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BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of: **AGRICULTURAL CONTRACTING SERVICES ASSOCIATION, INC., dba AMERICAN LABOR ALLIANCE WORKERS' COMPENSATION FUND & TRUST, dba COMPONE USA, and MARCUS ASAY,** Respondents.	File No. VA-2016-00137 **ORDER ADOPTING PROPOSED DECISION** (Cal. Ins. Code § 12921.8)

This matter came for hearing before Kristin L. Rosi, Chief Administrative Law Judge (hereafter "ALJ") of the Administrative Hearing Bureau. On October 16, 2017, the Commissioner received the attached Proposed Decision.

Now, therefore, pursuant to the provisions of California Insurance Code Section 12921.8, IT IS SO ORDERED that the attached Proposed Decision is hereby adopted by the Insurance Commissioner as his Decision in the above-entitled-matter.

It is further ordered that the entirety of this Decision is designated precedential pursuant to Government Code section 11425.60, subdivision (b).

It is so ordered.

DATED: November 10, 2017.

DAVE JONES
Insurance Commissioner

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Respondents.	)

PROPOSED DECISION

I. Introduction

Agricultural Contracting Services Association, Inc., doing business as American Labor Alliance Workers' Compensation Fund & Trust, also doing business as CompOne USA, and Marcus Asay (ALA or Respondents) challenge the California Department of Insurance's (CDI) Cease and Desist Order, mandating ALA immediately stop advertising and acting as an insurer, insurance agent, broker or solicitor in California. Respondents argue they are an exempt Multiple Employer Welfare Arrangement under the Employee Retirement Income Security Act (ERISA) and therefore not subject to CDI's jurisdiction. ERISA permits states to regulate multiple employer welfare arrangements unless those arrangements are maintained pursuant to a bona fide collective bargaining relationship.

For the reasons set forth below, the Chief Administrative Law Judge (CALJ) finds that ALA is a Multiple Employer Welfare Arrangement pursuant to title 29 United States Code section 1002(40)(A) and Insurance Code section 742.21, and not exempt under 29 Code of Federal Regulations, part 2510.3-40 (2003). The CALJ also finds that ALA acted in a capacity for which a license or certificate of authority was required, but not possessed, in violation of the Insurance Code sections 700 and 1631.

II. Statement of Issues

1. Did Respondents act in a capacity for which a license, registration, permit or certificate of authority is required but not possessed in violation of the Insurance Code?

2. Are Respondents an "entity claiming exemption" pursuant to federal regulations, and therefore exempt from CDI's oversight and licensing requirements?

III. Parties' Contentions

The CDI contends Respondents violated Insurance Code section 700 by transacting a class of insurance business without being admitted for that class.[1] In addition, the CDI alleges ALA violated Insurance Code section 1631 by soliciting, negotiating or effecting insurance contracts without a valid license issued by the Insurance Commissioner. Lastly, the CDI argues ALA's failure to seek a Multiple Employer Welfare Arrangement (MEWA) certificate of compliance before providing benefits violates Insurance Code section 742.23.[2]

Respondents assert they are an "entity claiming exemption" under federal rules and therefore exempt from CDI's oversight.[3] Respondents further argue that insurer

[1] CDI Closing Brief, 3:1-18.
[2] Amended Cease and Desist Order, 7:3-11; CDI Closing Brief, 2:6-20.
[3] Respondents' Post-Hearing Brief, 1:27-2:7.

complaints against them are "questionable."[4] Lastly, Respondents contend they do not need to comply with federal or state labor relations statutes, as federal pension rules preempt those laws.[5]

IV. Procedural History

On December 22, 2016, the CDI issued ALA an Amended Order to Cease and Desist pursuant to Insurance Code section 12921.8. The CDI's Cease and Desist Order alleges that beginning in March 2016, Respondents improperly solicited, marketed, sold or issued workers' compensation benefits to California employers and agents.[6]

On January 9, 2017, CALJ Kristin L. Rosi convened a telephonic status conference and on January 10, 2017, Judge Rosi issued a Notice of Hearing and Pre-hearing Order, scheduling the evidentiary hearing for February 15, 2017.

On February 15 and 16, 2017, the parties participated in an evidentiary hearing in the CDI's San Francisco hearing room. Teresa R. Campbell, Esq., Assistant Chief Counsel, appeared for CDI and Charles K. Manock, Esq., of Manock Law, appeared for Respondents. The parties submitted documentary evidence and presented witnesses. The evidentiary record includes witness testimony and all exhibits admitted into evidence as identified in the parties' Exhibit Lists.

On February 23, 2017, the CALJ issued a Post-Hearing Order for Additional Evidence, instructing Respondents to provide: (1) a complete list of all employers with whom Respondents had entered into a collective bargaining agreement since January 1, 2013; (2) complete, signed copies of all collective bargaining agreements between Respondents and the entities listed in the Cease and Desist Order; (3) complete copies of

[4] Respondents' Post-Hearing Brief, 2:9-3:11.
[5] Respondents' Post-Hearing Brief, 3:13-6:12.
[6] Amended Cease and Desist Order, 4:9-12.

all signed authorization cards for the employers listed in item 2; (4) a complete list of all agricultural employers staffed, in whole or in part, by Respondents' farm labor contractor clients since January 1, 2013; (5) complete copies of all correspondence between Respondents and the United States Department of Labor's Office of Labor-Management Standards (OLMS), including but not limited to, all series "LM" forms filed with the OLMS; (6) complete copies of all grievances filed on behalf of bargaining unit members since January 1, 2013; (7) complete copies of all correspondence between Respondents and the California Agricultural Labor Relations Board, including but not limited to, any file stamped Notices of Intent to Take Access, and Notices of Intent to Organize; (8) a complete copy of Respondents' Constitution and bylaws; (9) a complete list of Respondents' elected officers; and (10) a complete copy of CDI's Exhibit 10.[7] The CALJ ordered the exhibits be labeled as ALJ Exhibits 1 through 10.

On March 10, 2017, Respondents filed and served ALJ Exhibits 1 through 10. On March 15, 2017, the CALJ issued a Second Order for Additional Evidence, ordering Respondents to refile a complete ALJ Exhibit 4.

On March 24, 2017, Respondents filed their Post-Hearing Brief. On March 28, 2017, the CDI filed its Post-Hearing Brief. The CDI attached to its post-hearing brief a February 23, 2017 letter from Larry King, OLMS' Division Chief to Respondents. On April 3, 2017, Respondents filed an objection to introduction of that letter.

On April 7 and April 13, 2017, the CALJ issued Notices of Intent to Take Official Notice of several state and federal statutes, along with the February 23, 2017 letter. On April 21, 2017, Respondents filed objections to the February 23, 2017 letter. On May 12,

[7] During the trial, Respondents argued CDI Exhibit 10 was not the meeting notice actually issued to ALA members. The CALJ ordered Respondents to file and serve the meeting announcement issued.

2017, the CALJ overruled Respondents' objections and took Official Notice of selected statutes and the February 23, 2017 letter.

On June 28, 2017, the CALJ closed the evidentiary record. On July 20, 2017, the CALJ reopened the record and ordered Respondents to produce evidence regarding each business entity with which Mr. Asay had served as an officer, director, partner, incorporator or agent between January 2006 and the present.

