

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HILDA L. SOLIS, Secretary of)
Labor; **UNITED STATES DEPARTMENT**)
OF LABOR,)

Plaintiff,)

v.)

PAN-AMERICAN BERRY GROWERS, LLC,)
an Oregon limited liability)
company,)

Defendant.)

Case No. 6:12-CV-01474-HO

December 3, 2013

Eugene, Oregon

AMENDED TRANSCRIPT OF PROCEEDINGS
(Oral Argument)

BEFORE THE HONORABLE THOMAS M. COFFIN, MAGISTRATE JUDGE

TRANSCRIBER: MARGARET S. JILLSON
987 Tivoli Ave
Eugene, OR 97404
541-689-7964

1 APPEARANCES:

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3
4
5
6
7
8
9
10
11
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13
14
15
16
17
18
19
20
21
22
23
24
25

FOR THE PLAINTIFF:

United States Department of Labor
Office of the Solicitor
300 Fifth Ave Suite 1120
Seattle, WA 98104
206-757-6762

By: **Jeremiah Miller**
miller.jeremiah@dol.gov
Bruce L. Brown
brown.bruce@dol.gov

FOR THE DEFENDANT:

Dunn Carney Allen Higgins & Tongue, LLP
851 SW Sixth Ave Suite 1500
Portland, OR 97204-1357
503-224-6440

By: **Brian R. Talcott**
brt@dunn-carney.com
Elizabeth C. Knight
eck@dunn-carney.com
Timothy J. Bernasek
tbernasek@dunn-carney.com

1 APPEARANCES:

2 FOR THE PLAINTIFFS: Dunn Carney Allen Higgins & Tongue, LLP
3 851 SW Sixth Ave Suite 1500
4 Portland, OR 97204-1357
5 503-224-6440
6 By: **Brian R. Talcott**
7 brt@dunn-carney.com
8 **Elizabeth C. Knight**
9 eck@dunn-carney.com
10 **Timothy J. Bernasek**
11 tbernasek@dunn-carney.com

12 FOR THE DEFENDANTS: United States Department of Labor
13 Office of the Solicitor
14 300 Fifth Ave Suite 1120
15 Seattle, WA 98104
16 206-757-6762
17 By: **Jeremiah Miller**
18 miller.jeremiah@dol.gov
19 **Bruce L. Brown**
20 brown.bruce@dol.gov
21
22
23
24
25

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 **HILDA L. SOLIS**, Secretary of)
Labor; **UNITED STATES DEPARTMENT**)
4 **OF LABOR**,)

) Case No. 6:12-CV-01566-TC

5 Plaintiff,)

6 v.)

) December 3, 2013

7 **B&G DITCHEN, LLC**, an Oregon)
limited liability company, et al.,)

8 Defendants.)

9) Eugene, Oregon

10 TRANSCRIPT OF PROCEEDINGS
11 (Oral Argument)

12
13 BEFORE THE HONORABLE THOMAS M. COFFIN, MAGISTRATE JUDGE
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22 TRANSCRIBER: MARGARET S. JILLSON
23 987 Tivoli Ave
24 Eugene, OR 97404
25 541-689-7964

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APPEARANCES:

FOR THE PLAINTIFF:

United States Department of Labor
Office of the Solicitor
300 Fifth Ave Suite 1120
Seattle, WA 98104
206-757-6762

By: **Jeremiah Miller**
miller.jeremiah@dol.gov
Bruce L. Brown
brown.bruce@dol.gov

FOR THE DEFENDANT:

Dunn Carney Allen Higgins & Tongue, LLP
851 SW Sixth Ave Suite 1500
Portland, OR 97204-1357
503-224-6440

By: **Brian R. Talcott**
brt@dunn-carney.com
Elizabeth C. Knight
eck@dunn-carney.com
Timothy J. Bernasek
tbernasek@dunn-carney.com

1 (Tuesday, December 3, 2013)

2

3 P R O C E E D I N G S

4

5 THE CLERK: Now is the time set for Civil Case No.
6 12-1474, Solis v. Pan-American Berry Growers, LLC; Case No.
7 12-1566, Secretary of Labor Hilda Solis v. B&G Ditchen, LLC;
8 and Case No. 13-1439, Pan-American Berry Growers, LLC, v.
9 Perez, for oral argument.

10 THE COURT: You might all introduce yourselves at
11 table. So beginning over there.

12 MR. BROWN: Good morning, your Honor. Bruce --

13 THE COURT: And you can -- and remain seated because
14 we're recording this and it's necessary that you be close to
15 the microphones.

16 MR. BROWN: Good afternoon. Bruce Brown for the
17 Department of Labor.

18 MR. MILLER: Jeremiah Miller from the Department of
19 Labor.

20 MR. BERNASEK: Tim Bernasek for defendants
21 Pan-American Berry Growers and B&G Ditchen.

22 MR. TALCOTT: Brian Talcott for the defendants.

23 MS. KNIGHT: Elizabeth Knight, also for the
24 defendants.

25 THE COURT: All right. Good afternoon, everyone.

1 This is the defendants' motion to vacate the consent
2 judgment, so why don't we proceed with them first.

3 MR. BERNASEK: Your Honor, what -- would you prefer
4 we proceed with the motion to postpone and discovery or how
5 would you prefer us to start?

6 THE COURT: I would prefer you proceed with the
7 motion to vacate the consent judgment.

8 MR. BERNASEK: Okay. Thank you, your Honor.

9 The motions before the Court today all revolve around
10 two consent judgments entered into between defendants
11 Pan-American Berry Growers and B&G Ditchen, LLC, defendants,
12 and United States Department of Labor, after an investigation
13 into their employment practices in the summer of 2012.
14 Although the judgments are termed "consent" judgments,
15 defendants did not in fact consent to these judgments being
16 entered into against them. In reality they had no choice but
17 to agree to the terms demanded by the Department of Labor and
18 that is why these judgments should be vacated.

19 THE COURT: Well, you say that they had no choice,
20 but tell me, did you not -- did your clients consider
21 petitioning the court for injunctive relief, at any point?

22 MR. BERNASEK: Yes, we did, your Honor. We the --
23 when the objection was put in place, a number of options
24 obviously were considered. One was to try and get the
25 customers to accept shipment of the products anyway, but they

1 would not because they had been told by Department of Labor not
2 to handle the products. So the question was, do you then, you
3 know, wait for DOL to actually use its injunctive powers or do
4 you seek -- try and see an injunction yourself. And due to the
5 -- or a temporary restraining order.

6 Due to the perishability of the crop at issue, the
7 clients that I represented at the time, Ditchen, indicated that
8 we don't have days to weeks to wait, given the perishability of
9 these crops. We --

10 THE COURT: Well, we've set up hearings on a TRO
11 application within a day.

12 MR. BERNASEK: Well, they -- that's right, your
13 Honor. And they can. That can happen, but there's no
14 guarantee that we set up in one day.

