STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BO ARD

ACE TOMATO COMPANY, INC., California Corporation, DELTA PRE-PACK CO., California Company, KATHLEEN LAGORIO JANSSEN, an Individual,	)	Case No. 93-CE-37-VI
	)	(20 ALRB No. 7)
Respondents,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	41 ALRB No. 5
Charging Party.	)	September 10, 2015

DECISION AND ORDER

On April 14, 2015, Administrative Law Judge (ALJ) Douglas Gallop issued the attached recommended decision and order in the above-captioned matter. The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ decision in light of the exceptions and briefs filed by the parties, and has decided to affirm the findings of fact and conclusions of law of the ALJ, except where otherwise noted.

Introduction and Background

A representation election was held at Ace Tomato Company, Inc. (Ace) on August 10, 1989. A total of 328 ballots were cast in the election. Following challenged ballot and election objection proceedings, the Board certified the United Farm Workers of America

(UFW) as the collective bargaining representative of Ace's agricultural employees. (See *Ace Tomato Co., Inc*. (1992) 18 ALRB No. 9.)

Following the certification, Ace refused to bargain with the UFW, and in 1993, unfair labor practice (ULP) charges were filed. In *Ace Tomato Company, Inc.* 93-CE-37-VI (1994) 20 ALRB No. 7, the Board found the employer had engaged in a ULP and ordered a makewhole remedy.[1] Ace filed a petition for review of the Board decision and order. The Third District Court of Appeal summarily denied the petition for review in the Ace matter on February 9, 1995. The Ace matter was released for compliance in March 1995.[2] As a result, efforts to seek compliance with the Board's decision, including the preparation of a makewhole specification, began.

Compliance Efforts

A Board agent contacted Ace's counsel by letter dated February 29, 1996, and requested information relevant to the creation of the makewhole specification including payroll

[1] Bargaining makewhole is intended to compensate agricultural employees for the lost wages and other benefits they would have received had the employer bargained in good faith. The Board's order contained provisions that Ace "preserve and make available to the Board and its agents … all payroll and social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the amounts of makewhole and interest due under the terms of this order."

[2] The Board's Order contained a provision that makewhole would be owed for the period beginning June 14, 1993, until the date that Ace commenced good faith bargaining. In a letter dated March 27, 1996, from Ace's counsel, Spencer Hipp, to an ALRB Field Examiner, Mr. Hipp stated that the parties had met for their first negotiation meeting on July 27, 1994, in Stockton, California. In administrative orders issued in this matter issued since May 20, 2009, the Board has noted that the makewhole period in this matter was June 14, 1993 to July 27, 1994, based on the representation made by Mr. Hipp in his 1996 letter to regional office staff.

and personnel records. In March 1996, Ace's counsel informed the Region that there were no comparable contracts, and he provided no payroll records because he stated that no makewhole was due because Ace paid the highest rate for the harvest of fresh tomatoes, $0.475 per bucket, during the period in question.

After additional requests from regional staff to provide evidence supporting the position that no makewhole was owed, on December 12, 1996, Ace's counsel provided selected payroll records showing that Ace had been paying workers $0.475 per bucket. Full payroll and personnel records for all agricultural employees working during the makewhole period were never provided.

Regional office staff made several contacts with the UFW between 1997 and 1999, the latest being July 26, 1999, requesting the UFW's position on Ace's contention that no makewhole was due because $0.475 per bucket was the highest wage rate paid in the industry. There is no evidence that the UFW responded to these requests.

In 2001, the General Counsel ordered that case be transferred from the Visalia Regional Office to General Counsel Headquarters in Sacramento. In May 2002, Board Counsel Robert Murray, who was on loan to the General Counsel in order to assist with the development of a more expeditious method of computing makewhole amounts, issued a memo to the General Counsel recommending that a "contract averaging" method be used in cases where there are no comparable contracts available.[3]

[3] Mr. Murray thereafter recused himself from any matter coming before the Board involving Ace or the employer in a similar case, *San Joaquin Tomato Company, Inc*., Case No. 93-CE-38-VI.

Regional staff evaluated the 2002 memo and report and informed Ace's counsel that the ALRB intended to proceed with calculating a makewhole specification using the contract survey method. The Region again asked Ace's counsel to provide payroll records. On January 7, 2005, reiterating his position that no makewhole was due because the highest rate for the harvest of fresh tomatoes was paid during the makewhole period, Ace's counsel stated that Ace did not accept the new makewhole methodology, argued the case should be closed due to laches, and stated that that Ace no longer had any payroll records from the 1993 – 1994 makewhole period.

Regional Director's Motion to Close

On May 20, 2009, the Regional Director filed a motion requesting that the Board close the case without full compliance. The motion stated that under the unique circumstances of the case, the collection of monetary relief was not warranted and further compliance efforts would not further the purposes of the Agricultural Labor Relations Act (ALRA). The UFW filed an opposition to the motion to close on June 19, 2009.

On September 24, 2009, the Board ordered the motion to close held in abeyance until all parties had the opportunity to provide additional evidence or clarification that could assist the Board in determining whether makewhole relief was owed under the unique facts of this case.

Hearing on Equitable Defenses

On July 20, 2010, a hearing on equitable defenses was held, and parties had the opportunity to present evidence on laches, unclean hands, and any other potential equitable

defenses to enforcement and compliance with the Board's order.[4] The ALJ issued his decision on August 23, 2010. On October 11, 2010, the Board issued an order affirming the decision of the ALJ, and found that the equitable defenses raised by Ace did not preclude further compliance proceedings. The Board also denied the Regional Director's motion to close, and noted that recent developments in the parallel case of *San Joaquin Tomato Growers, Inc.*, Case No. 93-CE-38-VI, had precipitated further efforts at compliance by the Regional Office. The Board remanded the Ace matter back to the Regional Director to allow the Regional Director to assess whether the developments in *San Joaquin Tomato Growers, Inc*. affected the Region's ability to proceed with compliance in the Ace case. (See Administrative Order 2010-16.) The Ace matter remained in the investigative stage under the General Counsel from October 11, 2010, until the General Counsel issued her first makewhole specification on October 26, 2012. [5]

<u>Proposed Settlement Agreement</u>

On September 11, 2013, the General Counsel submitted a proposed formal, bilateral settlement agreement to the Board for approval. The settlement agreement purported to settle not only Case No. 93-CE-37-VI, but also a number of other cases involving Ace Tomato Company. After reviewing the settlement agreement, the Board issued Administrative

[4] During this hearing, testimony established that Ace had the payroll records for both its direct-hire employees and for contractor employees until about 2004, when they were destroyed.

[5] The makewhole specification was amended five times, with the sixth revised makewhole specification issuing on January 9, 2015. The amendments added numerous derivative liability respondents.

Order 2013-35 on September 24, 2013. In its order the Board conditionally approved the agreement, but explained why it could not approve portions of the settlement agreement as it was written. The Board allowed the parties the opportunity to submit a settlement agreement that conformed to the Board's order. When no such agreement was forthcoming, the Board scheduled a settlement conference with the parties toward the goal of achieving settlement of all matters within the Board's sole jurisdiction (Case Nos. 93-CE-37-VI and 2012-MMC-001). ALJ Thomas Sobel acted as settlement judge with the goal of facilitating a formal settlement between the parties. Ultimately, settlement was not reached.

The Makewhole Specification

The January 9, 2015 makewhole specification utilized Dr. Philip Martin's contract averaging method based on 38 UFW contracts with 26 agricultural employers in effect during the makewhole period. Based on those contracts, the specification included a 2.73 percent wage increase for 1993 and a compounded 5.12 percent increase in 1994. With respect to fringe benefits, Dr. Martin calculated that the average medical benefit under the contracts was $0.99 per hour with an average pension contribution of $0.11 per hour. Dr. Martin converted the hourly medical and pension calculations to percent increases which came to 16.71 percent of an average general laborer's pay ($6.58/hour was the average hourly figure used) during the makewhole period. The specification also included increases of 2.32 percent for paid holidays, 2 percent for paid vacation and 1 percent for miscellaneous fringe benefits, e.g., jury duty. Thus, the total bargaining makewhole in the specification was an increase of 24.76 percent for 1993 and an increase of 27.15 percent for 1994. This resulted in a total of

$943,472 in makewhole principal, and interest in the amount of $1,235,665 as calculated through January 20, 2015 to be distributed to approximately 2,554 workers.

Hearing on Makewhole Specification

The hearing on the makewhole specification was held January 20, 2015, through February 3, 2015. Respondent, Ace Tomato Co., and Respondent Kathleen Lagorio Janssen and the ALRB's Regional Director appeared at the hearing.[6]

The Decision of the Administrative Law Judge

The ALJ issued his recommended decision on April 14, 2015. The decision addressed five primary issues: A) Ace's equitable defenses; B) the length of the makewhole period; C) the makewhole class; D) the makewhole methodology; and E) the issue of derivative liability.

A. Ace's Equitable Defenses

The ALJ addressed Ace's contentions that no makewhole was due because of the delay in processing the case and because of alleged agency bias (in loaning Board Counsel Robert Murray to the General Counsel to help develop a makewhole formula and in

[6] Prior to the hearing on the makewhole specification, on October 10, 2014, ALJ Gallop granted motions to dismiss filed by other named respondents except for Delta Pre-Pack Company, Kathleen Lagorio Janssen, and the other individual people named as respondents. The Board denied the application for permission to appeal the ALJ's ruling in Administrative Order 2014-39. At the hearing, the Regional Director argued that Kathleen Lagorio Janssen, by her conduct, became the alter ego of Ace Tomato Company, and that she was therefore derivatively liable for bargaining makewhole. The specification also alleged that Delta Pre-Pack was derivatively liable, but the Regional Director did not present any evidence at the hearing to show this. The ALJ dismissed liability allegations against Delta Pre-Pack, and noted that, in any event, Delta Pre-Pack had merged into Ace Tomato Company and no longer existed. Prior to the merger, 100 percent of Delta Pre-Pack stock was owned by Ace and it was considered a subsidiary.

recommending the hire of Dr. Martin). The ALJ rejected the equitable defenses raised at the hearing because those defenses had been raised and rejected by the Board earlier in the Ace matter [7] and in other cases, namely *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4.

B. The Makewhole Period

Until late in the hearing on the makewhole specification, Ace did not contest the end date of the makewhole period, nor did it move to amend its answer to the makewhole specification to contest this date. During the hearing Ace's counsel began to question Ace's General Manager, Dean Janssen, about when the first collective bargaining session occurred. Janssen testified that the first bargaining session occurred on July 9, 1994. Ace's Counsel represented during the hearing that Mr. Janssen discovered his old notes from the collective bargaining session while he was testifying; however, counsel did not ask Janssen while he was on the witness stand when he discovered the notes or when he made counsel aware of this. The ALJ found that because counsel was not testifying when he made this representation, his representation was based on hearsay. Moreover, the ALJ pointed out that Board regulation section 20232 provides that any allegation in a complaint not denied shall be deemed admitted, and further the failure to amend an answer to a complaint, where an allegation was previously admitted, precludes the charging party from later contesting the allegation. (*B & B Farms* (1981) 7 ALRB No. 38.)

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[7] The ALJ cited Board Administrative Order 2010-16 in which the Board affirmed the ALJ's decision following the hearing on equitable defenses. The ALJ rejected Ace's defenses and found that they did not preclude further compliance proceedings.

In addition to this authority, the ALJ opined that the Regional Director was prejudiced by the timing of Ace's change in position, was unable to prepare a response, and given the "massive" delays in resolving this case, it would not have been acceptable to grant a continuance of the hearing so the Regional Director could do so. The ALJ concluded that the makewhole period would not be changed from that set forth in the makewhole specification (June 14, 1993 to July 27, 1994).

C. The Makewhole Class

It was undisputed that Ace's agricultural workforce during the makewhole period included direct hires, and workers hired by two farm labor contractors, RLC and G & G. The specification, based on documentary evidence and on calculations of the Regional Director's expert witness, Kenneth Creal (Mr. Creal), contended that 2,554 workers are owed bargaining makewhole. This included 220 direct Ace hires, 1,074 RLC employees, 1,123 G & G employees, and 247 workers whose direct employers cannot be determined (designated as "unrepresented workers").

When the General Counsel was prosecuting this case, she was able to obtain payroll records for the RLC workers which designate these individuals as being employed by Ace. In addition, Ace partially complied with the Board's notice-mailing remedy when this matter was initially released for compliance by sending notices to over 1,800 workers, and provided the mailing list from that effort. The Board's notice-mailing order covered a period which was contemporary to, but slightly shorter than the makewhole period. Mr. Creal used the mailing list and Employment Development Department (EDD) records to determine

makewhole for the G & G workers. The 247 other "unrepresented workers" appeared on the mailing list but not in the RLC records or the EDD records for Ace and G & G.[8]

The ALJ concluded that it was "clear that the total number of employees [listed in the specification] entitled to makewhole [was] grossly overstated." The ALJ stated that while any worker who suffered losses because of Ace's conduct should be fully reimbursed, he did not believe that the remedy should result in a windfall to the Agricultural Employee Relief Fund (AERF). The ALJ adjusted the total number of employees in the specification to 1,825, the approximate number of names on the mailing list. This number is made up of the 1,074 RLC workers, 711 G & G workers and 40 direct hires.[9] The ALJ concluded that the makewhole amount for the 1,875 employees should be deposited into an escrow account, and at the close of the escrow period, the amount remaining be deposited into the AERF. Should the number of employees located exceed the escrow balance, the ALJ proposed that the Regional Director petition the Board for an order requiring Ace to deposit additional funds.

D. The Makewhole Methodology

As discussed above, the makewhole specification included increases of 24.76 percent for 1993 and 27.15 percent for 1994. The ALJ opined that this matter was "factually

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[8] At the hearing, Mr. Creal reduced the total number of unrepresented workers by 97 because although those individuals worked during the same time for the same farm labor contractors, they are owed makewhole under the Board's Decision and Order in *San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4. This left approximately 232 unrepresented workers.

[9] The ALJ noted that while any of the 232 unrepresented workers whose direct employers cannot be determined could come forward to claim makewhole, it was too speculative to add them to the list for the purposes of establishing the escrow account.

indistinguishable" from the *San Joaquin Tomato Growers, Inc*. matter in which the Board adopted Dr. Martin's makewhole methodology with modifications. (*San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4, (2012) 38 ALRB No. 12, (2013) 39 ALRB No. 14, and (2013) 39 ALRB No. 15.) Ace raised numerous objections to the contract averaging methodology, and all but one of these arguments were previously rejected by the Board in the *San Joaquin Tomato Growers, Inc*. matter.

The ALJ found no merit in Ace's "new" objection, which was that in 2012, a mediator filed a report which did not include fringe benefits; therefore the makewhole award in the instant matter should not contain such benefits.[10] The ALJ reasoned that because 20 years had passed between the makewhole period and the 2012 MMC report, it was highly unlikely that the Board would find that the 2012 report reflected what would have resulted in 1993 had Ace bargained in good faith. Moreover, at the time of the makewhole period, Ace was a healthy, profitable business, while in 2012, it was about to sell most of its assets and close its operations. Thus, the 2012 mediator's report was not relevant to the determination of the makewhole award in this case.

Although the ALJ rejected Ace's objections to the general methodology used in the specification, the ALJ also found that the makewhole specification ran counter to the Board's order in *San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4 in several respects. The ALJ found that it was "clear that the average piece rate earned by harvest

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[10] See case number 2012-MMC-001.

workers was substantially higher than the average general laborer's hourly rate.[11] Thus, the percentage approach to calculating fringe benefits makewhole resulted in a significant increase in the award. The ALJ recommended adjusting this calculation back to an hourly figure for each employee (medical $0.99/hour and pension $0.11/hour).

Further, in *San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4, the Board eliminated paid vacation and miscellaneous fringe benefits as being too speculative, so the ALJ recommended deleting them in the adjusted specification.

Finally, with respect to holiday pay, in *San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4, the Board, in remanding the specification for revision, directed that the payroll records be reviewed and where it could be verified that a worker worked five days in the two weeks preceding either the July 4 or the Labor Day holiday, that worker would be given the equivalent of eight hours pay at the employee's assumed pay rate for that holiday. The ALJ recommended the same approach to calculating holiday pay in the instant case.

E. Derivative liability

Finally, the ALJ analyzed the question of whether Kathleen Lagorio Janssen (Ms. Janssen) should be personally liable for the bargaining makewhole remedy.

The ALJ found the following evidence and testimony that was presented at the hearing relevant to this issue: Ace Tomato Company was initially capitalized in 1967. At the time Ace unlawfully refused to bargain, Ms. Janssen was a minority shareholder, and was on

[11] Medical and fringe benefits come to 16.71 percent of an average general laborer's pay (the figure, $6.58/hour was used as the average pay) during the makewhole period.

the Board of Directors, but did not draw a salary and did not participate in Ace's day-to-day operations. In 1996, after her father's death, Ms. Janssen became president, chairman of the board, and sole shareholder of Ace. Ms. Janssen is also involved in the operation of several other businesses (sometimes referred to as "Lagorio Family Companies") including Delta Pre-Pack. Ms. Janssen also owns 85 percent of Lagorio Properties, which grows canning tomatoes.

The last year that Ace was profitable was 2006. Ace attempted to expand from a seasonal business to a year-round business and employed a new president to replace Ms. Janssen. Ultimately, the expansion plans were not successful, and Ace amassed debt as part of the expansion efforts. Ace lost money each year from 2007 forward. The new president resigned in 2008. Ms. Janssen began a search for a business partner to help stabilize the company, but could not find one. Ms. Janssen did not draw a salary from Ace Tomato after 2008. In 2009, in order to continue Ace's operations, Ms. Janssen personally loaned Delta Pre-Pack $6 million so that Delta Pre-Pack could repay its debts to Ace. Ms. Janssen later loaned another $500,000 to Ace. In 2012, Ms. Janssen and her husband, Dean Janssen, took out a $1.3 million certificate of deposit as collateral for a line of bank credit to permit Ace to continue operating. Finally, in July 2012, Ace sold most of its assets to the Lipman Company (Lipman) for $7.5 million. The purchase price was not enough to cover Ace's debts, so Lipman loaned Ace $3.8 million in addition to the sales price (the "Lipman loan").[12] Ms. Janssen was

[12] Because of Ace's financial decline, by the time Ace's assets were sold to Lipman, Ace had loans totaling approximately $12 million. This consisted of $10 million in notes to F & M Bank (KLJ exhibits 15, 16, 54, 58) and a $1.725 million note to Community Bank of San Joaquin. Ace's assets were serving as collateral for the loans.