On July 28, 2017, Respondents produced the additional documentary evidence and on September 7, 2017, the CALJ reclosed the record.[8]

V. Findings of Fact

The CALJ finds, by a preponderance of evidence, the following material facts.[9]

A. ALA's Formation & Structure

Founded in 2007 by Marcus Asay, Agricultural Contracting Services Association, doing business as American Labor Alliance Workers' Compensation Fund & Trust, is a not-for-profit Nevada corporation headquartered in Clovis, California.[10] ALA's purpose is to provide employment benefits to agricultural employers and their employees.[11] ALA characterizes itself as a "union labor organization" operating exclusively in California, New York and Georgia.[12] Agricultural Contracting Services Association received U.S. Internal Revenue Code section 501(c)(5) tax-exempt status from the Internal Revenue Service in June 2009.[13]

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[8] On August 11, 2017, Respondents filed objections to ALJ Exhibit 12. The CALJ overruled those objections on September 7, 2017, and admitted ALJ Exhibit 12 into the record on that same date.
[9] References to the evidentiary hearing transcript are "Tr." Followed by the page(s) number and, where line references are used, a ":" followed by the line number(s).
[10] Tr. 55:7-19; Tr. 61:2-4.
[11] Tr. 54:15-55:6.
[12] Tr. 52:20; Tr. 110:4-6.
[13] Exh. 300-1.

Agricultural Contracting Services Association comprises several subsidiaries. Among those are American Labor Alliance, CompOne USA Interinsurance Service Company (CompOne), Life Abundantly and Avanto Health Plan. CompOne is a for-profit Texas corporation, intended by Respondents to be an "interinsurance" company offering workers' compensation benefits to ALA members.[14] CompOne serves as a brand name for ALA's workers' compensation benefit plan.[15] Life Abundantly is ALA's referral marketing network, selling workers' compensation, health and other benefit products.[16] To be a member of Life Abundantly, one must also be a member of ALA.[17] Avanto is ALA's health benefit program. Avanto is intended by Respondents as a low-cost alternative to plans offered by Blue Cross, Blue Shield and Aetna.[18] Neither Agricultural Contracting Services Association, nor any of its affiliates or subsidiaries is licensed by the CDI.[19] None of the above entities is registered with the CDI as Multiple Employer Welfare Arrangement or possesses a certificate of authority from the Insurance Commissioner.[20]

ALA is governed by a Board of Trustees. The Board of Trustees consists of two employer representatives, one employee and Mr. Asay.[21] Mr. Asay serves as the Chair of the Board.[22] ALA's officers include Chief Operating Officer Antonio Gastelum, Chief Benefits Officer Harold Zapata, and Chief of International Government and Foreign

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[14] Tr. 165:18-23; Tr. 164:11-15.
[15] Tr. 143:17-24; Tr. 211:12-13.
[16] ALJ Exh. 8-9.
[17] Tr. 65:14-22; Exh. 2-6.
[18] Tr. 194:11-20.
[19] Tr. 68:14-69:2; Tr. 37:16-21.
[20] Tr. 15:5-12.
[21] ALA's Bylaws indicate the Board of Trustees must consist of two employer representatives and two employee representatives. (See ALJ Exh. 8-3). Mr. Asay serves as one of the two "employee" representatives.
[22] Tr. 56:10-15; Tr. 61:7-21.

Affairs Martha Hernandez.[23] In addition, ALA employs 10 full-time labor relations representatives and other customer service associates.[24]

B. ALA's Membership & Organizing Efforts

1. ALA's Membership

ALA's Bylaws govern membership in ALA and its affiliates.[25] Membership is not limited to employees and is open to people outside of the collective bargaining relationship. ALA's membership levels are defined as:

> Member-Associate: This membership type is reflective of the LiBu Representative whose sole directive is to sell American Labor Alliance memberships to the public. . . Anyone over the age of 18 can become a Member-Associate for a one-time $499 Membership Fee.
>
> Employee-Member: This membership type may be workers, employed part-time or full-time, and their dependent family members, who have elected one or more ERISA-based employee welfare benefits, mandated or elective, and/or services, offered exclusively by American Labor Alliance in order to protect their health and wealth. Employee-Members elect their enrolling Member-Associate to represent them in matters of benefits and working conditions before their employer. The annual fee to become an Employee-Member is $25.
>
> Business Members: This membership type encompasses the self-employed business owner, or corporation, who through the use of a bona fide Collective Bargaining Agreement and an annual fee of $99, joins the American Labor Alliance and is afforded discounted rates to assist them in covering their employees with government mandated and/or elective ERISA-based benefits and services.

[23] Tr. 63:3-9; Exh. 10-7.
[24] Tr. 64:6-12. ALA also contracts with over 350 part-time labor representatives. (Tr. 63:16-25.)
[25] ALA amended its Bylaws on December 29, 2016, immediately after the CDI issued its Amended Cease and Desist Order.

Membership is also available to trade employees and licensed professionals whom ALA does not purport to represent.[26] Under ALA's Bylaws, employees are represented not by ALA, but by the Member-Associate who enrolled them in the program.

ALA's membership surged after it introduced its workers' compensation benefit.[27] Before 2016, ALA contracted with fewer than 100 employers and had a small membership roll. As of February 2017, more than 400 employers employ ALA's approximately 30,000 members.[28] Two-thirds of those employees are seasonal agricultural workers employed by roughly 50 farm labor contractors.[29] For example, farm labor contractors Russell Contracting, LLC (Russell Contracting) Supreme Valley Agriculture and West Coast Staffing each employ over 1,000 agricultural workers.[30]

2. Organizing Efforts

Although ALA employs over 350 full and part-time labor relations representatives, employee organizing efforts are employer-led. For example, cabinetry fabricator JR Construction approached ALA when they received an adverse ruling from the Internal Revenue Service regarding worker status.[31] ALA advised JR Construction to change worker status from independent contractors to full-time employees. ALA subsequently spoke to the employees and gained their approval for union organization.[32]

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[26] ALJ Exh. 8-9 to 8-10.
[27] Tr. 195:16-196:1.
[28] Tr. 86:24-87:11.
[29] Tr. 189:22-190:18; ALJ Exh. 11.
[30] Tr. 235:1-236:16; ALJ Exh. 11. On two separate occasions, the CALJ ordered ALA to produce a list of all agricultural employers serviced by its farm labor contractor members. ALA did not comply with these orders, indicating that it did not track where its members worked. (Decl. of Antonio Gastelum dated March 21, 2017.) ALA's claim is dubious given that it issued Certificates of Liability Insurance to its farm labor contractor clients. (See Exhs. 6-4, 6-5 and 6-6).
[31] Tr. 91:15-20; Tr. 93:19-25.
[32] Tr. 93:7-18.

ALA exclusively uses a method known as "card check" to gain recognition as an employee representative. ALA solicits signed authorization cards from employees and presents them to employers as "documentation of [their] appointment."[33] But ALA does not secure authorization cards from employees before negotiating their so-called collective bargaining agreements, as evidenced by ALA's failure to produce a single signed authorization card for those employers listed in the Cease and Desist Order.[34] When ordered to produce signed authorization cards for Supreme Valley Agriculture's 1,961 employees, ALA provided only 17 membership forms.[35] In addition, the authorization cards for Russell Contracting's employees are dated more than 18 months after their purported collective bargaining agreement's inception date.[36]

ALA has never participated in a state or federally-sanctioned union election, nor has ALA ever requested such an election.[37] In addition, ALA has never been certified as the exclusive bargaining representative by any state or federal labor relations agency.[38]

C. Collective Bargaining Agreements

ALA 's "representative" three-page collective bargaining agreement (CBA) contains provisions regarding membership, wages, sick leave, holidays and retirement.[39] It does not identify the personnel or job classifications covered, nor does it provide a grievance or arbitration procedure. The CBA also does not specify pay periods or work hours, and includes no union rights provision.