15 THE COURT: Well, how do you know unless you try?

16 MR. BERNASEK: Well, that was -- those were the
17 issues that were before us and --

18 THE COURT: But the TRO petition was available to
19 you; you acknowledge that?

20 MR. BERNASEK: It -- yes, it was available.

21 THE COURT: Okay.

22 MR. BERNASEK: But what is at issue before the Court
23 are the tactics used by DOL in order to force defendants to
24 enter into these agreements. What is also at issue is the lack
25 of due process afforded defendants at the conclusion of DOL's

1 investigation; specifically DOL's improper use of its hot goods
2 power, culminating in the entry of two judgments defendants
3 seek to vacate.

4 What is not at issue today is DOL's role as the
5 enforcer of the country's wage and hour laws. Defendants
6 understand and appreciate the responsibility DOL has to ensure
7 that workers in this country are treated fairly and paid
8 properly. Also not at issue today are the specific findings of
9 DOL's investigation into defendants' operations. While DOL
10 unquestionably has the unquestioned responsibility to ensure
11 wage and hour law is enforced, it must do so lawfully. DOL
12 unlawfully coerced defendants into entering judgments without
13 due process and, accordingly, these judgments should be vacated
14 and the back wages and penalties paid by defendants should be
15 returned pending a fair and legal determination of the
16 investigation findings.

17 THE COURT: Why did you wait almost a whole year
18 before filing this motion to vacate the consent judgment? It
19 seems to me that everything you point out in terms of the
20 alleged impropriety of DOL's tactics was known to you when the
21 consent judgment was entered.

22 MR. BERNASEK: Well --

23 THE COURT: So why wait a year to bring this motion
24 to vacate?

25 MR. BERNASEK: Well, your Honor, when it happened,

1 the first question was to understand the authority under which
2 DOL claimed in issuing these hot goods objections. It was an
3 unprecedented -- it had not happened before in the north -- in
4 Northwest agriculture, at all. And so the first attempts were
5 to figure out, gather information to make sure that there
6 really were grounds to right this wrong.

7 And the first avenue the clients went to was a
8 political route in reaching out to Oregon's congressional
9 delegation, in which six of the seven members of the delegation
10 wrote a letter to the secretary demanding information about
11 what happened so that we could get some justification of this
12 unprecedented use of this power.

13 Also, Oregon's agriculture director and,
14 significantly, its labor commissioner similarly wrote letters
15 asking for information. In fact, the labor commissioner
16 traveled to Washington, DC, to bring up the issue. And there
17 was no meaningful response by Department of Labor.

18 So then the tactics changed in order to get
19 information to the Oregon Farm Bureau Federation, an interest
20 group representing Oregon agriculture, including the defendants
21 here. And they filed a Freedom of Information Act request on
22 February 27th, 2013, asking for specific information about
23 DOL's policies and procedures, what authority it has to act in
24 the way it did in 2012.

25 DOL failed to respond, as it -- in a timely manner.

1 In April when they did respond, late, DOL denied the FOIA
2 request. Farm Bureau then filed an appeal, DOL failed to
3 respond to that appeal, and so Farm Bureau filed a complaint in
4 federal district court which is still pending. And as recently
5 as a week ago yesterday, we got the latest round of information
6 to try and understand exactly what was at issue.

7 So to the extent DOL raises concerns about the timely
8 filing of this action, it's due to an unwillingness on their
9 part to provide the information that the defendants needed to
10 evaluate their claims and bring them properly before the Court.

11 THE COURT: Well, it is your position that it is
12 reasonable to delay filing a motion to vacate a judgment while
13 one party pursues political efforts to resolve the issues or to
14 change the law?

15 MR. BERNASEK: No, your Honor, I wouldn't deem what
16 defendants did as a political effort. It was an effort to
17 gather that information. And to file lawsuits, as you know, is
18 extremely a costly proposition. And so the question is --

19 THE COURT: Well, you indicated contacting political
20 representatives, congressional representatives.

21 MR. BERNASEK: They're their representatives to
22 gather information and question an agency's action. They have
23 the authority to do that, so it seems like -- it seemed to them
24 an appropriate way to try and gather that information in the
25 least costly way. When that didn't pan out --

1 THE COURT: But what does that have to do with the
2 merits of your position that this judgment was obtained through
3 wrongful conduct on the part of DOL and through economic
4 duress? That's something that you were -- that was your
5 position all along, was it not?

6 MR. BERNASEK: Well, that's correct, but we -- but to
7 understand whether that's -- we -- the defendants understood
8 that they had been wronged and they thought there was duress,
9 but whether it was legal duress sufficient which to support a
10 motion to vacate or rescission action required an understanding
11 of what DOL's authority is in this area. And that's one of the
12 key issues that we've been seeking, is the handbook; provisions
13 under their investigative handbook on its hot goods authority
14 and its proper use of hot goods. What DOL itself requires of
15 itself before instituting these actions. And we did not get
16 that information until after this action was filed, but it does
17 appear that they didn't follow the guidelines that are even
18 provided in their own handbook.

19 So that's the type of evaluation we needed, was to
20 get information so that claims that are filed are -- have a
21 substantial legal basis for doing so.

22 THE COURT: I understand the facts pertaining to each
23 of the defendants in this case are pretty similar, but tell me,
24 did either or both of your clients propose to DOL that they put
25 the alleged penalties in an escrow account and -- pending an

1 administrative review of DOL's findings in the listing of the
2 hot goods objection based on that action?

3 MR. BERNASEK: Your Honor, when I was first informed
4 of this, I happened to represent the farmers in Washington in
5 2011 where the first time this issue had -- where a hot goods
6 objection had ever been raised in Northwest agriculture and
7 that was the process and that was the first question that I
8 asked district director Jeff Genkos, was he said this will be a
9 very similar process to what happened last summer. And so my
10 inclination was that it was going to be exactly that, which I
11 still think is questionable behavior that you have to get a
12 judgment entered against you and then go through the appeal
13 rights afterwards, but at least I thought that's the process
14 that we were entering into and was frankly surprised to see the
15 terms of the consent judgment that did not provide for. That
16 the funding would go directly to the Department of Labor.
17 There would be no appeal rights. And there was no
18 substantiation of the findings to which -- under which to
19 evaluate these claims.

20 THE COURT: Did you understand that that represented
21 a shift in official policy by the DOL?

22 What was your understanding about that?

23 MR. BERNASEK: I had no idea. And that's exactly the
24 questions that we tried to understand, is what was the basis
25 for this.

1 THE COURT: What explanation did you get?

2 MR. BERNASEK: I was told that these are -- they were
3 very terrible violations that occurred and that they feel
4 justified in the actions that they were taking.

5 THE COURT: Well, I will tell you that if you had
6 come to this Court when this was going on, asking for a TRO, I
7 would have found it to be very disturbing that DOL was
8 unwilling to allow you to place the alleged penalties or the
9 estimated penalties in an escrow account and was insisting that
10 you waive all of your appeal rights or review rights. And that
11 was insisting that you waive all administrative review of their
12 determinations at peril of losing all of these agricultural
13 goods that were perishable within a short period of time; I
14 would have found that to be very disturbing.

15 In terms of balancing the equities, I would think you
16 would have made a very strong showing that the balance of
17 equities was in your favor in terms of issuing injunctive
18 relief if your clients were willing to deposit these funds into
19 an escrow account pending administrative review of the DOL's
20 determination. I would think that would give DOL everything
21 they were entitled to.

