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12 MARGARITA ALVAREZ BAUTISTA; ANA ROSA BAUTISTA;
SOCORRO RIVERA; MAURICIA CALVILLO; NATIVIDAD
13 CARRILLO; UNITED FARM WORKERS OF AMERICA; UFW
FOUNDATION

14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 CITY AND COUNTY OF LOS ANGELES

17 MARGARITA ALVAREZ BAUTISTA; ANA ROSA
18 BAUTISTA; SOCORRO RIVERA; MAURICIA
CALVILLO; NATIVIDAD CARRILLO; UNITED
19 FARM WORKERS OF AMERICA; UFW
20 FOUNDATION,

21 Plaintiffs,

22 vs.

23 STATE OF CALIFORNIA DIVISION OF
OCCUPATIONAL SAFETY AND HEALTH;
24 ELLEN WIDESS, IN ONLY HER OFFICIAL
CAPACITY AS CHIEF OF THE STATE OF
25 CALIFORNIA DIVISION OF OCCUPATIONAL
SAFETY AND HEALTH,

26 Defendants.

CASE NO.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND WRIT
OF MANDATE

1 **INTRODUCTION**

2 1. "Heat illness is totally preventable and should not occur if proper procedures are
3 followed."¹ Yet seven years after California enacted a regulation intended to protect outdoor
4 workers from heat illness, farm workers throughout the state continue to suffer and die from the
5 heat while the agency responsible for enforcing the regulation denies, misinterprets, and
6 systematically fails to perform its statutory enforcement duties. Plaintiffs bring this action
7 because Defendants Division of Occupational Safety and Health ("Cal/OSHA") and its Chief,
8 Ellen Widess, have failed and continue to fail to satisfy their statutory obligations to enforce the
9 Heat Illness Prevention regulation, Cal Code Regs. Title 8, § 3395, notwithstanding months of
10 advocacy pleading for reform and previous litigation directed at changing Cal/OSHA practices.

11 2. Already this year, Cal/OSHA is investigating four deaths of farm workers who
12 were laboring in the California heat, and past years' temperatures confirm that soaring
13 temperatures could persist into the winter months in California's fields. All told, at least 28 farm
14 workers have died of what were likely heat illnesses since the Heat Illness Prevention regulation
15 was enacted in 2005, yet Cal/OSHA limps along, continuing its practice of ignoring or failing to
16 satisfy its statutory obligations to keep farm workers safe from heat illness and death.
17 Notwithstanding this high continued death toll, Cal/OSHA's record of enforcement is shockingly
18 flawed. Cal/OSHA's own projections reflect 24% noncompliance among employers Cal/OSHA
19 investigates.² Given California's more than 35,000 farms employing at least 650,000 farm
20 workers, Cal/OSHA's projections would leave at least 156,000 farm workers at 8,400 farms
21 dramatically unsafe.

22 3. The actual number of farm workers endangered by the heat is even higher than
23 Cal/OSHA's statistics suggest. By regularly failing to issue citations for known violations,
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25 ¹ California Department of Industrial Relations, "Cal/OSHA issues citations in first confirmed
26 heat related fatality for 2011," January 11, 2012 (quoting Cal/OSHA Chief Ellen Widess),
available at <http://www.dir.ca.gov/DIRNews/2012/IR2012-02.html>.

27 ² California Department of Industrial Relations, "Cal/OSHA takes a proactive, comprehensive
28 approach to protecting workers from heat illness," July 30, 2012, available at
<http://www.dir.ca.gov/DIRNews/2012/IR2012-32.html>.

1 Cal/OSHA creates the appearance of increased compliance even as it fails to improve the quality
2 of its enforcement activity consistent with its statutory obligations.

3 4. Even when Cal/OSHA does issue citations, it routinely fails to take the steps
4 necessary to ensure that its actions result in improved farm worker safety, such as imposing and
5 collecting meaningful penalties and verifying that hazards have been corrected. For example, in
6 the farm worker deaths that Cal/OSHA has recognized as heat-related since the Heat Illness
7 Prevention regulation was enacted, the final penalties assessed against employers have averaged
8 less than \$6000. Plaintiffs are informed and believe that, because Cal/OSHA systematically fails
9 to collect final penalties, the amounts actually paid by those employers are lower still.

10 5. Plaintiffs United Farm Workers of America (“UFW”) and UFW Foundation
11 (“UFWF”) have been stymied in their recent efforts to improve farm worker heat safety because
12 of Cal/OSHA’s unreasonable and unlawful policies and practices. For example, in the summer of
13 2011, UFW staff filed or assisted farm workers in filing 78 complaints reporting serious
14 violations of the Heat Illness Prevention regulation by agricultural employers. Cal/OSHA failed
15 to conduct any on-site inspection for at least 55 of the 78 complaints; did not even attempt to
16 initiate an on-site inspection within the statutory time frame for at least 43 of the 78 complaints;
17 failed to contact the complainant at any time regarding 32 of the 78 complaints; and, despite
18 documented violations, issued a citation for violation of the Heat Illness Prevention regulation in
19 connection with only 3 of the 78 complaints.

20 6. This photo illustrates just one example of an instance in which Cal/OSHA
21 concluded it could not issue a citation notwithstanding concrete evidence provided to it of
22 extreme deviation from farm worker safety:
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11 An organizer for Plaintiff UFW filed a complaint with Cal/OSHA on July 19, 2011, after
12 observing that this ragged tarp strung across four sticks, just a few feet off the ground, was the
13 only shade available to approximately 18 workers for Golden Hills farm labor contractor (“FLC”)
14 who were working in 86-degree heat at Borba Farms. When Cal/OSHA investigated the work
15 site on July 22, 2011, it observed no employees working and took no further action against
16 Golden Hills FLC or Borba Farms. On July 27, 2011, the agency closed the case file, and on July
17 29, 2011, the agency informed the complainant that no inspection had occurred.

18 7. Cal/OSHA’s failure to investigate the complaints filed by the UFW in the summer
19 of 2011 was not anomalous. Rather, it reflects the agency’s systematic and ongoing failure to
20 investigate complaints charging violation of the Heat Illness Prevention regulation. For example,
21 in September 2011, Cal/OSHA informed the Los Angeles Times that 89 of the 185 heat
22 complaints filed with the agency over the previous two years—nearly half—had not resulted in
23 inspections.³

24 8. Despite public statements that it has improved, Cal/OSHA’s pattern and practice
25 of enforcement failures has persisted in the most recent heat season. For example, during the
26 week of July 30, 2012, Plaintiff UFWF staff filed 19 complaints reporting serious violations of

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28 ³ Paloma Esquivel, “Change slow for farmworkers,” Los Angeles Times, September 14, 2011.

1 the Heat Illness Prevention regulation by agricultural employers. For at least 9 of those
2 complaints, Cal/OSHA failed to conduct a single inspection. Plaintiffs are informed and believe
3 that Cal/OSHA has not issued any citations for violation of the Heat Illness Prevention regulation
4 in connection with any of the 19 complaints, despite UFWF complainants' willingness and ability
5 to testify in support of the violations they observed.

6 9. Cal/OSHA has a pattern and practice of failing to satisfy its statutory duties under
7 the California Labor Code to enforce the Heat Illness Prevention regulation. The agency does all
8 of the following in violation of its statutory obligations under the Labor Code:

- 9 • systematically fails to initiate investigations into serious heat complaints against
10 agricultural employers within three days, as is especially critical for farm worker safety
11 given the constantly moving nature of outdoor farm work;
- 12 • systematically fails to conduct on-site inspections for such complaints, thus failing to
13 observe or investigate conditions about which workers complain;
- 14 • systematically fails to evaluate the conditions alleged in the complaint when it does
15 conduct complaint-based inspections, thereby ignoring key components of heat illness
16 prevention safety;
- 17 • systematically fails to inform complainants of the action taken on a complaint within
18 fourteen days of initiating an inspection, as is essential for meaningful follow up if witness
19 or other information is needed to support a citation;
- 20 • systematically fails to investigate the causes of potentially heat-related injuries and
21 fatalities and to evaluate the conditions involved in such incidents;
- 22 • systematically fails to issue citations for serious, repeat, or willful violations of the Heat
23 Illness Prevention regulation that it has found to exist, losing opportunities to enforce
24 worker safety even when the agency does document unsafe conditions;
- 25 • systematically fails to issue citations classifying serious, repeat, or willful violations of the
26 Heat Illness Prevention regulation as such, thereby imposing penalties far lower than
27 warranted;

- 1 • systematically fails to conduct any review of its refusal to issue a citation and provide a
- 2 written statement of its reasons therefore, thereby failing even to monitor itself and create
- 3 best practice methods;
- 4 • systematically fails to prepare and maintain adequate records of an employer's previous
- 5 violations of the Heat Illness Prevention regulation, inhibiting its own efficacy at
- 6 identifying problem employers that need greater oversight;
- 7 • systematically fails to conduct re-inspections or penalize an employer's failure to
- 8 accomplish and certify abatement of violations of the Heat Illness Prevention regulation,
- 9 effectively providing free passes to employers that choose not to comply with the law; and
- 10 • systematically fails to impose and collect meaningful penalties for violation of the Heat
- 11 Illness Prevention regulation.

12 Cal/OSHA denies that the agency has a mandatory statutory duty to take any of these actions, has
13 failed to institute policies and procedures adequate to ensure that it will take these actions, and in
14 practice systematically fails to take these actions.

15 10. Cal/OSHA persists in these unlawful, inefficient, and ineffective systematic
16 practices, notwithstanding litigation that preceded the current Cal/OSHA chief, Defendant Ellen
17 Widess. This prior litigation placed the agency on notice that the agency has systematically
18 failed, and continues to fail, to protect farm workers from the dire consequences of prolonged
19 exposure to extreme heat. Instead of moving to alter and improve its practices in response to that
20 earlier litigation, which many of these same Plaintiffs filed in 2009, the agency has ignored farm
21 workers' safety needs, refused to modify its practices for the better, and insisted that the previous
22 litigation is limited to the year 2009, leaving farm workers ill assured that even a successful
23 outcome in that litigation could achieve redress to provide for their safety in the fields going
24 forward.

25 11. Through this lawsuit, Plaintiffs challenge Defendants' persistent denial, ongoing
26 misinterpretation, and systematic violation of their statutory obligations to enforce the Heat
27 Illness Prevention regulation, as well as Defendants' arbitrary and capricious failure to take action
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1 to protect farm workers from heat-related illness and death. Plaintiffs' goal is, once and for all, to
2 yield effective enforcement practices to protect farm workers from heat illness and death.

3 **PARTIES**

4 12. Plaintiff Margarita Alvarez Bautista is the daughter of Maria de Jesus Bautista,
5 who fell seriously ill on or about July 17, 2008 after being exposed to extreme heat while working
6 picking grapes in Riverside County. Maria de Jesus Bautista died two weeks later from health
7 complications arising from her heat exposure. Plaintiffs are informed and believe that, at the time
8 of such heat exposure, Maria de Jesus Bautista's employer had not complied with the Heat Illness
9 Prevention regulation. Plaintiff Margarita Alvarez Bautista is herself a farm worker who has
10 worked in the fields of Riverside County for 21 years during periods of extreme heat and expects
11 to continue doing so in 2012 and beyond. Plaintiff Margarita Alvarez Bautista fears for her safety
12 but must work out of economic necessity. Plaintiff Margarita Alvarez Bautista is a legal resident
13 of the United States and a resident of Riverside County.

14 13. Plaintiff Ana Rosa Bautista is the niece of Maria de Jesus Bautista, whose
15 exposure to extreme heat (described above) caused or contributed to her death on August 2, 2008.
16 Plaintiff Ana Rosa Bautista has worked in the fields of Riverside County and Kern County during
17 periods of extreme heat and expects to do so again. Plaintiff Ana Rosa Bautista has suffered from
18 heat illness in the past and fears for her safety but must work out of economic necessity. Plaintiff
19 Ana Rosa Bautista is a legal resident of the United States and a resident of Riverside County.