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[33] Tr. 182:1-5; Tr. 117:16-18.
[34] See ALJ Exh. 3.
[35] ALJ Exh. 3-10 through 3-26.
[36] ALJ Exh. 2-26; ALJ Exh. 3. The authenticity of those cards is doubtful given that all 336 of them bear the same execution date and a Russell Contracting supervisor is a member of ALA's Board.
[37] Tr. 224:17-20; Tr. 225:25-226:16; Tr. 117:9-18.
[38] Tr. 117:13-18.
[39] Tr. 96:1-7; Exh. 306.

ALA's agreement with the farm labor contractor Russell Contracting is slightly more detailed. That contract states:

> The COMPANY recognizes, now and during the whole term of the contract and all renewals thereof, AMERICAN LABOR ALLIANCE as the exclusive bargaining agency regarding wages, hours, working conditions and benefits, for all employees excluding supervisors, managerial and confidential employees, as defined by the National Labor Relations Act.[40]

The agreement continues until February 1, 2018, "yet may be terminated by either party upon the initial thirty (30) days of the execution of this Agreement, with written notice without a cancellation fee and is not unilaterally terminable or automatically terminated solely for non-payment of benefits, under, or contributions to, the plan."[41] The CBA further provides that no employee shall be paid "less than the following minimum salary: $10 per hour, and shall receive a minimum 3% increase on the anniversary date of his or her employment."[42]

Few, if any, employers have a CBA with Respondents. Mr. Asay repeatedly and falsely testified that all 400 business members (employers) are bound by CBAs with ALA.[43] When ordered to produce CBAs for the six employers listed in the CDI's Cease and Desist Order, ALA failed to produce a single CBA. Instead, ALA stated that "no worker injury coverage policy for [the employer] appears to have been issued for their

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[40] ALJ Exh. 2-28.
[41] ALJ Exh. 2-29.
[42] ALJ Exh. 2-29. This wage amount is inconsistent with California's Minimum Wage Order (MW-2017).
[43] Tr. 88:1-3; Tr. 88:9-11; Tr. 97:24-98:8.
Judge Rosi: I believe you told me earlier that all 400 members have collective bargaining agreements; is that correct?
Mr. Asay: Yes.
Judge Rosi: So if I asked to see collective bargaining agreements for the six entities that were listed in the Department's complaint, you would be able to provide me with those collective bargaining agreements?
Mr. Asay: Yes.

employees because no collective bargaining agreement was signed."[44] With regard to Ranone Enterprises, ALA produced a document meant to secure worker's compensation benefits but that provides no terms and conditions of employment.[45]

ALA does not engage in arms-length negotiations with employers. The only signed CBA provided is between ALA and Russell Contracting. Russell Contracting was organized in 2007 by Mr. Asay and Mr. Asay serves as the company's agent for service. In addition, Mr. Asay serves as a board member of Supreme Valley Agriculture, Green Ag, Ayon Farm Labor, Magbar Inc., and California Pride Harvesting, all employer-members of ALA.[46] In short, Mr. Asay serves as an officer or agent for many of the ALA member-employers while purporting to represent workers from those same entities.

Lastly, ALA does not view these agreements as mutually negotiated documents. ALA unilaterally revises the agreements and forwards them to employers for "updated signatures."[47] Specifically, ALA unilaterally alters the agreement's format and legal operating language in order to "strengthen the document itself."[48]

D. Certificates of Liability Insurance and Worker's Compensation Benefit Calculations

1. Certificates of Liability Insurance

Respondents issued numerous Certificates of Liability Insurance (COLI) on behalf of their employer members, signifying that their members maintain workers' compensation insurance in accordance with California law. These certificates are standard industry documents typically completed by insurance brokers and provided to

[44] ALJ Exh. 2; see, for example, ALJ Exhs. 2-7 and 2-8.
[45] ALJ Exh. 2-10; In fact, given ALA's admission that it did not possess authorization cards for Ranone's employees, any such CBA would be invalid.
[46] ALJ Exhs. 11 and 12; Mr. Asay also serves as an agent for JR Construction, the employer listed in Exh. 306.
[47] Tr. 192:4-6.
[48] Tr. 193:2-3.

regulatory agencies or others requiring proof of workers compensation insurance.[49] ALA's COLI each list CompOne USA as the "Producer." It is undisputed that CompOne USA is neither a licensed California insurer nor a licensed producer.[50] The COLI list Travelers Casualty Insurance Company (Travelers) and National Fire Union Insurance Company (National Fire) as the worker's compensation insurance carriers.[51] Neither Travelers nor National Fire provided workers' compensation insurance to ALA members. In fact, Respondents admit that they listed their own liability insurance providers on ALA-issued COLIs and listed their own insurance policy numbers.[52] ALA also identifies itself as an "additional insurer" for workers' compensation insurance, labeling itself as a MEWA, ERISA-exempt benefit plan.[53]

2. Policy Declarations

ALA provided employers with Policy Declarations listing the terms of its workers' compensation policies. The Policy Declarations "provide the terms under which CompOne USA can offer a workers' compensation policy."[54] Specifically, the Policy Declaration notes "premium payments will be collected for the policy term as a charge on each payroll period" and failure to pay may result in the policy's cancellation.[55] The Policy Declaration also states Respondents will collect mandated California fees on each worker's compensation policy. But Respondents admit they have not forwarded any of

[49] Tr. 34:19-35:2.
[50] Tr. 68:24-25.
[51] See Exhs. 3-5, 6-3, 6-4 and 6-5.
[52] Tr. 75:9-17.
[53] Exh. 3-5; Exh. 6-5.
[54] Exh. 3-2.
[55] *Ibid.*

the collected fees to the State of California.[56] Indeed, contrary to the Policy Declaration's language, Respondents say they do not believe they are mandated to collect the fees.[57]

Respondents' Policy Declaration indicates CompOne USA periodically files revisions to its rating plan, and that the workers' compensation quote "may include terms that are pending the authorization of regulatory authorities."[58] But as Respondents admit, they do not file their rating plan or any other statistical information with the CDI, Workers Compensation Insurance Rating Bureau or any other regulatory authority.[59] The Policy Declaration also defines the policy as:

> Formed as a multiple employer welfare arrangement (MEWA) as set forth by the US Department of Labor with the rules and regulations of a national labor organization and under IRS rules as a 501(c)(5) tax exempt designation (sic) under exception of collective bargaining agreement and under ERISA rules.[60]

Lastly, Respondents' Policy Declaration states coverage is available only to ALA members with a currently active CBA. But Respondents issued Policy Declarations to ServePro of Yerba Buena and Mold Solutions despite admitting that no collective bargaining agreements exist for these employers.[61]

3. Benefit Funding and Calculation

ALA funds the workers' compensation benefits entirely through employer contributions held in trust by ALA.[62] Respondents did not capitalize the workers' compensation trust fund before inception nor does ALA carry any reserve or reinsurance

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[56] Tr. 107:10-17; Tr. 120:8-21.
[57] Tr. 120:8-12.
[58] Exh. 3-3.
[59] Tr. 123:8-25.
[60] Exhs. 3-4, 4-5 and 6-2.
[61] Compare Exhs. 3-2, 4-1 and 6-1 with ALJ Exhs. 2-5 and 2-7.
[62] Tr. 210:8-11.

on its benefit fund.[63] ALA holds all its benefits funds in one trust account and does not have a contingency plan if employer claims exceed contributions.[64]

At the policy year inception, employers pay ALA an initial deposit of five to 10 percent of their annual payroll.[65] ALA then examines the employer's three year loss "runs" and the employer's assigned classifications. Using its own underwriter, ALA presents the employers with a premium quote, listing its classification's base rate and billing rate, as well as state-mandated fees.[66] ALA collects premium payments based on an employer's payroll period, either weekly, monthly or "on demand."[67]