(Footnote continued….)

required to co-sign for the Lipman loan. Land owned by Ace before 2012, known as the "Hotwood property," was used as collateral for the Lipman loan, as were two properties owned by Lagorio Properties. Ms. Janssen, as trustee for her living trust, subsequently assumed the loan. In a separate transaction, Lagorio Properties assumed the $3.8 million loan and the Hotwood property was transferred to it. Lagorio Properties has been paying off the Lipman loan.

The UFW and Regional Director argued at the hearing and in their exceptions that ultimately Ms. Janssen profited as a result of these transactions. The ALJ on the other hand found that based on the liabilities incurred, Ms. Janssen, overall lost several million dollars trying to keep Ace operating including not being repaid for the original $6 million loan.

In analyzing the derivative liability issue, the ALJ applied the fact-specific test set forth in cases such as *Dole Food Company, et al. v. Patrickson, et al.* (2003) 538 U.S. 468, 475, *White Oak Coal* (1995) 318 NLRB 732, and *Tex-Cal Management, Inc.* (1986) 12 ALRB No. 26. The rule of those cases is that the equitable remedy of derivative liability (also known as "piercing the corporate veil") is available only where (1) there is such a unity of interest between the corporation and the individual that the separate personalities of the two no longer exist, and (2) adherence to the fiction of the separate existence of the corporation would, under the facts presented, sanction fraud or promote injustice.

(Footnote continued)
In addition, both banks required collateralization by Ms. Janssen as security. Lipman loaned $3.8 million to Ace to pay off the bank notes. (KLJ exhibits 14 and 42).

In determining whether the first prong of the test was satisfied, the ALJ examined whether factors such as co-mingling of funds, failure to adhere to corporate form, treatment of corporate assets as belonging to the individual or transfers of corporate assets without due consideration existed in this case. The ALJ found that corporate formalities, such as the maintaining of separate accounts, were adhered to. The ALJ found that the most significant merger of assets that occurred was the infusion of assets by Ms. Janssen and her husband of "massive" amounts of capital and collateral "in an effort to maintain" Ace's operations. The ALJ was persuaded by cases cited by Ms. Janssen's counsel in which there was no finding of alter ego status based on financial assistance to a debt-ridden entity, operating at a loss. (E.g., *Sonora Diamond Corp. v. The Superior Court of Tuolumne County* (2000) 83 Cal.App.4th 523, 547.)

The ALJ found that the case of *Rome Electric Systems, Inc., et al*. (2010) 356 NLRB No. 38—a decision which the Regional Director argued involved facts similar to those in the instant case—actually involved strikingly dissimilar overall equitable circumstances. In the *Rome Electric* matter, the evidence showed that that a new corporation was established in order to avoid paying employees contractual wages and benefits ordered by the NLRB. In addition, the individual who was held to be personally liable for the award was also the same person who was solely responsible for the unfair labor practice. The finding of alter-ego in *Rome Electric* was also based on the lack of virtually any corporate formalities and the diversion of funds into totally personal non-business uses. The ALJ found that those circumstances were not present in the instant case.

The ALJ rejected the Regional Director's argument that the Janssen's personal use of an airplane purchased by Ace in 2005 showed co-mingling, reasoning that such personal use was minimal and occurred during a time when Ace was profitable. Thus, the ALJ concluded that the evidence did not show that the intended or likely result of the personal use of the airplane was to divert funds to pay the makewhole remedy because no makewhole debt was owed at that time.

The ALJ was somewhat persuaded by the Regional Director's argument that Ms. Janssen and Lagorio Properties were over-compensated by assuming the $3.8 million Lipman loan, but characterized the profit as "on paper only" in the amount of $950,000. This is because the Hotwood property is still encumbered by its use as collateral and cannot be sold. In any event, the ALJ reasoned, this paper profit was more than offset by the millions of dollars Ms. Janssen spent trying to keep Ace operating and to satisfy Ace's creditors.

The ALJ concluded that most of the asset transfers that occurred were the result of Ace's creditors demanding that Ms. Janssen personally guarantee the loans, and not because Ms. Janssen wanted to treat the assets as her own.

The ALJ ultimately concluded that while it might be "questionable" whether the first prong of the alter ego test was satisfied, even if the character of the transactions between the Janssens and Ace were sufficient to support a finding that Ace Tomato and Ms. Janssen did not have separate identities, the evidence did not support a finding that adhering to corporate form under the circumstances of the case would promote injustice or sanction fraud.

In concluding that the second prong of the test was not met, the ALJ reiterated that Ms. Janssen did not deplete Ace's assets, rather, she fought to restore Ace's viability at

"enormous financial sacrifice." Moreover, the ALJ found it significant that Ms. Janssen was not named as individually liable for the makewhole remedy until about 20 years after the Board's unfair labor practice decision. He also found it significant that the makewhole specification was not issued until 2012. The ALJ stated that "it is not Janssen's fault that the Agency extraordinarily delayed in pursuing their (sic) remedy," and since Ms. Janssen had already taken a "financial thrashing in these business affairs," it would be inequitable to subject her to an additional debt based on unsubstantiated claims of misconduct against her. Therefore, the ALJ dismissed the derivative liability allegations against Ms. Janssen.

Exceptions to the ALJ's Decision Filed by the Parties

The Regional Director, UFW and the Respondent all filed exceptions to the ALJ's Decision. They are summarized below.

A. Regional Director's Exceptions

The Regional Director filed 28 exceptions to the ALJ's decision. Half are to the ALJ's findings and conclusions on the derivative liability of Ms. Janssen, and half are with respect to the ALJ's adjustments to the makewhole specification.

1. Derivative Liability

The Regional Director's position is that Ms. Janssen should be held liable for the makewhole award because she shut down Ace's operations, sold off its assets, personally misappropriated over $3 million in the sale, and then by merging Ace with Delta Pre-Pack, she saddled Ace with $6 million in debt so it would be judgment proof. Ms. Janssen comingled her assets with Ace's assets when she personally assumed Ace's $3.8 million dollar debt to Lipman. Ms. Janssen misappropriated $1 million by acquiring the Hotwood property. Ms.

Janssen undercapitalized Ace by merging it with Delta Pre-Pack. Ms. Janssen diverted Ace's corporate assets when she used Ace's airplane for personal trips. The Regional Director argues that the ALJ should not have accepted Ms. Janssen's testimony that the majority of the flights were for business purposes, and the ALJ was incorrect that personal use of the plane was minimal. The Regional Director argues that the ALJ failed to analyze whether shielding Ms. Janssen from liability would promote an injustice, and that this analysis does not depend on the presence of actual fraud, but is designed to avoid or prevent what would be an injustice.

Finally, the Regional Director takes the position that if the Board were to find there is insufficient evidence to prove derivative liability, then the ALJ's decision to deny bifurcation of the derivative liability allegations will have been prejudicial to the Regional Director. The Regional Director requests that the Board reopen the record, allow discovery to continue and remand the matter for further hearing on the derivative liability issue if the Board finds derivative liability is not supported by the present record.

2. The Makewhole Specification

The Regional Director argues that the approach to calculating fringe benefits in *San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4, *et al*. cannot be reasonably applied in this case because using the per hour figures for health and pension benefits ($0.99/ hour and $0.11/hour) instead of determining those amounts as a percentage of each worker's gross wages would create a significant burden on staff to re-calculate the amounts owed.[13] Similarly,

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[13] The Regional Director admits that "certain aspects" of the Ace specification are departures from the Board's decision in *San Joaquin Tomato Growers, Inc*., but that this

(Footnote continued….)

using the ALJ's method for determining holiday pay would be complicated and controversial. According to the Regional Director, this is largely due to the fact that records for G & G or direct hires showing the number of hours worked in any given day or pay period are missing. With respect to the RLC records, which do have daily information, according to the Regional Director, those records have some gaps which would make this assessment difficult.

The Regional Director argues that the ALJ should not have eliminated vacation pay and miscellaneous fringe benefits because in *San Joaquin Tomato Growers, Inc*., *supra*, 38 ALRB No. 4, the Board specifically limited its decision to the facts in that case and did not create a rule eliminating such benefits from the makewhole remedy. According to the Regional Director, the vast majority of the contracts in the sample included vacation and miscellaneous fringe.

The Regional Director argues that the ALJ arbitrarily reduced the makewhole class. While the Regional Director agrees that the number of direct hires should be reduced because many were admittedly non-agricultural workers, the Regional Director disagrees with the ALJ's reduction in the number of G & G workers, and argues that expert witness Creal's calculation should be used. In addition, the Regional Director disagrees with the ALJ's elimination of the 232 "unrepresented" workers.

Finally, the Regional Director argues that the ALJ erred by failing to require Ace to deposit interest on the makewhole principle into the escrow account. The Regional

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(Footnote continued)
is justified because the Board stated that its ruling was specific to the circumstances in that case.

Director's position is that the ALJ's decision will allow Ace to avoid paying interest on the makewhole principal, and delay the process further. In sum, the Regional Director argues that the Board's treatment of interest in *San Joaquin Tomato Growers, Inc. supra*, 38 ALRB No. 4 rested on a questionable premise, and argues that the full amount of interest on the makewhole principal should be deposited into the escrow account.

B. The UFW's Exceptions to the ALJ Decision

The UFW excepts only to the ALJ's findings with respect to derivative liability. The UFW's position, like that of the Regional Director, is that it was an error for the ALJ to deny the Regional Director's request to bifurcate the derivative liability allegations and the issues regarding makewhole methodology.

The UFW excepts to the ALJ's conclusion that Ms. Janssen was not derivatively liable for the remedy in this case for a number of reasons. First, the UFW argues that the ALJ erred in finding Ms. Janssen's personal use of Ace's airplane was minimal. The UFW takes issue with the ALJ's statement that at the time of the personal airplane use "no makewhole debt was owing," because makewhole debt was indeed owing, but the amount of the remedy was unknown.

The UFW argues that Ms. Janssen's infusion of capital into Ace and her personal loan guarantees did constitute improper comingling of assets. According to the UFW, the case of *Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th 523, 547, relied on by the ALJ for his finding that infusion of capital and personal guarantees did not result in Ms. Janssen becoming an alter ego, is limited in scope. Moreover, the court in that case noted that

there was an absence of evidence of personal enrichment, commingling of funds, or stripping of assets, while in the instant case, the UFW argues, all of this is present.

The UFW argues that the ALJ should not have discounted the personal benefit that Janssen obtained from the transfer of the Hotwood property. Despite the fact that this property is being used as collateral and cannot be sold presently, Ms. Janssen still stands to make a $950,000 profit. The UFW goes on to dispute whether the property could be sold or not because discovery was not concluded with respect to that issue.

The UFW further argues that the ALJ erred in discounting the personal loan guarantees made by Ms. Janssen as a factor in finding Ms. Janssen derivatively liable for Ace's violations. The UFW urges the Board to find that the cases relied on by the ALJ, *Tex-Cal Land Management Co*. (1986) 12 ALRB No. 26 and *NLRB v. Fullerton Transfer and Storage Ltd., Inc*. (6th Cir. 1990) 910 F.2d 331, do not support the ALJ's decision, as those cases do not involve extensive comingling of debts and assets. Rather those cases stand only for the proposition that the cessation of a company's operations where corporate debts cannot be repaid does not result in individual liability for corporate officers.

The UFW takes issue with the ALJ's conclusions that Ms. Janssen suffered "enormous financial sacrifice" or that she took a "financial thrashing" in the transactions involving Ace. The UFW argues that the record evidence establishes that Ms. Janssen profited from the various sales, loans and transfers involving Ace, ultimately benefitting Ms. Janssen personally in $4.5 million in equity.

C. Respondent Ace Tomato Company's Exceptions to the ALJ Decision [14]

1. Ace's Equitable Defenses

Many of the exceptions are to the ALJ's findings that led him to dismiss Ace's equitable defenses. Ace maintains that due to these equitable defenses, the matter should be dismissed in its entirety.

Ace argues that with respect to its defenses of laches and agency bias, the ALJ erred in dismissing them as previously decided by the Board. Ace argues that it was free to raise those defenses again to the Board even after the Board issued Administrative Order 2010-16 on October 11, 2010. In that administrative order, the Board found that Ace's equitable defenses did not preclude further compliance proceedings in this matter. Ace appealed the ruling in that administrative order to the Court of Appeal, but the appeal was withdrawn pursuant to a stipulated order on December 9, 2010, which stated that Ace "will have the opportunity and is free to raise again to the ALRB in any pending matter or proceeding before the Board, and subsequently to the Courts, the very issues [e.g. laches and other equitable defenses] on which it seeks review in the instant action."[15]

a. Ace's Laches Defense

Other exceptions regarding Ace's equitable defenses are similar to arguments raised in its 2010 appeal. Ace argues that it has proven both unreasonable, inexcusable delay

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[14] Counsel for Ms. Janssen did not file exceptions to the ALJ's decision, but did file replies to the UFW's and Regional Director's exceptions.

[15] The stipulation followed a motion to dismiss the petition for review as premature because the administrative order was not a final order of the Board and thus not subject to review under Labor Code section 1160.8.

and that there was resulting prejudice from the delay as required by *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596.

Ace argues that the Regional Director did not present evidence to rebut the presumption that Ace was prejudiced by the delay in pursuing compliance with the Board's 1994 decision and order. Ace cites to *Fountain Valley Regional Hospital v. Bonita* (1999) 75 Cal.App.4th 316 in support of its argument that the ALRB has the burden of rebutting the presumption of prejudice where an analogous statute of limitations has expired. Ace argues that analogous limitations periods are found in California Code of Civil Procedure section 338(a) (three years for an action on either unpaid wages or other statutory violation), and Business and Professions Code section 17208 (four years for an unfair competition action seeking restitutions). Ace argues that in the instant case, under the analogous limitations period, the time to bring the matter to compliance has expired four times over, so prejudice must be presumed in this case.

Even if prejudice were not presumable, Ace argues that it presented ample evidence of prejudice, including the long accrual of interest, and the fact that because of the passage of time, Ace was able to present only one farm worker witness to testify about work patterns. In addition, others who were familiar with Ace's efforts to comply with the Board's order or who could have testified about Ace's operations have died or cannot be located.

Ace argues that the record in this case establishes that as a matter of law, the defense of laches applies, notwithstanding any countervailing public policy, because the injustice that would result from imposing the makewhole award outweighs the interest of the makewhole class. (*San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 646.) Ace's final

argument relates to agency delay is that the long period of inaction by both the ALRB and the UFW amounts to a waiver of the ALRB's right to demand production of payroll records. (*Savaglio v. Wal-Mart Stores, Inc*. (2007) 149 Cal.App.4th 588, 598.)

Ace urges the Board to dismiss the case in its entirety because it proved its laches defense.

b. Ace's Agency Bias Defense

Ace argues that the ALJ erred in not considering its agency bias arguments. Ace argues that the Board has not previously ruled on its bias defense because in Administrative Order 2010-16, the Board only considered Ace's laches, unclean hands, judicial estoppel and unjust enrichment defenses. Ace argues that by adopting the contract averaging approach developed by Board Counsel Robert Murray and Professor Phillip Martin, before a hearing on makewhole was held, the Board committed itself to a result which would ensure that Ace would have to pay significant amounts of makewhole.

In support of its argument that the ALRB has demonstrated bias in this matter, Ace cites *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236 in which the court held that to prevail on a claim of bias in an administrative hearing, the party asserting the defense must establish "an unacceptable probability of actual bias on the part of those who have actual decision-making power over their claims." Ace argues that the Board has consistently expressed a commitment to a result in this case. By hiring Professor Martin in 2001, the Board demonstrated it was prejudging the merits of the case, and concluding that there were no comparable contracts to use in the development of the makewhole award. In addition, the Board prejudged Ace's argument that no makewhole was due five years before

the hearing on the makewhole specification when it stated in Administrative Order 2010-16 that "the Board takes this opportunity to emphasize that it is not persuaded that evidence of payment of the highest wage rate during the makewhole period itself leads to the conclusion that no makewhole is due."

2. Ace's Exceptions to the ALJ's Findings on the Makewhole Specification

Ace argues that the approach to calculating makewhole that it has offered is more reasonable than that contained in the makewhole specification, and that it was an error for the ALJ not to independently evaluate it.

First, Ace argues that the 1995 collective bargaining agreement with Meyer Tomato (Visalia) is an appropriate comparable contract for the purposed of determining the amount of the makewhole award. Ace argues that it addressed and rebutted the Board's reasoning for rejecting the Meyer Tomato contract in *San Joaquin Tomato Growers, Inc., supra,* 38 ALRB No. 4, and moreover, that the facts in the instant matter are distinguishable from those in *San Joaquin Tomato*. According to Ace, on cross-examination, Professor Martin admitted that his testimony that wages were lower in Visalia where Meyer Tomato was located was speculative. In addition, Ace argues that the Board should discount Professor Martin's testimony that the Meyer Tomato contract was not comparable because Meyer Tomato was going out of business when the contract was negotiated. This was not in fact the case, according to Ace, rather, Meyer Tomato was in the process of reorganization and did not go out of business.

Ace argues that the Regional Director's contract averaging approach is unreasonable, because the contracts averaged bear no resemblance to Ace's operations and

have increases which are unsupported. Thus, the makewhole specification results in a punitive rather than compensatory result. The contracts used to develop the makewhole specification in the instant case involved employers with no similarity to Ace's operations and most of the contracts were successor agreements arising from mature collective bargaining agreements. Moreover, Ace argues, that there was no evidence that Ace would have agreed to the wage and benefits in the makewhole specification because it was already paying the highest rate for the harvest of tomatoes.