20 14. Plaintiff Socorro Rivera is a farm worker who has worked in the fields of Kern
21 County and Tulare County for 31 years during periods of extreme heat and expects to do so again.
22 Plaintiff Socorro Rivera fears for her safety but must work out of economic necessity. Plaintiff
23 Socorro Rivera is a legal resident of the United States and a resident of Kern County.

24 15. Plaintiff Mauricia Calvillo is a farm worker who has worked in the fields of Kern
25 County and Tulare County for 16 years during periods of extreme heat and expects to do so again
26 in 2012 and beyond. Plaintiff Mauricia Calvillo works for an employer that has not and presently
27 does not comply with the Heat Illness Prevention regulation. Plaintiff Mauricia Calvillo fears for
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1 her safety but must work out of economic necessity. Plaintiff Mauricia Calvillo is a legal resident
2 of the United States and a resident of Kern County.

3 16. Plaintiff Natividad Carrillo is the sister of Ramiro Carrillo, who died on July 10,
4 2008, from heat stroke caused by his exposure to extreme heat while working in a field in Fresno
5 County, California. Plaintiffs are informed and believe that, at the time of such heat exposure,
6 Ramiro Carrillo's employer did not provide any shade and did not make any effort to seek out
7 medical attention for him. Plaintiff Natividad Carrillo has also suffered from heat illness while
8 working in the fields of Tulare County during periods of extreme heat. Plaintiff Natividad
9 Carrillo works for an employer that has not and presently does not comply with the Heat Illness
10 Prevention regulation. Plaintiff Natividad Carrillo fears for her safety but must work out of
11 economic necessity. Plaintiff Natividad Carrillo is a legal resident of the United States and a
12 resident of Tulare County, California.

13 17. Plaintiff United Farm Workers of America ("UFW") was founded in 1962 by
14 Cesar Chavez and is the nation's largest farm workers' union. The UFW is headquartered in
15 Keene, California, and has offices in California, Oregon, Washington State and Florida. The
16 UFW has thousands of members in California. In addition, tens of thousands of farm workers
17 who work in California fields during periods of extreme heat and are therefore at risk of heat-
18 related death or illness, have voted for the union during union elections and rely on the union as a
19 source of information about heat safety regulations, yet still do not have union contracts. The
20 UFW has represented the interests of these farm workers in negotiations with Cal/OSHA over the
21 adoption of the Heat Illness Prevention regulation and has mounted public service campaigns to
22 inform farm workers about their rights under the regulation. The UFW brings this action on
23 behalf of its members and farm workers who have voted for union representation.

24 18. Plaintiff UFW Foundation ("UFWF") has approximately 1,000 members who
25 work in agriculture in California and therefore face the risk of heat-related death or illness.
26 UFWF, which is part of Cesar Chavez's Farm Worker Movement, partners with the United Farm
27 Workers of America and the Cesar Chavez Foundation to serve the needs of farm workers and
28 other low-income individuals. UFWF is headquartered in Los Angeles, has offices in Kern and

1 Monterey Counties, and has provided services to farm workers in Fresno, Tulare, Sonoma, and
2 Ventura Counties. UFWF has devoted substantial resources to the prevention of heat illness
3 among agricultural workers, including by filing heat illness complaints with Cal/OSHA on behalf
4 of farm workers, attending heat illness trainings conducted by Cal/OSHA, and conducting
5 community outreach about preventing heat illness associated with farm work. UFWF brings this
6 action on behalf of its members and farm workers who have benefited and will benefit from
7 services provided by it.

8 19. Defendant Division of Occupational Safety and Health (“Cal/OSHA”) is the
9 division within the Department of Industrial Relations that is charged with responsibility for
10 implementing and enforcing occupational safety and health standards in general, (Cal. Labor
11 Code § 142), and the Heat Illness Prevention regulation, Cal Code Regs. Title 8, § 3395, in
12 particular. Cal/OSHA is under a mandatory duty to inspect places of employment and enforce
13 safety provisions under the California Occupational Safety and Health Act of 1973, and to take
14 action to prevent or prohibit any unsafe condition in a place of employment that could reasonably
15 be expected to result in immediate death or serious physical harm. (Cal. Labor Code § 6327.5.)

16 20. Defendant Ellen Widess is sued herein only in her official capacity as Chief of
17 Defendant Division of Occupational Safety and Health. Ms. Widess is responsible in her official
18 capacity for ensuring that the Division performs its mandatory obligation to inspect and enforce
19 occupational health and safety standards and acts to prevent or prohibit any unsafe condition in
20 any place of employment that could reasonably be expected to result in immediate death or
21 serious physical harm. (Cal. Labor Code § 6327.5.)

22 VENUE

23 21. Venue in this Court is proper under Code of Civil Procedure § 401.

24 BACKGROUND

25 22. California’s Heat Illness Prevention regulation, Cal. Code Regs. Title 8, § 3395,
26 was adopted in August 2005 in response to five farm worker heat-related deaths that year. The
27 regulation applies to “all outdoor places of employment” and provides that “[e]mployees shall
28 have access to potable drinking water” that meets specified requirements, “provided in sufficient

1 quantity ... to provide one quart per employee per hour for drinking for the entire shift.” (Cal.
2 Code Regs. Title 8, § 3395(c).) Section 3395(d) provides that “[e]mployees shall be allowed and
3 encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a
4 time when they feel the need to do so to protect themselves from overheating. Such access to
5 shade shall be permitted at all times.” Section 3395(b) defines “shade” as the “blockage of direct
6 sunlight” and clarifies that “[s]hade is not adequate when heat in the area of shade defeats the
7 purpose of shade, which is to allow the body to cool.” Section 3395(e) requires agricultural
8 employers to implement high-heat procedures when the temperature equals or exceeds 95
9 degrees. Section 3395(f) provides that “[t]raining ... shall be provided to each supervisory and
10 non-supervisory employee” in topics that include environmental and personal risk factors for heat
11 illness, the importance of frequent consumption of water, the importance of acclimatization,
12 common signs and symptoms of heat illness, and the employer’s procedures for responding to
13 symptoms of possible heat illness and contacting emergency services.

14 23. Defendant Ellen Widess has recognized that the “basic requirements” set forth in
15 the Heat Illness Prevention regulation “can mean the difference between life and death to protect
16 the most vulnerable employees working outdoors.”⁴ Widess has also acknowledged that heat-
17 related illnesses and deaths “are completely preventable, and by simple means.”⁵ Yet despite the
18 absolute preventability of heat-related injuries and fatalities through straightforward and low-cost
19 precautions, and despite the state’s adoption seven years ago of a regulation requiring employers
20 to take such steps, farm workers throughout California continue needlessly to suffer heat-related
21 illness and death. In the past two summers alone, Cal/OSHA has investigated eight potentially
22 heat-related deaths in agriculture.

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25 _____
26 ⁴ Department of Industrial Relations, Cal/OSHA Enforcing Heat Illness Prevention as Heat
27 Spikes Across the State, available at [http://www.prnewswire.com/news-releases/calosha-](http://www.prnewswire.com/news-releases/calosha-enforcing-heat-illness-prevention-as-heat-spikes-across-the-state-124318209.html)
28 [enforcing-heat-illness-prevention-as-heat-spikes-across-the-state-124318209.html](http://www.prnewswire.com/news-releases/calosha-enforcing-heat-illness-prevention-as-heat-spikes-across-the-state-124318209.html).

⁵ Cal-OSHA Reporter, “Widess: ‘These illnesses and deaths are completely preventable,’” June 8, 2012.

1 Failure to Investigate Heat-Related Illnesses and Deaths

2 24. Research demonstrates that coroners frequently underreport heat-related deaths,
3 and that deaths from other causes, such as cardiovascular and respiratory diseases that can be
4 exacerbated by heat stress, are often not classified as heat-related when they should be.⁶ As
5 David Michaels, head of the federal Occupational Safety and Health Administration, recently
6 explained, “We know from epidemiological studies that if someone works outside in the heat all
7 day, then goes home and dies of a heart attack, we know that the death is heat-related, but it’s not
8 recorded as that.”⁷ Accordingly, it is likely that many more farm workers have died due to the
9 effects of heat than has been officially reported, investigated, or acknowledged by Cal/OSHA.

10 25. Even when Cal/OSHA does purport to investigate potentially heat-related injuries
11 and deaths, the agency has a pattern and practice of unjustifiably concluding that farm worker
12 injuries and deaths are not heat-related, by ignoring substantial evidence to the contrary or by
13 failing to investigate and evaluate the conditions involved in the fatality. For example, in the
14 September 23, 2011 death of a farm worker, Cal/OSHA’s medical expert identified the cause of
15 death as “congestive heart failure exacerbated by the physical exertion during hot humid weather”
16 and concluded that “performing work (even light work) in the heat DID contribute to his death.”
17 (See Cal/OSHA memorandum attached as Exhibit A.) Notwithstanding this finding from its own
18 medical expert, Cal/OSHA nonetheless chose to classify this death as *not* heat-related. Such a
19 classification allows Cal/OSHA to claim greater enforcement success (by minimizing the total
20 death or injury toll) but provides small comfort to the unprotected dead worker or that worker’s
21 family and colleagues who must continue to risk their lives while picking in extreme heat
22 conditions without meaningful regulatory enforcement.

23 26. Plaintiffs Margarita Alvarez Bautista, Ana Rosa Bautista, and Natividad Carrillo
24 have each lost a family member to heat illness, but in each case Cal/OSHA classified the death as
25 not heat-related. Ramiro Carrillo, brother of Plaintiff Natividad Carrillo, died of heat stroke on

26 ⁶ Bart D. Ostro et al., *Estimating the Mortality Effect of the July 2006 California Heat Wave*,
27 *Environmental Research* 109 (2009) at 614-619.

28 ⁷ People’s World, “OSHA Warns Bosses on Summer Heat,” May 10, 2012, available at
<http://peoplesworld.org/osha-warns-bosses-on-summer-heat/>.

1 July 10, 2008 after falling ill while picking nectarines in 112 degree weather in Fresno County.
2 Defendants cited his employer for violating the Heat Illness Prevention regulation on the day Mr.
3 Carrillo died, yet did not classify his death as heat-related. Four years later, the citation remains
4 under appeal, tolling his employer's obligation even to pay the Cal/OSHA citation for the
5 employer's failure to satisfy its obligations to Mr. Carrillo and the other workers present that day
6 all those years ago. Maria de Jesus Bautista, mother of Plaintiff Margarita Alvarez Bautista and
7 aunt of Plaintiff Ana Rosa Bautista, died on August 2, 2008 from health complications arising
8 after she fell ill while picking grapes in 110-degree heat in Riverside County. Defendants cited
9 her employer for violating the Heat Illness Prevention regulation when she died, yet did not
10 classify her death as heat-related, and fined her employer only \$420. Plaintiffs are informed and
11 believe that Cal/OSHA did not conduct an adequate investigation into either of these deaths
12 before ruling out heat as a cause.

13 27. In addition to these deaths that have touched their immediate families, Plaintiffs
14 Margarita Alvarez Bautista and Ana Rosa Bautista in 2012 again suffered the tragic death of a
15 family friend who, like each of them, was working in the fields. This family friend died on July
16 12, 2012, after collapsing on a day when temperatures reached 99 degrees, while he was working
17 for a company Cal/OSHA had previously cited for failure to provide employees with adequate
18 access to water and failure to adopt a written heat illness prevention plan. Plaintiffs are informed
19 and believe that the only shade available to the workers on the day of the fatality came from a
20 small awning attached to the side of a portable toilet, and the only water available to the workers
21 was too hot to drink. Cal/OSHA again classified this fatality as not heat-related.

22 28. These ongoing tragedies, and Cal/OSHA's continuing deficient response to both
23 the deaths themselves and the dangers they reflect, cause the Bautista Plaintiffs and farm workers
24 throughout the state to fear for their health and safety each time they go to work in the fields.