22 But I'll hear from DOL when it's their turn.

23 MR. BERNASEK: Well, your Honor, I guess, you know,
24 in response to that, you know, in the haze of the harvest
25 season and, you know, being faced with this unprecedented

1 action, and trying to understand, I think one of the key issues
2 here is we didn't even have any understanding of what the
3 allegations were, if there was any basis whatsoever for these
4 findings. But we did have an immediate urgency to get the crop
5 picked and along moving in the stream of commerce. And so to
6 seek a TRO --

7 THE COURT: I understand you had, what, a \$4 million
8 sword over your head?

9 MR. BERNASEK: Well, in one instance, with
10 Pan-American, it was about 3 -- you know, the -- if the TRO --
11 or if the objection had been in place for even a month's time,
12 working through the process, it would have been an estimated
13 \$3.5 million. So a \$41,000 fine, as troubling as that is, is
14 small potatoes.

15 But I think the fact that the burden should somehow
16 be on the employer when faced with these aggressive,
17 unprecedented tactics is not how I understand the notions and
18 burdens of fairness. A temporary restraining order is to hold
19 and stop a present action and the action was all done by DOL.
20 We had no information --

21 THE COURT: I understand that. I just brought up the
22 issue about the TRO possibility in response to your statement
23 that you had, quote, no choice --

24 MR. BERNASEK: Well --

25 THE COURT: -- end of quote, other than to do what

1 DOL wanted you to do. And it seems to me that there was
2 another option available to you if you chose to pursue it, but
3 you did not.

4 MR. BERNASEK: Well, it was considered, to go forward
5 and attempt that, but the problem -- we did not even know --
6 have enough information under which -- as you know, to get a
7 TRO you -- the burden is on the party seeing the temporary
8 restraining order and it's a costly process to engage in any of
9 this. So, as the attorney in the matter, I didn't feel like I
10 had enough information to advise the strengths/weaknesses of
11 that argument whatsoever.

12 And the question was, Well, how long is this going to
13 take? I said, well, you know -- as you indicated, it could be
14 as quick as a day, it could take days or a week. There's no
15 guarantee in that process.

16 And the clients in this matter, due to the
17 perishability of the crop -- and again, we didn't have a lot of
18 information to move forward, so the other option was, well,
19 wait, continue to try and work with your customers to see if
20 they will take shipment because we think that the methodology
21 and the findings and what DOL is doing is egregious. And maybe
22 we can convince them to take a wait-and-see-what-DOL-does,
23 because then the burden is on them to get the extraordinary
24 injunctive remedy.

25 THE COURT: Well, I understand that your clients were

1 faced with hard choices. And the -- certainly I understand the
2 position that they were in. But it would be one thing if you
3 filed this motion to vacate, let's say, within a month of the
4 consent judgment being entered. It's another thing to justify
5 a delay of almost a full year, which is the outer boundaries of
6 when you have to file it. But that's not an assumption that
7 it's within a reasonable time simply because it's filed within
8 a year; that's just the outer limit. And the wait here was
9 virtually one solid year. And I just don't understand the
10 reason for waiting that long or the justification for it when
11 all the facts and issues were apparently known to you at the
12 time this was entered.

13 MR. BERNASEK: Well, your Honor, no, I guess that --
14 I think that goes to the -- I would vehemently disagree with
15 that. I think it goes to the very heart of the issue in front
16 of us, is we did not know. We still don't fully understand
17 because we have not gotten that information from Department of
18 Labor, about what its policies and procedures are in --
19 regarding issuing hot goods objections.

20 THE COURT: Well, here's what you knew: You know
21 that you had something in the neighborhood of 3.5 million, 4
22 million dollars worth of blueberries that were subject to this
23 hot goods objection by DOA. You couldn't move them. You were
24 in peril of losing them unless you agreed to what the DOL
25 wanted you to agree to. That's what you knew.

1 MR. BERNASEK: That's right. That's right. But we
2 -- but --

3 THE COURT: Which is the grounds for your motion to
4 vacate; the economic duress, wrongful conduct ground that
5 you're asserting to vacate the judgment. But it seems to me
6 all of that was known to you at the time. DOL was holding this
7 sword over your client's head, compelling your client to either
8 give up its rights or suffer the loss of these perishable
9 agricultural commodities.

10 MR. BERNASEK: Well, that --

11 THE COURT: That hasn't changed.

12 MR. BERNASEK: That is correct, your Honor. But
13 it's -- you know, in discussing this and considering this with
14 the clients, who have been already victimized in this process,
15 paid an extraordinary amount of money in order -- you know,
16 before they were ready to put their toe in the water to try and
17 right this wrong, a very costly proposition, we felt like we
18 needed some -- an understanding about, you know, was there
19 something we were missing in all of this?

20 What is there, a justification --

21 THE COURT: Are you talking about the DOL's
22 calculations and how they came by their -- the lost wage
23 estimation that they did?

24 Or the statistical --

25 MR. BERNASEK: No --

1 THE COURT: -- analysis they did about ghost workers;
2 is that what you're talking about?

3 MR. BERNASEK: No, your Honor. That goes to the
4 invest -- the issues in the investigation itself. It's what is
5 the precedent for this across the country. Where else has this
6 been used? How often has it been used? What is the precedent
7 in agriculture? There's no case law on this, but having full
8 understanding of what the policies and procedures are, I think
9 -- No. 1, it doesn't seem like it was an extraordinary question
10 to ask, that the congressional delegation and other folks on
11 behalf of the industry and these individual defendants asked
12 those questions and couldn't get a meaningful answer.

13 Then when the Freedom of Information Act were filed
14 by Farm Bureau on behalf of the industry and these growers, to
15 wait months and months before any response, I didn't envision
16 that would happen. But frankly, some of the information that
17 we were trying to ascertain to get our heads around what this
18 very process would look like and what kind of risks and costs
19 these defendants would be wading into, we still didn't know by
20 the time we filed this action.

21 So, I mean, I think your point is well taken in the
22 sense of legally, in the narrow prism of what happened and was
23 it wrong, I think there was a general sense that this was wrong
24 and this should be challenged. But there are economic
25 realities too, about the costs of bringing forward an action

1 like this when you've been victimized and when you can't get
2 information by the very -- from the very people that you're
3 looking to go up against that should provide that information.
4 It's very troubling and it seems a continued injustice to have
5 that held up against these defendants for doing what I think
6 makes sense, is to fully analyze the merits of this situation.
7 I mean, looking at it another way, what is the harm in waiting
8 and -- you know, waiting a little bit of time to make sure --

9 THE COURT: Well, waiting a year, then the Government
10 states in its opposition that they would be prejudiced because
11 the investigation is long ago put to bed, the investigators are
12 off doing other things, the workers are scattered hither and
13 yon. And it may be that, had you done this in a more timely
14 fashion, they could have continued with the investigation.

15 Perhaps the penalties would have been even greater at
16 the end of that investigation, while it was still fresh, than
17 the ones that you obtained as a result of the agreement to the
18 consent judgment. So you may have been facing even greater
19 penalties if you'd have done this, let's say within a month of
20 the consent judgment being entered, and the Government went
21 back full steam ahead with their investigation at that time.
22 So that's what the Government points out.