Ace agrees with the ALJ's conclusion that the number of G & G and direct hire Ace employees was overstated by the Regional Director. However, Ace argues that the numbers should be reduced even further to 130 G & G employees, and that the makewhole period for those workers should be limited to September and October of the 1993 season. Ace points to the testimony of a former G & G worker about crew size and work patterns in support of its position (TR: Vol. 5, pp. 19-53).[16]

Finally, Ace argues that the ALJ erred in not changing the end date of the makewhole period from July 27, 1994, to July 6, 1994. Ace argues that the Board never conclusively determined when the makewhole period ended in this case; rather the Board based its understanding of the date when the parties first met for bargaining on the representations in a letter from Ace's former counsel, Spencer Hipp, sent to ALRB Regional staff in the mid-1990s. Contrary to the ALJ's determination, Ace never admitted that the end date of the makewhole period what July 27, 1994.

[16] References to the hearing transcript will be abbreviated as "TR" followed by the volume number(s) and page number(s).

<u>Respondent Kathleen Lagorio Janssen's Reply to Exceptions Filed by the Regional Director and the UFW</u>

Ms. Janssen's reply addresses only the propriety of the ALJ's findings on derivative liability and addresses in great detail the UFW and Regional Director's exceptions to the ALJ's findings on this issue.

Ms. Janssen argues that the record supports the finding that Ace followed corporate formalities. She argues that case authority supports the finding that a shareholder can make a loan to a corporation or guarantee certain financial transactions without such transactions resulting in per se alter ego liability. In this case, the transactions were properly documented, executed by the appropriate authority and were disclosed. (*Whitney v. Wurtz* (2007) U.S. Dist. LEXIS 40000; *Doe v. Unocal Corp*. (9th Cir. 2001) 248 F.3d 915; *Seiko Epson Corp. v. Print-Rite Holdings, Ltd*. 2002 U.S. Dist. LEXIS 27427.)

Ms. Janssen's position is that the financial support and loan guarantees benefitted Ace, and do not show unity of interest between Ms. Janssen and Ace. Cases acknowledge that it is not uncommon for key equity holders of close corporations to provide guarantees of credit assurances. (*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App4th 523, 539, 547; *Tex-Cal Land Management, Inc.* (1986) 12 ALRB No. 26, p. 31; *AT&T v. Compagnie Bruxelles Lambert* (9th Cir. 1996) 94 F.3d 586, 591; *NLRB v. Fullerton Transfer and Storage, Ltd.* (6th Cir. 1990) 910 F.2d 331, 340.)

Ms. Janssen further argues that the evidence shows that she did not profit from the sale of Ace. At the time of the 2012 asset sale to Lipman, all of Ace's assets were serving as collateral for Ace's loans (approximately $12 million).[17]

Ms. Janssen argues that the Regional Director and the UFW have mischaracterized the $650,000 F & M Bank loan which was paid off as part of the sale of Ace as a personal loan of Ms. Janssen's. Rather, this loan was a business loan made to Ms. Janssen and her trust. F & M Bank required the loan be made to Ms. Janssen rather than Ace, but it was for Ace purposes. (KLJ Exhibit 54, entitled "Business Loan Agreement.")

The ALJ credited testimony demonstrating that Ms. Janssen, acting as Ace's president, did not prioritize repayment of the $6 million loan that she made to Delta Pre-Pack to pay Ace in 2008 for its tomatoes. Ms. Janssen testified that she does not expect repayment. Rather priority was given to outside known unaffiliated creditors.

Ms. Janssen's position is that the ALJ was correct in concluding that it was "unsupported conjecture" that the Hotwood property, which was encumbered by debt in amounts more than twice its appraised value (the $3.8 million loan after sale), could be liquidated to pay creditors. There was at no time any equity available in the property for liquidation or the satisfaction of Ace's debts beyond the secured party.

[17] Ms. Janssen's living trust first assumed the outstanding debts of Ace and Delta Pre-Pack under the Lipman loan in exchange for the Hotwood property and the release of accounts payable in the amount of $2.9 million. (KLJ exhibits 18, 19.) In a separate transaction, Lagorio Properties then assumed the Lipman loan and received the Hotwood property and a personal promissory note from Ms. Janssen as consideration for the assumption of the loan. (KLJ Exhibit 44.) Lagorio properties was making payments on the $3.8 million loan at the time of the hearing. (TR: Vol. 7, p. 88.)

Ms. Janssen also argues that the Regional Director is mistaken in stating that it is not legally significant that Ms. Janssen was not responsible for the underlying ULP. Alter ego is an equitable doctrine dependent on all the circumstances of a case, including whether an individual is responsible for the underlying ULP. (*NLRB v. O'Neill* (1992) 965 F.2d 1522, 1531.) The evidence demonstrated that at the time of the ULP, Ms. Janssen had very limited connections with Ace.

In support of her argument that the Regional Director misinterpreted the law with respect to undercapitalization, Ms. Janssen cites cases stating that undercapitalization is just one of the factors to consider in an alter ego inquiry. (*Ahcom Ltd. v. Smeding* 2011 U.S. Dist. LEXIS 87253; *Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1213.) In addition, for purposes of alter ego, whether or not an entity is undercapitalized is most relevant at the time of formation of the entity. (*Seymour v. Hull & Moreland Engineering* (9th Cir. 1979) 605 F.2d 1105, 1113.) In addition, Ms. Janssen argues that courts have concluded that an inequitable result does not occur in those cases where a corporation was once adequately capitalized, but subsequently fell upon bad times. (*Flores v. DDJ, Inc.*(2007) U.S. Dist. LEXIS 88242.)

Ms. Janssen urges the Board to uphold the ALJ's findings related to the airplane as they are well-supported by the record. The personal use was de minimus and was also documented and reimbursed. The record shows that less than 5 percent of the trips since 2005 were for non-business purposes. Adjustments were made to the year-end taxes to account for personal use.

Finally, Ms. Janssen argues that the entire record supports the ALJ's conclusion that respecting the corporate form in this case would not sanction a fraud or injustice. Ms. Janssen did not use Ace's corporate form to defraud or deceive anyone who did business with Ace. Any ability of Ace to pay makewhole does not stem from misuse of the corporate form, but from the fact that Ace was not profitable.

Discussion and Analysis

A. Ace's Equitable Defenses

1. Laches

The equitable doctrine of laches can serve to bar an action where a party's unexcused and unreasonable delay has prejudiced the party's adversary. Delay alone will not constitute laches, rather the delay must have caused some prejudice to the party raising the defense. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 459.) Generally, prejudice cannot be presumed from the delay itself, instead, the party asserting the defense must show it was prejudiced by the delay. (*Conti v. Comm'rs of the City of Los Angeles* (1969) 1 Cal.3d 351.) The case cited by Ace, *Fountain Valley Regional Hospital v. Bonita, supra*, 75 Cal.App.4th 316, states that "the element of prejudice may be "presumed" if there exists a statute of limitations which is sufficiently analogous to the facts of the case, and the period of such statute of limitations has been exceeded by the public administrative agency in making its claim." (*Id.* at 323, emphasis added.) Recognition of an analogous statute of limitations shifts the burden of proof from the party asserting laches to the party arguing against application of the doctrine of laches. Whether a statute of limitations can be analogized or borrowed depends

upon the strength of the analogy." (*Brown v. State Personnel Bd*. (1985) 166 Cal.App.3d 1151, 1159-1160.)

Ace urges the Board to find that that analogous limitations periods are can be found in California Code of Civil Procedure section 338(a) (three years for an action on either unpaid wages or other statutory violation), and Business and Professions Code section 17208 (four years for an unfair competition action seeking restitutions.) However, neither California Code of Civil procedure section 338(a) nor Business and Professions Code section 17208 is analogous because these sections speak to the time for commencing an action once a cause of action has occurred, not to the time period in which compliance with any remedies awarded needs to be completed. Thus prejudice cannot be presumed in this situation, and the burden never shifted to the Regional Director to rebut the presumption.

We conclude that Ace has not shown adequate prejudice to support a laches defense. As the ALJ noted in his decision in the instant matter, the Board previously rejected Ace's laches defense in Administrative Order 2010-16, which affirmed the ALJ's August 23, 2010 decision that there were no equitable defenses precluding compliance with and enforcement of the Board's decision ordering makewhole. As the ALJ stated in that decision, "[Ace], for years, has defied the Board's Order by refusing to produce the payroll records, and then by destroying them. That conduct, in itself, constitutes an ample ground upon which to dismiss the [equitable] defenses."

Furthermore, Ace has been on notice since 1995 that a bargaining makewhole remedy was the final order of the Board as affirmed by the Court, and has also been on notice of the fixed time period covered by that remedy (June 14, 1993 - July 27, 1994). Thus, Ace

has not been prejudiced in its monetary losses from the bargaining makewhole principal for this fixed time period (this is in contrast to an expanding backpay remedy). Although interest on the makewhole amount has been mounting, that alone is not sufficient to prejudice to Ace, especially given the Board's ruling on the interest award described below at page 43.

Ace's argument that it was prejudiced by the lack of available witnesses and/or witnesses with clear memories of this case is also unavailing. As discussed above, the fact of Ace's liability was determined many years ago, and Ace has not shown that it was significantly prejudiced by the lack of witnesses during the compliance hearing. Indeed, General Manager Janssen was still available and testified at the hearing.

Moreover, the Supreme Court held in *NLRB v. Rutter-Rex Manufacturing Co.* (1969) 396 U.S. 258 that the consequences of agency delay should not be borne by wronged employees to the benefit of wrongdoing employers. In *NLRB v. Int'l Ass'n, Bridge, Structural & Ornamental Ironworkers, Local 480* (1984) 466 U.S. 720, another case where the delay also occurred during the compliance phase, the Supreme Court held that it was well-established that a court may not refuse to enforce a backpay order solely because of the Board's delay subsequent to that order in formulating a backpay specification. (*Id.* at p. 724 citing *Rutter-Rex*, *supra*, 396 U.S. 258.)

2. Agency Bias

Ace's bias defense is essentially the same as its unclean hands defense, which was rejected by the Board in 2010 in Administrative Order 2010-16: that the Board committed itself to the makwhole methodology developed by Board Counsel Robert Murray and Professor Philip Martin, and that the Board pre-judged the merits of the case.

Ace's claims of agency bias have no merit. Ace has clearly not met the burden discussed in *Breakzone Billiards v. City of Torrance, supra*, 81 Cal.App.4th 1205, 1236, which held that for a party to prevail on a claim of bias violating fair hearing requirements, the party must establish "an unacceptable probability of actual bias on the part of those who have actual decision making power over their claims." (*Ibid.*, citing *U.S. v. State of Oregon* (9th Cir. 1994) 44 F.3d 758, 772.) A mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty. (*Breakzone Billiards v. City of Torrance, supra*, 81 Cal.App.4th 1205, 1236, citing *Brooks v. New Hampshire Supreme Court* (1st Cir. 1996) 80 F.3d 633, 640; *Stivers v. Pierce* (9th Cir. 1995) 71 F.3d 732, 74.) Moreover, the court stated in *Breakzone Billiards*, "a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Breakzone Billiards v. City of Torrance, supra*, 81 Cal.App.4th 1205, 1237 citing *Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 792.)

Early in the compliance phase of this case, it was apparent that there were no available comparable contracts the Board could have used to calculate makewhole owed to Ace's employees. In fact, Ace's attorney, Spencer Hipp, admitted to this lack of comparable contracts in a 1995 letter to ALRB Regional staff. Thus, this case presented a situation where calculation of a makewhole specification was very challenging.

In order to further compliance with its order, the Board lent Board Counsel Robert Murray to the General Counsel to assist with the case. Mr. Murray was not acting on behalf of the Board when he produced his report on alternative makewhole methodologies.

Nor was the Board or its other counsel involved in the General Counsel's evaluation of Mr. Murray's recommendations, and Mr. Murray thereafter recused himself from any matter coming before the Board involving Ace or the employer in the San Joaquin Tomato Company matter.

In addition, the Board was not bound by the preliminary determinations by the Regional office that Ace owed no makewhole, nor was the Board required to use a "comparable contracts" approach to determine the amount of makewhole due. Indeed, Board regulation sections 20291(b)(3) and 20291(b)(4) state that the Board may use "other economic data" besides comparable contracts to makewhole wage rates and benefits. The Board has the authority to determine the most reasonable method of calculating makewhole under the circumstances presented in each case.

B. The Makewhole Period

We uphold the ALJ's conclusion that the makewhole period should not be changed from that set forth in the makewhole specification. Ace attempted to raise this issue in the eleventh hour, and presented no evidence as to why it delayed until nearly the end of the period to do so. Board regulation section 20232 provides that any allegation in a complaint not denied shall be deemed admitted, and further the failure to amend an answer to a complaint, where an allegation was previously admitted, precludes the charges party from later contesting the allegation. (*B & B Farms*, *supra,* 7 ALRB No. 38.)

C. The Makewhole Class

It is undisputed that there were three groups of agricultural workers at Ace during the makewhole period: Ace's direct hires, employees from farm labor contractor RLC,

and employees from farm labor contractor G & G. Records relied on by Kenneth Creal, the Regional Director's expert, in determining which workers were eligible for makwhole included: (1) Employment Development Department (EDD) records for Ace and G & G; (2) partial payroll records for RLC; and (3) a mailing list of approximately 1,825 people provided by Ace to Regional staff to prove that it had complied with the Board's 1994 notice remedy after the liability phase of this case was complete (the mailing list is found at RD exhibit 11).

The EDD records for Ace and G & G contain the names of workers and their social security numbers, and quarterly earnings for each person. The records do not contain information about hourly, daily or weekly earnings. The records for Ace do not indicate whether workers were agricultural workers (some worked in a packing facility). The records for G & G do not indicate whether all of the wages earned in each quarter were for Ace or for other employers. (RD exhibits 8 and 10.)

The RLC payroll records identify Ace as the sole employer for which the RLC workers worked. The records provided information about daily earnings but not about the number of buckets picked, or about how many hours a worker had worked over the course of a year (RD exhibit 9). Creal included all of the RLC workers in the makewhole specification because the records reflected work performed at Ace during the makewhole period. The number of RLC workers is 1,075. None of the parties contest that these individuals should be part of the makewhole class.

With respect to the direct hire employees, the specification originally included 220 individuals. The ALJ reduced this number to 40. The Regional Director indicated in his

exceptions that he did not contest this reduction because many of the direct hires were admittedly non-agricultural workers, and from the records, it was impossible to distinguish who was an agricultural employee and who was not.

We agree with the ALJ's conclusion that inclusion of the 232 workers labeled as "unrepresented" is too speculative for the purposes of establishing the makewhole specification, and we uphold his exclusion of these workers.

This leaves the G & G contractor employees. Mr. Creal included 1,123 G & G workers in the specification. The ALJ reduced this number to 711, and Ace argues that this number should be reduced even further to 130. The ALJ did not explain how he arrived at the 711 figure except that he found that the number of workers on the mailing labels provided the most reasonable estimate of workers employed during the makewhole period. Ace supports its position with the testimony of a former G & G employee Jose Mendez, who testified that G & G only worked for Ace for 5-6 weeks per year in September and October, and worked for other farms the rest of the year. (TR: 5, 41-42; 44-46; 57.) Mr. Mendez testified that his G & G crew worked 50-60 percent of the time for Ace and 40-50 percent of the time for other companies. (TR; 5, 40-41.) Mr. Mendez also testified that the Ace G & G crew had only 120-130 people in it. (TR: 5, 36; 48.) In response to a question by the ALJ, Mr. Mendez testified that it was not possible that there were over 1,000 G & G workers working only at Ace in 1993 and 1994. (TR: 5, 53.)

Kenneth Creal, the Regional Director's expert, testified that he had already identified and reduced the G & G workers by 97 because he found that those individuals worked for both Ace and San Joaquin Tomato during the same period.

Given the limited nature of the record, it appears that the ALJ's approach is the most reasonable approach to identifying the G & G workers in the makewhole class. As parties do not contest the number of RLC and direct hires, it is reasonable that the remaining complement of workers on the mailing list came from G & G. Thus we uphold the ALJ's finding that the makewhole class consists of a total of 1,826 workers.

However, workers who do not appear on the makewhole specification due to the fact that the records are not complete should not have to bear the burden of the long procedural delays in this matter, or be penalized for Ace's recalcitrance in not providing payroll records when the case was released for compliance. We also adopt the ALJ's approach set forth on pages 22-23 of his decision should any worker not accounted for in the specification, such as one of the "unrepresented workers," appear and be able to show he/she worked for Ace during the makewhole period.

D. The Makewhole Methodology

1. The Meyer Tomato contract is not an appropriate measure of makewhole

Ace argues that the appropriate makewhole methodology to apply is a comparable contract using the 1995 Meyer Tomato Contract with the UFW in which the piece rate was $0.43 per bucket and no medical or pension benefits were provided. The Board rejected the Meyer Tomato contract as comparable in *San Joaquin Tomato Growers, Inc.*,

supra, 38 ALRB No. 4.[18] The facts of San Joaquin are virtually indistinguishable from the facts in the instant case.

The Meyer Tomato contract is not an appropriate comparable contract for several reasons. First, it was not contemporaneous with the makewhole period in the instant case. As expert witness Dr. Martin testified, contemporaneous time period was the largest factor in determining which contracts were included in the list of those averaged. (TR: I, 70) Moreover, this contract was negotiated after the employer was found guilty of surface bargaining. (*Robert Meyer d/b/a Meyer Tomatoe*s (1991) 17 ALRB No. 17; affd. by the Fourth Appellate District in an unpublished decision on September 1, 1992.) The pernicious nature of surface bargaining weakens the union's bargaining position as much or more than an outright refusal to bargain, so this contract did not reflect the market wages that good faith bargaining would have achieved. Dr. Martin also testified that Meyer Tomato was likely to be a much smaller operation than Ace which had 3,000 acres of tomatoes during the makewhole period. The entire tomato acreage in Visalia County during this time was 1000 acres, and this included both fresh market and canning tomatoes. (TR: I, 71.) Finally, contrary to Ace's representation, Meyer Tomato went out of business in California at the end of its contract with the UFW (1997). Accordingly, the Meyer Tomato contract is an inappropriate measure of makewhole in this matter.