25 29. Cal/OSHA has a mandatory duty under section 6313 of the Labor Code either to
26 investigate the causes of potentially heat-related illnesses and deaths or to summarize the facts
27 indicating that the accident need not be investigated and the means by which those facts were
28 determined; and a mandatory duty under section 6314.5 of the Labor Code to evaluate the

1 conditions involved in the accident if an inspection is conducted pursuant to section 6313.
2 Cal/OSHA disputes its obligation to take these statutorily required actions, has not adopted
3 policies or procedures adequate to ensure that it will satisfy these obligations, and in practice
4 systematically fails to satisfy these obligations. Cal/OSHA has therefore violated its mandatory
5 duties under sections 6313 and 6314.5 of the Labor Code.

6 Failure to Issue Citations

7 30. Cal/OSHA has also demonstrated a pattern and practice of unwillingness to find
8 and cite agricultural employers for violations of the Heat Illness Prevention regulation. For
9 example, during a single five-day period beginning on July 18, 2011, the UFW (relying on just
10 fourteen staff members) observed and reported 55 violations of the Heat Illness Prevention
11 regulation by agricultural employers. That same week, Cal/OSHA (with a staff of approximately
12 two hundred inspectors) conducted inspections that resulted in only 12 citations for violations of
13 the Heat Illness Prevention regulation by agricultural employers. The discrepancy between the 12
14 violations cited by Cal/OSHA and the 55 violations reported by the UFW during the same time
15 period with a fraction of the staff suggests that the agency fails to take meaningful action to
16 identify violators, fails to issue citations for those violations of which it is aware, or both.

17 31. The actions taken by Cal/OSHA in response to heat complaints filed by the UFW
18 further demonstrate the agency's unwillingness to issue citations when warranted. In total,
19 between July and September 2011, UFW staff filed or assisted farm workers in filing 78
20 complaints reporting serious violations of the Heat Illness Prevention regulation by agricultural
21 employers. Cal/OSHA issued citations for violation of the Heat Illness Prevention regulation in
22 connection with only 3 of those 78 complaints, even though the UFW complainants sent dozens
23 of letters in which they informed Cal/OSHA that they personally observed the violations,
24 expressed their willingness to testify as to their observations, and specifically requested that
25 Cal/OSHA issue citations.

26 32. Cal/OSHA's unwarranted reluctance to cite known violators results in part from
27 the agency's unreasonable policy and practice regarding the evidence necessary to establish an
28 employer-employee relationship. In its correspondence with the UFW (discussed below),

1 Cal/OSHA has taken the position that only a statement by a testifying employee can provide the
2 evidence of an employment relationship necessary to support a citation, regardless of whatever
3 other evidence shows that the endangered employees worked for the employer at the time of the
4 violation. This requirement does not appear anywhere in the statutes, regulations, or case law
5 governing issuance of citations by Cal/OSHA. It is an arbitrary evidentiary limitation of
6 Cal/OSHA's own making, and its effect is to prevent the agency from issuing valid citations in
7 accordance with its statutory obligations. In imposing this requirement upon itself, the agency
8 has therefore created an arbitrary, capricious, and unwarranted barrier to its enforcement of the
9 Heat Illness Prevention regulation and its compliance with its statutory duties.

10 33. Cal/OSHA has a mandatory duty under section 6317 of the Labor Code to issue a
11 citation or notice whenever it determines that an employer has violated the Heat Illness
12 Prevention regulation, and a mandatory duty to issue a citation if the violation is serious, repeat,
13 or willful. Cal/OSHA disputes its obligation to take these statutorily required actions, has not
14 adopted policies or procedures adequate to ensure that it will satisfy these obligations, and in
15 practice systematically fails to satisfy these obligations. Cal/OSHA has therefore violated its
16 mandatory duties under section 6317 of the Labor Code.

17 Failure to Investigate Complaints

18 34. Cal/OSHA has further demonstrated a pattern and practice of failing to investigate
19 complaints from employees or employees' representatives alleging a violation of the Heat Illness
20 Prevention regulation by an agricultural employer. For example, although an employee or
21 employee's representative was the complainant in each of the 78 serious heat complaints filed by
22 UFW staff in the summer of 2011, Cal/OSHA failed to conduct an inspection for at least 55 of
23 those 78 complaints.

24 35. Cal/OSHA's failure to investigate the heat complaints filed by UFW staff in the
25 summer of 2011, like its failure to investigate other serious heat complaints filed by employees
26 and employees' representatives, has overwhelmingly resulted from Cal/OSHA's policies (or lack
27 thereof) and practices, which lead the agency unjustifiably to abandon investigations into heat
28 complaints against agricultural employers.

1 36. One example of Cal/OSHA’s unwarranted abandonment of investigations occurred
2 in July 2011, when an organizer for Plaintiff UFW observed approximately 25 workers at
3 Valpredo Farms toiling in 90-degree heat with only a small beach umbrella provided for shade, as
4 pictured below:



16 Another crew of 40 workers was provided no shade at all. A complaint was filed with Cal/OSHA
17 on July 11, 2011, but Cal/OSHA did not attempt to investigate this violation until more than two
18 weeks later, on July 28, 2011. On that date, Cal/OSHA observed no employees working and
19 thereafter abandoned any further efforts to investigate the complaint. On August 11, 2011, the
20 agency closed the case file, and on August 12, 2011, the agency informed the complainant that no
21 inspection had occurred.

22 37. Cal/OSHA’s failure adequately to investigate and fine Valpredo Farms is
23 especially egregious because, in July 2005, a farm worker collapsed while working at Valpredo
24 Farms and died from heat illness.

25 38. The agency’s failures with regard to the foregoing complaints were not isolated
26 incidents: For 43 of the 78 heat complaints filed by UFW staff in the summer of 2011—nearly
27 half—a Cal/OSHA inspector made a single visit to a work site and observed no employees
28 working at that particular site at that particular time, and Cal/OSHA thereafter abandoned all

1 efforts to investigate the complaint. This practice fails to account for the inherently migratory
2 nature of farm work. The work required to grow a crop happens in stages, with work crews at
3 various times performing irrigation, planting, weeding, picking, and other tasks. When a group of
4 workers completes a task in one field, they naturally and predictably move to another. If a work
5 crew that was the subject of a complaint does not appear in a particular field at a particular time,
6 it is thus overwhelmingly likely that those same workers still face the same hazard, but in a
7 different location. Yet Cal/OSHA responds as though the hazard itself no longer exists and fails
8 to take any meaningful steps to determine where workers may be at the time of Cal/OSHA's
9 delayed investigation.

10 39. Cal/OSHA has also demonstrated a pattern and practice of abandoning
11 investigations into heat complaints against agricultural employers whenever an investigator
12 cannot immediately locate the work site described in the complaint. For example, for 11 of the 78
13 complaints filed by UFW staff in the summer of 2011, no inspection occurred because a
14 Cal/OSHA inspector purported to be unable to find the work site specified in the complaint. Each
15 complainant had provided his or her contact information, but in only one of those 11 cases did
16 Cal/OSHA call the complainant in an effort to obtain more information to find the work site.

17 40. Cal/OSHA has a mandatory duty under section 6309 of the Labor Code to conduct
18 an inspection after receiving a complaint from an employee or employee's representative alleging
19 a violation of the Heat Illness Prevention regulation. Cal/OSHA disputes its obligation to take
20 this statutorily required action, has not adopted policies or procedures adequate to ensure that it
21 will satisfy this obligation, and in practice systematically fails to satisfy this obligation.
22 Cal/OSHA has therefore violated its mandatory duties under section 6309 of the Labor Code.

23 Failure to Initiate Timely Complaint Investigations

24 41. Contributing to its failure to conduct inspections is Cal/OSHA's pattern and
25 practice of failing to initiate investigations in a timely manner. Because agricultural work crews
26 are highly mobile, moving from field to field as soon as a crop is picked or planted, ensuring that
27 an inspection actually occurs requires prompt action.

1 42. Each of the 78 heat complaints filed by UFW staff in the summer of 2011 alleged
2 a serious violation of the Heat Illness Prevention regulation, obligating the agency to take action
3 within three working days in accordance with section 6309 of the Labor Code. Because
4 agricultural employees routinely work on weekends and holidays, three working days is in this
5 context equivalent to three calendar days. For at least 43 of the 78 heat complaints filed by UFW
6 staff in the summer of 2011, however, Cal/OSHA waited more than three calendar days before
7 even attempting to initiate an inspection. (For at least 40 of the 78 complaints, Cal/OSHA waited
8 more than three weekdays before attempting to initiate an inspection.) One district office (Van
9 Nuys) did not attempt to initiate an inspection within either three calendar days or three weekdays
10 for any of the complaints filed with that office.

11 43. One Summer 2011 example of Cal/OSHA's failure timely to initiate heat
12 investigations involved a sixteen-year-old farm worker who suffered heat illness while working in
13 105-degree heat for AgPrime Corporation at Uesugi Farms on July 6, 2011. Six months later, on
14 January 3, 2012, Cal/OSHA issued citations against AgPrime for serious violations of the Heat
15 Illness Prevention regulation in connection with that incident. In the interim, the agency was
16 alerted to three other serious violations by FLCs working for the same grower but allowed those
17 violations to continue uncorrected. Specifically, on July 11, 2011, a complaint alerted Cal/OSHA
18 that 150 employees of Global Ag—another FLC working at Uesugi Farms—had insufficient
19 shade while working in 89-degree heat. Cal/OSHA went out to the work site more than a week
20 later; because no workers were there at the time, the agency conducted no inspection and issued
21 no citations. A month later, on August 10, 2011, two more complaints alerted Cal/OSHA that
22 more than 100 workers at the same site still had no shade while working in 90-degree heat.
23 Another week went by before Cal/OSHA attempted to take action on these new complaints.
24 When the agency did go out to the work site, it again observed that no workers were there at the
25 time—and again closed the file without taking further action.

26 44. Not only has Cal/OSHA failed to institute policies and procedures adequate to
27 ensure that it complies with its mandatory duties under the Labor Code, including the duty to
28 initiate inspections from employees and employees' representatives within three working days,

1 the agency has adopted affirmative written policies that conflict with or otherwise permit
2 deviation from the statutory requirements for heat illness prevention enforcement. For example,
3 in June 2011 Cal/OSHA adopted a written policy purporting to require an on-site inspection “as
4 soon as possible or within 48 hours” for heat complaints. Because “as soon as possible” is not a
5 measurable or enforceable requirement, it cannot be deemed consistent with the statutory
6 requirement of an investigation within three days. In addition, Cal/OSHA’s Policy and
7 Procedures Manual creates under-inclusive definitions of both “employee” and “employee’s
8 representative” for purposes of complaint classification and response. For example, Cal/OSHA
9 does not deem a worker to be an “employee” unless the individual provides his or her name and
10 address, and the agency does not deem a union representative to be an “employee’s
11 representative” unless the union has a collective bargaining agreement with that employee’s
12 employer. Neither definition appears in the statute, and the definitions unilaterally narrow
13 Cal/OSHA’s obligations in a manner inconsistent with state law and worker safety.

14 45. Cal/OSHA has a mandatory duty under section 6309 of the Labor Code to initiate
15 an inspection within three calendar days of receiving a complaint from an employee or
16 employee’s representative alleging a violation of the Heat Illness Prevention regulation.
17 Cal/OSHA disputes its obligation to take this statutorily required action, has not adopted policies
18 or procedures adequate to ensure that it will satisfy this obligation, has in fact adopted policies
19 and procedures that affirmatively undermine this obligation, and in practice systematically fails to
20 satisfy this obligation. Cal/OSHA has therefore violated its mandatory duties under section 6309
21 of the Labor Code.