23 MR. BERNASEK: Well, and I find that particularly
24 curious and troubling, frankly, your Honor, that, you know, bef
25 -- I think, again, it goes to the issue that's before us, is

1 the wise use of this incredible power. That they seem to be
2 saying that they had not completed their investigation and
3 perhaps their investigation was cursory and was not done, and
4 yet they used this very extreme, heavy tactic that could have
5 completely crippled these two defendants. So, to me, it's
6 troubling that, wait a minute, you're saying -- if your
7 investigation was complete and you'd had the findings and you
8 knew what the penalties were, and you felt comfortable with
9 what you had done in your investigation, then it shouldn't
10 matter a year later. What investigation is there to go do
11 again?

12 But if in fact they're saying that the investigation
13 was not complete and yet they used this very heavy tactic, that
14 seems to go to the very issue that we're arguing in front --
15 today, your Honor, that --

16 THE COURT: Well, I'm just pointing out to you that
17 it's the Government's position, and the case law supports them,
18 that when a party sits on their right to file a motion to
19 vacate a judgment for too long, they can be viewed as having
20 waived that right by accepting the benefits of the judgment and
21 the agreed-upon resolution of the matter for that period of
22 time. And you seem to be advocating a proposition that there
23 were no benefits to your client from this consent judgment.
24 And the Government --

25 MR. BERNASEK: I sure can't see --

1 THE COURT: Well, the Government points out that
2 indeed their investigation may have revealed even a greater
3 violation of the wage and hour laws than they thought to be the
4 case at the time of the consent judgment and your clients may
5 have been exposed to even higher penalties than were imposed
6 here.

7 I don't know, but that's what the Government says.
8 And so that certainly -- how can you deny that as a
9 possibility?

10 MR. BERNASEK: Well, that could be a possibility. I
11 mean, I guess there's a lot of possibilities, but I think that
12 we've got to look at the issues at hand, the decisions that
13 were made at the time with the information that these
14 defendants had. And it's been piece-by-piece. It's been very
15 difficult to get the information that they have felt they
16 needed before taking a pretty -- a big step in trying to get
17 these judgments vacated and right this wrong.

18 THE COURT: I don't know what piece was missing back
19 then, shortly after the consent judgment, that you now have
20 that you didn't have back then. Could you fill me in on that?

21 MR. BERNASEK: Well --

22 THE COURT: What piece do you have now as part of the
23 puzzle that took a year for you to get, that you didn't have,
24 let's say within a month of the consent judgment?

25 MR. BERNASEK: Well, your Honor, I'd say we still

1 don't have a very good understanding of DOL's policies and
2 procedures and the justification that they have for using their
3 hot goods powers in the way that they did. I think what the
4 statute and scheme provides is that if they feel like goods are
5 hot, they have the ability to go and seek an injunction against
6 the producer, the employer, to stop the goods.

7 That's not what they did. Their first step in this
8 process, before ever giving any information to the clients --
9 or any meaningful information to the clients about what the
10 basis of the allegations were -- is they contacted the
11 customers and told them to stop handling those goods. I don't
12 understand where they get any justification for that. That's
13 not anything legally I could explain to my clients. Maybe it's
14 there.

15 THE COURT: Okay. But --

16 MR. BERNASEK: Maybe it's there. That's what we've
17 been asking for, for over a year now.

18 THE COURT: But my point is you knew back then that
19 they were doing that. That's not new. That's something you
20 knew when you were in the process of agreeing to the consent
21 judgment, the consent decree. And so that you knew at that
22 time.

23 MR. BERNASEK: Your Honor, that's right, and there
24 was an inherent sense that what they were doing was wrong. But
25 again, before filing a motion and incurring the costs and

1 moving forward with this, the concept was let's -- maybe
2 there's something we don't understand, that justifies what they
3 did. These were the questions that these clients were asking
4 and the industry has been asking, is what are we missing here.
5 This does seem terribly wrong, but before incurring the tens of
6 thousands of dollars that fighting an action like this costs,
7 the thought was, let's get some information.

8 I, as their lawyer, could not advise them to the
9 point I thought was important about the costs and benefits of
10 moving forwards. And that's why all these efforts have been
11 taken to try and get ahold of this information that really
12 shouldn't be secret. This is -- these shouldn't be tough
13 questions to ask. This shouldn't be difficult to get ahold of
14 Chapter 84 of the wage and hour field handbook that outlines
15 what their investigators are supposed to do and not do, but we
16 still don't have a complete record of that chapter of that
17 handbook that is not heavily redacted.

18 And that's curious to us, but we felt, because of the
19 timeliness issue, because there is the one-year bar on two of
20 the three claims -- the 60(b)(3) and 60(b)(4) claims. The
21 60(b)(6) does not have a one-year time limit.

22 Its reasonableness -- we felt like even though we
23 don't feel like we have enough information even at this time,
24 the decision was let's proceed and at least get this ball
25 rolling. And yeah, I mean, I guess if we had a crystal ball

1 and understood exactly how this would lay out at the time, you
2 know, maybe those decisions would have been made to go earlier.
3 But it seems like that's a pretty heavy burden to ask
4 defendants to try and marshal up and move forward, particularly
5 when what is not clear to me is the -- I understand the
6 Government's argument about the prejudice that a year's delay
7 makes for them. But again, to me, that's damning in and of
8 itself that they went ahead and used -- that the argument is,
9 hey, we may have gone and found more things in this
10 investigation. What they're saying is their investigation
11 wasn't complete and they used this very heavy, powerful tool
12 when they didn't know what all was at issue. And that, to me,
13 is equally troubling.

14 If in fact, as I suspect, what's really true is the
15 investigation was complete and they wanted to move forward with
16 it, there's nothing that this last months would impact the
17 findings. The interviews that they took are the interviews
18 that they took. The documents that they reviewed by the
19 employers, that made them determine whatever came up with
20 \$160,000 in the Ditchen matter, the \$41,000 with Pan-American,
21 that justified those sanctions, that's going to be just the
22 same today.

23 So yeah, there's a lot of roads we could go down of
24 hypotheticals of what if this, what if that, and what if this
25 other thing. But I think when we look at the seriousness of

1 the egregious tactics that were employed by Department of
2 Labor, without complete findings being provided to these
3 growers, to demand that they pay extremely high fines, sign a
4 consent judge -- have a judgment entered against them with no
5 appeal rights when, at the time -- as we looked at the consent
6 judgment and tried to find out the basis of it, the consent
7 judgment speaks in terms of -- and let me find my notes here on
8 that point.

9 Consent judgment reads, on section 2 regarding
10 Ditchen:

11 Ditchen is required to pay \$156,616 in FLSA and
12 MSPA back wages and liquidated damages, quote, for their
13 employees as listed and allocated in the attached
14 Exhibit A.

15 Okay, when we look at attached Exhibit A, this is it.
16 And what it says is, "This information to be supplied at a
17 later date."

18 That's the information they had at the time that they
19 were told either sign this consent judgment, waive your appeal
20 rights, pay these fines, or else we know your customers aren't
21 going to accept shipment of your product and you're going to
22 lose millions of dollars of goods.