E. Employee Representation and Workers' Compensation Claims

ALA has never filed an unfair practice charge with the National Labor Relations Board or Agricultural Labor Relations Board, nor has ALA filed any grievances under any of the CBAs.[68]

ALA's claims reporting requirements mirror those found in the Insurance Code, as does ALA's obligation to pay such claims.[69] From January 2016 to December 31, 2016, ALA paid out approximately $350,000 in worker's compensation benefits.[70] To

[63] Tr. 208:13-18; Tr. 209:25-210:3; Tr. 232:23-25.
[64] Tr. 210:12-19; Tr. 209:13-24.
[65] Tr. 105:5-9.
[66] Tr. 105:4-19. Mr. Asay falsely testified ALA does not use the term "premium." (Tr. 104:13:20.) ALA's Policy Declaration uses the term "premium" in three separate places and informs employers that "any WCIRB update that affects the pricing of the policy will be reflected in your *premium billing statement*." (Exhs. 3-3, 4-2, 4-4; emphasis added.) In addition, ALA's policy Binder specifically uses the term "premium" in calculating policy costs, as does its Annual Rating Endorsement. (Exhs. 5-1 and 3-1.)
[67] Exh. 3-2.
[68] Tr. 118:8-13; ALJ Exh. 6-2.
[69] Tr. 206:24-207:12.
[70] Tr. 108:13-14; Tr. 204:20-205:11.

date, ALA has never denied a workers' compensation claim.[71] ALA also boasts a loss ratio of 15 percent.[72]

F. Regulatory Communications

On November 7, 2012, the OLMS assigned ALA a file number.[73] In December 2012, Respondents began filing annual reports with the OLMS.[74] On February 23, 2017, the OLMS issued ALA a letter stating in part that ALA "does not qualify as a labor organization pursuant to Sections 3(i) and (j) of the Labor-Management Reporting and Disclosure Act."[75]

Respondents further admit they failed to seek certification from the Department of Labor as an entity claiming exemption under ERISA.[76]

G. Complaints Against ALA and CDI's Investigation

In March 2016, the CDI received an anonymous complaint regarding ALA. The complaint alleged ALA marketed and sold workers' compensation insurance without a California license.[77] Shortly thereafter, the Zenith Insurance Company's (Zenith) clients began receiving ALA-issued Certificates of Liability Insurance (COLI). Each COLI listed Travelers Casualty & Surety Company and National Union Fire Insurance Company as "Insurer(s) Affording Coverage" and provided alleged Travelers' policy

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[71] Tr. 212:7-11.
[72] Tr. 213:20-23. The loss ratio is the sum of incurred losses and loss adjustment expenses divided by earned premium. As a comparison, the 2016 average loss ratio for a workers' compensation insurance carrier was 96%. (See WCIRB Report on Insurer Experience published December 31, 2016, available at www.wcirb.com.)
[73] ALJ Exh. 5-35.
[74] Tr. 101:13-17.
[75] On February 23, 2017, the CALJ ordered Respondents to provide a complete list of all correspondence between OLMS and ALA. Respondents' production in response to this Order omitted the February 23, 2017 letter discussed herein. Instead, CDI provided the CALJ with the OLMS letter. The CALJ took Official Notice of this letter on May 12, 2017.
[76] Tr. 99:23-100:25; Tr. 220:23-222:5.
[77] Tr. 13:4-15.

numbers. The COLIs also listed "CompOne USA" as the producer.[78] Over the next several months, Zenith received several more COLIs issued by ALA. Each of those COLI listed Travelers or National Union Fire as the insurers, and CompOne USA or ALA as the producer.[79] When Zenith contacted Travelers to verify the COLI, Travelers stated it did not insure the businesses listed on the COLIs. Believing these COLI to be invalid, Zenith forwarded the results of its investigation to the CDI.

In August 2016, the California Department of Industrial Relations (DIR) contacted the CDI regarding a COLI issued by CompOne USA to ServePro of Yorba Linda.[80] When the DIR questioned the validity of the COLI, ServePro provided the DIR with Mr. Asay's contact information. Mr. Asay, in turn, provided the DIR with a name and telephone number where the DIR could confirm Travelers' coverage. The contact person was not a Travelers' employee, but instead an insurance agent serving as ALA's underwriting "expert."[81] The DIR denied ServePro's COLI and forwarded its findings and communications to the CDI.[82]

In September 2016, the CDI asked Travelers Insurance to verify workers' compensation coverage for six California businesses with ALA-issued COLIs.[83] On October 11, 2016, Travelers stated it did not insure the six businesses listed.[84]

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[78] Exh. 3-5.
[79] Exh. 2-3; Exhs. 6-3 to 6-5.
[80] Exh. 7; Tr. 15:13-16:16.
[81] Exh. 7-2; Exh. 7-4.
[82] Tr. 16:14-16.
[83] Exh. 8-1. The six businesses were SPYB, Mold Solutions, 7 Contracting, Ranone Enterprises, Central Cal Ag., and Preferred Services Group.
[84] In December 2016, the CDI asked Travelers and AIG to verify workers' compensation coverage for another 26 California businesses whose ALA-issued COLIs listed Travelers and National Union Fire as the insurers. Both Travelers and AIG responded that they did not provide insurance for the 26 businesses. (See Exhs. 8 & 9.)

H. Cease and Desist Orders

On October 17, 2016, the CDI issued ALA an Order to Cease and Desist and Notice of Right to Hearing (Order) contending ALA improperly solicited, marketed, sold, and/or issued what they alleged to be workers' compensation insurance benefits in six instances, in violation of the Insurance Code.[85] The Order alleges Respondents issued Certificates of Liability Insurance listing Central Cal. Ag., SPBY, Inc., Mold Solutions, Inc., Tapatio Auto and Truck Dismantling, and Ranone Enterprises c/o Ruth Dias dba 7 Contracting as the insureds, and Travelers and/or ALA as the insurers. The Order further alleged that, in each instance, neither Travelers, nor National Union nor any other insurer actually issued workers' compensation insurance policies covering the above California businesses despite Respondent's representations.

The CDI ordered ALA to immediately cease and desist "from acting as an insurance agent, producer, insurer, or any other capacity in the State of California without a valid license, permit, or Certificate of Authority to do so, including but not limited to transacting as a producer or insurer."[86] Specifically, ALA was ordered to cease "advertising or acting as an insurer, insurance agent, broker, or solicitor exempt from regulation in the State of California" and to cease "receiving any money, commission, fee, rebate, payment, remuneration, or any other valuable consideration whatsoever, in connection with any insurance transactions."

[85] Order to Cease and Desist, p. 4. On December 22, 2016, CDI amended the Order to Cease and Desist. The Amended Order to Cease and Desist is the operative filing in this proceeding.
[86] Order to Cease and Desist, pp. 7-8.

Despite the Order, Respondents continue to solicit, market, sell and issue workers' compensation insurance benefits.[87] In fact, Respondents admit they have issued at least 53 new "policies" since the CDI ordered ALA to stop doing so.[88]

VI. Discussion

Respondents contend they are an exempt multiple employer welfare arrangement under ERISA and therefore immune from the Insurance Code's MEWA requirements.[89] Respondents further contend NLRB certification is not required for exclusive representative status and allege that the complaints underlying CDI's Amended Order to Cease and Desist are unreliable.[90] CDI contends ALA is not a certified labor organization and thus not a MEWA exempt entity under ERISA rules.[91] CDI further asserts ALA violated the Insurance Code by transacting insurance without proper authority or license.[92]

Based on the facts and applicable law, the CALJ finds ALA is not an "entity claiming exemption" and thus is a MEWA, as defined by ERISA and the Insurance Code. The CALJ further finds ALA failed to comply with the Insurance Code's certification requirements and engaged in the unlawful solicitation, marketing and sale of insurance in violation of Insurance Code section 700.