22 Failure to Communicate with Complainants

23 46. Cal/OSHA has further demonstrated a pattern and practice of failing to provide
24 information to complainants within fourteen days of taking any action on a complaint, as required
25 under section 6309 of the Labor Code. The duty to communicate with complainants takes on
26 increased importance when the agency has decided not to issue a citation for the reported hazard,
27 because, until Cal/OSHA informs the complainant that it has decided not to cite the employer, the
28 complainant cannot know that the hazard will continue to go uncorrected unless he or she takes

1 further action. Farm workers who file heat complaints should not have to wait indefinitely to find
2 out whether the agency charged with protecting their safety will take any meaningful steps to
3 protect them against the serious dangers they have reported, or whether it even investigated their
4 complaint at all. Yet for 32 of the 78 complaints filed by the UFW in the summer of 2011,
5 Cal/OSHA at no point contacted the complainant regarding the action taken on the complaint;
6 only one of those 32 complaints resulted in a citation for the reported hazard. For another 14 of
7 the 78 complaints, Cal/OSHA contacted the complainant only after more than fourteen days had
8 elapsed since its sole attempt to initiate an inspection. Two of Cal/OSHA's district offices (San
9 Jose and Van Nuys) did not contact any of the complainants at any time to provide post-
10 inspection information about any of the complaints filed with those offices.

11 47. The post-inspection letters that Cal/OSHA does send are overwhelmingly
12 insufficient to convey to the complainant the statutorily required information, which must include
13 the action taken by the Cal/OSHA in regard to the subject matter of the complaint as well as the
14 reasons for the action. Rather than provide that information, the letters often contain statements
15 so cryptic as to be meaningless to the recipient. For example, Cal/OSHA sent the following letter
16 dated July 26, 2011 to one of the UFW complainants:

1 Dear Complainant:

2 The Division of Occupational Safety and Health received your
3 complaint of the following hazardous condition(s) at Ramirez
4 Agriculture FLC 7265, I-5 & 165 301 Honeybell St, Los Banos:

5 1.No shade.

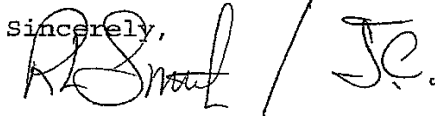
6 The Division conducted an inspection of the item(s) referenced in
7 your complaint with the following results:

8 1.Process not active.

9 California law protects any person who makes a complaint about a
10 workplace safety or health hazard from being treated differently,
11 discharged or discriminated against in any manner by their
12 employer. If you believe that you have been discriminated
13 against because you made a complaint to the Division of
14 Occupational Safety and Health, you may file a discrimination
15 complaint with the nearest office of the Division of Labor
16 Standards Enforcement (Labor Commissioner). However, you must
17 file your complaint within six (6) months of the discriminatory
18 action.

19 Thank you for your concern about workplace safety and health.

20 Sincerely,

21 

22 John Caynak
23 District Manager

24 As with many of Cal/OSHA's complainant letters, this letter contains no reasonably
25 comprehensible information as to what action the agency took or why it took that action. What in
26 fact occurred was that a Cal/OSHA inspector visited the work site on a single occasion, observed
27 no employees working at that particular time, and thereafter abandoned any further investigation
28 into the complaint. On the same day that Cal/OSHA wrote this letter, the agency closed the
inspection file.

48. The letters that Cal/OSHA sends to complainants are often incomprehensible to
the recipients for an additional reason: Despite the linguistic diversity of California's farm
workers, every letter that Cal/OSHA sends to complainants is written wholly or partly in English.
Plaintiffs are informed and believe that far more than five percent of the people served by each of
Cal/OSHA's District Offices either do not speak English or are unable to effectively
communicate in English because it is not their native language, obligating the agency to address
the resulting language barriers pursuant to the Dymally-Alatorre Bilingual Services Act, Gov't

1 Code §§ 7290 et seq. Cal/OSHA's duty to communicate with complainants therefore includes the
2 duty to communicate in languages other than English.

3 49. Cal/OSHA's post-inspection communications routinely include an express but
4 unwarranted assumption that the hazard reported by the complainant no longer exists, even when
5 Cal/OSHA has taken no action that could have corrected the violation, and its letters purport to
6 place the burden on the complainant to contact the agency again if the violation has not been
7 corrected. For example, Cal/OSHA sent the following letter dated September 27, 2011 regarding
8 a complaint against employer Stamoules Produce:

9
10 Dear UFW:

11 On 08/02/2011, the Division of Occupational Safety and Health received
12 your complaint of the following hazardous conditions at S. Stamoules,
13 Inc., N. Fairfax Ave & Belmont Ave, Mendota.

14 1. 40 workers with no water.

15 The Division investigated the item(s) referenced in your complaint with
16 the following results:

17 1. Employer not found at location.

18 If you do not agree that the hazards you complained about have been
19 satisfactorily corrected, please contact me within ten (10) days of the
20 date of this letter or I will assume that the hazard(s) has been
21 corrected and will close the case file.

22 California law protects any person who makes a complaint about a
23 workplace safety or health hazard from being treated differently,
24 discharged, or discriminated against in any manner by their employer.
25 If you believe that you have been discriminated against because you made
26 a complaint to the Division of Occupational Safety and Health, you may
27 file a discrimination complaint with the nearest office of the Division
28 of Labor Standards Enforcement (Labor Commissioner). However, you must
file your complaint within six (6) months of the discriminatory action.

Thank you for your concern about workplace safety and health.

Sincerely,

Jerry Walker
District Manager

25 This letter informs the complainant that Cal/OSHA conducted no inspection, purportedly because
26 the inspector could not find the employer at the work site reported in the complaint filed seven
27 weeks earlier, but states that the agency will nonetheless assume that the violation has been
28 corrected. Moreover, although the letter states that the complainant should contact Cal/OSHA if

1 the hazard has not been corrected and states that the hazard will be assumed to have been
2 corrected and the case file will be closed if he or she fails to do so within ten days, the agency in
3 fact closed the case file on the same day it sent the letter.

4 50. Cal/OSHA's failure adequately to respond to the complaint about Stamoules
5 Produce, and its stance of "assum[ing]" that the violation was corrected despite Cal/OSHA's
6 failure to issue a citation or conduct an inspection unless it is notified otherwise, is especially
7 egregious because, in July 2006, a farm worker collapsed while working at Stamoules Produce
8 and died from heat illness.

9 51. Cal/OSHA has a mandatory duty under section 6309 of the Labor Code to inform
10 every complainant who provides his or her contact information of the action taken in regard to the
11 subject matter of the complaint and the reasons for that action, within fourteen days of conducting
12 an inspection, attempting to initiate an inspection, or otherwise taking any action in regard to the
13 subject matter of the complaint. Cal/OSHA disputes its obligation to take this statutorily required
14 action, has not adopted policies or procedures adequate to ensure that it will satisfy this
15 obligation, and in practice systematically fails to satisfy this obligation. Cal/OSHA has therefore
16 violated its mandatory duties under section 6309 of the Labor Code.

17 Failure to Review Refusals to Issue a Citation

18 52. Cal/OSHA has a related policy and practice of failure to comply with its duty
19 under section 6309 of the Labor Code to conduct an informal review of its refusal to issue a
20 citation, pursuant to authorized regulations governing such review, and to provide a written
21 statement of the reasons for its final disposition of the case. The agency has demonstrated this
22 policy and practice in three principal ways. First, as noted above, Cal/OSHA systematically fails
23 to inform complainants that it has decided not to issue a citation, and that failure to communicate
24 effectively deprives those complainants of the opportunity to contest the agency's refusal to cite.
25 Second, Cal/OSHA has failed to adopt the statutorily required regulations governing an informal
26 review of its refusal to issue a citation. Finally, Cal/OSHA does not in fact conduct an informal
27 review of its refusal to issue a citation or provide a written statement of the reasons for its
28 disposition of the case.

1 53. Cal/OSHA’s actions in response to the complaints filed by UFW staff in the
2 summer of 2011 again provide an example of the agency’s systematic failure to satisfy its
3 statutory duties. As noted, for 31 of the complaints, Cal/OSHA decided not to issue a citation but
4 at no point provided that information to the complainant, thus providing no opportunity to contest
5 its refusal to issue a citation. In addition, for 33 other complaints, the agency closed the
6 inspection file on or before the day it wrote to notify the complainant that it would not issue a
7 citation for the reported violation.

8 54. Upon receiving letters from Cal/OSHA indicating that the agency had not issued
9 citations for reported violations and would take no further action, the UFW complainants sent
10 dozens of letters in reply. The UFW letters specifically requested that Cal/OSHA issue a citation
11 and noted that the complainant had personally observed the reported violation and would be
12 willing to testify as to his or her observations. Cal/OSHA did not respond to each letter, as it was
13 statutorily obligated to do, by conducting an informal review of its own actions and providing a
14 written explanation of its disposition of the particular case. Instead, Cal/OSHA proposed a
15 meeting and sent a letter (attached as Exhibit B to this complaint) containing an extensive list of
16 information that each UFW complainant would have to provide—apparently without any
17 assistance from Cal/OSHA in gathering that information—in order for the agency to issue a
18 citation.

19 55. As the letter attached as Exhibit B demonstrates, Cal/OSHA effectively takes the
20 position that a complainant must functionally stand in the shoes of a Cal/OSHA inspector and
21 provide every piece of evidence the agency deems necessary to support a citation before
22 Cal/OSHA would be willing to cite an employer for the violation reported in the complaint.

23 56. Notwithstanding Cal/OSHA’s apparent unwillingness to conduct any further
24 investigation of its own into any of the complaints, several UFW complainants met with
25 Cal/OSHA on November 7, 2011 to share the evidence they had obtained. At that meeting and in
26 subsequent emails, the UFW complainants provided Cal/OSHA with detailed descriptions of
27 violations, photographic evidence of the existence of many of the violations, photographic
28

1 evidence of the identity of some of the employers, and admissions by supervisors regarding the
2 identity of 13 of the employers.

3 57. When provided with this substantial evidence of dozens of violations, Cal/OSHA
4 decided that it would issue a citation in only one case, and that it would not reopen its
5 investigation into any of the other complaints. Cal/OSHA informed the UFW of its decision in a
6 letter dated December 9, 2011 (attached as Exhibit C to this complaint), stating that for all but one
7 of the complaints, “Cal/OSHA will be unable to reopen its investigations into those complaints or
8 issue citations in those cases” because “Cal/OSHA will be unable to carry its burden of proving
9 an employer-employee relationship.” The letter asserted that the statements made by employees
10 to UFW staff were inadmissible hearsay and would not be sufficient to establish the required
11 relationship. The letter did not explain why the agency would not take any action of its own to
12 gather any of the evidence it perceived itself to need but lack. Nor did the letter explain (1) why
13 the employer admissions the UFW complainants had obtained in more than a dozen cases were
14 not sufficient, either alone or together with other admissible evidence reasonably available to
15 Cal/OSHA by subpoena or otherwise, such as the employer’s business records; or (2) why the
16 presence of the employer’s supervisory personnel at the site, overseeing farm workers, was not
17 sufficient, either alone or together with such other admissible evidence.

18 58. Cal/OSHA has mandatory duties under section 6309 of the Labor Code to conduct
19 an informal review of any refusal by a representative of the agency to issue a citation with respect
20 to an alleged violation, to adopt regulations governing such reviews, and to provide a written
21 explanation of the disposition of the case to any complainant requesting such a review.
22 Cal/OSHA disputes its obligation to take these statutorily required actions, has not adopted
23 policies or procedures adequate to ensure that it will satisfy these obligations, and in practice
24 systematically fails to satisfy these obligations. Cal/OSHA has therefore violated its mandatory
25 duties under section 6309 of the Labor Code.

26 Failure to Impose Meaningful Penalties

27 59. When Cal/OSHA does issue citations, it has a pattern and practice of failing to
28 impose meaningful penalties for violations of the Heat Illness Prevention regulation, including the

1 enhanced penalties associated with serious, repeat, and willful violations. For example, only
2 about 7.5% of the citations for violation of the Heat Illness Prevention regulation issued in
3 calendar year 2010 were classified as serious. The average proposed penalty that year for a
4 violation of the Heat Illness Prevention regulation—prior to any reduction through settlement or
5 appeal—was less than \$900.