[18] Affirmed in full by the Fifth Appellate District in an unpublished decision on May 14, 2015.

2. <u>The contract averaging method is a reasonable measure of makewhole</u>

Ace argues that the makewhole specification does not represent a reasonable approximation of alleged losses. Ace argues that the contracts averaged do not bear any resemblance to Ace's operations.

As the Board held in *San Joaquin Tomato Growers*, Inc., *supra,* 38 ALRB No. 4, Board precedent clearly permits alternative makewhole formulas when there are no comparable contracts available. (See also *Hess Collection Winery* (2005) 31 ALRB No. 3; *Adam Dairy* (1978) 4 ALRB No. 24; *Abatti Farms, Inc.* (1986) 16 ALRB No. 17.) The contract averaging formula applied in this case is a reasonable, equitable estimation of what the parties would have negotiated if Ace had not engaged in a bad faith refusal to bargain. The averaging of wage and benefit increases in contemporaneous contracts provides the best estimate of what could have been negotiated in good faith during the 1993-1994 makewhole period. Although the contracts averaged involved different commodities than tomatoes, the contracts averaged reflect prevailing wage rates negotiated in good faith by the UFW in the years 1993-1994.

With respect to Ace's argument that many of the contracts averaged were "mature" or successor contracts, the wage increases in the sampled "mature" contracts could represent far more modest gains than those in first contracts. As the Board held in the *San Joaquin Tomato* matter, "in situations where benefits were not provided prior to the first contract, the initial economic value of those benefits would tend to be greater than the incremental increase in benefits in successive contracts. Therefore, while the averaging of

benefits from the sampling of contracts is not a perfect measure, we find it to be reasonable in these circumstances." (*San Joaquin Tomato Growers, Inc., supra*, 38 ALRB No. 4, p. 17.)

The comparable contract methodology in this case is based upon the best available information in the record and is reasonable under the circumstances. As the Board has noted, "exactitude in our quest to make employees whole" is not required, "rather the formula used must be reasonably calculated to arrive at a close approximation of the amount the employees would have earned if the employer had bargained in good faith." (*J.R. Norton Company, supra*, 10 ALRB No. 42, at p. 13.)

3. It was appropriate for the ALJ to adjust the makewhole methodology

In the *San Joaquin Tomato Growers* case, the Board made modifications to the methodology proffered by the General Counsel, by eliminating a 5 percent increase for miscellaneous fringe benefits (holiday vacation, etc.) as too speculative. With respect to paid holidays, the Board directed that where it could be verified that a worker worked 5 days in the 2 weeks preceding either the July 4 or Labor Day holiday, that worker would be given the equivalent of 8 hours pay. (*San Joaquin Tomato Growers, Inc*., *supra,* 38 ALRB No. 4.)

a. Calculation of health and pension contributions

As indicated above, medical and pension benefit contributions in the specification come to 16.71 percent of an average general laborer's pay ($1.10/hour in benefits divided by $6.58/hour in wages) during the makewhole period.

Ace's expert, George Magula, testified that the RLC payroll records showed that the average hourly employee was earning between $10 and $11 per hour. He testified that piece rate workers were earning between $12 and $13 per hour. (TR: Vol. 7, 172, 185.) Thus,

under the Regional Director's specification, workers earning $12 per hour would receive $2 per hour in health/pension contributions, or nearly twice the amount of the average contributions in the contracts averaged, which would not be a reasonable approximation of what might have been negotiated in good faith.

The Regional Director's approach creates the potential for an inequitable approximation of the increase in benefits. The increase in fringe benefits is the largest component of the makewhole award, and this calculation must be reasonably accurate. Thus, we uphold the ALJ's recommendation that $0.99/hour for medical and $0.11/hour for pension be applied to all workers in the specification regardless of their hourly wage. While this may not be the most practical approach, we believe it will result in more accurate figures.

b. Holiday pay

Professor Martin calculated the value of paid holidays at 2.32 percent of earnings based on the assumption that Ace workers would be entitled to half of the average paid holidays found in the contracts[19] and on the assumption that workers worked at least 125 days. To find the value of the paid holiday to a typical worker employed half of the year (or 1,000 hours), Professor Martin divided 8 (an 8 hour day) by 1,000. Thus, the value of one holiday was 0.8 percent of earnings. He assumed workers would be eligible for 2.9 paid holidays. Thus, 2.9 holidays x 0.8 percent = 2.32 percent of total earnings.

[19] There was an average of 5.8 paid holidays in the contracts with eligibility requirements that a worker worked before and after the holiday (TR: Vol. 1, p. 99).

In the *San Joaquin Tomato Growers, Inc*. matter, the Board, in remanding the specification for revision, directed that the payroll records be reviewed and where it could be verified that a worker worked 5 days in the 2 weeks preceding either the July 4 or the Labor Day holiday, that worker would be given the equivalent of 8 hours pay at the employee's assumed pay rate for that holiday.

There is not enough data in the payroll records in the instant case to accurately verify which days all of the workers worked, so it is reasonable to estimate holiday pay based on a set of reasoned assumptions; however, the assumption that workers would be eligible for essentially 3 holidays per year is unreasonable given the short length of the harvest season.[20] Thus, we reduce the number of holidays to 2, with a resulting 1.6 percent of earnings as the value of paid holidays in the makewhole specification.

c. Vacation pay and miscellaneous fringe

We conclude that the proposed 3 percent increase for vacation and miscellaneous benefits should be eliminated, consistent with the Board's decision in *San Joaquin Tomato Growers, Inc*. matter, and given the evidence of the nature and timing of the work performed by the tomato pickers. An award for miscellaneous benefits such as jury duty is unreasonable because it is too speculative to conclude that any particular employee would have benefited from such provisions.

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[20] See RD Exhibit 9. The RLC records show totals paid by day to each worker. The beginning date for each season is in mid-June, while the last checks were issued in the first week of November.

With respect to the vacation calculation in the specification, the contracts averaged contain prerequisites of hundreds of hours worked and/or some number of years of continuous service to qualify for paid vacation. Therefore, it is too speculative to assume Ace's employees would have qualified for vacation benefits.

We therefore remand the makewhole specification to the Regional Director for recalculation consistent with the above discussion.

4. Interest on the makewhole specification

In the instant case, the agency, employer and union shared responsibility for the delay. Further, the agency is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. (*NLRB v. J.H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 264-265.) This principle applies to the interest payments on monetary remedies. (*Yorkaire, Inc.* (1999) 328 NLRB No. 38.)

Interest on the makewhole will be treated the same way the Board did in *San Joaquin Tomato Growers, Inc*. because the procedural history of the instant case is almost identical. In *San Joaquin*, the Board awarded interest on the make-whole amount for the entire period of the enforcement delay. However, based on the "unique" history of the case, i.e., "a complex amalgam of agency inaction, employer recalcitrance and union indifference," the Board ordered the award of interest to be contingent upon the employees being located. (*San Joaquin Tomato Growers, Inc., supra,* 38 ALRB No. 4, p. 21.)[21]

[21] Chairman Gould did not participate in the Board's decision in *San Joaquin Tomato Growers, Inc*., *supra,* 38 ALRB No. 4, and dissents from the failure of that decision and this one to provide makewhole with interest for those monies which will be
(Footnote continued….)

E. Derivative Liability

We turn finally to the question of whether Ms. Janssen should be held personally liable for the makewhole award under the equitable doctrine of alter-ego or piercing the corporate veil. We first provide a detailed discussion of the standards established through case law.

A basic tenet of American corporate law is that a corporation and its shareholders are distinct entities. (*First National City Bank v. Banco Para el Comercio Exterior de Cuba* (1983) 462 U.S. 611, 625.) Nevertheless, the "veil" separating corporations and their shareholders may be pierced in some circumstances. The doctrine of piercing the corporate veil, however, is the rare exception, applied only in the case of fraud or certain other exceptional circumstances. (*Dole Food Co., et al. v. Patrickson, et al.* (2003) 538 U.S. 468, 475, citing *Burnet v. Clark* (1932) 287 U.S. 410, 415.)

The National Labor Relations Board (NLRB), in *White Oak Coal Co*. (1995) 318 NLRB 732 (enfd. *NLRB v. White Oak Coal Co*. (4th Cir. 1996) 81 F.3d 150), clarified that the following two-pronged test was to be used for determining whether the corporate veil should be pierced and personal liability assessed:

> … (1) there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would

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(Footnote continued)
deposited into the AERF as well as those monies which will be distributed to individuals who are located. Chairman Gould sees no principled basis for drawing a distinction for the purposes of relief between these two groups.

> sanction a fraud, promote injustice, or lead to an evasion of legal obligations. (Emphasis in original.)

(*White Oak Coal Co*. at p. 735, citing *NLRB v. Greater Kansas City Roofing* (10th Cir. 1993) 2 F.3d 1047, 1052.)

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, the NLRB considers generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors considered are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of the same or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities; (8) diversion of the corporate funds or assets to noncorporate purposes, and, in addition, (9) transfer or disposal of corporate assets without fair consideration. (*White Oak Coal Co., supra,* 318 NLRB 732, 735.)

When assessing the second prong, the NLRB determines whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice, or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. "Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found." (*Id.* at p. 735.)

This is a reiteration of the 10th Circuit's holding in *NLRB v. Greater Kansas City Roofing, supra*, 2 F.3d 1047, that "[t]he mere fact that a corporation commits an unfair labor practice, or breaches a contract, or commits a tort, does not mean that the individual shareholders of the corporation should personally be liable. To the contrary, the corporate form of doing business is typically selected precisely so that the individual shareholders will not be liable. It is only when the shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes the fraud that the corporate veil may be pierced." (*NLRB v. Greater Kansas City Roofing, supra*, 2 F.3d 1047, 1053, citing *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.* (1974) 417 U.S. 703, 713.)

The California Supreme Court has explained that before alter ego liability may be imposed, two conditions must be present:

> [T]he conditions under which a corporate entity may be disregarded vary according to the circumstances in each case. It has been stated that the two requirements for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.

(*Automotriz Del Golfo De California S. A. De C. V. v. Resnick* (1957) 47 Cal.2d 792, 796.)

The first condition requires that there must be a unity of interest and ownership between the corporation and the individual. (*Automotriz Del Golfo De California S. A. De C.V. v. Resnick, supra*, 47 Cal.2d 792 at 796.) Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by

one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other. Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers. No one characteristic governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied. Alter ego is an extreme remedy, sparingly used. (*Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th 523, 538-539.)

The second condition requires the court to find that if the acts are treated as those of the corporation alone, an inequitable result will follow. (*Automotriz, supra*, 47 Cal.2d 792 at 796.) The alter-ego doctrine affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. The lack of corporate funds to pay the judgment is not enough to impose alter ego liability. (*Sonora Diamond Corp., supra*, 83 Cal.App.4th 523, 539.)

The purpose of the doctrine is not to protect every unsatisfied creditor, but rather, to afford him or her protection, where some conduct amounting to bad faith makes it inequitable for the equitable owner of a corporation to hide behind its corporate veil. (*Arnold v. Browne* (1972) 27 Cal.App.3d 386, 397, overruled on other grounds by *Reynolds Metals Co. v. Alperson* (1979) 25 Cal. 3d 124, 129.) An inequitable result does not occur in those cases where a "corporation was once adequately capitalized but subsequently fell upon bad financial times." (*Flores v. DDJ, Inc.* (2007) U.S. Dist. LEXIS 88242, at p. 51, citing *Laborers Clean-Up Contract Admin. Trust Fund* (9th Cir. 1984) 736 F.2d 516, 525.) "The

result is very regrettable, but it does not rise to the level of being inequitable." (*Flores v. DDJ, Inc., supra*, at p. 51.)

The following NLRB cases provide examples of factual scenarios which led to the imposition of liability on individuals.

In *White Oak Coal Co., supra*, 318 NLRB 732, the NLRB imposed liability on individuals for a back pay remedy. The NLRB found that the first prong of the test described at page 735 of the decision was met where the individuals were responsible for the ULPs, they diverted corporate assets for personal use, they transferred corporate assets without arm's-length dealing for personal gain, they caused the transfer of White Oak's major asset (a mining permit) without bona fide consideration flowing to the company while they received personal economic benefit, and they failed to maintain adequate corporate records. As for the second prong of the test, the NLRB held that the blurring of separate corporate identity and the misuse of corporate assets and form resulted in an evasion of the company's back pay obligations.

In *Rome Electrical Systems, Inc., et al.* (2010) 356 NLRB No. 38, the NLRB found that the first prong of the *White Oak Coal* test was met where an individual transferred title of four vehicles owned by the company in order to obtain a personal loan (the individual admitted that he made no payment for the vehicles). The company also paid for the individual's country club membership. This established that corporate and personal assets were commingled and that Rome Electrical was not operated as a separate entity. In addition, the record was devoid of current corporate records. The NLRB reasoned that the second prong of the *White Oak Coal* test was met because the individual "engaged in substantial financial transactions, juggling thousands of dollars of corporate funds and assets among Rome

Electrical, [a second company], and himself … so he could pick and choose which creditors to pay, based on his own financial interests and in derogation of the government's rights as a creditor." (*Rome Electrical Systems, Inc., et al., supra*, 356 NLRB No. 38 at p. 44.)

In *West Dixie Enterprises* (1997) 325 NLRB, 194, the NLRB found that individuals were personally liable for remedying ULPs where there had been a failure to maintain corporate formalities (e.g., using personal checks to pay company employees, using personal credit cards for company expenses, lending personal vehicle to company employees for company use), and where corporate funds were used to pay for the individuals' apartment for six months. This payment of rent constituted a diversion of corporate funds for personal use which affected the discriminatees' remedial rights. (*West Dixie Enterprises, supra*, 325 NLRB 194, 195.)

The NLRB pierced the corporate veil in *AAA Fire Sprinkler, Inc*. (1996) 322 NLRB 69, stating that under *White Oak Coal*, the second prong of the test must have some causal relationship to the first prong. In other words, the fraud, injustice or evasion of legal obligations must flow from the misuse of the corporate form. (*AAA Fire Sprinkler, Inc., supra*, 322 NLRB 69, 74.) The NLRB went on to find that the facts presented a classic case involving the misuse of corporate form in order to create a shield against legal liability. There was a clear failure to maintain arm's-length relationships between three related companies as evidenced by the individual's inclination to use the assets of each company as his personal funds to transfer at will. The individual had the company pay personal expenditures posted to his personal credit card accounts. The second prong of the test was satisfied most significantly because the fundamental purpose of the misuse of the corporations was to conceal the

individual's ownership and control of the companies, and thereby evade his labor law obligations. By exploiting the resources of each company, the individual depleted corporate assets that could have otherwise been used to satisfy outstanding legal obligations. (*AAA Fire Sprinkler, Inc.*, supra, 322 NLRB 69, 74.)

In *Domsey Trading Corp*. (2011) 357 NLRB No. 180, there was a backpay award recommended by an ALJ in 1999. In 2002, three components of the corporation ceased operations and the corporation was formally dissolved in 2009. In the meantime, in 2007, the NLRB had remanded the matter for the regional director to recalculate the back pay award, and a second back pay specification was issued. The NLRB found it significant that the company was historically operated as a separate entity, but this changed in 2002 when the principals used their complete control to sell some property which was the company's largest asset. One individual acted quickly to move his share of the proceeds from the sale into his personal bank and brokerage accounts. The individual also acted quickly to distribute the remaining proceeds to his partner. The NLRB found that the individual clearly regarded the sale proceeds to be free for the taking, and by doing so effectively rendered the company judgment-proof. Thus, the first prong of the *White Oak Coal* test was met. (*Domsey Trading Corp*. (2011) 357 NLRB No. 180, at pp. 3-4.)

In finding that the second prong of the test was also met, the NLRB explained that the specific intent to evade debts was not required, rather persons are held to intend the

foreseeable consequences of their conduct. (*Domsey Trading Corp., supra*, 357 NLRB No. 180, at p. 4.)[22]

With respect to collateralization of loans or the infusion of personal funds into a company to keep it afloat, the weight of authority is that this alone does not constitute commingling of assets or disregard of corporate legal formalities and the failure to maintain an arm's-length relationship.

For example, in *NLRB v. Greater Kansas City Roofing, supra*, 2 F.3d 1047, the court reversed the NLRB's holding that an individual was personally liable for a back pay remedy where the court found no evidence or finding that the individual looted the assets of the company to avoid payment of the back pay award, nor was there any evidence or finding that the individual's disregard of corporate formalities caused the company to be any less able to respond to the back pay order against it or otherwise caused injustice. In fact, the record supports the finding that the individual infused both companies involved in the case with her own personal assets.

The court found that the individual was careless in the way she conducted business under the second company and that she admittedly failed to comply with corporate formalities and even commingled some corporate assets with her personal assets. However, the second company was not formed until long after the unfair labor practices had occurred.

[22] See also, *Reliable Electric Co*. (2000) 330 NLRB 714 (where the first prong of the *White Oak Coal* test was met when there was an extensive record of disregard for corporate form, a commingling of assets and lack of arm's-length dealings, and where vehicles were purchased with company money but were titled in the name of another entity controlled by the individual. The second prong of the test was met because the titling of the vehicles would likely lead to the evasion of legal obligations).