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[87] Tr. 113:12-114:8.
[88] See ALJ Exh. 1. ALJ Exhibit 1 lists the "join" date for each of Respondents' participants. At least 53 employers joined after the CDI issued its Order to Cease and Desist.
[89] Respondents' Post-Hearing Brief, pp. 4-6.
[90] *Id.* at pp. 2-4.
[91] CDI's Closing Brief, p. 2.
[92] *Id.* at pp. 2-4.

A. ALA Is Not an "Entity Claiming Exemption" under ERISA Rules

1. Background

The U.S. Department of Labor, through the Employee Benefits Security Administration, is responsible for administering and enforcing the federal Employee Retirement Income Security Act (ERISA). In general, ERISA prescribes participation and funding standards for private-sector pension plans. In addition, ERISA prescribes standards for the administration and management of employee benefit plans. ERISA-regulated employee benefits plans include multiple employer welfare arrangements, frequently referred to as MEWAs.

Before 1983, ERISA's preemption provisions precluded states from regulating ERISA-covered MEWAs. By avoiding state insurance reserve or other requirements, MEWAs were able to market insurance coverage at rates substantially below those of regulated insurance companies, thus making the MEWA an attractive alternative for small businesses. But in practice, many MEWAs were unable to pay claims as a result of insufficient funding and inadequate reserves. Or in the worst situations, they were operated by individuals who drained the MEWA's assets through excessive fees or embezzlement.[93]

In 1983 Congress amended ERISA's preemption provisions, recognizing the states' need to enforce insurance laws with respect to MEWAs. The amendment removes preemption protection for MEWAs and permits states to regulate MEWAs regardless of whether those MEWAs are ERISA-covered employee welfare benefit plans.

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[93] For a general overview of MEWAs, see U.S. Department of Labor, Employee Benefits Security Administration, Multiple Employer Welfare Arrangements under ERISA, A Guide to Federal and State Regulation, Aug. 2013.

2. Applicable Law

a. ERISA

ERISA Section 3(40) defines a "multiple employer welfare arrangement" as an employee welfare benefit plan or any other arrangement,

> which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) [welfare plan benefits] to the employees of two or more employers, or to their beneficiaries, except that such term does not include any such plan or arrangement that is established or maintained –
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> (i) under or pursuant to one or more agreements which the Secretary [of Labor] finds to be collective bargaining agreements.
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> (ii) by a rural electric cooperative, or
>
> (iii) by a rural telephone cooperative association.[94]

A MEWA designation therefore requires that (1) the arrangement offers benefits to employees of two or more employers, and (2) the arrangement is not exempted from the definition of MEWA as established under a collective bargaining agreement, or a rural electric cooperative or a rural telephone cooperative.

The Code of Federal Regulations sets forth criteria for securing a MEWA exemption from the U.S. Secretary of Labor.[95] An entity will be treated as "established under a collective bargaining agreement" if it meets four affirmative requirements and does not fall within three exclusions. The affirmative requirements are:

> (1) The entity is an employee welfare benefit plan within the meaning of section 3(1) of ERISA;
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> (2) at least 85% of the participants are individuals employed under one or more collective bargaining

[94] 29 U.S.C. § 1002(40)(A).
[95] 29 C.F.R. § 2510.3-40 (2003). See also, Exh. 310.

> agreements or who otherwise have a nexus to the bargaining unit; and
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> (3) The plan is incorporated or referenced in a written agreement between one or more employers and is the product of a bona fide collective bargaining relationship between the employers and the employee organization(s), where the collective bargaining agreement identifies the personnel, job classifications, and terms and conditions of employment.[96]

A bona fide collective bargaining relationship is similarly outlined in the federal regulations. If four of the eight factors are met, there is a rebuttable presumption that the bargaining was bona fide. Those eight factors include (1) contribution to a labor-management trust fund in accordance with the Taft-Hartley Act; (2) participation of substantially all employers in a multiemployer pension plan in accordance with the Internal Revenue Code and the Taft-Hartley Act; (3) participation in a collective bargaining agreement prior to 1983; (4) employee organization status prior to 1983; (5) determination by a court, government agency or government-supervised election that the employee organization is the lawfully recognized collective bargaining representative; (6) determination that employers pay at least 75% of the premiums required for coverage under the plan; (7) sponsorship by the employee organization of a hiring hall; and (8) determination that the collective bargaining agreement is bona fide for the purposes of establishing prevailing wages in a locality.[97]

Even assuming the plan meets four of the eight criteria, the plan will be denied a MEWA exemption if:

> (1) The plan is self-funded or partially self-funded and is marketed to employers or sole proprietors;

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[96] 29 C.F.R. §§ 2510.3-40(b)(1), (b)(2) and (b)(3).
[97] 29 C.F.R. §§ 2510.3-40(b)(4)(i) through (b)(4)(viii).

> (2) The agreement under which the plan is established or maintained is a scheme, plan, stratagem, or artifice of evasion, a principal intent of which is to evade compliance with state law and regulations applicable to insurance; or
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> (3) There is fraud, forgery, or willful misrepresentation as to the factors relied on to demonstrate that the plan satisfies the criteria set forth in paragraph (b) of this section.[98]

Lastly, federal law sets forth the exclusive process for seeking a Secretary of Labor finding.[99] An entity claiming an exemption must request a finding by a Department of Labor Administrative Law Judge that the plan is the product of a bona fide collective bargaining relationship.[100] Absent such a finding, the arrangement shall be deemed a MEWA without exemption.[101]

b. Federal Labor Relations Law

A number of federal statutes and regulations govern the formation, organization, certification and conduct of labor organization and employers. Included among those are the National Labor Relations Act (NLRA) and the Labor-Management Reporting and Disclosure Act (LMRDA).

The NLRA defines a "labor organization" as any organization "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[102] The LMRDA employs a similar definition while further requiring the organization engage in an industry affecting commerce.[103] A labor organization is engaged in an industry affecting commerce if it is the certified

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[98] 29 C.F.R. §§ 2510.3-40(c)(1), (c)(2) and (c)(3).
[99] 29 C.F.R. § 2570.150 et seq.
[100] 29 C.F.R. §§ 2510.3-40(f) and (g).
[101] *Virginia Beach Policemen's Benev. Ass'n. v. Reich* (E.D.Va. 1995) 881 F.Supp. 1059, 1070; *Long v. Hammond* (2004) 164 N.C.App. 486, 493.
[102] 29 U.S.C. § 152(5).
[103] 29 U.S.C. § 402(i).

representative of employees under NLRA provisions, or an organization recognized or acting as an employee representative of an employer engaged in an industry affecting commerce.[104]

The NLRA also provides the exclusive method by which employees may select union representation. Employee organizations must first file a certification petition and proof of support with the National Labor Relations Board (NLRB).[105] If the NLRB determines the unit is appropriate and proof of support is sufficient, it will begin the formal election process. Unless otherwise directed by the NLRB, all representation elections shall be by secret ballot.[106] After a secret ballot election, the NLRB certifies the election results and the employee organization's exclusive bargaining representative status.[107]

c. California Labor Code and Regulations

In 1975, the California Legislature passed the Agricultural Labor Relations Act (ALRA) guaranteeing rights to California farm workers.[108] The ALRA protects California farm workers' rights and prohibits employers and unions from interfering with those rights. Under the ALRA, an agricultural employer engaging a farm labor contractor shall be deemed the employer of record for those employees.[109]

The ALRA creates the exclusive method by which California farm workers may select a bargaining representative.[110] Labor organizations wishing to represent agricultural employees must first file certification petition with the state Agricultural

[104] 29 U.S.C. § 402(j). Agricultural employers are exempt from the NLRA and instead covered by the California Agricultural Labor Relations Act.
[105] 29 C.F.R. § 102.60(a).
[106] 29 C.F.R. § 102.69(a).
[107] 29 C.F.R. § 102.69(b).
[108] Lab. Code § 1140 et seq.
[109] Lab. Code § 1140.4, subd. (c).
[110] Lab. Code § 1156.3.