6 60. On January 1, 2011, an amendment to section 6432 of the Labor Code, which sets
7 forth the criteria for a “serious” violation, took effect. The amendment changed the definition of
8 a serious violation from one that creates a “substantial probability that death or serious physical
9 harm could result” to one that creates a “realistic possibility that death or serious physical harm
10 could result from the actual hazard created by the violation.” Although the amendment had the
11 effect of lowering the threshold for establishing that a violation is serious, Cal/OSHA classified a
12 lower percentage of citations as serious after the change took effect in 2011 (15%) than it had
13 under the higher threshold in 2010 (18%).⁸ Moreover, several months into 2012, Cal/OSHA still
14 had not updated its Policy and Procedures Manual to reflect the current definition of a “serious”
15 violation.⁹

16 61. Just as Cal/OSHA systematically fails to impose enhanced penalties for “serious”
17 violations of the Heat Illness Prevention regulation, the agency systematically fails to impose
18 enhanced penalties for “repeat” violations of the Heat Illness Prevention regulation. Although
19 sections 334 and 336(g) of Title 8 of the California Code of Regulations provide for penalties to
20 be doubled for a second violation, quadrupled for a third violation, and multiplied by ten for a
21 fourth violation of the same standard within a three-year period, Cal/OSHA systematically fails to
22 increase penalties when an employer repeatedly violates the Heat Illness Prevention regulation.
23 At least 55 agricultural employers have been cited multiple times for heat safety violations, but
24 only four have ever been cited as “repeat” violators.

25 _____
26 ⁸ Cal-OSHA Reporter, “Cal/OSHA Inspections Down in 2011 – And Violations Down Even
More,” September 14, 2012.

27 ⁹ United States Department of Labor, FY 2011 Federal Annual Monitoring and Evaluation
28 (FAME) Report on the California Division of Occupational Safety and Health (Cal/OSHA), at 8,
available at <http://www.osha.gov/dcsp/osp/efame/california.html>.

1 62. One example of Cal/OSHA’s failure to enhance penalties for repeat violations
2 relates to agricultural employer Dan Avila & Sons. Cal/OSHA has cited the employer for the
3 following violations of the Heat Illness Prevention regulation:

- 4 • June 19, 2008: failure to provide shade (proposed penalty \$485, reduced to \$125 through
5 informal settlement), failure to provide heat illness prevention training to employees
6 (proposed penalty \$240, reduced to \$125 through informal settlement), failure to provide
7 heat illness prevention training to supervisors (proposed penalty \$2925, reduced to \$2250
8 through informal settlement), and failure to have a written heat illness prevention plan
9 (“HIPP”) (proposed penalty \$485, reduced to \$125 through informal settlement);
- 10 • June 19, 2008 (different work site): failure to provide heat illness prevention training to
11 employees (proposed penalty \$325, reduced to \$125 through informal settlement) and
12 failure to have a written HIPP (proposed penalty \$160, reduced to \$125 through informal
13 settlement);
- 14 • July 9, 2008: failure to provide shade (proposed penalty \$625, reduced to \$125 through
15 informal settlement), failure to provide heat illness prevention training to supervisors
16 (proposed penalty \$5062, reduced to \$2250 through informal settlement), and failure to
17 have a written HIPP (\$375, reduced to \$125 through informal settlement);
- 18 • July 9, 2008 (different work site): failure to provide water (proposed penalty \$3375,
19 reduced to \$2250 through informal settlement), failure to provide shade (proposed penalty
20 \$560, reduced to \$125 through informal settlement), and failure to have a written HIPP
21 (proposed penalty \$375, reduced to \$125 through informal settlement);
- 22 • August 12, 2008: failure to provide shade (proposed penalty \$5400, reduced to \$2700
23 through an Administrative Law Judge decision);
- 24 • December 8, 2011: failure to provide heat illness prevention training to employees
25 (proposed penalty \$750, not appealed);
- 26 • March 9, 2012: failure to provide water (proposed penalty \$1125, not appealed) and
27 failure to provide heat illness prevention training to employees (proposed penalty \$1125,
28 not appealed);

- 1 • May 7, 2012: failure to provide heat illness prevention training to employees (proposed
2 penalty \$710, not appealed);
- 3 • July 19, 2012: failure to provide heat illness prevention training to employees (proposed
4 penalty \$1500, not appealed);

5 Cal/OSHA did not classify any of these citations as repeat and thus did not enhance any of the
6 penalties for the employer's repeated violations of the Heat Illness Prevention regulation. Nor did
7 this extensive citation history lead to greater responsiveness by Cal/OSHA to heat complaints
8 against the employer: UFW complainants reported two serious heat violations by Dan Avila &
9 Sons in the summer of 2011, but in both cases Cal/OSHA failed to conduct an inspection.

10 63. Another example of Cal/OSHA's failure to enhance penalties for repeat violations
11 relates to citations issued to employer Punjab Farms. On October 16, 2008, Cal/OSHA cited the
12 employer for failure to provide shade and failure to have a written HIPP. About a year later, on
13 September 3, 2009, the employer was again cited for failure to provide shade and failure to have a
14 written HIPP. Cal/OSHA initially classified the 2009 HIPP citation as repeat, yet did not classify
15 the shade citation as repeat, and later agreed to withdraw the HIPP citation altogether. About a
16 year after that, on November 2, 2010, Cal/OSHA cited the employer for failure to provide heat
17 illness prevention training to employees, but failed to classify the violation as repeat, and
18 proposed a penalty of only \$240. About seven months after that, on June 17, 2011, Cal/OSHA
19 again cited the employer for failure to provide shade and failure to have a written HIPP but failed
20 to classify either violation as repeat. Not only did Cal/OSHA fail to issue increased penalties for
21 the 2011 violations by classifying them as repeat, but the agency also later agreed to reduce the
22 penalties for those violations by more than ninety percent, from \$6300 to \$375.

23 64. The failure to pursue repeat citations results in part from Cal/OSHA's arbitrary
24 and unreasonable written policy regarding the issuance of repeat citations. The agency's Policy
25 and Procedures Manual provides that a violation will be classified as repeat only if the citation is
26 issued within three years of the date that a previous citation for violation of the same standard
27 became a Final Order. This requirement that an earlier violation must become a Final Order
28 before it can serve as grounds for a repeat citation does not appear in the governing statutes or

1 regulations. Because several years may pass before a citation becomes a Final Order, and
2 because inspectors have no reliable means of determining whether a Final Order was issued
3 against an employer within the previous three years, this policy ensures that repeat violations
4 often will not be issued when warranted.

5 65. Cal/OSHA has mandatory duties under sections 6428 and 6429 of the Labor Code
6 to impose a civil penalty for every serious, repeat, or willful violation of the Heat Illness
7 Prevention regulation and to calculate that penalty within statutory constraints based on the
8 classification of the violation. Cal/OSHA disputes its obligation to take these statutorily required
9 actions, has not adopted policies or procedures adequate to ensure that it will satisfy these
10 obligations, and in practice systematically fails to satisfy these obligations. Cal/OSHA has
11 therefore violated its mandatory duties under sections 6428 and 6429 of the Labor Code.

12 Failure to Collect Penalties and Verify Abatement

13 66. The inadequacy of the fines Cal/OSHA proposes is exacerbated by the agency's
14 pattern and practice of failure to collect the fines ultimately imposed against agricultural
15 employers for violation of the Heat Illness Prevention regulation. Cal/OSHA routinely fails to
16 collect final penalties imposed against agricultural employers for violation of the Heat Illness
17 Prevention regulation, and Plaintiffs are informed and believe that the agency has no system in
18 place to track or verify the collection of these or other final penalties.

19 67. Cal/OSHA has further demonstrated a pattern and practice of failure to conduct re-
20 inspections or penalize an employer's failure to accomplish and certify abatement of violations of
21 the Heat Illness Prevention regulation. For example, in the much-publicized heat-related
22 workplace death of 17-year-old Maria Isabel Vasquez Jimenez in 2008, Cal/OSHA had already
23 fined the employer, Merced Farm Labor, \$2,250 in 2006 for three occupational safety violations,
24 including two related to employees' risk of heat illness; but, prior to her death, the agency had
25 never collected the fine or verified that the company was in compliance with regulations. After
26 her death, Cal/OSHA claimed publicly that agency staff had "felt comfortable the abatement was
27 done and didn't make an actual field visit" because company representatives told Cal/OSHA that
28

1 the employer had corrected the problems,¹⁰ but in fact the company had not even signed and
2 returned the required abatement form stating that it had corrected the violations. Cal/OSHA took
3 no action to penalize the employer for its failure to sign and return the abatement form, and it
4 took no other action to verify abatement of the 2006 violations until July 3, 2008. On that date,
5 more than a month after Maria Isabel Vasquez Jimenez had died and more than a year and a half
6 after the abatement form had been due, Cal/OSHA sent the employer a letter. Rather than impose
7 a penalty for the employer's failure to verify abatement, the July 3, 2008 letter simply enclosed
8 another copy of the abatement form and asked the employer to sign and return it.

9 68. As the foregoing example demonstrates, Cal/OSHA fails to enforce the abatement
10 form requirement, imposing few if any consequences for employers' failure to timely return the
11 form. For nearly all violations, Cal/OSHA reduces the penalty by 50% based on a presumption
12 that the employer will timely correct the violation and return the abatement form, but the agency
13 systematically fails either to revoke this abatement credit or impose a penalty for failure to abate
14 when an agricultural employer fails to provide timely certification of abatement after receiving a
15 citation for violating the Heat Illness Prevention regulation. In fact, the agency's Policy and
16 Procedures Manual does not set forth any mechanism, short of a follow-up inspection, by which
17 an abatement credit can be revoked or a failure to abate penalty can be assessed.

18 69. Cal/OSHA has mandatory duties under sections 6320 and 6430 of the Labor Code
19 to conduct a re-inspection whenever the agency has no timely evidence of abatement of a serious
20 violation, to revoke the abatement credit whenever the employer fails to timely certify abatement,
21 and to impose a civil penalty whenever an employer fails to timely abate a violation of the Heat
22 Illness Prevention regulation. Cal/OSHA disputes its obligation to take these statutorily required
23 actions, has not adopted policies or procedures adequate to ensure that it will satisfy these
24 obligations, and in practice systematically fails to satisfy these obligations. Cal/OSHA has
25 therefore violated its mandatory duties under sections 6320 and 6430 of the Labor Code.

26
27 _____
28 ¹⁰ Susan Ferriss, "Farmworker's Employer Fined in '06 Violations," Sacramento Bee, May 30,
2008.

1 Impact of Defendants' Failures

2 70. The foregoing enforcement failures contribute to an environment in which
3 agricultural employers can violate the Heat Illness Prevention regulation and endanger farm
4 workers with little risk of any consequence to the employers themselves. The consequences to
5 the farm workers are dire. Defendants have been made aware of the flaws in Cal/OSHA's heat
6 enforcement and the resultant danger to farm workers, but they have failed to take action
7 sufficient to correct those flaws.

8 71. The foregoing examples of Cal/OSHA's specific enforcement failures in 2011 and
9 2012, and the other specific examples set forth in this complaint, are merely examples of
10 Cal/OSHA's systematic failures. This complaint is not limited to challenging the specific
11 examples that are presented. Plaintiffs challenge Defendants' persistent denial, ongoing
12 misinterpretation, and systematic violation of their statutory obligations to enforce the Heat
13 Illness Prevention regulation, as well as Defendants' arbitrary and capricious failure to take action
14 to protect farm workers from heat-related illness and death.