Further, the court found that no link between the individual's sloppy manner of conducting business under the second company and any fraud, injury or injustice to the former employees of the first company or their union with regard to the ULPs. Informality in the operation of a closely held corporation will not lead to disregard of the corporate entity if the informality neither prejudices nor misleads a plaintiff. (*NLRB v. Greater Kansas City Roofing, supra*, 2 F.3d 1047, 1055.) [23]

In *NLRB v. Fullerton Transfer and Storage Ltd., Inc.*, *supra*, 910 F.2d 331, the court reversed the NLRB's finding that owners were alter-egos of a defunct company and therefore personally liable for a back pay remedy. The court found that the individuals had not commingled their personal assets despite there being a "degree of financial interaction between the two." The company had difficulty obtaining long-term loans, and one long-term commercial loan was personally guaranteed by the individuals at the insistence of the lending institution. Nor was there a failure to maintain corporate records. There was no evidence that the company was undercapitalized as it had operated as a solvent business for 12 years after incorporation. The court found it important that at the time the company's assets were being liquidated and creditors were being paid, the Board's back pay order had not yet been reduced to an amount certain, and had not yet been enforced by the court. (*NLRB v. Fullerton Transfer and Storage Ltd., Inc., supra*, 910 F.2d 331, 341.)

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[23] Because the court decided that the second prong of the test was not satisfied, it stated that it was not necessary to decide whether the separate corporate identity had been adequately preserved to satisfy the first prong.

In reversing the NLRB, the court stated that "the mere fact that the company ceased operations without being able to pay of its debts [was] … not the sort of injustice contemplated." (*NLRB v. Fullerton Transfer and Storage Ltd., Inc., supra,* 910 F.2d 331, 341, citing *Scarbrough v. Perez* (6th Cir. 1989) 870 F.2d 1079, 1084.)

In *Sonora Diamond Corp., supra*, 83 Cal.App.4th 523, the court declined to find that a parent company and a subsidiary were alter-egos where the parent company's contribution of funds to the subsidiary was made for the purpose of assisting it in meeting its financial obligations, not for the purpose of perpetrating a fraud. (*Sonora Diamond Corp., supra*, 83 Cal.App.4th 523, 539, citing *Lowell Staats Mining Co. v. Pioneer Ura Van, Inc.* (10th Cir. 1989) 878 F.2d 1259, 1262.) The court further stated that "if such an owner wishes to remain in business in the anticipation of ultimately turning a profit, one option is to use its own assets to make up for the business's inability to generate sufficient revenue to cover all of its costs." (*Sonora Diamond Corp., supra,* 83 Cal.App.4th 523, 547, citing *Alberto v. Diversified Group, Inc.* (5th Cir. 1995) 55 F.3d 201, 207.)

Finally in *Tex-Cal Land Management, Inc.* (1986) 12 ALRB No. 26, this Board declined to pierce the corporate veil, holding that the mere fact that an individual personally co-signed on a Farmer's Home Administration (FmHA) loan to the company did not suggest a disregard for the company's separate identity, particularly since the action was taken at the demand of the FmHA. Also, the facts did not support a finding of any intermingling of individual and company funds. (*Tex-Cal Land Management, Inc., supra,* 12 ALRB No. 26, at p. 31.)

In applying the above principles to the facts of this case, we reach the same conclusion as did the ALJ, and dismiss the allegations of derivative liability against Ms. Janssen.

1. Personalities and assets of Ace Tomato Company and Ms. Janssen were distinct

In contrast to the facts in the cases discussed above in which the NLRB looked behind the corporate veil and found individuals liable, the facts of the instant case support a finding that corporate legal formalities were maintained, and individual and corporate funds, assets and affairs were generally kept separate.

a. Adherence to corporate form

The record supports a finding that in contrast to the scenarios presented by *White Oak Coal Co., supra*, 318 NLRB 732, *West Dixie Enterprises, supra,* 325 NLRB 194 and *AAA Fire Sprinkler, Inc., supra*, 322 NLRB 69, corporate formalities were maintained. Ms. Janssen's attorneys submitted numerous exhibits showing that Ace maintained articles of incorporation and by-laws (KLJ exhibits 1, 2, 3, 4). Ace held annual meetings of its Board of Directors and shareholders (KLJ exhibits 6, 7, 8, 9, 10), and held special meetings or obtained written consent of its Board of Directors to authorize important decisions. KLJ exhibit 11, dated December 17, 2012, shows unanimous written consent for the merger of Ace and Delta Pre-Pack. KLJ exhibits 35 and 36 show unanimous written consent for the sale of Ace's airplane, and KLJ exhibit 52 shows unanimous written consent for the sale of Ace's other assets to Lipman.

Ms. Janssen's expert, Lammert Van Laar, a Certified Public Accountant certified in financial forensics, reviewed entries in Ace's general ledger for the years 2010-2012 and reviewed the documents related to the sale of Ace's assets and the Lipman loan. He concluded that Ace and Ms. Janssen maintained separate identities, separate accounting records and separate cash returns. (TR: Vol. 8, p.14.) The ALJ did not specifically discuss his credibility resolutions with respect to Mr. Van Laar's testimony regarding corporate form, but he did state that the evidence established that Ace, under Ms. Janssen's ownership adhered to corporate formalities. (ALJ Dec. at p. 28.)[24] We uphold the ALJ's finding that the corporate form was adequately maintained.

b. <u>No commingling of assets</u>

The Regional Director and the UFW argue that Ms. Janssen commingled Ace's assets with her own when she assumed the $3.8 million Lipman loan because she was overcompensated for this transaction. The ALJ found that the most significant merger of assets was the infusion by Mr. and Ms. Janssen of "massive amounts" of capital and collateral prior to the sale in order to maintain Ace's operations. The Regional Director cites *Rome Electrical Systems, Inc., et al., supra,* 356 NLRB No. 38 in support of his position. However, that case is factually distinguishable from the instant case. First, as discussed above, in *Rome*

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[24] The ALJ did specifically credit Mr. Van Laar's testimony regarding bookkeeping entries accounting for the transfer of the Hotwood property, which at the time of the hearing showed a "paper" benefit to Ms. Janssen in the amount of approximately $900,000. Mr. Van Laar testified that there should have been a deduction of that amount to the debt owed to Ms. Janssen on Ace's balance sheet, but he attributed this to a bookkeeping omission rather than an indicator of alter-ego status. (TR: 8, p. 58-59, 65; ALJ Dec. p. 34.)

Electrical, the record was devoid of current corporate records, and the evidence clearly established that the individual found personally liable used company assets in order to obtain a personal loan and pay personal expenses. Significantly, the evidence showed that the individual ceased operations of one company and established a new one purposely to avoid paying wages and benefits negotiated under a multi-employer union contract. The record in the instant case contains no such evidence.

Moreover, the assumption of the $3.8 million loan, the forfeiting of a 2010 personal loan to Ace of over $1.37 million, the 2009 $6 million personal loan to Delta Pre-Pack so that Delta Pre-Pack could repay its debts to Ace Tomato, and the additional $500,000 loan to Ace and the collateralization of loans at the demand of the financial institutions were all to Ms. Janssen's detriment and were to Ace's benefit. The weight of the authority supports the conclusion that Ms. Janssen's use of personal assets to make up for Ace's inability to generate sufficient revenue and the personal guarantee of Ace's loans does not show a disregard for Ace's separate identity or improper commingling that should result in a finding of unity of interest. (*NLRB v. Greater Kansas City Roofing, supra*, 2 F.3d 1047; *NLRB v. Fullerton Transfer and Storage Ltd., Inc., supra*, 910 F.2d 331; *Sonora Diamond Corp., supra*, 83 Cal.App.4th 523; *Tex-Cal Land Management, Inc., supra*, 12 ALRB No. 26.)

c. No misappropriation of funds

As discussed above, the Regional Director and UFW argue that Ms. Janssen shut down Ace Tomato's operations, sold off its assets, and personally misappropriated millions in the sale of Ace to Lipman. Specifically, the Regional Director and UFW argue that Ms. Janssen misappropriated $650,000 of the sale proceeds to pay back a personal loan, that Ms.

Janssen misappropriated approximately $1 million by acquiring the Hotwood property, and that Ms. Janssen absolved herself of $2.95 million debt to Ace.

With respect to the 2011 $650,000 loan, the loan document (KLJ exhibit 54) indicates that the loan was a business loan, not a personal one. Ms. Janssen and Ace Chief Financial Officer Thomas McMillan both testified that the loan was required by F & M Bank in order to continue financing Ace's operations and that the bank required that the loan be made to Ms. Janssen rather than to Ace. (TR: Vol. 6, pp. 137, 257, 258: TR: Vol. 7, pp. 39, 40, 83, 84) The pay-off of the loan appears on the escrow statement created pursuant to the sale of Ace (KLJ exhibit 14). The Regional Director provided no evidence to contradict the testimony that Lipman agreed that the $650,000 was Ace-related debt to be paid off with the $3.8 million Lipman loan except to point out that the $650,000 loan agreement does not mention Ace, and the $650,000 does not appear on Ace's balance sheets (RD's exhibit 65). However, since the loan was to Ms. Janssen not to Ace, its mere absence on the balance sheets does not indicate that the proceeds for the loan were used for any improper purpose.

The Regional Director arrives at his position that Ms. Janssen misappropriated $1 million as follows: After Ace's transaction with Lipman, Ms. Janssen transferred the Hotwood property to herself in exchange for her assumption of the $3.8 million Lipman loan. Also as consideration for Ms. Janssen's assumption of the Lipman loan, Ace released her from $2,950,000 she owed Ace in accounts receivable. This amount appears on Ace's 2010 and 2011 balance sheets as notes receivable from K.L. Janssen. (RD exhibit 65.) Ms. Janssen also acknowledged during the hearing that the balance sheet showed that she owed Ace $2,950,000.

(TR: 7, 25, 32.)[25] Even though the Hotwood property was encumbered when she acquired it, the Regional Director argues that Ms. Janssen would be free to sell the property once the Lipman loan was paid off.[26]

While loans from a company to its shareholders have been considered by the NLRB as a factor in determining whether a shareholder's personal affairs were so intermingled with a company's affairs that corporate formalities were effectively blurred, there is no authority holding that such loans are a misappropriation of funds *per se*. In the decisions where individual liability was found, the overall equitable circumstances showed extensive diversion of funds for personal use and an overall failure to observe corporate formalities.[27] While the record in the instant case does not include evidence that a formal promissory note or loan agreement was given to Ace by Ms. Janssen, there was record of the loan included in Ace's balance sheets, and the release of this debt was approved by the Board of Directors. The

[25] As the ALJ noted in footnote 18 on page 19 of his decision, there is no explanation in the record about what the $2,950,000 was used for.

[26] The Regional Director's position that Ms. Janssen benefitted in the amount of $1 million is based on the appraised value of the Hotwood property which was $1,850,000. $4.8 million is the value of the property plus the release of the $2,950,000 in notes receivable from Ms. Janssen. The Lipman loan is $1 million less than this amount.

[27] See for example, *Best Roofing Co., Inc. and Belton Roofing & Construction, Inc.* (1993) 311 NLRB 224, where the record showed individual shareholders periodically borrowed from the company, and these loans were evidenced only by cancelled company checks payable to the shareholders with the notation "loan" rather than any formal documentation in company records. The NLRB found individual liability because the overall circumstances showed a complete failure to keep records and extensive examples of the use of corporate assets for personal non-business reasons. Also in *Rome Electrical Systems, Inc., et al., supra*, 356 NLRB No. 38, the company's tax returns showed several hundred thousand dollars in loans to an individual who was the only shareholder. Among the circumstances that led to the piercing of the corporate veil, was the shareholder's incredible denial that he ever borrowed such amounts.

Regional Director did not provide evidence that the loan rose to the level of misappropriation found in *Best Roofing Co., Inc. and Belton Roofing & Construction, Inc.*, *supra*, 311 NLRB 224 or *Rome Electrical Systems, Inc., et al., supra*, 356 NLRB No. 38.

As discussed above, the ALJ specifically credited expert witness Van Laar's testimony regarding bookkeeping entries accounting for the transfer of the Hotwood property, which at the time of the hearing showed a "paper" benefit to Ms. Janssen in the amount of approximately $900,000. Mr. Van Laar testified that there should have been a deduction of that amount to the debt owed to Ms. Janssen on Ace's balance sheet, but he attributed this to a bookkeeping omission rather than an indicator of alter-ego status. (TR: 8, p. 58-59, 65; ALJ Dec. p. 34.) In a separately documented transaction, Lagorio Properties assumed the $3.8 million Lipman loan and received the Hotwood property and a personal promissory note from Ms. Janssen as consideration for assuming the loan (KLJ ex. 44). Ace benefitted from this transaction because it was relieved of paying the Lipman loan.

The Regional Director's argument that Ms. Janssen could have sold Hotwood for its appraised value to pay off creditors is too speculative to support the argument that Ms. Janssen misappropriated Ace's assets. The Hotwood property, along with two other properties owned by Lagorio Properties, were collateral for the Lipman loan.[28] In addition, the Hotwood property was collateral for the F & M bank notes prior to the sale of Ace. We uphold

[28] As the ALJ points out, the UFW and Regional Director omit that these two additional properties were put up as collateral by Lagorio Properties where Ms. Janssen was an 85 percent shareholder.

the ALJ's finding that the Hotwood property was fully encumbered both before and after the sale to Lipman.

The Regional Director and UFW also argue that Ms. Janssen diverted corporate assets to non-corporate purposes when she used Ace funds to purchase an airplane for unreimbursed personal use. We agree with the ALJ's conclusion that the personal use of the airplane was minimal, amounted to about 5 percent of the use documented on the flight log, and the majority of this use was at a time when Ace was profitable.[29] Ms. Janssen testified that adjustment to Ace's year-end tax documents were made to account for personal use of the plane (TR: Vol. 6, pp. 151,161,162), and when Ace was used for charitable purposes, Ace would receive documentation for a charitable contribution from the organization that used the airplane. In 2011 and 2012, the primary use of the plane was for paid rentals to third parties, which generated income for Ace.

The limited and documented personal use of Ace's aircraft in this case is far from the diversion of funds shown by the facts in *White Oak Coal Co., supra*, 318 NLRB 732, *West Dixie Enterprises, supra,* 325 NLRB, 194, *AAA Fire Sprinkler, Inc., supra,* 322 NLRB 69 or *Domsey Trading Corp., supra*, 357 NLRB No. 180 discussed above, and does not support a finding of unity of interest.

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[29] The airplane was purchased in 2005 and was the third airplane owned by Ace. Ace used $500,000 from the sale of the previous airplane and a $1,145,000 note to buy the airplane. Lipman did not want to buy the plane as part of the sale of Ace. In 2012, the plane was appraised at $1,100,000. During 2012, Janssen assumed the $700,000 in remaining debt for the plane in exchange for a 60 percent ownership interest. This sale was approved by Ace's Board of Directors (KLJ exhibit 35). Ace retained 40 percent of the interest, but then sold it for $440,000 to FlyHi Aviation, LLC in October 2012.

d. <u>No undercapitalization</u>

The Regional Director argues that Ms. Janssen undercapitalized Ace by merging it with Delta Pre-Pack. First, we agree with the ALJ that the merger of Delta Pack into Ace did not result in additional debt to Ace because Ms. Janssen had loaned $6 million in 2009 to Delta Pre-Pack to pay its debts to Ace. No payments were ever made on this loan. Ms. Janssen testified that she considered this amount uncollectable, did not expect to be repaid and she also testified that she did not expect repayment before any makewhole award was satisfied. (TR: Vol. 7. pp. 48, 49, 73, 77.) The Regional Director attempts to tie the merger of Ace and Delta Pre-Pack with the issuance of the makewhole specification, however, there was testimony that Ace's accountant had recommended the merger in prior years. Mr. Van Laar also testified that the timing of the merger did not impact his opinion that there was no misappropriation of funds.

In addition, we find persuasive Ms. Janssen's counsels' argument that for the purpose of analyzing alter-ego, whether an entity is undercapitalized is most relevant at the time the entity is formed because that is indicative of whether it is only being formed as a shell or sham entity. The facts in the instant case are similar to those in *NLRB v. Fullerton Transfer and Storage Ltd., Inc., supra*, 910 F.2d 331, where there was no evidence that the company was undercapitalized as it had operated as a solvent business for 12 years after incorporation. Here, Ace was profitable from 1967 until 2007.

In sum, after a consideration of all the circumstances, we find that the record does not establish that the first prong of the *White Oak Coal* test was met.

2. Would adherence to the corporate form sanction a fraud, promote injustice, or lead to an evasion of legal obligations?

Even if the first prong of the test were met, the record does not support a finding that there was conduct amounting to bad faith which would make it inequitable for Ms. Janssen to "hide" behind the corporate form. As discussed above, the lack of corporate funds to pay the judgment is not enough to impose alter ego liability. (*Sonora Diamond Corp., supra*, 83 Cal.App.4th 523, 539.) As in *NLRB v. Fullerton Transfer and Storage Ltd., Inc., supra*, 910 F.2d 331, "the mere fact that the company ceased operations without being able to pay off its debts [was] … not the sort of injustice contemplated." (*Id.* at p. 341.)

The record does not support the conclusion that Ace was sold for an improper purpose or to evade its legal obligations. The record does show, as stated by the ALJ, that Ms. Janssen did not deplete Ace's assets, rather Ms. Janssen provided financial assistance to Ace, and collateralized loans at the request of Ace's lenders and creditors. When efforts to stabilize Ace after 2007 failed, a buyer was found for Ace's assets and proceeds of the sale were distributed to bona fide creditors. Moreover, Ms. Janssen was not responsible for the underlying ULP in this matter. (*White Oak Coal Co., supra*, 318 NLRB 732.)[30]

[30] Chairman Gould agrees with Members Shiroma and Rivera Hernandez that in contrast to the facts presented in *White Oak Coal Co., supra*, 318 NLRB 732, *West Dixie Enterprises, supra,* 325 NLRB, 194, *AAA Fire Sprinkler, Inc., supra,* 322 NLRB 69, adherence to the corporate structure in the instant matter does not promote injustice, lead to an evasion of legal obligations or the use of the corporate form as a shield to protect Ms. Janssen from unlawful conduct performed for her personal benefit. (See *West Dixie Enterprises, supra,* 325 NLRB, 194, 195, FN 10.)