Labor Relations Board (ALRB) and a notice of intent to access the employer's property.[111] If the bargaining unit is deemed appropriate and the organization has shown sufficient proof of support, the ALRB will conduct a secret ballot election.[112] After the election, the ALRB certifies the election results and the labor organization.[113] Only labor organizations certified by the ALRB have a legally enforceable right to represent California farm workers. [114]

3. Analysis and Conclusions Regarding Exemption Claim

Respondents' adamantly contend they are an entity claiming exemption under ERISA section 3(40)(A), and thus not subject to the California Insurance Code.[115] But Respondents' claim is unsupported by the facts presented and the applicable law. ERISA rules and regulations, as well as federal and state labor laws, make clear that Respondents fail to meet the criteria for a labor organization.

a. Respondents Did Not Receive a Finding from the Secretary of Labor as Required by Federal Law

ERISA Section 3(40)(A) provides that a MEWA does not include an employee welfare benefit plans established or maintained pursuant to one or more agreements that the Secretary of Labor finds to be collective bargaining agreements. 29 Code of Federal Regulations, part 2510.3-40 (2003) provides the exclusive method for seeking a finding from the Secretary of Labor. Specifically, part 2510.3-40(f) directs employee welfare benefit plans to the hearing procedures codified in 29 Code of Federal Regulations, part 2570.150 et seq. Only a Department of Labor ALJ decision issued pursuant to part

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[111] Cal. Code Regs., tit. 8, §§ 20300 and 20900; see also Lab. Code § 1156.6.
[112] Lab. Code § 1156.3, subd. (b).
[113] Cal. Code Regs., tit. 8, § 20380.
[114] Lab. Code §§ 1156 and 1159. Labor Code section 1159 explicitly states that "only labor organizations certified pursuant to this part shall be parties to a legally valid collective bargaining agreement."
[115] 29 U.S.C. § 1002(40)(A).

2570.150 will constitute a finding whether the entity is an employee welfare benefit plan operating under a collective bargaining agreement.[116]

This requirement of an affirmative finding has been upheld by federal and state courts. In *Virginia Beach Policemen's Benevolent Association v. Reich* (E.D.Va. 1995) 881 F.Supp. 1059, the federal district court held that a state is presumptively free to regulate a MEWA when the Secretary of Labor has not made a finding as to its collective bargaining status. The court found,

> [i]t is clear that, through ERISA section 3(40)(A)(i), Congress intended to promote state regulation of MEWAs. The Court finds that, consistent with the legislative history, *only if the Secretary chooses to make a finding*, would a MEWA receive exemption from state regulation.[117]

Similarly, in *Long v. Hammond* (2004) 164 N.C.App. 486, the North Carolina Court of Appeal held that absent a finding by the Secretary of Labor, an entity may not claim exemption under ERISA section 3(40)(A)(i).[118] The Court further held that if the employee welfare benefit plan "otherwise meets the definition of a MEWA, a determination the Commissioner of Insurance can make on its own, [the state] can regulate the MEWA until the Secretary of Labor makes some finding to the contrary."[119]

Respondents admit they did not seek or receive a finding by the Secretary of Labor that they are an employee welfare benefit plan operating under a collective bargaining agreement.[120] Respondents also admit they were aware of the federal

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[116] 29 C.F.R. § 2510.3-40(g)((1). Part 2510.3-40(g)(1) states "An Administrative Law Judge finding issued pursuant to the procedures in 29 CFR part 2570, subpart H will constitute a finding whether the entity in that proceeding is an employee welfare benefit plan established or maintained under or pursuant to an agreement that the Secretary finds to be a collective bargaining agreement for purposes of section 3(40) of ERISA."

[117] *Virginia Beach Policemen's Benev. Ass'n. v. Reich, supra,* 881 F.Supp. at p. 1070 (emphasis added).

[118] *Long v. Hammond, supra,* 164 N.C.App. at p. 493.

[119] *Id.* at p. 494.

[120] Tr. 99:23-100:25; Tr. 220:23-222:5.

requirements before this proceeding.[121] In fact, in communications with the DIR, Mr. Gastelum claimed ALA was exempt from state regulation based on the criteria set forth in 29 Code of Federal Regulations, part 2510.3-40 (2003).[122] Mr. Gastelum even went so far as to send the DIR a copy of part 2510.3-40. Since the Secretary of Labor has not found ALA to be an employee welfare benefit plan operating under a collective bargaining agreement for the purposes of ERISA section 3(40)(A), Respondents are not exempt from state regulation under ERISA.

b. Respondents Do Not Meet the Criteria Set Forth in the Federal Regulations

Even assuming a Secretary of Labor determination were not required, Respondents do not meet the criteria set forth under 29 Code of Federal Regulations, part 2510.3-40 (2003) and therefore are not exempt from state regulation.

An entity will be treated as "established under a collective bargaining agreement" if it meets four affirmative requirements and does not fall within three exclusions. While ALA is an employee welfare benefit plan within the meaning of ERISA, and thus meets the first affirmative requirement, there is no evidence that at least 85% of ALA's participants are covered by a collective bargaining agreement, as required by part 2510.3-40(b)(2).[123] In fact, there is no evidence that any ALA member is covered by a valid collective bargaining agreement. ALA did not produce signed authorization cards for its largest employers or collective bargaining agreements executed after proof of support. Indeed, while the CALJ ordered ALA to produce seven pertinent collective bargaining agreements, ALA could not produce even one valid agreement. As such, the evidence

[121] Tr. 220:4-222:5; Tr. 100:6-12.
[122] Exh. 310.
[123] 29 C.F.R. § 2510.3-40(b)(2).

does not support a finding that at least 85% of ALA's members are covered by a collective bargaining agreement, and Respondents fail to satisfy the second affirmative requirement.

Similarly, Respondents cannot meet the third affirmative condition, which requires demonstration of a bona fide collective bargaining relationship. Part 2510.3-40(b)(4) lists eight factors indicative of bona fide collective bargaining. If four factors are met, there is a rebuttable presumption that the bargaining was "bona fide." But Respondents do not meet more than one element. There is no evidence Respondents make contributions to a labor-management trust fund, operate a multiemployer pension plan, operated before January 1, 1983 or were parties to a CBA before January 1, 1983; elements one through four.[124] In addition, Respondents admit no court or other agency has certified ALA as an exclusive bargaining representative, nor does ALA operate a hiring hall. Accordingly, Respondents do not satisfy factors five and seven.[125] Given that Respondents fail at least six factors, Respondents' cannot demonstrate a bona fide collective bargaining relationship exists and are not afforded exempt status.[126]

c. ALA Is Not a Certified Labor Organization

Finally, Respondents cannot qualify for a MEWA exemption since they are not a certified labor organization engaged in lawful collective bargaining.