23 I think weighing the hypotheticals of what these
24 defendants could have done, might have done had they sort of
25 been in a different position, I think, is outweighed by the

1 extremely heavy hand of the government in this instance.

2 THE COURT: Well, it -- isn't your argument --
3 doesn't it boil down to the statute needing to be amended to
4 prevent this from occurring when it's applied to perishable
5 products?

6 MR. BERNASEK: No, your Honor, I --

7 THE COURT: Isn't that -- I received the amicus brief
8 of Congressman Schrader and apparently he's making efforts to
9 amend the statute to prohibit this from happening. Correct?

10 MR. BERNASEK: That's my understanding, your Honor.

11 THE COURT: But doesn't that, in and of itself,
12 indicate that currently under the statute they do have the
13 power to do this because there's no exception for perishable
14 goods?

15 MR. BERNASEK: Well, I think the response to that is
16 actually two parts, your Honor. I think the statute itself
17 talks in terms of under -- let me again find the section in my
18 notes. If you'll give me just a second.

19 THE COURT: Yeah, but I guess it's my point that it's
20 not up to the Court to --

21 MR. BERNASEK: Section 15(a)(1) is --

22 THE COURT: It's not up to the Court to rewrite the
23 statute. It's up to congress.

24 MR. BERNASEK: No, and we're -- no. I -- we're not
25 asking you to. But the issue is what is their authority.

1 And I think what their authority is, is that they --
2 there are -- there is such a thing as hot goods, hot goods that
3 are unlawfully produced using -- violating the minimum wage or
4 using oppressive child labor. And Section 17 of the FLSA
5 provides the authority for DOL to seek an injunction to obtain
6 that relief. Nowhere in the statute does it talk about
7 specifically giving DOL the authority to unilaterally decide on
8 their own that, because we think those goods are hot, to go to
9 the customers and tell them, Don't accept shipment of this
10 crop, and move forward.

11 That's not clear. That's a position that they take.

12 THE COURT: Well, they describe that as asking the
13 customers to voluntarily not accept shipments in a -- but if
14 you're a customer, a downstream purchaser, once you're told
15 that it's the DOL's position that these are hot goods, are you
16 going to run the financial risk of accepting these goods in
17 commerce, only to then have the court issue the injunctive
18 relief?

19 And now these goods are worthless to you, correct?

20 MR. BERNASEK: Well, not only that, but maybe you've
21 run afoul of the Fair Labor Standards Act by violating the
22 request of Department of Labor. I think that's exactly why
23 they can do that.

24 THE COURT: But that's part of the statute.

25 MR. BERNASEK: Well, no, it -- I don't believe it is,

1 your Honor. The statute says that they have the authority to
2 get an injunction to prohibit those goods.

3 THE COURT: Okay. What I'm talking about is the
4 blueberries are in a warehouse, the grower still has control of
5 them. DOL issues a hot goods objection. A downstream
6 purchaser, Costco, is advised that DOL has a hot goods
7 objection. At that stage they're still free to accept the
8 goods, the blueberries. So let's say on day one the goods are
9 shipped, Costco accepts them. On day two DOL goes to court and
10 gets an injunction, and now Costco can't do anything with them.

11 MR. BERNASEK: Correct.

12 THE COURT: So Costco now has the blueberries that
13 are going to rot in Costco's control as opposed to rotting in
14 the grower's control. And Costco is out the money they paid
15 for the blueberries.

16 Is that the way it works?

17 MR. BERNASEK: Well, that's one way it could work.
18 That's not what happened here.

19 THE COURT: Okay. No, I understand that.

20 MR. BERNASEK: Okay.

21 THE COURT: But you're saying that DOL doesn't have
22 the authority to tell the downstream purchasers not to accept
23 the goods, but my understanding is that what DOL told the
24 downstream purchasers was that we have a hot goods objection to
25 these blueberries. And then the downstream purchasers

1 themselves wouldn't touch the blueberries until that hot goods
2 objection was lifted because of the financial loss they could
3 suffer if they purchased the blueberries despite knowing about
4 the hot goods objection.

5 It's my understanding that that's the way that works,
6 so correct me if I'm wrong.

7 MR. BERNASEK: I'm not sure what the customers
8 thought, but they were notified that DOL had determined that
9 these products were in fact hot and that it was illegal to
10 handle those products and move them. And so their decisions,
11 for whatever reason that was, was not to handle them. Maybe
12 for the reasons that you've provided, but from the defendants'
13 consideration, it really didn't matter. It was that
14 opportunity was foreclosed to them; you're absolutely right.

15 And whether that is lawful or not in a general sense
16 I guess is an open question because, again, the statute doesn't
17 say specifically that DOL has the authority to tell these
18 customers. It says you have the authority to go get an
19 injunction in court. But that's not what they did here. So.

20 I don't know; maybe it is -- you know, maybe it isn't
21 illegal. But I don't -- so I guess that's point No. 1 on your
22 question.

23 But point No. 2 is, you know, whether congress needs
24 to amend this. Certainly that would be welcome, but I think
25 the very issue that we have raised in the companion lawsuit is

1 that the constitutional provisions, due process concerns under
2 the Fifth Amendment, don't prohibit no matter what congress
3 says. And that's obviously an argument for another day, but it
4 doesn't require congress to amend the Fair Labor Standards Act
5 if the way DOL chooses to employ its hot goods powers, whatever
6 those may be.

7 Again, I think it's very unclear, but the way they
8 did in this case; the perfect storm, if you will, of a
9 perishable crop, no findings provided to the growers,
10 requirement of a consent judgment, damage -- and no appeal
11 rights, that clearly doesn't pass due process, whether congress
12 intended that or not. Which again, I don't think they did, but
13 it doesn't require congress to amend the Fair Labor Standards
14 Act for this Court to decide that.

15 THE COURT: Let me hear from DOL on this subject.
16 Does this represent a change in policy where you're now
17 requiring these growers, when you have a hot goods objection,
18 that in order for the objection to be lifted you require them
19 to waive all of their administrative rights and hearing rights
20 and review rights? Waive any appeal?

21 MR. MILLER: Well, your Honor --

22 THE COURT: And not put the money in escrow that you
23 estimate to be the penalties that are due while all that is
24 done?

25 MR. MILLER: Well, first I'd just like to point out

1 that there is no requirement, either by regulation or in the
2 statute, that the escrow process be used. That is a process
3 that the Department --

4 THE COURT: That what actual process be used?

5 MR. MILLER: Pardon me?

6 THE COURT: There's no requirement that what actual
7 process be used?

8 MR. MILLER: That the escrow process is used, the one
9 that you were discussing where funds go into escrow and then
10 there's further negotiation to work out a resolution. That
11 process is not required.

12 Now, the department has done that in the past but,
13 you know, each situation is approached separately. From --

14 THE COURT: Wait a minute. When you say each
15 situation is approached separately, you mean every field agent
16 has the discretion to require a grower to waive all of their
17 appeal rights or is that done at a higher level than the field
18 level?