15 72. Absent judicial intervention, Plaintiffs and those similarly situated will continue to
16 suffer the ill effects of Defendants' enforcement policies and practices. Farm workers will
17 continue to face an unjustifiable and unnecessary risk of heat illness and death so long as
18 Cal/OSHA persists in failing to acknowledge, misinterpreting, and failing to perform its
19 mandatory statutory duties to enforce the Heat Illness Prevention regulation under sections 6309,
20 6313, 6314.5, 6315, 6317, 6320, 6428, 6429, and 6430 of the Labor Code; and arbitrarily and
21 capriciously failing to take action to protect farm workers from the risk of heat illness and death
22 under section 6327.5 of the Labor Code.

23
24 **FIRST CAUSE OF ACTION -- WRIT OF MANDATE UNDER CALIFORNIA**
25 **CODE OF CIVIL PROCEDURE § 1085**

26 73. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
27 72.

1 74. Defendant Cal/OSHA is under a statutory duty to inspect places of employment
2 and enforce safety provisions under the California Occupational Safety and Health Act (Labor
3 Code §§ 6300 et seq.). Among its statutory duties are:

4 (a) The duty to ensure safe and healthful working conditions through the
5 enforcement of effective safety standards (Labor Code §§ 6300, 6309);

6 (b) The duty to undertake timely investigations of places of employment after
7 receiving employee complaints charging a violation; to keep complete and accurate records of all
8 complaints; to inform the complainant of any action taken by the division in regard to the subject
9 matter of the complaint and the reasons for the action, within 14 calendar days of taking any
10 action; and to conduct an informal review of any refusal to issue a citation with respect to an
11 alleged violation and provide a written statement of the reasons for the division's final disposition
12 of the case (Labor Code §§ 6309);

13 (c) The duty to investigate the causes of any employment accident that is fatal
14 or results in serious injury or illness (Labor Code § 6313);

15 (d) The duty to evaluate the condition or conditions alleged in the complaint,
16 during a complaint-based inspection; and to evaluate the condition or conditions involved in the
17 accident, during an accident-based inspection (Labor Code § 6314.5);

18 (e) The duty to issue a citation with reasonable promptness against an
19 employer who has violated any standard, rule, order or regulation, where the violation is serious,
20 repeated, willful or arises from a failure to abate, and to prepare and maintain records capable of
21 supplying an inspector with previous citations and notices issued to an employer (Labor Code §
22 6317);

23 (f) The duty to conduct a reinspection to determine compliance where a
24 serious, willful or repeated violation has not been abated or a special order has not been complied
25 with, and to revoke any adjustments to the civil penalty based on abatement if the employer fails
26 to timely submit a signed statement of abatement (Labor Code § 6320);

27 (g) The duty to impose a civil penalty for serious, willful, or repeat violations
28 or where an employer fails to correct violations in a timely manner (Labor Code §§ 6428, 6429,

1 6430);

2 (h) The duty to maintain the capacity to receive and act upon complaints at all
3 times and to employ as many investigators and other employees as is necessary to ensure safe and
4 healthful working conditions (Labor Code §§ 6309, 6315).

5 75. The foregoing duties are mandatory. (Labor Code § 15.) Defendant Cal/OSHA is
6 required to investigate complaints of violations in a timely manner; to issue citations against
7 employers for serious, willful, or repeated violations, or where an employer has failed to abate; to
8 verify that violations have abated or been corrected; to impose penalties; and to maintain the
9 capacity to receive and act upon complaints at all times.

10 76. Defendant Cal/OSHA has a pattern and practice of failing to enforce these safety
11 provisions. The specific incidents and inspections described herein are provided as examples
12 illustrative of the agency's pattern and practice of enforcement failures. Cal/OSHA has failed to
13 hire, staff, or train a reasonably sufficient number of safety inspectors and other officers to
14 respond promptly and adequately to complaints and to close inspections in a timely fashion.
15 Cal/OSHA has also failed to undertake timely and adequate inspections of workplaces in response
16 to employee complaints or in response to complaints by concerned members of the public.
17 Cal/OSHA has also failed to issue citations for serious, willful, and repeated violations of the
18 Heat Illness Prevention regulation, even against employers with a record of multiple serious heat
19 regulation violations or who have had prior heat-related employee injuries or fatalities.
20 Cal/OSHA has also improperly invalidated or cancelled many serious violations, such that its
21 actions have imperiled employees working at those workplaces. Cal/OSHA has also failed to
22 take reasonable steps (*i.e.*, beyond relying on a company's representations) to verify that citations
23 it issues have been corrected or abated. Cal/OSHA has also failed to impose mandatory penalties
24 for serious, willful, and repeated violations and has failed to collect in a timely manner those
25 penalties it has imposed. Cal/OSHA has failed to keep complete and accurate records of
26 complaints and other enforcement activity, including records capable of supplying an inspector
27 with previous citations and notices issued to an employer. Finally, Cal/OSHA has utterly failed
28 to ensure the safe and healthful working conditions of California's farm workers.

1 77. Plaintiffs have a beneficial right to the performance of these statutory duties.

2 78. Plaintiffs do not have any other plain, speedy, or adequate remedy at law.

3 79. Serious and specific efforts have been made to notify Cal/OSHA about workplace
4 safety violations. To continue to do so would be repetitive and futile.

5
6 **SECOND CAUSE OF ACTION -- WRIT OF MANDATE UNDER**
7 **LABOR CODE § 6327.5**

8 80. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
9 79.

10 81. Cal/OSHA is required to prevent or prohibit any conditions or practices in any
11 place of employment in which a danger exists that could reasonably be expected to cause death or
12 serious physical harm immediately or before the imminence of such danger can be eliminated
13 through other available means.

14 82. Since the Heat Illness Prevention regulation was adopted in 2005, Cal/OSHA
15 reasonably should have expected that more farm workers would die or be in imminent danger
16 from heat-related illnesses if it did not act promptly and urgently to investigate and prevent or
17 prohibit dangerous conditions in the fields such as inadequate monitoring, access to drinking
18 water, shade, rest, training, and emergency services. In farms which resulted in death or serious
19 illness, Cal/OSHA was notified or on notice of the existence of violations of safety regulations.

20 83. Defendant Ellen Widess, as Director of Cal/OSHA, arbitrarily and capriciously
21 failed to take action to prevent or prohibit said dangerous conditions by:

22 (a) failing to investigate workplaces where a danger exists that could reasonably be
23 expected to cause death or serious physical harm immediately or before the imminence of such
24 danger can be eliminated through other available means;

25 (b) failing to issue a citation or order or to take other appropriate action to prevent
26 or prohibit said imminent dangerous conditions;

27 (c) failing to verify that hazardous conditions posing imminent danger to farm
28 workers have abated or been corrected;

1 (d) failing to impose adequate penalties that reasonably would deter further
2 hazardous conditions from parties responsible for violations of the Heat Illness Prevention
3 regulation, including from growers that contract with serious or repeat farm labor contractor
4 offenders; and

5 (e) failing to collect such penalties.

6 These failures, which are not limited to the specific examples explicitly identified
7 herein, constitute a pattern and practice of failing to perform Defendants' statutory duties, as well
8 as individual instances of failing to perform such duties.

9 84. Serious and specific efforts have been made to notify Cal/OSHA about workplace
10 safety violations. To continue to do so would be repetitive and futile.

11
12 **THIRD CAUSE OF ACTION -- DECLARATORY RELIEF**

13 **(California Labor Code Section 6309; California Government Code Section 7290 et seq.)**

14 85. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
15 84.

16 86. There exists an actual controversy between Plaintiffs and Defendants as to what
17 Defendants' duties are under Section 6309 of the California Labor Code.

18 87. Plaintiffs contend (a) that Section 6309 of the California Labor Code imposes
19 upon Defendants a mandatory duty to investigate any complaint that alleges a violation of the
20 Heat Illness Prevention regulation within three working days, if the complaint was filed by an
21 employee or employee's representative; (b) that the phrase "working days" as used in Section
22 6309 refers to all days on which any employees of the employer against whom the complaint was
23 filed are working; (c) that the term "employee" as used in Section 6309 includes an employee
24 who does not provide his or her name or address, as well as an employee who does provide any or
25 all of that information; and (d) that the phrase "employee's representative" as used in Section
26 6309 includes any individual acting on behalf of an employee, including but not limited to a
27 union representative regardless of whether the union has a collective bargaining agreement with
28 the employee's employer. Defendants contend otherwise.

1 88. Plaintiffs further contend (a) that Section 6309 of the California Labor Code
2 imposes upon Defendants a mandatory duty to inform each complainant of any action taken by
3 Defendants in regard to the subject matter of the complaint and the reasons for the action, within
4 14 calendar days of taking any action, if the complainant provided his or her phone number or
5 address to Defendants; (b) that “any action” as used in Section 6309 includes conducting an on-
6 site inspection in response to the complaint, as well as issuing citations or determining that such
7 citations will not be issued; and (c) that the communication required by Section 6309 must be
8 made in a language understood by the complainant, pursuant to California Government Code
9 Section 7290 et seq. Defendants contend otherwise.

10 89. Plaintiffs further contend that Section 6309 of the California Labor Code imposes
11 upon Defendants (a) a mandatory duty to conduct an informal review of any refusal by a
12 representative of the division to issue a citation with respect to an alleged violation; (b) to adopt
13 regulations governing such an informal review; and (c) to provide a written statement of the
14 reasons for the division’s final disposition of the case to any employee or employee’s
15 representative requesting such a review.

16 90. Plaintiffs further contend that Section 6309 of the California Labor Code imposes
17 upon Defendants a mandatory duty to maintain the capability to receive and act upon complaints
18 at all times. Defendants contend otherwise.

19 91. Plaintiffs desire a declaration of their rights and Defendants’ duties and
20 responsibilities with respect to Section 6309 of the California Labor Code and ask the Court to
21 make a declaration of the parties’ rights, duties, and responsibilities.

22 92. Such a declaration is necessary and appropriate at this time in order that
23 Defendants understand their obligations under Section 6309 of the California Labor Code. A
24 timely declaration by this Court is urgent because, in the absence of such a declaration,
25 Defendants will continue to misinterpret and fail to perform their duties under Section 6309, to
26 Plaintiffs’ injury in the ways described above.

27
28

1 **FOURTH CAUSE OF ACTION -- DECLARATORY RELIEF**

2 **(California Labor Code Section 6313)**

3 93. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
4 92.

5 94. There exists an actual controversy between Plaintiffs and Defendants as to what
6 Defendants' duties are under Section 6313 of the California Labor Code.

7 95. Plaintiffs contend that Section 6313 of the California Labor Code imposes upon
8 Defendants a mandatory duty either to investigate each farm-worker fatality or serious illness that
9 may have been heat-related or to summarize the facts indicating that the incident need not be
10 investigated and the means by which those facts were determined. Defendants contend otherwise.

11 96. Plaintiffs desire a declaration of their rights and Defendants' duties and
12 responsibilities with respect to Section 6313 of the California Labor Code and ask the Court to
13 make a declaration of the parties' rights, duties, and responsibilities.

14 97. Such a declaration is necessary and appropriate at this time in order that
15 Defendants understand their obligations under Section 6313 of the California Labor Code. A
16 timely declaration by this Court is urgent because, in the absence of such a declaration,
17 Defendants will continue to misinterpret and fail to perform their duties under Section 6313, to
18 Plaintiffs' injury in the ways described above.

19
20 **FIFTH CAUSE OF ACTION -- DECLARATORY RELIEF**

21 **(California Labor Code Section 6315)**

22 98. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
23 97.

24 99. There exists an actual controversy between Plaintiffs and Defendants as to what
25 Defendants' duties are under Section 6315 of the California Labor Code.

26 100. Plaintiffs contend that Section 6315 of the California Labor Code imposes upon
27 Defendants a mandatory duty to employ as many attorneys and investigators as are necessary to
28

1 carry out the purposes of the California Occupational Safety and Health Act (Labor Code §§ 6300
2 et seq.). Defendants contend otherwise.

3 101. Plaintiffs desire a declaration of their rights and Defendants' duties and
4 responsibilities with respect to Section 6315 of the California Labor Code and ask the Court to
5 make a declaration of the parties' rights, duties, and responsibilities.