We therefore uphold the ALJs dismissal of the allegations against Ms. Janssen.

3. Regional Director's request to reopen the record

As discussed above, the Regional Director takes the position that if the Board were to find there is insufficient evidence to prove derivative liability, then the ALJ's decision to deny bifurcation of the derivative liability allegations will have been prejudicial to the Regional Director. The Regional Director argues that his ability to litigate derivative liability was impacted because Ace and its alter egos had not fully complied with discovery. The Regional Director requests that the Board reopen the record, allow discovery to continue and remand the matter for further hearing on the derivative liability issue.

We deny this request. This matter has already been delayed unreasonably, and it appears that the Regional Director had ample time to prepare his alter-ego theory of the case.

Conclusion

In summary, we affirm the ALJ's findings and conclusions dismissing Respondent Ace Tomato Company's equitable defenses, rejecting Ace's argument that the length of the makewhole period should be adjusted, rejecting the Regional Director's argument that the makewhole class should be expanded, and dismissing alter-ego allegations against Kathleen Janssen. With respect to the makewhole specification itself, we uphold the ALJ except as to the award for paid holidays which we adjust to 1.6 percent of earnings.

ORDER

The Agricultural Labor Relations Board (Board) hereby remands this matter to the Region for the issuance of a revised bargaining makewhole specification calculated in accordance with this Decision. The revised specification shall issue no later

than 30 days from the date of the Board's decision and order. Pursuant to Regulation 20292, the parties shall have the opportunity to file an answer to the specification within 15 days, which also shall be filed with the Board in accordance with Regulation 20164. Any denials of the facts alleged in the revised specification shall be limited to claims that the specification does not fully or accurately reflect the Board's decision herein and/or that mathematical errors were made in applying the Board's approved formula to the payroll records. Thereafter, the Board shall issue a final order in this matter that is subject to review pursuant to Agricultural Labor Relations Act section 1160.8.

DATED: September 10, 2015

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

ACE TOMATO COMPANY, INC. and KATHLEEN LAGORIO JANSSEN, an Individual
(United Farm Workers of America)

Case No. 93-CE-37-VI
41 ALRB No. 5

Background
This case arises out of a technical refusal to bargain engaged in by Ace Tomato Company, Inc. (Respondent Ace) to test the certification of the United Farm Workers of America (UFW) as the collective bargaining representative of Respondent Ace's agricultural employees. In 1994, the Agricultural Labor Relations Board (ALRB or Board) found Respondent Ace's refusal to bargain violated the Agricultural Labor Relations Act (ALRA), and the Board ordered that bargaining makewhole be paid to the employees for the period June 14, 1993, through July 27, 1994 (the period during which the Respondent Ace refused to bargain). (*Ace Tomato Company, Inc*. (1994) 20 ALRB No. 7.) Ace's petition to the 3rd District Court of Appeal was summarily denied in 1995. The General Counsel (GC) issued a final revised makewhole specification in this matter on January 9, 2015. The methodology used to calculate the specification was based on a contract averaging approach developed by Dr. Philip Martin, a professor of agricultural economics at U.C. Davis. The total bargaining makewhole in the specification was an increase of 24.76 percent for 1993 and an increase of 27.15 percent for 1994. This resulted in an alleged total of $943,472.00 in makewhole principal, and interest in the amount of $1,235,665.00 as calculated through January 20, 2015 to be distributed to approximately 2,554 workers.

Administrative Law Judge Decision
After conducting a compliance hearing, the Administrative Law Judge (ALJ) issued his recommended decision on April 14, 2015. The ALJ found the GC's contract averaging methodology as expressed in the makewhole specification to be reasonable, as it comported with the Board's decision and order in *San Joaquin Tomato Growers, Inc*. (2012) 38 ALRB No. 4, but made several adjustments. First, he found that the number of workers included in the specification was "grossly overstated," and adjusted the total number of employees to 1,825. The ALJ recommended adjusting the calculation of medical and pension benefits from a percentage of wages to an hourly figure for each employee. The ALJ recommended eliminating paid vacation and miscellaneous fringe benefits as being too speculative. Finally, with respect to holiday pay, the ALJ recommended that the payroll records be reviewed and where it could be verified that a worker worked five days in the two weeks preceding either the July 4 or the Labor Day holiday, that worker would be given the equivalent of eight hours pay at the employee's assumed pay rate for that holiday.

The ALJ dismissed derivative liability allegations against Respondent Kathleen Lagorio Janssen (Respondent Janssen). In analyzing the derivative liability issue, the ALJ applied

the fact-specific test set forth in cases such as *Dole Food Company, et al. v. Patrickson, et al.* (2003) 538 U.S. 468, 475, and *White Oak Coal* (1995) 318 NLRB 732, and found that (1) there was no unity of interest between Respondent Ace and Respondent Janssen such that the separate personalities of the two no longer existed, and (2) adherence to the fiction of the separate existence of the corporation did not, under the facts presented, sanction fraud or promote injustice.

Board Decision and Order (41 ALRB No. 5)

The Board upheld the ALJ's recommended decision and order in full, and made one modification to the makewhole specification. With respect to paid holidays, the Board reduced the number of holidays to 2, with a resulting 1.6 percent of earnings as the value of paid holidays in the makewhole specification. With respect to interest, the Board found as it had in *San Joaquin Tomato Growers, Inc.*, *supra*, 38 ALRB No. 4, in light of the unique circumstances presented by the extraordinary delay in enforcement, the award of interest would be contingent on the employees being located. Chairman Gould noted that did not participate in the Board's decision in *San Joaquin Tomato Growers, Inc.*, and he dissented from the failure of that decision and the instant decision to provide makewhole with interest for those monies which will be deposited into the AERF as well as those monies which will be distributed to individuals who are located.

The Board rejected Respondent Ace's equitable defense of laches, finding that Respondent Ace had not shown adequate prejudice to support such a defense. The Board also found that Respondent Ace's claims of agency bias had no merit.

With respect to derivative liability of Respondent Janssen, the Board concluded that the record did not support any finding of commingling of funds and other assets of Respondent Ace and Respondent Janssen. In addition there was no evidence of undercapitalization of Respondent Ace, disregard for corporate formalities, misappropriation of funds, or misuse of corporate form in order to create a shield against legal liability. The Board determined that adhering to the corporate form and not piercing the corporate veil in this matter would not permit a fraud, promote injustice, or lead to an evasion of legal obligations.

The Board remanded the matter to the ALRB Regional Office for the issuance of a revised makewhole specification calculated in accordance with its decision.

***

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO COMPANY, INC.,
A California Corporation, DELTA PRE-PACK CO., A California Company,
BERENDA RANCH LLC, A Limited
Liability Company,
CHRISTOPHER G. LAGORIO, An
Individual, CHRISTOPHER G.
LAGORIO TRUSTS, CREEKSIDE
VINEYARDS, INC., A California
Corporation, DEAN JANSSEN,
An Individual, JANN JANSSEN, An
Individual, KATHLEEN LAGORIO
JANSSEN, An Individual, KATHLEEN
LAGORIO JANSSEN TRUST, K.L.J.
LLC, Limited Liability Company,
K.L. JANSSEN LIVING TRUST,
JANSSEN PROPERTIES, LLC, A
Limited Liability Company, JANSSEN
& SONS LLC, Limited Liability
Company, LAGORIO FARMING CO.,
INC., A California Corporation,
LAGORIO FARMS, LLC, A
Limited Liability Company,
LAGORIO LEASING CO.,
A California Company, LAGORIO
PROPERTIES LP, A Limited
Partnership, ROLLING HILLS
VINEYARD LP, A Limited
Partnership, QUAIL CREEK
VINEYARD, a California Company,

Respondents,

and

UNITED FARM WORKERS OF
AMERICA,

Charging Party.

Case No. 93-CE-037-VI
(20 ALRB No. 7)

DECISION OF THE
ADMINISTRATIVE LAW
JUDGE

Appearances:

Robert K. Carrol and Traci Bernard-Marks
Nixon Peabody, LLP
San Francisco, California
For Respondent Ace Tomato Company, Inc.

Stephanie Elkins and Ruth Stoner Muzzin
Friedman & Springwater, LLP
San Francisco, California
For Respondent Kathleen Lagorio Janssen

Abdel Nassar, John Gonzalez Cohen and Alegria De La Cruz
Visalia and Salinas ALRB Regional Offices
For the Visalia Regional Director

By Post-Hearing Brief:
Mario Martinez
United Farm Workers Legal Department
Bakersfield, California

DOUGLAS GALLOP: I conducted a compliance hearing in this matter on nine days in January and February 2015, at Modesto, California, pursuant to a Makewhole Specification, which was amended six times, issued by the General Counsel and Visalia Regional Director of the Agricultural Labor Relations Board (ALRB or Board), the final amendment taking place at the hearing.[1] Ace Tomato Company, Inc., a California Corporation (Respondent), Kathleen Lagorio Janssen (Respondent Janssen or, collectively, Respondents) and the Regional Director appeared at the hearing. Prior to the hearing, the undersigned granted motions to dismiss filed by the other named

[1] General Counsel initially prosecuted this case, but the Board subsequently reassigned the matter to the Visalia Regional Director.

Respondents, other than Respondent, Delta Pre-Pack Co.[2] After the hearing, the parties, including the Charging Party filed briefs, which have been duly considered. Upon the entire record in this case, including the testimony, documentary evidence and the briefs and oral arguments made by Counsel, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

The history of this case is largely set forth in the Visalia Regional Director's Motion to Close Case Without Full Compliance and Statement in Support, dated May 15, 2009, and Board Administrative Orders 2009-12 and 2010-16. In summary, over 24 years ago, Respondent's employees voted for representation by the Charging Party. Challenged ballots were determinative, and Respondent filed objections to the election. More than three years later, the determinative challenged ballots were counted, the objections were overruled, and a certification issued.[3] Respondent refused to bargain with the Charging Party, resulting in the filing of an unfair labor practice charge. The Board issued its decision in (1994) 20 ALRB No. 7, finding an unlawful refusal to bargain, which Respondent appealed. The Court of Appeal summarily denied the appeal, and the case was released for compliance in March 1995. One aspect of the Board's Order issued in this case was that Respondent preserve and, upon request, make available

[2] These Respondents and Respondent Janssen were named as derivatively liable for bargaining makewhole. The reasons for granting the motions are contained in the orders.

[3] (1992) 18 ALRB No. 9.

to the Board payroll records, to establish any bargaining makewhole due to the unit employees.

Compliance with the Order was initially assigned to the El Centro Region. The first indication of any attempt to seek compliance in this matter was a letter to Respondent, dated almost a year after the case was released, seeking various information. Among the requests were payroll records of bargaining unit employees, so that a makewhole determination could be made. Respondent, for decades, did not furnish those records, instead contending no makewhole was due, because it paid the highest piecerate in the industry.[4] Despite subsequent requests, Respondent did not produce those records, other than a small sampling to support this contention. The Board contemplated seeking enforcement of the request, but never did so. At the hearing conducted by the undersigned in 2010, testimony established that Respondent had these records in its possession, including both its direct hires, and those of the contractor employees, until about 2004, when they were destroyed.

Responsibility for compliance was transferred to the Visalia Region, until 2001. The ending date for the makewhole period was determined by the Board, based on representations from Respondent's then counsel, resulting in a fixed liability of slightly over one year, plus interest.[5] The Region considered Respondent's arguments against any makewhole award and, apparently, found merit to them. At the hearing conducted by

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[4] The record shows that the Charging Party was repeatedly requested to respond to the claim that no makewhole was due, but delayed, perhaps for several years, in doing so.

[5] See Administrative Order 2015-2.

the undersigned in 2010, Respondent's counsel, at that time, testified he was repeatedly told the Region agreed with his position, and the case would be closed. Nevertheless, as of April 20, 2001, six years after the case was released for compliance, no makewhole specification or, alternatively, motion to close the case without monetary compliance, had issued.

On April 20, 2001, the case was transferred to the General Counsel's office in Sacramento. The Board "loaned" Board Counsel, Robert Murray, to General Counsel, for the purpose of developing a makewhole specification with Dr. Phillip Martin, an expert on bargaining makewhole, paid by General Counsel. They investigated alternative makewhole formulas and, apparently, determined to issue a specification based on such a methodology. Nevertheless, almost nine years passed without such a specification being issued, at which point, the Visalia Regional Director filed a Motion to Close Case. After granting the motion, the Board vacated its decision, and set the issue of Respondent's equitable defenses for hearing.

The Board affirmed the undersigned's rejection of these defenses, stating its reasons therefore, in Administrative Order 2010-16. The first makewhole specification was not provided to Respondent's counsel until the fall of 2012. This was followed by the issuance of the makewhole specification, amended six times to, inter alia, add numerous derivative liability respondents, exhaustive discovery, and numerous motions, responses and requests to appeal interim rulings, continuing even after the hearing concluded. Both Respondent and the Regional Director/General Counsel bitterly object

to the way this entire litigation has been handled, by everyone involved but themselves and, doubtless, the Board will be called upon to determine the merits of these objections.

Bargaining Makewhole

The Makewhole Period:

In Administrative Order 2009-12, the Board stated that the makewhole period was from June 14, 1993 to July 27, 1994. In Administrative Order 2015-15, the Board explained it arrived at the ending date for makewhole based on representations from Respondent's former counsel. The specifications set forth these dates as the makewhole period. In its answers, Respondent did not deny this allegation, and did not dispute the makewhole period at the prehearing conference.

Late in the hearing, Respondent's General Manager, Dean Janssen, testified that the first collective bargaining session between Respondent and the Charging Party took place on July 9, 1994. On the motion of the Regional Director, the undersigned struck Janssen's testimony, because Respondent had disputed the makewhole period in an untimely manner. This ruling was reversed, *sua sponte,* in order to give Respondent the opportunity to make a record on the issue. In resumed examination, Janssen testified the first session actually took place on July 6, based on his notes of the meeting.

The notes, which identified the persons in attendance, were produced at the hearing, for inspection by the Regional Director. The undersigned denied the Regional Director's renewed motion to strike but, in light of the timing of this testimony, the Regional Director was given two weeks to attempt to locate witnesses who could testify on this issue, and to request that the record be reopened should any of them deny that the

meeting took place on that date.[6] The Regional Director, after the close of the hearing, sought permission to appeal the denial of its motion to strike. The Board, in Administrative Order 2015-02, denied the request as premature, but declined to take a position on the merits of the appeal.

Workers Entitled To Receive Bargaining Makewhole:

It is undisputed that the agricultural workforce of Respondent during the makewhole period included workers directly hired by labor contractors, RLC and G&G. Some of Respondent's direct hires also performed agricultural work, while others worked in a commercial packing shed, not subject to ALRB jurisdiction. The Regional Director, based on the documentary evidence, and calculations by his expert, Kenneth Creal, contends 2,554 workers are owed bargaining makewhole, including the 220 direct hires, 1074 RLC employees, 1123 G&G employees and 232 workers whose direct employers cannot be ascertained. Creal reduced this number by 97 workers who are also owed bargaining makewhole under the Board's Decision in *San Joaquin Tomato Growers, Inc.* (2013) 38 ALRB No. 4, while employed by the same contractors.

A total of 328 ballots were cast in the August 1989 election. The total number of workers on the voter eligibility list was under 400. Dean Janssen testified that the harvest

[6] At the undersigned's direction, the Regional Director submitted a post-hearing declaration by Field Examiner, Pauline Alvarez, detailing her unsuccessful attempts to locate witnesses who could affirm or deny that the meeting took place. Respondent has moved to strike the declaration as hearsay. Respondent then submitted two declarations, one containing a third declaration, partially pertaining to this issue, in conjunction with its brief. The Regional Director moved to strike these post-hearing documents. Respondent filed a response to the motion. The undersigned will not consider Pauline Alvarez's declaration, and the Regional Director's motion to strike is granted, although the undersigned will take judicial notice of his 2010 decision in this matter.

workforce was approximately the same in 1993.[7] That season, there were 3 RLC crews, totaling 320 positions. Janssen further testified that one G&G crew harvested for Respondent, accounting for 120 positions.

A worker witness testified that a second G&G crew was hired later in the harvest. That witness testified that G&G workers regularly harvest more than one grower's field each season. Another worker testified that perhaps 24 of Respondent's direct hires would perform agricultural transplanting work during the months of April – June, and then most would return to Respondent's packing shed. Respondent's employee roster for the 1993 season shows that 25 workers were hired during the transplanting season, and the rest outside that period.

Respondent's expert, Dr. Howard Roy Rosenberg, estimated that a typical area contractor harvests for about 10 growers each season. Thus, it is probable that many of the G&G workers listed in the makewhole specification actually were contract employees for different growers. With respect to the RLC workers, although Respondent destroyed the payroll records in its possession, General Counsel, when prosecuting this case, was able to obtain payroll records for the RLC employees, all of which designate them as being employed by "Ace Tomatoes," or some variation of that name.

Furthermore, in partial compliance in this case, Respondent provided a mailing list containing about 1,825 names,[8] as workers it sent notices to under the Board's notice-

[7] Janssen primarily worked in the packing shed, and his familiarity with the day-to-day field operations is admittedly somewhat limited. Respondent's harvesting manager at that time is deceased.

[8] The Regional Director counts 2045 names.

mailing order, which covers a period slightly shorter in duration than the makewhole period. The mailing lists were largely compiled based on information provided by the contractors, and Respondent contends that at least the G&G list identifies all of its workers, and not just those performing work for Respondent. No manager or agent from the contractors testified at the hearing, and Respondent presented some evidence that no percipient G&G representative is available to testify on this issue.