19 MR. MILLER: It --

20 THE COURT: Is that a policy or not?

21 MR. MILLER: Um, well, I mean, one thing I -- well,
22 okay. So one of the things I would point out is that when
23 you're talking about waiving the administrative appeal, you're
24 only talking about waiving the appeal as to a very small
25 portion of the total funds that got paid. The numbers that

1 have been being thrown around here -- you know, \$41,000 in the
2 Pan-American case and \$150,000 in the Ditchen case, those both
3 represent back wages and liquidated damages due employees. The
4 portion that was subject to an administrative appeal was a much
5 smaller amount; in other words, the civil monetary penalty --
6 the civil money penalties. And that was only \$13,000 in the
7 case of the Ditchens and \$7,000 in the case of Pan-American.
8 So the waiver of the appeal rights really only applied to that
9 small portion.

10 THE COURT: Well, did they have appeal rights on the
11 back wages? Or not?

12 MR. MILLER: Well, they were always free to disagree
13 with wage and hour and to continue to try to ship their goods,
14 at which point we would have sought a temporary restraining
15 order and they would have been accorded the entire court
16 process.

17 THE COURT: No, no, no, no, no. No. That's not my
18 question. I -- you said in terms of the consent decree they
19 were only required to waive their administrative appeal rights
20 on some civil penalties.

21 MR. MILLER: That's right.

22 THE COURT: It was my understanding that they
23 couldn't appeal your determination about the back wages either.

24 MR. MILLER: Well, that's correct, your Honor. That
25 was the settlement agreement that we reached is that they would

1 agree that that were the amount of -- that was the amount of
2 back wages due, and then they would pay that amount.

3 THE COURT: Okay. So they had to waive that too, in
4 order for you to lift your hot goods objection.

5 MR. MILLER: Mm -- that's correct, your Honor, but --

6 THE COURT: So they did have to waive everything.

7 MR. MILLER: Well, that's correct. I mean, at least
8 that was the deal that was on the table. But again, from our
9 point of view there was -- the court was never closed to them.
10 They could easily have disagreed with us.

11 Something you were --

12 THE COURT: You do recognize, do you not, that you're
13 dealing with perishable goods?

14 MR. MILLER: Yes, your Honor.

15 THE COURT: So the longer that this is hanging over
16 their heads, the greater the loss that they have.

17 MR. MILLER: Certainly, your Honor.

18 THE COURT: And that's leverage that the DOL was
19 certainly aware of.

20 MR. MILLER: I would be hesitant to speak of exactly
21 what decision makers at that point were aware of, but almost
22 certainly, your Honor.

23 THE COURT: And so you had roughly 3 1/2, 4 million
24 dollars worth of blueberries that were going to rot unless this
25 resolution was expedited.

1 MR. MILLER: Well, your Honor, I'm not sure that 3 or
2 4 million dollars is an accurate number. That's a projection
3 assuming that it went on for a month. You know, the actual
4 amount of blueberries that were being held at that point may
5 have been less.

6 THE COURT: I heard from one defendant \$2 million and
7 for the other defendant 400,000. Seems to me that I saw that
8 in the briefing somewhere.

9 MR. MILLER: My memory, your Honor, was that the
10 numbers were lower than that and that there were projections
11 out, but perhaps I'm incorrect.

12 THE COURT: Okay. Well, I'll let counsel for the
13 defendants --

14 MR. MILLER: Try to find that number?

15 THE COURT: Try and find that. I thought it was
16 400,000 for Pan-American and 2 million for Ditchens.

17 MR. MILLER: My recollection -- well.

18 THE COURT: But anyway, whatever, it's a significant
19 sum of money that's at stake and the goods are perishable. And
20 the government wasn't going to lift their hot goods objection
21 unless there was a consent decree agreed to by the defendants,
22 correct?

23 MR. MILLER: That's true. There was no intention to
24 lift the objection without a consent decree.

25 THE COURT: And as part of the settlement, they had

1 to agree to waive their rights for review?

2 MR. MILLER: This is correct, your Honor.

3 THE COURT: And you'll only go to court, then, to
4 file the consent decree. In the meantime, the hot goods
5 objection is lifted, the goods go on, and the government has
6 its consent judgment.

7 MR. MILLER: That's true, your Honor, but again, from
8 the department's point of view, you know, one of the tasks that
9 we are specifically charged with is to ensure that tainted
10 goods don't enter the stream of commerce. Now, there's no
11 other way for us to do that, particularly in a fast-moving
12 business like fresh food, without talking to downstream
13 suppliers. So -- or purchasers.

14 THE COURT: Well, there is another way to do that,
15 and you've done it before. You've allowed the growers to put
16 the money in escrow while -- and then you've lifted your hot
17 goods objection to allow the goods to pass through in commerce.
18 And in the meantime you've got your back wages, your fines,
19 your penalties there in escrow while you then satisfy the
20 system that you have a case that they violated the law.

21 MR. MILLER: Again, your Honor --

22 THE COURT: Wouldn't that work for the DOL?

23 MR. MILLER: As I've said, certainly the department
24 has done that in the past; it has worked for the department.

25 But --

1 THE COURT: Why aren't you doing it now?

2 MR. MILLER: Um --

3 THE COURT: What changed?

4 MR. MILLER: Well, there was a -- you know, a
5 decision made to approach the enforcement slightly differently
6 in this growing season.

7 THE COURT: At what level was that decision made?

8 MR. MILLER: I don't know that I could tell you the
9 level at which that decision was made.

10 THE COURT: Well, the buck has to stop somewhere.
11 What -- where does it stop?

12 MR. MILLER: Again, your Honor, I don't think I could
13 tell you at what point wage and hour made that decision, but
14 again from --

15 THE COURT: Well, I will tell you in no uncertain
16 terms that if someone had applied to this Court for a temporary
17 restraining order, pointing out the -- what was going on in
18 this particular case, I would have concluded that the growers
19 here had a very strong case for the issuance of an injunction
20 against DOL requiring them to lift their hot object -- their
21 hot goods objection and deposit the proposed penalties and back
22 wages in escrow and allow the growers to have this
23 administrative review take place.

24 What is the harm to DOL in doing that?

25 MR. MILLER: But, your Honor, to some extent that's

1 precisely the point. I mean, they could have come to court to
2 try to address the issue and they chose not to. So, to the
3 extent that they want to characterize this as duress, you know,
4 the time for that has really passed. They had every
5 opportunity to get sort of as much process as the judicial
6 system has to offer and they chose not to. They chose to make
7 a deal with us.

8 So, to some extent, questions about the way in which
9 we negotiated this consent judgment are beside the point with
10 respect to whether or not these consent judgments stay in
11 effect.

12 THE COURT: All right. What is the prejudice to the
13 DOL about the time delay in the growers filing this motion to
14 vacate the judgment?

15 MR. MILLER: Well, as we laid out in our opposition,
16 your Honor, one of the real problems we face is the high rate
17 of dispersal of the workforce. So if we were to -- if you were
18 to vacate these consent judgments and we were to start over to
19 attempt to prosecute these cases, we would be extremely
20 prejudiced in trying to locate workers who could give
21 testimony. You know, counsel made reference to the statements
22 we took, but I would be hard-pressed to think that those would
23 be sufficient proof in a case about back wages. That's one of
24 the large prejudices we would suffer.