6 102. Such a declaration is necessary and appropriate at this time in order that
7 Defendants understand their obligations under Section 6315 of the California Labor Code. A
8 timely declaration by this Court is urgent because, in the absence of such a declaration,
9 Defendants will continue to misinterpret and fail to perform their duties under Section 6315, to
10 Plaintiffs' injury in the ways described above.

11
12 **SIXTH CAUSE OF ACTION -- DECLARATORY RELIEF**

13 **(California Labor Code Section 6317)**

14 103. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
15 102.

16 104. There exists an actual controversy between Plaintiffs and Defendants as to what
17 Defendants' duties are under Section 6317 of the California Labor Code.

18 105. Plaintiffs contend that Section 6317 of the California Labor Code imposes upon
19 Defendants (a) a mandatory duty to issue a citation or a notice, with reasonable promptness, for
20 every violation of the Heat Illness Prevention regulation that Defendants determine an employer
21 has committed; and (b) a mandatory duty to issue a citation for every such violation that has a
22 direct or immediate relationship to the health or safety of any employee or that is serious, repeat,
23 or willful. Defendants contend otherwise.

24 106. Plaintiffs desire a declaration of their rights and Defendants' duties and
25 responsibilities with respect to Section 6317 of the California Labor Code and ask the Court to
26 make a declaration of the parties' rights, duties, and responsibilities.

27 107. Such a declaration is necessary and appropriate at this time in order that
28 Defendants understand their obligations under Section 6317 of the California Labor Code. A

1 timely declaration by this Court is urgent because, in the absence of such a declaration,
2 Defendants will continue to misinterpret and fail to perform their duties under Section 6317, to
3 Plaintiffs' injury in the ways described above.

4
5 **SEVENTH CAUSE OF ACTION -- DECLARATORY RELIEF**
6 **(California Labor Code Section 6320)**

7 108. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
8 107.

9 109. There exists an actual controversy between Plaintiffs and Defendants as to what
10 Defendants' duties are under Section 6320 of the California Labor Code.

11 110. Plaintiffs contend that Section 6320 of the California Labor Code imposes upon
12 Defendants (a) a mandatory duty to conduct a re-inspection within thirty days of the end of the
13 period fixed for abatement of a serious violation of the Heat Illness Prevention regulation that is
14 characterized as repeat or willful or that has an abatement period of less than six days; and (b) a
15 mandatory duty to conduct a re-inspection within forty-five days following the end of the period
16 fixed for abatement of a serious violation of the Heat Illness Prevention regulation whenever
17 Defendants still have no evidence of abatement at that time. Defendants contend otherwise.

18 111. Plaintiffs further contend that Section 6320 of the California Labor Code imposes
19 upon Defendants a mandatory duty to revoke any adjustment to a civil penalty based on
20 abatement of a violation of the Heat Illness Prevention regulation if the violation was not abated
21 at the time the citation was issued and, within ten working days after the end of the period fixed
22 for abatement, the employer has not submitted to Defendants a signed statement under penalty of
23 perjury that it has complied with the abatement terms within the period fixed for abatement of the
24 violation. Defendants contend otherwise.

25 112. Plaintiffs desire a declaration of their rights and Defendants' duties and
26 responsibilities with respect to Section 6320 of the California Labor Code and ask the Court to
27 make a declaration of the parties' rights, duties, and responsibilities.
28

1 113. Such a declaration is necessary and appropriate at this time in order that
2 Defendants understand their obligations under Section 6320 of the California Labor Code. A
3 timely declaration by this Court is urgent because, in the absence of such a declaration,
4 Defendants will continue to misinterpret and fail to perform their duties under Section 6320, to
5 Plaintiffs' injury in the ways described above.

6
7 **EIGHTH CAUSE OF ACTION -- DECLARATORY RELIEF**

8 **(California Labor Code Section 6428)**

9 114. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
10 113.

11 115. There exists an actual controversy between Plaintiffs and Defendants as to what
12 Defendants' duties are under Section 6428 of the California Labor Code.

13 116. Plaintiffs contend that Section 6428 of the California Labor Code imposes upon
14 Defendants (a) a mandatory duty to impose a civil penalty of up to twenty-five thousand dollars
15 for every serious violation of the Heat Illness Prevention regulation; and (b) a mandatory duty not
16 to reduce any such civil penalty based on the good faith of the employer or the employer's history
17 of previous violations, unless the employer has an operative injury-prevention program.
18 Defendants contend otherwise.

19 117. Plaintiffs desire a declaration of their rights and Defendants' duties and
20 responsibilities with respect to Section 6428 of the California Labor Code and ask the Court to
21 make a declaration of the parties' rights, duties, and responsibilities.

22 118. Such a declaration is necessary and appropriate at this time in order that
23 Defendants understand their obligations under Section 6428 of the California Labor Code. A
24 timely declaration by this Court is urgent because, in the absence of such a declaration,
25 Defendants will continue to misinterpret and fail to perform their duties under Section 6428, to
26 Plaintiffs' injury in the ways described above.

1 **NINTH CAUSE OF ACTION -- DECLARATORY RELIEF**

2 **(California Labor Code Section 6429)**

3 119. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
4 118.

5 120. There exists an actual controversy between Plaintiffs and Defendants as to what
6 Defendants' duties are under Section 6429 of the California Labor Code.

7 121. Plaintiffs contend that Section 6429 of the California Labor Code imposes upon
8 Defendants a mandatory duty to impose a civil penalty in an amount not less than five thousand
9 dollars for every violation of the Heat Illness Prevention regulation, if the violation was willful.
10 Defendants contend otherwise.

11 122. Plaintiffs further contend that Section 6429 of the California Labor Code imposes
12 upon Defendants a mandatory duty not to reduce a civil penalty for a violation of the Heat Illness
13 Prevention regulation based on the good faith of the employer or the employer's history of
14 previous violations, if Defendants cite the employer for a repeat violation pursuant to Section
15 6429. Defendants contend otherwise.

16 123. Plaintiffs desire a declaration of their rights and Defendants' duties and
17 responsibilities with respect to Section 6429 of the California Labor Code and ask the Court to
18 make a declaration of the parties' rights, duties, and responsibilities.

19 124. Such a declaration is necessary and appropriate at this time in order that
20 Defendants understand their obligations under Section 6429 of the California Labor Code. A
21 timely declaration by this Court is urgent because, in the absence of such a declaration,
22 Defendants will continue to misinterpret and fail to perform their duties under Section 6429, to
23 Plaintiffs' injury in the ways described above.

24
25 **TENTH CAUSE OF ACTION -- DECLARATORY RELIEF**

26 **(California Labor Code Section 6430)**

27 125. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
28 124.

1 126. There exists an actual controversy between Plaintiffs and Defendants as to what
2 Defendants' duties are under Section 6430 of the California Labor Code.

3 127. Plaintiffs contend that Section 6430 of the California Labor Code imposes upon
4 Defendants (a) a mandatory duty to impose a civil penalty for every violation of the Heat Illness
5 Prevention regulation that an employer has not corrected within the time period permitted for its
6 correction; and (b) a mandatory duty to impose any such civil penalty in an amount up to fifteen
7 thousand dollars for each day during which the violation continues. Defendants contend
8 otherwise.

9 128. Plaintiffs desire a declaration of their rights and Defendants' duties and
10 responsibilities with respect to Section 6430 of the California Labor Code and ask the Court to
11 make a declaration of the parties' rights, duties, and responsibilities.

12 129. Such a declaration is necessary and appropriate at this time in order that
13 Defendants understand their obligations under Section 6430 of the California Labor Code. A
14 timely declaration by this Court is urgent because, in the absence of such a declaration,
15 Defendants will continue to misinterpret and fail to perform their duties under Section 6430, to
16 Plaintiffs' injury in the ways described above.

17
18 **ELEVENTH CAUSE OF ACTION -- DECLARATORY AND INJUNCTIVE RELIEF**

19 130. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through
20 129.

21 131. There exists an actual controversy between Plaintiffs and Defendants relating to
22 Defendants' pattern and practice of failing to perform their duties under the California
23 Occupational Safety and Health Act (Labor Code §§ 6300 et seq.), as described more fully above.
24 Plaintiffs contend that Defendants have a pattern and practice of failing to perform such duties
25 and have also failed to perform such duties in sufficient individual instances to justify the relief
26 sought; Defendants contend otherwise.

1 132. Plaintiffs desire a judicial determination that Defendants have a pattern and
2 practice of failing to perform their duties under the California Occupational Safety and Health
3 Act (Labor Code §§ 6300 et seq.), as described more fully above.

4 133. Plaintiffs are suffering and, absent a preliminary and permanent injunction, will
5 continue to suffer irreparable injury—potentially including death or serious illness due to heat-
6 related causes—as a result of Defendants’ pattern and practice, and individual instances, of failing
7 to perform their duties under the California Occupational Safety and Health Act (Labor Code §§
8 6300 et seq.), as described more fully above.

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1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiffs pray for judgment as follows:

3 1. For a peremptory writ of mandate requiring that Defendants fully perform their
4 duties under the California Occupational Safety and Health Act (Labor Code §§ 6300 et seq.), as
5 specified above.

6 2. For a declaration of the parties' rights, duties, and responsibilities under Sections
7 6309, 6313, 6315, 6317, 6320, 6428, 6429, and 6430 of the California Labor Code.

8 3. For a declaration that Defendants have a pattern and practice of failing to perform
9 their duties under the California Occupational Safety and Health Act (Labor Code §§ 6300 et
10 seq.) and have failed to perform their duties in numerous individual instances, as specified above.

11 4. For a preliminary and permanent injunction requiring that Defendants fully
12 perform their duties under the California Occupational Safety and Health Act (Labor Code §§
13 6300 et seq.), as specified above.

14 5. For an award of Plaintiffs' attorneys fees and costs.

15 6. For such other and further relief as the Court deems appropriate.

16 DATED: October 17, 2012

MUNGER, TOLLES & OLSON LLP

17
18
19 By: 

Stuart N. Senator

20
21 PUBLIC COUNSEL

22
23 By: 

Catherine E. Lhamon

24
25 Attorneys for Plaintiffs
26 MARGARITA ALVAREZ BAUTISTA; ANA
27 ROSA BAUTISTA; SOCORRO RIVERA;
28 MAURICIA CALVILLO; NATIVIDAD
CARRILLO; UNITED FARM WORKERS OF
AMERICA; UFW FOUNDATION

EXHIBIT A

Comparison of UFW Heat-Related Death Data vs. Cal/OSHA Heat-related Death Data provided by Cal/OSHA (8/1/12)

Cal OSHA comments/data in blue

2008

1) Maria Isabel Vasquez Jimenez – UFW and Cal/OSHA consider heat related.

DOD: 05/16/2008
Location: Merced County
Grower: West Coast Grape Farming
FLC: Merced Farm Labor

Confirmed Heat Related Fatality – San Joaquin County Coroner Report states: Visceral Multi-Organ Hyperthermic Injury due to Heat Stroke/Sun Stroke due to Occupational Environmental Exposure

2) Jose Macarena Hernandez – UFW considers heat related.

DOD: 06/20/2008
Location: Santa Maria, CA
Grower: Sunrise Growers
FLC: N/A

Ruled Out Heat Related Fatality – Santa Barbara County Coroner Report states: Undetermined

3) Audon (Abdon) Felix Garcia – both UFW and Cal/OSHA consider heat related.

DOD: 07/09/2008
Location: Delano, CA
Grower: Sunview Vineyard
FLC: N/A

Confirmed Heat Related Fatality – Kern County Coroner Report States: Environmental Heat Exposure

4) Ramiro Carrillo Rodriguez – UFW sheet says cal/OSHA confirmed as heat related, Cal/OSHA does not include the death on the list of heat deaths for 2008.