Creal used the payroll records to determine makewhole for the RLC workers, and the mailing list and EDD records to determine makewhole for the G&G and 247 other workers who appeared on the mailing list, but not the EDD or payroll records. Creal had to estimate makewhole due for the G&G workers, based on the limitations in the EDD records, including the specific dates worked (as compared to the makewhole period). He testified that his estimates were on the conservative side. Creal estimated the number of direct hire workers performing agricultural work on the basis of the EDD records, the makewhole period, and the availability of field work for direct hires during the makewhole period.

Makewhole Methodology:

Dr. Phillip Martin, the Regional Director's makewhole methodology expert, testified he could not find any comparable contract during the makewhole period. Therefore, he utilized a contract averaging method, based on 38 of the Charging Party's contracts with 26 agricultural employers in effect at any time during that period. Based on those contracts, Martin calculated that each makewhole worker would have received a 2.73% wage increase in 1993, plus a compounded 5.12% increase in 1994.

Martin further calculated that under the contracts, an average of $.99/hour was paid into Charging Party's medical plan, and $.11/hour for the Charging Party's pension plan.[9] He also converted these figures into percentage increases, based on the general laborer average hourly rate of $6.58. The specification uses the percentages, rather than the hourly contributions. He also added 2.32% for paid holidays, 2% for paid vacations and 1% for miscellaneous fringe benefits, such as jury duty, throughout the makewhole period. Martin testified he converted the fringe benefits into percentages on the basis of convenience in calculating makewhole for a large class of individuals. Martin recommends a 24.76% total bargaining makewhole award for 1993, and 27.15% for 1994.

It is clear, however, that the average piecerate earned by the harvest workers was substantially higher than the average general laborer's hourly rate. Thus, the percentage approach to calculating fringe benefits makewhole resulted in a significant increase in the award.

The RLC and limited G&G payroll records do not show how many hours each employee worked on a given day, or any fringe benefits received. It is undisputed, however, that Respondent did not provide any fringe benefits to employees, and hours worked per day can be estimated based on the average piecerate obtained by the workers over any given period. It is also undisputed that the contractor workers did not work in Respondent's packing shed, so it is reasonably clear that all of their work was agricultural

[9] Martin made no calculations for contracts where the parties agreed to the employer's medical or pension plan. The medical and pension benefits would come to 16.71% of the average general laborer's pay during the makewhole period.

in nature. As noted above, the records specify that the RLC pay statements were for work at “Ace Tomatoes,” or some variation of that name. The EDD records, however, do not specify whether the G&G workers’ earnings were from Ace, or some other employer.

Respondent called George Anthony Magula and Dr. Howard Roy Rosenberg as expert witnesses.[10] Based on their testimony, the documentary evidence and the history of this litigation, Respondent contends:

1. The makewhole specification does not factor in the frequent cases where the Charging Party, after certification, fails to ever consummate a first contract.
2. Kenneth Creal’s calculations are inaccurate, because they base makewhole on an hourly pay rate, when most to the workers were paid on a piecerate basis. Magula did not testify as to whether a piecerate-based calculation would increase or decrease the makewhole due.
3. Makewhole, if any, should include a comparison with a contract between the Charging Party and Meyer Tomatoes, executed the season following the end of the bargaining makewhole period. The Meyer contract provided no fringe benefits.
4. The medical benefits calculations are excessive because the premiums are paid to the medical plan, and not the employees, and many employees would not work enough hours to qualify for benefits.

[10] Magula was qualified as an expert in economic damages, while Rosenberg was qualified as an expert in California agricultural human resources issues.

5. The workers' gross earnings are overstated by approximately $1,400,000. This is primarily based on methodology conflicts, and the reduction in number of G&G employees.
6. The percentages used for fringe benefits are artificially high, because they are based on the general laborer rate, while the actual wages of the workers herein were much higher.
7. If fringe benefits were eliminated and the other considerations above were adopted, bargaining makewhole, if at all appropriate in this case, would be about $173,000.
8. In its brief, Respondent contends that the Meyers Tomatoes contract is comparable, and if used, the bargaining makewhole would be about $26,000.

<u>Derivative Liability</u>

The makewhole specification alleges that Kathleen Lagorio Janssen, by her conduct, became the alter ego of Respondent, and is derivatively liable for bargaining makewhole.[11] At the time of Respondent's unlawful refusal to bargain, her father ran the company. At that time, Janssen was a minority shareholder, held the office of Secretary and was on the Board of Directors. She was not paid a salary, and did not participate in Respondent's day-to-day operations. At the time, Lagorio worked for one of the other

[11] The specification also alleges that Delta Pre-Pack Co. is derivatively liable. No evidence was presented to show such liability and, at any rate, Delta merged into Respondent and no longer exists. The derivative liability allegations involving Delta will be dismissed.

Lagorio Family businesses. She did not play any role in the decision to test the Board's certification of the Charging Party.

In 1996, after her father's death, Janssen became the President, Chairman of the Board and the sole shareholder of Respondent.[12] Janssen is currently involved in the operations of several other businesses, most or all of which are named in the specification as being derivatively liable herein. These are sometimes referred to as the Lagorio Family Companies. Thomas Francis McMillan is the Chief Financial Officer for all of these businesses. Lagorio Farming Company, and then Lagorio Properties, grew tomatoes, while other companies were involved in unrelated business activities.[13]

Janssen owns about 85% of Lagorio Properties, which now grows cannery, rather than green or Roma tomatoes. Respondent also had a close relationship with Respondent Delta Pre-Pack Co., which packaged some of Respondent's tomatoes. Respondent owned 100% of Delta's outstanding shares, and considered it a subsidiary.

Janssen testified that she did not become directly involved in the bargaining makewhole issue until 2011, when she received a request for payroll records. Prior to that, her attorneys and Chief Financial Officers were responsible for this. She did not attend the 2010 hearing conducted by the undersigned, regarding Respondent's equitable defenses, and although she was aware of her husband's involvement, did not know what, specifically, was involved.

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[12] Respondent later hired an individual who served as President for two or three years, at which point, Janssen reassumed that office.

[13] At one point, Lagorio Properties sold about half the tomatoes purchased by Respondent.

The Regional Director does not contend that Janssen, prior to her takeover of Respondent's operations, was its alter ego. Rather, he points to specific actions taken by her subsequent to becoming the sole shareholder, which establish such status. With respect to corporate form, Respondent Janssen's expert, Lammert Van Laar, reviewed the millions of entries in Respondent's general ledger for the years 2010-2012, and the documents related to Respondent's sale of assets and accompanying loan. He concluded that Respondent did not operate for Janssen's personal benefit, or that she misappropriated any corporate funds. He further found that Respondent and Janssen properly segregated their funds and assets, maintained their own bank accounts, had separate addresses, and maintained separate books and records. After Janssen became the sole shareholder, Respondent's board of directors and shareholders continued to regularly conduct meetings, and approved all major proposed actions. Van Laar found no evidence that Janssen engaged in any transactions for her personal benefit, at the expense of the corporation.

In 2005, Respondent purchased an 11-passenger airplane, for $1,645,000. Janssen signed the purchase agreement. This was the third aircraft owned by Respondent.[14] The purchase was funded by $500,000 in proceeds for the previous aircraft and a $1,145,000 note. The Charging Party contends that 100% of the aircraft's depreciation was the result

[14] The Regional Director takes issue with Janssen's alleged testimony, that Respondent purchased the aircraft to expand its business into Mexico, citing the lack of any trips there in 2005 and 2006. Janssen testified that at the time of the purchase, Respondent was planning to expand into new markets, including Mexico, not that this was the purpose for the acquisition. As noted above, Respondent was still profitable in 2005, and the failure to immediately use it to explore new markets hardly shows the purchase was for personal, non-business uses.

of personal use, while the Regional Director characterizes such use as regular. Both are exaggerations.

Based on Janssen's testimony and the flight logs, Janssen, her family and friends used the aircraft for personal purposes on about 24 occasions. Janssen testified that all personal use was reported to the Internal Revenue Service. Respondent occasionally loaned the aircraft to charitable organizations, who usually had to pay the associated costs of their trips, such as hiring a pilot and fuel. Respondent claimed such uses as deductible charitable contributions in its tax returns. The flight logs show approximately 12 such flights. The flight logs show about 475 entries during Respondent's ownership, so the combined personal and loaned use amounted to between 5% and 10% of the entries. In 2011 and 2012, the primary use of the aircraft was for paid rentals to third parties, generating income for Respondent. There are about 50 such entries, some of them for multiple days.

The aircraft was not included in the sale of Respondent's assets, discussed below, because the purchaser did not want it included. In 2012, it was appraised at about $1,100,000.[15] During that year, Janssen assumed the remaining $700,000 debt for the aircraft, in exchange for a 60% ownership interest, with Respondent retaining the remaining 40% interest. Respondent subsequently sold this interest to FlyHi Aviation for

[15] Janssen testified that the original appraisal was verbal. When the appraisal was challenged in this litigation, Janssen obtained a written appraisal, retroactive to 2012. The Regional Director again misstates Janssen's testimony by alleging she admitted the aircraft depreciated by over $900,000. In fact, Janssen testified that Respondent expended over $900,000 in paying for and operating the aircraft, as of 2012. Based on the 2012 appraisal, the total depreciation was $545,000.

$440,000. Janssen is one of five members of FlyHi, and subsequently sold her interest in the aircraft.

The last profitable year for Respondent was 2006. After that, it suffered very large financial losses, until the sale of its assets. Because of these losses, Janssen did not draw a salary from Respondent after 2008. Respondent could not repay the money it drew from the lines of credit it had established, so the banks would not finance its operations for 2008. In order to continue operations, Janssen personally loaned Delta Pre-Pack $6,000,000, in 2009, all of her available funds, so that Delta could repay debts it owed, in that amount, to Respondent.[16] In subsequent years, Janssen loaned Respondent about another $500,000. She and her husband, Dean, also took out a $1,300,000 certificate of deposit as collateral for a line of credit, at the bank's insistence, to permit Respondent to continue operating in 2012.

Respondent explored avenues for changing its operations to restore profitability, including growing tomatoes year-round, and international production, without success. The banks refused to renew Respondent's line of credit for 2012, and the Janssens had no more personal assets to continue operations. Respondent searched for a partner, to continue operating, but was unsuccessful. As the result, Respondent determined it would be necessary to either cease operations, or sell its assets. If it had merely ceased operations, this would have resulted in its creditors losing millions of dollars.

[16] On December 17, 2012, Respondent's Board of Directors and Janssen, as trustee of her living trust, voted to merge Delta into Respondent, effective December 31.

In July 2012, Respondent sold most of its assets to WRP-GP, LLC, generally known as the Lipman Company, for $7,500,000. Delta Pre-Pack and Lagorio Properties were also parties to the sale agreement. Janssen signed as President of all three entities. At the time, Respondent's outstanding loans were approximately $12,000,000. As part of the sale, the Janssens forfeited most of a personal loan made in 2010, exceeding $1,370,000, to continue the line of credit furnished by a bank to Respondent. Respondent and Lipman had negotiated the sale for several months prior to this, and the sale was consummated prior to Respondent being presented with the makewhole specification.[17] In his brief, the Regional Director does not contest the validity of the sale.

Lipman was unwilling to pay enough to cover all of Respondent's outstanding debts, but it did loan Respondent $3,800,000, in addition to the sales price, so it could obtain the assets unencumbered. The escrow closing statement shows the payment of both the sales price and the loan, and does not distinguish specifically how sales proceeds were distributed, as opposed to the loan proceeds. Furthermore, the sales and loan proceeds combined did not cover all of Respondent's liabilities. Therefore, additional financing had to be obtained to cover the debt balances.

Some of those other debts were to Janssen and Lagorio Properties. $1,950,000 of the loan was made to cover two additional loans made to Respondent by the Janssens: $1,300,000 in certificates of deposit they had put up as collateral to renew Respondent's line of credit, and $650,000 in additional loans for that purpose. Given the state of

[17] Lipman agreed to allow Respondent to complete the 2012 season, and leased back the operation, until December 31, 2012.

Respondent's operations, Janssen was required to co-sign for the Lipman loan, thus becoming personally liable.

The escrow closing statement shows that $1,300,000 was paid to purchase certificates of deposit for the Janssens. The Janssens, however, agreed to have their certificates in that amount, that were being held as collateral for a bank loan, to be liquidated and paid to the bank, in order to reduce that loan. The Janssens then put up the new certificate as collateral for a new loan, issued by a different bank, so that Respondent could continue operating for the remainder of 2012, and thus obtain income to satisfy some of its other debts.

Lipman only required a low interest rate on the loan, essentially equivalent to the inflation rate at the time. Lipman, however, did require substantial collateral for the loan, including the "Hotwood Property," owned by Respondent, and two properties owned by Lagorio Properties. The Hotwood Property, when owned by Respondent, was already being used as collateral for a bank loan.

The Charging Party contends that Janssen personally benefitted from the loan, because the Hotwood Property used as collateral was worth considerably less than the loan amount. The Charging Party omits the additional properties put up as collateral by Lagorio Properties, where Janssen was an 85% shareholder. It also fails to show how the alleged under-collateralization of the loan resulted in money in Janssen's pockets, since the loan is being paid off.

Janssen, as trustee for her living trust, subsequently assumed the loan, although Lipman has not released Respondent from its obligation thereunder. Janssen, as trustee,

simultaneously transferred the Hotwood Property to her trust. Respondent, as part of the sale agreement, received funds to pay off the bank debt for which Hotwood had served as collateral. Respondent also released Janssen from $2,950,000 in debts she accumulated to it in 2010 and 2011.[18]

The Regional Director and Charging Party contend that the entire consideration represents profit for Janssen, since she was already personally liable for the loan. The Regional Director alternately contends she profited $950,000, the difference between the loan amount, and the combined forgiveness of debt and appraised value of the Hotwood Property. Janssen then transferred the Lipman loan to Lagorio Properties. The Regional Director alleges Janssen received an additional $2,000,000 from the transfer, even though Janssen is an 85% owner of Lagorio Properties. Since Respondent had lost title to Hotwood in the previous transaction, there is no evidence that any of Respondent's assets were involved in the subsequent transfer.

These calculations do not take into account the $6,000,000 Respondent owed Janssen for her 2009 loan, the additional loans she made in subsequent years, the liquidation of one of her collaterals, or the years she did not receive any compensation from Respondent. At the end of 2012, Respondent also owed Lagorio Properties $2,326,312 for tomatoes it had purchased, and Janssen testified that a substantial percentage of this has never been paid off.[19] Based on these liabilities, Janssen, overall,

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[18] The record does not explain the source of this debt.

[19] See RD Exh. 63, page 11. Lagorio Properties did not receive any payout from the sale of assets to Lipman. With respect to the $6,000,000 loan, Van Laar testified it would be appropriate for Respondent to reduce that amount in its financial reports, by the

lost several millions of dollars in trying to keep Respondent operating, and unpaid sales by Lagorio Properties.

ANALYSIS AND CONCLUSIONS OF LAW

Section 1160.3 of the Agricultural Labor Relations Act (Act) grants the Board the authority to award employees bargaining makewhole in cases where the employer fails or refuses to bargain in good faith. In *J.R. Norton Company, Inc. v. ALRB* (1979) 26 Cal.3d 1 [160 Cal.Rptr. 710], the California Supreme Court held that the Board may not adopt a per se rule to award bargaining makewhole in every refusal to bargain case. Rather, it must examine the facts in every case, and determine whether, under the circumstances, such an award is appropriate. In a technical refusal to bargain case, to test the validity of a certification after an election, the test is whether the employer pursued its appeal in good faith.[20] The Board, in (1994) 20 ALRB No. 7, determined that bargaining makewhole is appropriate in this case.

Bargaining Makewhole

Respondent's Equitable Defenses and Piecerate Defense:

Respondent contends no bargaining makewhole is due, because of the delay in processing this case (laches) and agency bias, in loaning a Board counsel to General Counsel and recommending the hire of Dr. Martin, at agency expense and then ruling on

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potential gain realized by Janssen when she assumed the Lipman loan, but Respondent has yet to do so.

[20] Although section 1160.3 only refers to makewhole for lost wages, the Board has interpreted this to include fringe benefits. *William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195, at page 1209 [237 Cal.Rptr. 206]; *Perry Farms* (1978) 4 ALRB No. 25.

the credibility of his testimony. Respondent also contends that no makewhole is due, because it paid the highest piecerate for harvesting tomatoes. With no disrespect to the lengthy, passionate arguments made by Respondent, these and other equitable defenses, along with the piecerate argument, have already been raised and rejected by the Board in this, and other cases, and the undersigned sees no purpose in reiterating or discussing them at length. Respondent suggests that the undersigned simply reject the Board's administrative orders and decisions, while at the same time, it recognizes that he is obligated to follow Board precedent. At this point, Respondent's arguments are between it, the Board and the courts. *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 12;[21] *Tri-Fanucci Farms* (2014) 40 ALRB No. 4; Administrative Orders 2010-16 and 2015-01.

The Makewhole Period:

Throughout this litigation, until late in the hearing, Respondent did not contest the makewhole period. Even then, it did not move to amend its answer to specification to contest this issue. Instead, counsel simply began questioning Dean Janssen about the first collective bargaining session. Respondent presented no competent evidence as to why it delayed, until the twilight of the proceeding, to raise this issue. In this regard, counsel did not ask Janssen when he discovered the collective bargaining notes, and when he made counsel aware of this.[22]

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[21] The California Court of Appeal has granted a writ of review in that case, which is pending.

[22] In this regard, counsel indicated that Janssen discovered the notes during his testimony. In making this representation, counsel was not testifying, and such

Board Regulations section 20232 provides that any allegation in a complaint not denied shall be deemed admitted. The failure to amend an answer to complaint, where an allegation was previously admitted, precludes the charged party from later contesting the allegation. *B & B Farms* (1981) 7 ALRB No. 38. Even if the circumstances warranted inferring a motion to amend Respondent's answer, there is no competent evidence showing good cause for raising this issue at such a late date. The Regional Director was obviously prejudiced by the timing of this change in position, and was unable to prepare a defense. Given the massive delays in resolving this case, a continuance of the hearing for that purpose would have been unacceptable. Based on the foregoing, it is concluded that the makewhole period set forth in the specification will not be changed.