As noted above, the bulk of Respondents' members are farm labor contractors and their employees. For collective bargaining purposes, such workers are employees of the

[124] 29 C.F.R. §§ 2510.3-40(b)(4)(i), (ii), (iii) and (iv).
[125] 29 C.F.R. §§ 2510.3-40(b)(4)(v) and (vii); Tr. 116:6-8.
[126] Respondents' employee welfare plan is likely also barred by 29 Code of Federal Regulations, part 2510.3-40(c) (2003), which excludes those plans established as a means to evade compliance with state laws. But as the plan fails under other provisions of part 2510.3-40, such analysis is unnecessary in this proceeding.

agricultural employer they work for, and thus are covered under the ALRA.[127] The ALRA requires all labor organizations seek recognition through a secret ballot election and only certified labor organizations have a legally enforceable right to represent employees.[128] It is uncontroverted that Respondents have never participated in a secret ballot election and have never been certified by the ALRB as a labor organization. Accordingly, Respondents are not the exclusive representative of any farm labor employees and have no legally enforceable right to represent those members.[129]

The NLRA also provides the exclusive method by which non-agricultural employees may select representation. Employee organizations must first file a certification petition and proof of support with the NLRB.[130] Only after the NLRB receives such proof will it conduct a secret ballot election. Again, Respondents admit they did not comply with the federally-mandated representation process. Respondents did not file a certification petition with the NLRB, nor did Respondents provide the NLRB with proof of support or participate in an election. Instead, Respondents claim, falsely, that they certified their own authorization cards. In fact, Respondents did not provide a single authorization card for the employers listed in the CDI's Cease and Desist Order. And cards Respondents provided for Russell Contracting and Supreme Valley Agriculture were grossly insufficient to demonstrate support. Since there is no law permitting an employee organization to certify its own proof of support in order to

[127] Lab. Code § 1140.4, subd. (c).
[128] Lab. Code §§ 1156, 1159. Section 1159 explicitly states that "only labor organizations certified pursuant to this part shall be parties to a legally valid collective bargaining agreement."
[129] Moreover, there is no evidence ALA entered into any lawful or unlawful collective bargaining agreements, as Respondents were unable to produce even one valid agreement.
[130] 29 C.F.R. § 102.60(a).

circumvent mandated election procedures, Respondents do not represent any non-agricultural employees.[131]

The U.S. Department of Labor's investigation provides further support for this conclusion. On February 23, 2017, the OLMS determined that ALA did not qualify as a labor organization under the NLRA or other LMRDA provisions. As such, the OLMS terminated ALA's file number and ordered Respondents to cease filing any financial information.

In response, Respondents contend their Internal Revenue Code status as a "labor organization" qualifies them for MEWA exemption.[132] But such reliance is misplaced. Neither ALA's self-designation as a "labor organization" on its income tax exemption application, nor the IRS's grant of tax exempt status based on ALA's application, render ALA a labor organization for labor law purposes.[133] The Internal Revenue Code has a distinct definition of "labor organization" and the Courts have refused to hold that a tax code determination constitutes a NLRA determination.[134] Accordingly, Respondents' claims of labor organization status fail.

B. ALA Is a Multiple Employer Welfare Arrangement under Federal Law

1. Applicable Law

As discussed above, a MEWA designation requires only that (1) the arrangement offers benefits to employees of two or more employers, and (2) the arrangement is not

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[131] Respondents cite to case law regarding neutrality and consent election agreements. None of those cases permits an employee organization to circumvent NLRB card check procedures, as was done here, and become the exclusive bargaining representative.
[132] Tr. 55:10-24; Tr. 134:24-135:8.
[133] *Waugh Chapel South, LLC v. United Food and Commercial Workers Union, Local 27* (4th Cir. 2013) 728 F.3d 354, 362.
[134] *Ibid*; *Tupper v. United States* (1st Cir. 1998) 134 F.3d 444, 446 fn. 1.

exempted from the definition of MEWA as established under a collective bargaining agreement, or a rural electric cooperative or a rural telephone cooperative.[135]

2. Analysis and Conclusions Regarding MEWA Status

Since Respondents offer benefits to employees of over 300 employers, Respondents operate as a MEWA. Indeed, Respondents identify themselves on all policy declarations, COLIs and in regulatory communications as a "multiple employer welfare arrangement" claiming exemption.[136] Mr. Gastelum confirmed Respondents' MEWA status:

> If a labor organization does not go through that process of being authorized by the employees of the company that they're organizing and then has not gone through the process of negotiating the collective bargaining agreement with the employer and written in the specifics of the benefit policy into that collective bargaining agreement, then they would be a MEWA.[137]

Since Respondents do not operate as a labor organization and do not possess valid collective bargaining agreements with their employer-members, ALA and its affiliates are a MEWA as defined under ERISA rules and regulations.

C. ERISA-Covered MEWAs Are Subject to State Insurance Regulation

1. Applicable Law

If an ERISA-covered welfare plan is a MEWA, states may apply and enforce their own insurance laws on the plan to the extent provided in title 29 United States Code section 1144(b)(6)(A). Section 1144(b)(6)(A) provides an exemption to the "deemer clause" of section 1144(b)(2)(B), which otherwise precludes states from deeming an ERISA-covered plan to be an insurance company for regulatory purposes. Specifically,

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[135] 29 U.S.C. § 1002(40)(A).
[136] See Exhs. 304-3, 305-1 and 310-13.
[137] Tr. 134:7-13.

federal law permits States to apply and enforce any insurance law requiring the maintenance of specific reserves or contributions designed to ensure the MEWA can satisfy their benefit obligations.[138]

2. Analysis and Conclusions Regarding State Law Applicability

Respondents maintain they are exempt from California's insurance laws. In support of their alleged state law exemption, Respondents cite 29 United States Code section 1144(b)(2)(B) which provides that no employee benefit plan shall be deemed to be an insurance company for state regulatory purposes.[139] But Respondents' reliance on this provision is misguided. Respondents fail to read the entire statute, which continues to say that states may regulate ERISA-covered MEWAs notwithstanding section 1144(b)(2)(B). As noted in Section VI(A), *ante*, in 1983 Congress amended ERISA to curb abuses by multiple employer trusts that claimed ERISA preemption when states attempted to regulate them as quasi-insurance companies. Since that amendment, courts have consistently held that section 1144(b)(6)(A) authorizes states to regulate MEWAs as insurance companies.[140] Similarly, Respondents' reliance on *FMC Corporation v. Holliday* (1990) 498 U.S. 52 is unpersuasive.[141] In *FMC Corporation*, the Supreme Court held that the deemer clause exempts self-funded ERISA plans from state regulation insofar as that regulation "relates to" the plans.[142] But that decision did not address state regulation of MEWAs. Indeed, the term MEWA does not appear anywhere in the Supreme Court's decision. Instead, *FMC Corporation* addressed only a State's ability to

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[138] 29 U.S.C. § 1144(b)(6)(A)(i).
[139] Respondents' Post-Hearing Brief, p. 5:16-26.
[140] *Atlantic Healthcare Benefits Trust v. Googins* (2nd Cir. 1993) 2 F.3d 1, 5; *Fuller v. Norton* (10th Cir. 1996) 86 F.3d 1016, 1024; *Long v. Hammond, supra*, 164 N.C.App. at p. 493.
[141] Respondents' Post-Hearing Brief, 5:23-6:3.
[142] *Id.* at p. 61.

regulate other ERISA-covered plans, not multiple employer welfare plans, as exists in this proceeding.

As Respondents are an ERISA-covered MEWA, they are subject to California insurance laws, as provided in title 29 United States Code section 1144(b)(6)(A)(i).[143]

D. Respondents Violated the Insurance Code's MEWA Certification Rules

1. Applicable Law

Because MEWAs serve as an alternative to insurance programs, the California Legislature drafted special certification and eligibility rules for employee welfare plans wishing to conduct business in California. As noted in Insurance Code section 742.23, a MEWA shall not provide any benefits to California residents without first obtaining a certificate of compliance.