25 Also, you know, as you pointed out earlier, we closed

1 the investigation. There may well have been a number of other
2 violations we didn't find because we agreed, as part of the
3 settlement agreement, to give up the continued right to
4 investigate and to find more violations, find additional civil
5 money penalties, find additional back wages, in exchange for
6 resolving the matter then.

7 THE COURT: What would the position of DOL have been
8 if the defendants in this matter had moved to vacate the
9 consent judgment within a month of the consent judgment being
10 entered, as opposed to waiting a year?

11 I think, had they done that, there wouldn't be an
12 issue about the timeliness of it.

13 MR. MILLER: Right.

14 THE COURT: So let's say they had moved at that time.
15 Let's say you had then opposed it and let's say the Court had a
16 hearing and let's say the Court agreed with the defendants and
17 disagreed with the DOL and found then economic coercion and
18 vacated the judgment at that point. How would DOL have gone
19 forward with its -- what policy would it have had with respect
20 to these perishable commodities, going forward?

21 MR. MILLER: Well, at that point -- and again I'm
22 speculating. So in the context of this hypothetical, I think
23 our response would have been to come back to court with a TRO
24 seeking to restrain the movement of the tainted goods in
25 commerce, followed by a preliminary injunction.

1 THE COURT: Well, by then their goods are gone.

2 MR. MILLER: Right. But --

3 THE COURT: So that you would have lifted your hot
4 objection when they filed a consent -- your hot goods objection
5 when they filed a consent judgment. A month later, now they
6 move to set it aside. The goods are in -- you said something
7 in your brief. The reason I bring this up is you said
8 something in your brief about how setting aside these consent
9 judgments would prejudice growers in general because the DOL
10 would not be willing to negotiate with them for consent
11 decrees.

12 MR. MILLER: Yes, your Honor. That --

13 THE COURT: So what did you mean to imply by that?

14 MR. MILLER: Well, that's exactly -- actually, it's
15 one of the central concerns we've got, is that if consent
16 judgments become unreliable as a means of resolving these
17 investigations, you know, the department will stop entering
18 into them. And what that means is that other growers, other
19 members of the agricultural community who may want to resolve
20 violations by something short of a TRO and a preliminary
21 injunction and all of the other process that goes along with
22 that will be unable to because the department will be unwilling
23 to enter those agreements because they get invalidated.

24 The other thing that this --

25 THE COURT: Well, there seems to be a middle ground

1 here, which apparently you availed yourselves of before but
2 seemingly have gotten away from it now. And that is not
3 insisting that the growers waive their administrative review.
4 Put the money -- the penalties, the back wages in escrow while
5 that takes place, and maintain their ability to seek judicial
6 review after the administrative review if they feel that's
7 appropriate. Correct?

8 MR. MILLER: Yes, your Honor. Again, in the past we
9 have used that, that sort of an arrangement.

10 You know, it --

11 THE COURT: Can you tell me, with certainty or not,
12 whether the Department of Labor as an official policy has now
13 determined that it will not allow that to be done, placing the
14 wages and penalties in escrow while allowing the administrative
15 review and perhaps judicial review still on the table?

16 MR. MILLER: I could not tell you with a certainty
17 whether or not that's the only policy of the Department of
18 Labor or if they have -- if they will never return to an escrow
19 approach.

20 Your Honor, from our view, you know, this is driving
21 a hard bargain in a settlement negotiation. They --

22 THE COURT: Well, there is a difference between a
23 hard bargain and an unfair bargain when you're dealing with
24 perishable crops. They're being held hostage, as it were, to
25 the timeframe involved. They're just -- they're going to be

1 worthless after a short period of time.

2 MR. MILLER: That may be true, your Honor, but again,
3 as you pointed out, I mean, courts do schedule TRO hearings the
4 same day. You know, the process that we ultimately employed
5 took a few days.

6 Undoubtedly there are always going to be some issues
7 of this sort. And in fact, you know, they even appear in
8 nonperishable goods. I mean, to the extent that you have
9 breach-of-contract problems, you know, shifts in fashion in the
10 garment industry, there's always some potential for loss to the
11 goods, loss of the value of the goods in a hot goods action.

12 But, clearly, congress made the call that it was
13 important enough to restrain these tainted goods from entering
14 the stream of commerce to accept that risk as part of the
15 enforcement scheme.

16 THE COURT: All right. Anything else?

17 MR. BERNASEK: Your Honor, could I add?

18 THE COURT: Yes, you may.

19 MR. BERNASEK: Number 1, on the -- I wanted just to
20 address this waiver of appeal rights, whether this was a narrow
21 issue or broad. And if I think you look at the first page of
22 the consent judgment, it makes it very clear that it would
23 waive service of process, their answer, and any defense to the
24 complaint to be filed, and waive further findings of fact and
25 conclusions of law.

1 So you're correct, it was a complete waiver of any
2 appeal rights.

3 As far as a TRO, I want to approach this again
4 because, you know, we've talked a lot about, you know, what
5 could have you done, what should have you done, whatever. But
6 I think it's important to go back and rewind the tape and
7 understand, day by day, what was going on.

8 These consent -- the hot goods objections were
9 placed. The investigation started late July. It was the 1st
10 or 2nd of August when the objection went out. We'd not seen
11 any draft consent judgment. We had no idea what the issues
12 were, so we entered negotiations and discussions with DOL at
13 that time. And again, the earliest indication was, hey, this
14 is going to be like last summer in Washington, where -- put in
15 escrow and move forwards.

16 So a day or two were passing. We're now at Friday
17 and no crops were being picked. Things were sitting and
18 waiting. It wasn't until Saturday or Sunday that we saw the
19 first draft of the consent judgment where this appeal issue was
20 even raised. The crops have been sitting waiting four days
21 even at this point. So when you go blow-by-blow and look
22 through day-by-day as it's going on in this very difficult time
23 where timing is everything, the issue of even waiting one more
24 day was a problem. And that's what, in the Ditchen matter what
25 was so problematic is one of the promises that was made is if

1 you get the cashier's check to us right away Monday morning,
2 we'll lift it right then and there. And you'll see the
3 correspondence by my colleague Allyson Krueger that here it is.
4 We're paying this under protest because we don't understand
5 what you even said, but here's the money. Lift this objection.

6 Oh, no, now, remember, we're going to add this
7 consent judgment needs to be filed and entered into. So now
8 we've added another day and another day. So, you know, coulda,
9 woulda, shoulda; we did talk about it. We did talk about
10 affirmatively trying to move forward and the costs and benefits
11 there, but it was weighed that, you know, one more day or a few
12 more days just could not be tolerated in the circumstances due
13 to what was at risk with the immediate loss of crops and the
14 damage that had already been incurred.

15 But also the damage in customer relations, that
16 they're now holding this crop. They too have got contracts
17 that they need to obligate. And you've got a situation where,
18 you know, many suppliers, few buyers. And boy, we've got
19 trouble with these few over here; you know, let's cut them out.