The Makewhole Class:

The Board, in *San Joaquin Tomato Growers, Inc.,* supra, made it perfectly clear that no agricultural employee otherwise due bargaining makewhole will suffer any adverse consequences based on the manner in which that case was processed, or the inability to prove up his or her specific losses. The circumstances are almost identical in this case. Accordingly, any worker named in the makewhole specification may, within the escrow period established by the Board in its final order, come forward to claim bargaining makewhole. Furthermore, any other individual who is not named in the specification may, within the escrow period, come forward to demonstrate that he or she was employed by Respondent during the makewhole period.

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representation was based on hearsay, in the absence of establishing a foundation for such claim.

With respect to workers already named in the specification, they will not be required to document their agricultural employment with Respondent, given the passage of time, although if such documentation exists, they shall produce it to the Regional Director. In the absence of documentation, these employees will, to the best of their ability, set forth the dates of their employment and earnings. For those not named in the specification, documentation of agricultural employment with Respondent will be required. The Regional Director shall then calculate their bargaining makewhole, as determined by the Board's final order in this case.

Respondent shall be advised of the employee's name and makewhole amount. It will then be Respondent's burden to show that the employee is not entitled to bargaining makewhole, or is entitled to a reduced amount, within two weeks of being notified of the worker's proposed bargaining makewhole. If Respondent submits evidence disputing the bargaining makewhole, the Regional Director will, in good faith, decide whether to accept any part of Respondent's objections, and will then, to the extent appropriate, pay the employee out of the escrow fund, with interest. No further compliance proceedings will be conducted.

On the other hand, it is clear that the total number of employees entitled to bargaining makewhole is grossly overstated. The figure, in excess of 2,500 workers, is about 40% higher than the number of workers on the mailing labels. Respondent questions the use of the mailing labels to determine the number of affected employees, but has not shown a more reliable source.

Section 1161 of the Act provides that any money uncollected by employees entitled to relief under Board orders shall be deposited into the Agricultural Employee Relief Fund (AERF). Although any worker suffering losses by virtue of Respondent's conduct should be fully reimbursed, the undersigned does not believe that the remedy in this case should result in a windfall to the AERF. Therefore, the makewhole principal shall include the bargaining makewhole, as adjusted by the Board, for the 1,074 RLC workers,[23] the average of the bargaining makewhole, as adjusted, for the direct hires, multiplied by 40, and the average of the bargaining makewhole, as adjusted, for the G&G workers, multiplied by 711, for a total of 1825 employees, the approximate number of mailing labels. The undersigned believes the above estimates adequately account for employee turnover, based on the number of required positions.

Although any of the 232 workers labeled as "unrepresented" may come forward to claim bargaining makewhole, the addition of those positions, for the purposes of establishing the escrow amount, is too speculative. The makewhole amount, for 1825 employees, as adjusted in the discussion below, will be deposited into the escrow account, and at the close of the escrow period, the unpaid balance will be deposited into the AERF, without interest, in accord with the Board's decision in *San Joaquin Tomato Growers, Inc.,* supra. In the highly unlikely event that it appears the makewhole paid to employees who are located, after all these years, may exceed the escrow balance, the

[23] Respondent does not dispute the RLC workers identified by the EDD records, which state their wages were earned while working for "Ace Tomatoes". The large number is probably due to employee turnover. Thus, even though the number of positions was probably much lower, the record indicates that many more workers were required to fill them through the makewhole period.

Regional Director may petition the Board for an order requiring Respondent to deposit additional funds.

Makewhole Methodology:

In *San Joaquin Tomato Growers, Inc.,* the Board adopted Dr. Martin's makewhole methodology, with modifications. This case is factually indistinguishable. Respondent requests that the undersigned simply disregard that decision, which is clearly not authorized. Respondent raises numerous objections to the contracts averaging methodology, all but one having already been rejected by the Board. The new objection is based on Respondent's assertion that a mediator, in 2012, filed a recommended contract between the Charging Party and Respondent with the Board, which rejected fringe benefits. The mediator's report is not in evidence, but the undersigned will assume that Respondent's representation is correct. Since the issuance of the report took place almost 20 years after the makewhole period, it is highly unlikely that the Board would accept this as a reliable reflection of what would have taken place, had Respondent, at the time, bargained in good faith. Furthermore, as will be discussed below, at the time of the makewhole period, Respondent was an established, profitable business, whereas as of 2012, it had suffered years of losses, and was about to sell most of its assets, and cease operations. Thus, the mediator, in assessing Respondent's ability to pay for fringe benefits, was evaluating an entirely different economic setting than existed 20 years earlier.

The makewhole specification also runs counter to the Board's *San Joaquin* order, in several respects. It applies 2.32% for holidays, 2% for paid vacations and 1% for

miscellaneous fringe benefits. In *San Joaquin,* the Board eliminated the paid vacations and miscellaneous fringe benefits provisions as speculative. With respect to paid holidays, the Board instructed the General Counsel to re-examine the payroll records, and to credit holiday pay where warranted, but on the basis of eight hours of pay per holiday, and not a percentage of total wages.

The Regional Director contends this aspect of the *San Joaquin* decision is distinguishable, primarily on the basis that Respondent destroyed the payroll records, and that the payroll records for RLC workers are incomplete. With respect to paid vacations and miscellaneous benefits, the Regional Director essentially cites Dr. Martin's testimony, that these benefits were granted in most of the other contracts, and that his allowances were very conservative. The undersigned does not believe the evidence shows the RLC payroll records are incomplete, or that the Regional Director cannot determine holiday pay therefrom. The Regional Director also now has EDD records for many of the G&G and direct hire workers. Furthermore, the Regional Director may consult with those workers who are located to obtain additional evidence on their eligibility for holiday pay. For those workers, it is almost certain that there will be enough funds in the escrow account to cover their holiday pay, if any.

In *San Joaquin Tomato Growers,* the Board, in apparent agreement with Respondent's position, calculated fringe benefits on an hourly basis, rather than as a percentage of their wages. It is evident that the calculation of these benefits as a percentage of the general laborer job classification is substantially amplified, when

applied to the higher-paid employees herein. Based on the foregoing, the makewhole calculations per employee will be as follows:[24]

Wages: 2.73% for 1993, and 5.12% for 1994.

Health plan contributions: $.99/hour.

Pension plan contributions: $.11/hour.

Paid holidays: Eight hours of pay per established eligible holiday.

Derivative Liability

Derivative liability for a corporate officer is an equitable remedy, and is fact-specific to the case at hand. The Supreme Court has held that the veil protecting corporations and their shareholders may only be pierced in rare cases, involving fraud or other exceptional circumstances. *Dole Food Company, et al. v. Patrickson, et al.* (2003) 538 U.S. 468, at page 475 [123 S.Ct. 1655]. Both ALRB and NLRB cases hold, in accordance with the general case law, that this remedy is only available where two standards are met. First, it must be shown that there is such a unity of interest between the corporation and individual and the corporation that the separate personalities of the two no longer exist. Second, adherence to the fiction of the separate existence of the corporation would, under the facts presented, sanction a fraud or promote injustice to the party claiming alter ego. *White Oak Coal* (1995) 318 NLRB 732 [150 LRRM 1113], enfd. (C.A. 4, 1996) 152 LRRM 2128; *Tex-Cal Land Management, Inc.* (1986) 12 ALRB No. 26.

[24] The figures here are slightly different than those in *San Joaquin Tomato Growers,* because in this case, Dr. Martin examined additional and, perhaps different contracts, to arrive at his calculations.

Some of the factors used to determine whether the first prong of the test is satisfied are the failure to adhere to corporate form, the co-mingling of funds, undercapitalization of the corporate entity, the treatment of corporate assets as belonging to the individual and transfers of corporate assets without due consideration, to the point where the corporation has lost its separate identity. Misappropriation of corporate assets with the intent to, or the likely result being the avoidance of a judgment is the signature misconduct associated with the second prong of the alter ego test. On the other hand, the cessation of operations, without being able to pay all corporate debts, does not result in individual liability for corporate officers or shareholders. *NLRB v. Fullerton Transfer and Storage Limited, Inc.* (C.A. 6, 1990) 910 F.2d 331 [135 LRRM 2304].

The evidence establishes that Respondent, under Ms. Janssen's ownership, adhered to corporate formalities, such as maintaining separate accounts, addresses and approval of most business decisions by the board of directors. To the extent that it should be considered co-mingling of assets, the most significant merger of assets herein, by far, resulted from the infusion, by the Janssens, of massive amounts of capital and collateral, in an effort to maintain Respondent's operations, much of which was lost. Janssen's attorneys cite persuasive authority that this does not result in her becoming an alter ego of the corporation. *Sonora Diamond Corp. v. The Superior Court of Tuolumne County* (2000) 83 Cal.App.4th 523, at page 547 [99 Cal.Rptr.2d 824].

The evidence shows several instances where Janssen, or one of the other Janssen Family Businesses, guaranteed Respondent's loans, and put up their property as collateral. This was usually on the demand of the creditors. All of these transactions

were identified as the obligations of the different businesses, or as Janssen's personal debt, to be repaid by the benefiting entity. The courts have found that such collateralization does not show a single identity among the businesses. *NLRB v. Fullerton Transfer & Storage,* supra; *Tex-Cal Land Management*, supra.

The Regional Director contends that Janssen co-mingled Respondent's assets with her own when she assumed the Lipman loan. It is difficult to imagine how incurring a $3,800,000 **debt** establishes that Janssen commingled one of Respondent's **assets**. It is true, however, that in exchange for assuming the debt, Janssen deeded herself the Hotwood Property, an action approved by Respondent's Board of Directors. As noted above, the Hotwood Property was already fully encumbered as collateral, and could not have been liquidated by Respondent. More specifically, it is highly unlikely that the Hotwood Property could have been sold to satisfy bargaining makewhole.

The Regional Director contends that the NLRB's decision in *Rome Electrical Systems, Inc., et al.* (2010) 356 NLRB No. 38 [190 LRRM 1132] involves facts which are "strikingly" similar to those herein. While certain factors in that case arguably exist herein, the overall equitable circumstances are strikingly dissimilar. In *Rome Electrical*, an employer bound by a multi-employer union contract admittedly ceased operations, and then restarted as a new corporation to avoid paying the contractual wages and fringe benefits. The evidence also clearly showed that the new corporation was established to avoid paying an NLRB order to make whole the employees for the difference in wages and benefits, since the original corporation ceased operations shortly after the NLRB order issued. A striking difference in that case was that the individual held personally

liable was solely responsible for the underlying unfair labor practice, while Ms. Janssen had nothing to do with Respondent's violation.

The administrative law judge in that case did, in part, base his alter ego conclusion on the assumption of a loan by the successor's president, along with his personal assumption of title to four vehicles owned by the predecessor. In addition, the judge based his conclusion, that the entities were not separate, on the lack of virtually any corporate formalities, and the diversion of funds into totally personal, non-business uses, not present herein. Aside from the more extreme circumstances presented in *Rome Electrical Services, Inc.,* the undersigned finds the court cases cited by Ms. Janssen's attorneys more persuasive in finding that a shareholder should be penalized for her efforts to save a corporation, and relieve its debts.

The Regional Director also contends that Janssen was paid $1,300,000 out of the sales proceeds in certificates of deposit, which shows a co-mingling of assets. Given the bank debt owed by Respondent, and the payment of the sales proceeds to those banks, the evidence fails to establish that the Janssens were paid anything out of the sales proceeds. The evidence does establish that the certificate of deposit is listed as a payoff in the escrow statement. However, the evidence also shows that the Janssens released their interest on certificates of deposit in the same amount, to pay down Respondent's loan, for which they were being used as collateral. At the same time, the new certificate of deposit was used as collateral for a loan enabling Respondent to continue operations through 2012. Thus, the Janssens did not profit from the purchase of the new certificate of

deposit. It is also noted that Respondent's Board of Directors approved the sale agreement, including that provision.

As noted above, the Regional Director and Charging Party contend that all of the loan proceeds represented profit for Janssen, because she was already personally liable for the loan, with the Regional Director citing *Rome Electrical Systems, Inc.,* supra, in support. As discussed above, the assumption of debt, technically already owed, was but one of several factors cited in support of alter ego status in that case, and Respondent cites more persuasive court cases, which do no find such status based on financial assistance to a debt-ridden entity, operating at a loss. The undersigned also does not find merit to the Regional Director's assertion that the transfer of the debt and Hotwood Property to Lagorio Properties, resulted in an additional $2,000,000 gain for Janssen. Even if it did, the benefit no longer involved an asset owned by Respondent, and would have been at the "expense" of Lagorio Properties, 85% owned by Janssen. In any event, this was not a debt incurred by Janssen, and the transfers of title and forgiveness of debt were in exchange for Janssen, and the Lagorio Properties, paying off Respondent's debt.

The Regional Director more convincingly argues that Janssen, and then Lagorio Properties were over-compensated for assuming the Respondent's $3,800,000 loan debt to Lipman.[25] This is based entirely on the appraisal of the Hotwood Property, since the forgiveness of the $2,900,000 note payable to Respondent by Janssen was less than the

[25]There is no merit to the argument that Respondent was any more than technically still liable for the loan. Even absent a formal release by Lipman, Respondent could clearly assert the transfer of the loan, for consideration, to Janssen, as a defense. Furthermore, Lipman was fully aware that Respondent was unable to repay any more than a small fraction of the loan.

loan amount. Thus, on paper, Janssen profited from this transaction, in the amount of $950,000. The Hotwood Property is still encumbered by its use as collateral, as it was when owned by Respondent, and cannot be sold.

The Regional Director argues that alter ego should be found, because Janssen undercapitalized it. In support, he contends that the merger of Delta Pre-Pack into Respondent saddled it with an additional $6,000,000 in debt. Even if this were true, the undersigned fails to see where the incursion of additional debt would constitute undercapitalization. In any event, the merger did not result in Respondent incurring any additional debt, because Janssen had paid off Delta's debt to Respondent.

Finally, the Regional Director claims that the personal use of Respondent's aircraft shows additional co-mingling. As noted above, the personal aircraft use was minimal, and was at least partially offset by the rental income it generated. Furthermore, the personal use primarily occurred when Respondent was profitable, and at a time when this Agency was not actively pursuing bargaining makewhole. Thus, the evidence fails to show that the intended or likely result of the personal use was to divert funds to pay bargaining makewhole, because no makewhole debt was owing at the time.

As noted above, the fact that the party claiming alter ego status will absorb unsatisfied claims, in itself, does not warrant a finding of such status. Corporations frequently fold with unsatisfied debts, and the normal remedy is through bankruptcy proceedings. Sole ownership and dominance over corporate business decisions do not, in themselves, establish alter ego status.

It is questionable whether the evidence satisfies the first prong of the alter ego test. The evidence shows that the Lagorio Family businesses maintained corporate formalities throughout, and the Regional Director's claim of undercapitalization has been rejected. The minimal personal use on the aircraft is insufficient to establish co-mingling of assets. As for the other transactions, the records have always clearly defined the owners of the assets, and for almost every asset transferred, there has been an accompanying credit assigned to the transferor. Most of the asset transfers have been the result of Respondent's creditors demanding that Janssen personally guarantee loans, and not the result of her wishing to treat the assets as her own.

Nevertheless, if the number and character of transactions between Respondent and Janssen were deemed sufficient to destroy their separate identities, the evidence fails to show that respecting the corporate form would sanction a fraud or injustice. To the contrary, it was not until about 20 years after the Board's unfair labor practice decision herein that Janssen was named individually liable. Janssen played no role in that unfair labor practice. Rather than depleting Respondent's assets, Janssen, at enormous financial sacrifice, fought to restore Respondent's profitability, required her personal involvement, at the demand of Respondent's lenders and creditors. In addition, Janssen stopped receiving a salary from Respondent. When those efforts failed, she obtained a buyer for Respondent's assets, rather than cutting off Respondent's creditors. At the time, this Agency had still not presented a makewhole demand, or contended Janssen was personally liable.

The one questionable transaction disclosed by the evidence was the over-compensation, on paper, to Janssen, when she assumed the Lipman loan, based on the appraised value of property already encumbered by debt. This is far more than offset by the multi-million dollar losses she has incurred in trying to keep Respondent afloat, and to satisfy its creditors. As Respondent's expert, Van Laar, explained, the paper gain could have simply been applied to reduce Respondent's debts to Janssen and/or Lagorio Properties. He attributed the failure to do this as a bookkeeping omission, and the undersigned agrees. His assessment that this failure does not establish alter ego status in Janssen is reasonable, and is accepted.

While it is unfortunate that this conclusion may limit the recovery of bargaining makewhole for the affected employees, it is not Janssen's fault that this Agency extraordinarily delayed in pursuing their remedy. Ms. Janssen has already taken a financial thrashing in these business affairs, and it would be inequitable to now subject her to what the Regional Director contends exceeds $2,000,000 in additional debt, based on unsubstantiated claims of misconduct against her. The allegations against Kathleen Janssen will be dismissed.

ORDER

The Regional Director shall issue a revised bargaining makewhole specification calculated in accordance with the Board's decision in this case.[26] Pursuant to California Code of Regulations, Title 8, section 20292, Respondents shall have the opportunity to

[26] In the event no exceptions are filed, this Decision will become the Decision of the Board.

file answers to the revised specification, which shall also be filed with the Board in accordance with Board Regulations section 20164. Any denials of facts contained in the answers to the revised specification shall be limited to claims that the specification does not fully or accurately reflect the Board's decision and/or that mathematical errors were made in applying the Board's approved formula to the payroll records. Thereafter, the Board shall issue a final order in this matter that is subject to review, pursuant to Agricultural Labor Relations Act section 1160.8.

The derivative liability allegations against Kathleen Lagorio Janssen and Delta Pre-Pack Co. are dismissed.

Dated: April 14, 2015

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Douglas Gallop
Administrative Law Judge, ALRB