> (a) After December 31, 1995, a self-funded or partially self-funded multiple employer welfare arrangement shall not provide any benefits for any resident of this state without first obtaining a certificate of compliance pursuant to this article, provided, however, that if the commissioner has not issued or denied an application for a certificate of compliance within 180 calendar days of the date of the filing of the completed application, the commissioner shall not take any action against the applicant solely on the basis that the department has not granted the certificate of compliance.
>
> (b) The department may take regulatory action against a MEWA pursuant to all applicable provisions of this code during the period beginning on the effective date of this act and ending on the date on which the MEWA is certified under this article, at which time the provisions of this article shall apply. [144]

[143] See also Ins. Code § 742.425.
[144] Ins. Code § 742.23, subd (a).

The Insurance Code provides MEWA eligibility and investment requirements, as well as a detailed application process.[145] If the MEWA obtains and maintains a certificate of compliance, it shall not be considered an unauthorized insurer.[146]

In accordance with ERISA, the California legislature promulgated Insurance Code sections 742.20 et seq. to ensure the financial integrity of MEWAs, provide uniform standards of compliance and grant the CDI sanctioning authority.[147] The Insurance Code provides that MEWAs shall not provide any benefits without first obtaining a CDI certificate of compliance, and grants the Commissioner authority to punish those MEWAs that fail to comply with the code.[148] Before certification, MEWAs must maintain a surplus of not less than one million dollars, possess adequate stop loss insurance and comply with specific investment requirements.[149]

2. Analysis and Conclusions Regarding Violations of Insurance Code Section 742.23

As discussed at length above, ALA is a MEWA and thus subject to California insurance regulation. Respondents admit they did not seek or receive a MEWA certificate of compliance before offering benefits to California residents.[150] Accordingly, Respondents violated Insurance Code section 742.23.

E. Respondents Violated Insurance Code Sections 700 and 1631

1. Applicable Law

California law prohibits transacting insurance business without first securing admission from the Insurance Commissioner. Admission is secured by obtaining a

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[145] Ins. Code §§ 742.24, 742.25 and 742.29.
[146] Ins. Code § 742.22.
[147] Ins. Code § 742.20, subd. (b).
[148] Ins. Code § 742.23.
[149] Ins. Code § 742.24.
[150] Tr. 15:5-8; Tr. 68:14-25.

certificate of authority after conformance with all California insurance laws and regulations.[151] The Insurance Code also prohibits transacting any class of insurance without first being admitted for that class by procuring a certificate of authority from the Insurance Commissioner.[152] The unlawful transaction of insurance is a public offense punishable by imprisonment pursuant to Penal Code section 1170, subdivision (h) and a fine not to exceed one hundred thousand dollars.[153] In addition, a person shall not solicit, negotiate, or effect contracts of insurance, or act in any of the capacities defined in Article 1 of the Insurance Code (commencing with section 1621) unless the person holds a valid license or certificate.[154]

2. Analysis and Conclusions Regarding Violations of Insurance Code Sections 700 and 1631

It is uncontroverted that Respondents do not possess a certificate of authority or any license from the CDI.[155] The record clearly demonstrates Respondents solicited, marketed and effected workers' compensation benefits to hundreds of employers and purporting to cover thousands of employees, including but not limited to Central Cal Agriculture, SPYB Yorba Linda, Mold Solutions, Inc., Tapatio Auto and Truck Dismantling, and Ranone Enterprises doing business as 7 Contracting. Certificates of Liability Insurance as well as purported insurance policies were issued to the above-listed employers, and Respondent represented itself as a lawful worker's compensation provider to numerous regulatory agencies.[156] Respondents collected state-mandated insurance fees and went so far as to list false insurance policy numbers on ALA-issued

[151] Ins. Code § 700.
[152] Ins. Code § 700, subd. (a).
[153] Ins. Code § 700, subd. (b).
[154] Ins. Code § 1631.
[155] Tr. 68:14-25.
[156] Exhs. 3 – 7.

COLI.[157] In addition, Respondents consistently employed the term "premium" in marketing and effecting worker's compensation benefits.[158] Lastly, Respondents admit they continue to solicit, market and transact insurance business despite CDI's Cease and Desist Order.[159]

Accordingly, the CALJ finds Respondent transacted insurance without a certificate of authority in violation of Insurance Code section 700. The CALJ further finds that Respondents violated Insurance Code section 1631 by soliciting, marketing and effecting insurance contracts without a license.

VII. Conclusions

Based on the foregoing facts and analysis, Respondents are a Multiple Employer Welfare Arrangement pursuant to 29 United States Code section 1002(40)(A) and not an exempt labor organization operating under bona fide collective bargaining agreements as provided in 29 Code of Federal Regulations, part 2510.3-40 (2003). Respondents did not seek or receive such an exemption from the Secretary of Labor, as required by statutory and case law, nor does ALA qualify under federal regulations for such an exemption.

As an ERISA-covered MEWA, Respondents are subject to California Insurance Code sections 742.20 et seq., and Respondent violated Insurance Code section 742.23 by failing to secure a certificate of compliance before offering benefits to California residents. Respondents also acted in a capacity for which a license, registration, permit or

[157] Tr. 106:19-107:17; Exh. 3-5.
[158] Tr. 104:10-20; Exhs. 304-1, 304-2 and 304-3.
[159] Tr. 113:12-114:8.

certificate of authority was required but not possessed, in violation of Insurance Code section 700 and 1631.[160]

ORDER

1. Respondents shall continue to cease and desist from acting as an insurance agent, producer, insurer or in any other capacity in the State of California, in accordance with CDI's October 17, 2016 and December 22, 2016 Cease and Desist Orders.

2. Respondents shall continue to cease and desist from transacting insurance in the State of California in any capacity, including but not limited to insurer, insurance agent, broker or solicitor, in accordance with CDI's October 17, 2016 and December 22, 2016 Cease and Desist Orders.

3. Respondents shall continue to cease and desist from advertising or acting as an insurer, insurance agent, broker, or solicitor exempt from regulation in the State of California, in accordance with CDI's October 17, 2016 and December 22, 2016 Cease and Desist Orders.

4. Respondents shall continue to cease and desist from advertising, or participating in advertising, by newspaper, telephone, book or listing, mail, handout, business card, or by any other written or printed presentation, or by telephone, radio, television, Internet, public outcry or proclamation, or in any other manner or means whatsoever, whether personally or through others, that implies they are a multiple employer welfare association, exempt from ERISA and/or State of California regulation, in accordance with CDI's October 17, 2016 and December 22, 2016 Cease and Desist Orders.

[160] In the Amended Cease and Desist Order, CDI provided Respondents notice of the monetary penalty associated with Insurance Code violations. Any monetary penalty issued under Insurance Code section 12921.8, subdivision (a)(3) requires the filing of an Order to Show Cause, which has not yet been filed.

5. Respondents shall continue to cease and desist from advertising, or participating in advertising, by newspaper, telephone, book or listing, mail, handout, business card, or by any other written or printed presentation, or by telephone, radio, television, Internet, public outcry or proclamation, or in any other manner or means whatsoever, whether personally or through others, that implies they are licensed, permitted, or authorized, or are engaged in the business of soliciting, negotiating, executing, delivering, or furnishing insurance in the State of California in any manner, in accordance with CDI's October 17, 2016 and December 22, 2016 Cease and Desist Orders.

6. Respondents shall continue to cease and desist from receiving any money, commission, fee, rebate, payment, remuneration, or any other valuable consideration whatsoever, in connection with any insurance transaction, in accordance with CDI's October 17, 2016 and December 22, 2016 Cease and Desist Orders.

Dated: October 12, 2017

KRISTIN L. ROSI
Chief Administrative Law Judge
Administrative Hearing Bureau
California Department of Insurance