. In addition, Gerawan still faces the prospect of crippling liability, while its employees will have to wait for Gerawan's litigation to conclude before they can even hope to be compensated.

55. Section 226.2(g)(5)'s carve out for lawsuits containing ghost worker allegations filed prior to April 1, 2015 specifically targets Fowler.

56. Section 226.2(g)(5)'s carve out for lawsuits containing ghost worker allegations is arbitrary and does not advance the purposes of the statute. The carve out is not tailored to employers who have actually used ghost workers. The mere allegation that they have done so, however baseless, is sufficient to strip them of the safe harbor protections.

57. Section 226.2(g)(5) not only arbitrarily excludes and punishes one employer based

solely on an unproven allegation. It arbitrarily includes and protects employers, alleged to have used ghost workers, so long as they were sued after April 1, 2015. The ghost worker carve out thus does not punish actual wrongdoers, nor can it have a deterrent effect on future wrong doers given that it applies to a single employer. Instead, the ghost worker allegation carve out is simply a mechanism to subject Fowler to disparate and punitive legislative treatment based solely on an allegation of wrongdoing.

SECOND CLAIM FOR RELIEF

Unlawful Bill Of Attainder

58. Fowler and Gerawan incorporate Paragraphs 1 to 57 as if set fully forth herein.

59. Sections 226.2(g)(2) and 226.2(g)(5) violate the prohibition against Bills of Attainder of Article I, Section 10 of the United States Constitution and Article 1, Section 9 of the California Constitution. These provisions apply with specificity and constitute legislative punishment.

60. Section 226.2(g)(2) was targeted specifically at Gerawan. The March 1, 2014 cut-off date is only weeks after filing of the class action complaint against it.

61. Section 226.2(g)(5) was targeted specifically at Fowler. The April 1, 2015 cut-off date is only weeks after filing of the class action complaint against it.

62. Sections 226.2(g)(2) and 226.2(g)(5) constitute punishment because they mark specified employers with the brand of infamy. Without the benefit of due process afforded by a judicial proceeding, Gerawan and Fowler have been labeled as "bad actors" by the California Legislature and uniquely exposed to a statutory scheme of penalties.

63. Sections 226.2(g)(2) and 226.2(g)(5) constitute punishment because the severity of the burdens they impose on Fowler and Gerawan cannot be said to further any non-punitive legislative purpose. These provisions impede rather than further the purposes of the overall statutory scheme. The carve outs serve no legitimate state interest and are intended solely to punish Fowler and Gerawan at the demand of the UFW.

64. Sections 226.2(g)(2) and 226.2(g)(5) constitute punishment because the context, timing, structure, and legislative history of these provisions evince a legislative motivation to punish Fowler and Gerawan at the behest of the UFW. The carve outs were drafted to target two

specific employers, as tribute to a politically influential union, and were forced through the Legislature at the eleventh-hour without sufficient time for legislative debate or public oversight.

THIRD CLAIM FOR RELIEF

Violation Of Cal. Const., Art. IV, § 16

65. Fowler and Gerawan incorporate Paragraphs 1 to 64 as if set fully forth herein.

66. Sections 226.2(g)(2) and 226.2(g)(5) violate Article IV, Section 16 of the California Constitution. These provisions impose peculiar disabilities or burdensome conditions in the exercise of a common right on a class of persons – namely Fowler and Gerawan – arbitrarily selected from the general body of employers. Fowler and Gerawan stand in precisely the same relation to the subject of AB 1513, codified as California Labor Code Section 226.2, as other employers subject to potential penalties and liabilities for nonpayment or underpayment of nonproductive time. These provisions constitute laws of special applicability for which a law of general applicability – namely Section 226.2 – may be applied. Sections 226.2(g)(2) and 226.2(g)(5) are impermissible special legislation.

67. Section 226.2(g)(2)'s carve out for lawsuits filed before March 1, 2014 was specifically targeted at Gerawan. It singles out Gerawan for special mistreatment for which no rational, non-arbitrary, and non-discriminatory explanation may be given. The stated purpose of Section 226.2 is to codify *Gonzalez* and *Bluford* and enable prompt payment of back wages without the threat of massive statutory and civil penalties. Not only is Section 226.2(g)(2) unnecessary to effectuate the purpose of Section 226.2 as to Gerawan, it is contrary to its purpose.

68. As a result of this provision, the full extent of Gerawan's obligation to compensate its employees for past unpaid wages remains unresolved, as is the ability of Gerawan and its workers to obtain the potential benefits accorded to other employers and employees under AB 1513. The specific targeting of Gerawan has no fair and substantial relation to the purpose of the legislation.

69. Section 226.2(g)(5)'s carve out for lawsuits containing ghost worker allegations filed prior to (but not after) April 1, 2015 specifically targets Fowler and only Fowler. It singles out Fowler for special mistreatment for which no rational, non-arbitrary, and non-discriminatory explanation may be given. Specifically, the carve out is not tailored to employers who have

actually been found to have improperly used fictitious workers. Rather, it strips protection from one (but not all) of those employers merely accused of using ghost workers.

70. Section 226.2(g)(5) is further indefensible as its own limitation belies any possible need to specifically target employers alleged to have used fictitious workers. It arbitrarily selects such employers for punishment if they were sued before April 1 2015, while protecting those sued after April 1, 2015. It arbitrarily imposes peculiar disabilities or burdensome conditions on a class of persons – Fowler – arbitrarily selected from the general body of employers and even of those accused of using ghost workers. The specific targeting of Fowler has no fair and substantial relation to the purpose of the legislation.

71. Neither Section 226.2(g)(2) nor Section 226.2(g)(5) accomplishes any legitimate purpose which may not be accomplished by Section 226.2 generally.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Pursuant to 28 U.S.C. § 2201, sever California Labor Code Subsections 226.2(g)(2) and 226.2(g)(5) and declare these provisions as unconstitutional;

2. Enter preliminary and permanent injunctive relief prohibiting the enforcement of California Labor Code Subsections 226.2(g)(2) and 226.2(g)(5);

3. Award reasonable attorneys' fees and costs to the extent permitted by applicable law, including 42 U.S.C. § 1988; and

4. Award such additional and further relief as the Court finds just and proper.

Dated: January 22, 2016

IRELL & MANELLA LLP

By: David A. Schwarz

David A. Schwarz
Attorneys for Plaintiffs Fowler Packing Company, Inc. and Gerawan Farming, Inc.