20 So it really was a situation where, you know, yeah, I
21 guess, rewinding the tape, looking back, doing the
22 Monday-morning quarterbacking, there potentially were some
23 other options. But again, I think given the -- where it was
24 day-by-day, the decisions that had to be made, I think it was
25 entirely understandable that the farmers made the choice, if

1 you will; and really lack of any choice but to consent to this
2 and wait to try and figure out how, if at all, to challenge
3 this another day when they were faced with the immediate
4 potential losses that they were facing.

5 And I think if you'll allow me an additional point
6 there, I think it also begs the question of, you know, why not
7 use the normal process? You talked about this sort of hybrid,
8 in-between process, but I will tell you in most cases with DOL,
9 including at least three or four that I've concluded just this
10 past summer where there were allegations of minimum wage
11 violations, there was never a hot goods objection put in place.
12 They concluded the findings, we did a closing interview, they
13 provided the findings to us, we had 30 days to review them and
14 decided whether to agree and pay the fines or invoke the
15 administrative process.

16 So this new use -- and like I said, the traditional
17 understanding, or at least what the statute clearly provides
18 for, is that DOL, if they feel like it's -- that these goods
19 are in fact hot and it's so important to stop them in the
20 stream of commerce, they can go get the injunction. They can
21 face the burden and the cost of what it takes to get that
22 extraordinary injunctive relief.

23 But to somehow twist this to say, you know, we can
24 now go out on findings that we're not going to tell you about.
25 We're going to tell your customers not to hold your goods. And

1 then you, if you don't like it, you in the middle of harvest
2 sort of marshal up the resources and hope that the court will
3 schedule it in a day or two. Hope that the judge gives you an
4 answer in a day or two. When you're dealing with millions of
5 dollars in -- where every day makes a difference, that just
6 seems like an extraordinarily unfair burden to place on these
7 farmers at that time.

8 Again, given -- what's wrong with the normal process?

9 THE COURT: I think we're getting a little bit off
10 track with my question that generated this discussion about the
11 option of a TRO. The option of a TRO really doesn't figure in
12 here in terms of your motion to vacate the consent judgment. I
13 just pointed out the option of a TRO in response to your
14 statement that you had no options other than to agree to the
15 consent decree.

16 But having gone the route of the consent decree and
17 having entered that judgment as a consent judgment, the issue
18 now becomes -- assuming arguendo that there are grounds,
19 serious grounds to set aside the judgment. The question is,
20 has your motion been filed in a timely fashion when it's been
21 filed about a year after the consent judgment was entered into.

22 So that's the real issue before me now because I
23 think the main obstacle you have is the time frame of waiting a
24 year before you filed your motion. I bring up the TRO scenario
25 simply as food for thought going forward if the DOL continues

1 with this policy of requiring agricultural employers to waive
2 all of their hearings and rights of appeal, et cetera, as a
3 condition of them lifting a hot goods objection should this
4 come up down the road. And I'm just telling you candidly that,
5 had someone filed a motion for a TRO back when all this was
6 taking place, I would have found that the growers here had very
7 good grounds for the issuance of injunctive relief if the
8 proposition was they could put the estimated penalties and back
9 wages in an escrow account and that they were willing to pursue
10 their administrative remedies in the event that DOL lifted
11 their hot goods objection. I would have found that to be a
12 very reasonable position.

13 And I don't know what DOL's position would be under
14 that scenario. Be interesting to see.

15 Okay. Thank you. Anything else?

16 MR. MILLER: Your Honor, if I could just clarify one
17 or two things. First of all, one of the points that defense
18 raised frequently is that hot goods have never been used. The
19 hot goods objections, the hot goods provision has never been
20 used in the Northwest prior to the 2011 growing season. And
21 there is at least one case we're aware of in 2002 in Washington
22 that involved cherries and apples, where we did pursue the TRO
23 and injunction process. You know, in --

24 THE COURT: Where you went to court and got an
25 injunction.

1 MR. MILLER: That's right. You know, but ultimately
2 we resolved that matter by a consent judgment as well. You
3 know, and I would just point out that every time we negotiate a
4 consent judgment, you know, there is waiver of rights.

5 You know, to put it all in context too, there have
6 certainly been several cases out of the Ninth Circuit that have
7 approved far greater waivers of rights, waiver of First
8 Amendment rights in the terms of a consent judgment. So asking
9 growers to waive their right to appeal to an administrative
10 tribunal -- a CMP, the civil money penalties -- or to waive
11 their right to challenge the back wages calculation in court
12 doesn't seem so beyond the pale.

13 THE COURT: Well, when you mention this case in 2002
14 -- was it?

15 MR. MILLER: Yeah -- that's right, your Honor.

16 THE COURT: And what kind of goods did that case
17 involve?

18 MR. MILLER: It was cherries, your Honor.

19 THE COURT: And were the cher -- did you have a hot
20 goods objection to the cherries? Were they in storage
21 somewhere?

22 MR. MILLER: I believe we did have a hot goods
23 objection to them.

24 THE COURT: Were they being held up?

25 MR. MILLER: Actually, I'm not certain about that. I

1 don't know whether we had the hot goods objection first or if
2 we saw the TRO first.

3 THE COURT: See, what I'm concerned about here, it's
4 one thing to have a hot goods objection to nonperishables, like
5 in the garment industry or something, where they can just sit
6 there in a warehouse without losing their value while you
7 litigate the issue. But it's another thing where you're
8 dealing with a very short timeline for perishable goods that
9 are going to be worthless in short order if the case isn't
10 resolved.

11 MR. MILLER: Well, again, your Honor, I mean, even
12 the garments lose value if they're held for significant periods
13 of time. You know, they go out of fashion, you violate your
14 contracts. There can be monetary consequences to that.

15 The other thing, you know, I didn't mention this
16 earlier, but, you know, when you were talking about the bona
17 fide purchasers, the exception that allows downstream
18 purchasers to take goods and not be subject to, you know,
19 penalty under the Act, you know, the bona fide purchaser
20 exception allows them to take if they have a good faith belief
21 that the goods were not manufactured in violation of the Act.

22 THE COURT: How would they know?

23 MR. MILLER: Well, that's the thing.

24 THE COURT: How would Costco, for example, know what
25 the berry growers' economic practices, labor practices are?

1 MR. MILLER: Well, the berry growers could convince
2 them that they had not violated the Act.

3 THE COURT: Well, and that would require Costco to do
4 an investigation before -- that's pretty unrealistic, I would
5 think, that that would happen.

6 Okay. All right. Well, thank you, everyone.

7 MR. TALCOTT: Your Honor, could I just ask a question
8 for clarification?

9 We did have other motions that were scheduled today.
10 And given how the proceeding has gone, I don't know if those
11 motions are still on the table or if your Honor wants to hear
12 argument on them. There was a motion to be allowed to conduct
13 discovery in connection with the Rule 60 motion, as well as a
14 motion to dismiss one of the claims in the companion lawsuit.

15 THE COURT: Before we get to those motions, I'm going
16 to rule on your motion to vacate the judgment because that's
17 the critical.

18 MR. TALCOTT: And that we just wanted clarification
19 on that, so thank you, your Honor.

20 THE COURT: Yep. Okay. Thank you. We'll take it
21 under submission.

22 THE CLERK: This court is in recess.

23 (Conclusion of proceedings.)
24
25