DOD: 07/10/2008
Location: Kingsburg, CA
Grower: Sun Valley Packing
FLC: Esparza Enterprises

Ruled Out Heat Related Fatality – Sarah Davis, Deputy Coroner, stated that Dr. Gopal listed the cause of death as: “Complications related to diabetes mellitus.” Other contributing factors listed include: “acute and chronic alcoholism.” Heat is not listed as a cause or a contributing factor.

5) Jorge Herrera – Cal/OSHA data sheet says we confirmed as heat related, UFW sheet says Cal/OSHA does not consider this a heat death.

DOD: 07/31/2008
Location: Bakersfield, CA
Grower: Vignolo Vineyards
FLC: N/A

Confirmed Heat Related Fatality – County of Kern Certificate of Death: Cardio Pulmonary Arrest due to multi-organ failure due to Heat Stroke.

6) Maria de Jesus Bautista – UFW considers heat related.

DOD: 08/02/2008
Location: Thermal, CA
Grower: Anthony Vineyards
FLC: Manuel Torres

Ruled Out Heat Related Fatality – County of Riverside Certificate of Death: Hydrocephalus due to Meningitis, Etiology/unknown.

2009

7) Unknown name – UFW considers heat related.

DOD: 07/15/2009
Location: Delano, CA
Grower: N/A
FLC: Juan Luis Ayala Lopez DBA JA Contracting

Ruled Out Heat Related Fatality – Kern County Coroner Report Cause of Death: Atherosclerotic and Hypertensive Cardiovascular Disease.

8) Lorenzo Guzman – UFW considers heat related.

DOD: 07/22/2009
Location: Bakersfield, CA
Grower: Giumarra Vineyards
FLC: N/A

Ruled Out Heat Related Fatality – Dr. Prudhomme’s Medical Opinion: this is not heat related. Specific Diagnosis: Cardiac Arrest due to Acute Myocardial Infarction.

2010

9) Unknown name – UFW considers heat related.

DOD: 05/12/2010
Location: not listed
Grower: FS Commercial Landscaping
FLC: N/A

We do not have anyone listed with DOD 5/12/10 or in the month of May

10)Rodolfo Ceballos Carrillo – UFW considers heat related.

DOD: 07/14/2010
Location: Arvin, CA
Grower: Sunview Vineyards
FLC: N/A

Ruled Out Heat Related Fatality – Kern County Coroner Report cause of death: Atherosclerotic and Hypertensive Cardiovascular Disease.

2011

11)56 yr old laborer, unknown name – UFW considers heat related and doesn't list whether Cal/OSHA agrees or not. Cal/OSHA data does not include death on list of heat related.

DOD: 04/26/2011
Location: Westmoreland, CA (Imperial County)
Grower: N/A
FLC: Ralph Collazo Packing – Heber, CA

Ruled Out Heat Related Fatality – Imperial County Coroner Report cause of death: Arteriosclerotic cardiovascular disease. Other significant conditions were hypertension and diabetes mellitus.

12)Romero Vazquez – both UFW and Cal/OSHA consider heat related.

DOD: 7/7/2011
Location: Blythe, CA
Grower: N/A
FLC: C. Clunn Consulting

Confirmed Heat Related Fatality – Maricopa County Coroner Report cause of death: Heat Stroke.

13)Lilia Estrada – UFW considers heat related and doesn't list whether Cal/OSHA agrees or not. Cal/OSHA data does not include death on list of heat related.

DOD: 8/20/2011
Location: UFW says "between Adams and Valentine streets" with no city listed.

Grower: "Rudi"?

FLC: Labor Contracting El Dorado Farms

Ruled Out Heat Related Fatality – Dr. Shusterman confirms the diagnosis of "right-sided basal ganglia (brain) hemorrhage. Her onset of symptoms relatively early in the day preceded – and was unlikely related to – any significant heat stress.

14)Timoteo Castro Cruz - UFW considers heat related and doesn't list whether Cal/OSHA agrees or not. Cal/OSHA data does not include death on list of heat related.

DOD: 09/23/2011

Location: Yuba City

Grower: N/A

FLC: George Masih Pagany Labor Contractors – Yuba City, CA

Ruled Out Heat Related Fatality – Dr. Prudhomme's medical opinion: as confirmed by the Forensic Pathologist and Coroner, EE died secondary to significant cardiac disease. I would NOT classify this as a heat fatality although I agree with the pathologist that performing work (even light work) in the heat DID contribute to his death. Cause of Death: congestive heart failure exacerbated by the physical exertion during hot humid weather. Due to obstructed aortic coarctation with secondary hypertensive cardiovascular disease.

EXHIBIT B

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY & HEALTH

LEGAL UNIT

1515 CLAY STREET, 19TH FLOOR
OAKLAND, CA 94612

TEL: (510) 286-7348 FAX: (510) 286-7039

*VIA U.S. MAIL AND E-MAIL*

October 4, 2011

Mr. Armando Elenes
United Farm Workers
30172 Garces Hwy
PO Box 130
Delano, CA 93216

Re: Heat Complaints to Cal OSHA

Dear Mr. Elenes:

I am following up on our phone call on Monday, September 26, 2011, concerning the complaints that you and your colleagues at the United Farm Workers filed with Cal/OSHA alleging violations of California's heat illness prevention standard. The Division takes allegations of violations of the heat illness prevention standard very seriously, and Eric Berg and I are looking forward to meeting with you on October 24, 2011, at the UFW office in Delano, California to discuss and review the evidence you have regarding some of these complaints.¹

In order to focus our discussions regarding the various complaints, I wanted to provide you a list of information that the Division would need to evaluate each complaint and to determine whether there is sufficient evidence to issue citations in each case. Before the Division can issue a citation alleging a violation of a safety order, it must have evidence sufficient to establish that a violation has occurred. Accordingly, for the complaints filed by the UFW, the Division would need evidence that would establish that an employer-employee relationship existed between any worker at the worksite and any employer subject to citation; that one or more employees at the worksite were exposed to a hazardous condition in violation of an applicable safety order; that any alleged violation presented a "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation" under California Labor Code section 6432; and that each specific element necessary to prove a violation of an applicable safety order has been met. Therefore, I would appreciate it if you and your colleagues could bring all of the evidence you have for each of the UFW complaints, including, but not limited to, photographs, documents received from the employers, business cards, written or oral statements from employees, personal observations, and notes taken during your observations. For your convenience, I have provided a list below of the type of information that the Division would require in each case.

¹ I am sorry that I am unavailable to meet this week. However, both Eric and I are available to meet the week of October 10, 2011. Should your schedule for that week clear up, please let us know and we can arrange for a meeting then. Otherwise, we look forward to meeting with you on Monday, October 24, 2011.

- Evidence of the identity of the employer controlling the day-to-day work of the employees at the worksite;
- Evidence of the identity of the primary employer (e.g., temporary employment agency), if any, who provided temporary workers at the worksite;
- Evidence of the existence of an employer-employee relationship between any employer and the workers at the worksite;
- Evidence of the number of workers at the worksite at the time of your observation;
- Evidence of the temperature at the time the workers were observed working;
- Evidence of the amount of shade, if any, available to the workers at the time they were observed working;
- Evidence of the distance of the available shade, if any, from the workers at the time of observation;
- Evidence of the time the workers who were observed began their shift and were scheduled to complete their shift;
- Evidence of the amount of water provided by the employer(s) at the worksite at the beginning of the shift;
- Evidence of the amount of water available to the workers at the time they were observed working;
- Evidence of the procedures, if any, the employer(s) had for replenishing water at the worksite;
- Evidence of the number of available bathrooms, if any, available at the time of observation;
- Evidence of the distance of the available bathrooms, if any, from the workers at the time of observation;
- Name and contact information for any supervisors, forepersons, or management officials at the worksite at the time of your observation;
- Evidence of any statements made by any supervisors, forepersons, or management officials at the worksite at the time of your observation;
- Name and contact information for any non-supervisory employees at the worksite at the time of your observation;
- Evidence of any statements made by any non-supervisory employees at the worksite at the time of your observation;

If you have any questions regarding this matter, please feel free to contact me by phone at (510) 286-7348, or by e-mail at wnguyen@dir.ca.gov. I look forward to meeting with you soon.

Sincerely,



Willie Nguyen
Staff Counsel

c.c. Eric Berg

EXHIBIT C

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY & HEALTH
LEGAL UNIT
1515 CLAY STREET, 19TH FLOOR
OAKLAND, CA 94612
TEL: (510) 286-7348 FAX: (510) 286-7039



VIA U.S. MAIL AND E-MAIL

December 9, 2011

Mr. Armando Elenes
United Farm Workers
30172 Garces Hwy
PO Box 130
Delano, CA 93216

Re: Heat Complaints to Cal/OSHA

Dear Mr. Elenes:

I am writing to follow up on our meeting in Delano last month regarding the heat complaints that you and your colleagues at the United Farm Workers filed with Cal/OSHA earlier this year. I appreciate the time that you and your colleagues took to meet with Eric Berg and me, and the additional information that you all provided at that meeting. I also appreciate your taking time to e-mail me the additional information on those complaints which we did not get to discuss during our meeting.

As I mentioned in my October 4, 2011, letter prior to our meeting, before Cal/OSHA can issue citations alleging a violation of a safety order, it must have evidence sufficient to establish that such a violation had occurred. One of the threshold issues that Cal/OSHA must establish in any inspection is whether there was an employer-employee relationship between the inspected entity and any workers at the worksite who were exposed to an alleged hazard. Cal/OSHA cannot issue a citation against an employer unless it can carry its burden to show that such an employer-employee relationship existed between the employer and the workers at the worksite.

During our meeting in Delano, your colleague Antonio Cortes stated that he had the name and contact information for an employee of Ag Pro Solutions. This employer was the subject of a UFW complaint (File No. 026 20747288-h) alleging that farm workers at a worksite at West Manning and Leonard Street in Fresno, California, were working without access to shade or restrooms on July 11, 2011. I appreciate your providing me with this employee's contact information yesterday. Cal/OSHA will attempt to contact this employee to see if she might be able to provide evidence of an employer-employee relationship between Ag Pro and the workers that Mr. Cortes saw on July 11th. We will also determine if she has additional information regarding the working conditions at the worksite during her employment there.

It is my understanding based on our meeting and the information you subsequently provided me, that the Ag Pro Solutions complaint is the only complaint filed by the UFW this past summer where you have the name and contact information for an employee of an entity that was the subject of one of the UFW

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complaints. I do understand that you and your colleagues had spoken to some farm workers during some of your other observations, and those workers provided you with the name of the employer whom they believed they worked for, but that you were unable to obtain the names or the contact information for any of those workers. Unfortunately, because we are unable to identify or contact those workers, and because any statements they may have made to you and your colleagues would be inadmissible hearsay, Cal/OSHA will be unable to carry its burden of proving an employer-employee relationship between those workers and the entities who were the subject of the UFW complaints. Accordingly, Cal/OSHA will be unable to reopen its investigations into those complaints or issue citations in those cases.

While we will only be able to reopen the inspection into the Ag Pro Solutions complaint, I do feel that our meeting and continued dialogue on all of the UFW complaints have been productive. The UFW and Cal/OSHA share the goal of protecting farm workers from heat illness and other workplace hazards. Organizations like the UFW can play an important role in helping Cal/OSHA enforce California's first-in-the-nation heat illness prevention standard by providing Cal/OSHA evidence of alleged violations of that standard. To help promote such efforts, Cal/OSHA is willing to meet further with you and your colleagues at the UFW to discuss the kinds of information that is legally required to form the basis of a sustainable citation and how the UFW could assist in gathering that information in the future. We are committed to strong enforcement of the heat illness prevention standard. If you and your colleagues are interested in such a meeting, please let me know and I can work to coordinate one.

If you have any questions regarding any of this, please feel free to contact me.

Sincerely,



Willie Nguyen
Staff Counsel

c.c. Eric Berg (by e-mail)
Catherine Lhamon (by e-mail)
Maureen Carroll (by e-mail)
Stuart Senator (by e-mail)