STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PREMIERE RASPBERRIES, LLC, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case No. 2018-CE-004-SAL (44 ALRB No. 9) ORDER MODIFYING DURATION OF BARGAINING MAKEWHOLE PERIOD Admin. Order No. 2020-05-P (March 6, 2020)

The Agricultural Labor Relations Board (ALRB or Board) certified the United Farm Workers of America (UFW) as the exclusive bargaining representative of the agricultural employees of respondent Premiere Raspberries, LLC (Premiere) in *Premiere Raspberries, LLC* (2017) 43 ALRRB No. 2. Premiere refused to bargain with the UFW in order to draw an unfair labor practice charge from which it could test the validity of the UFW's certification on judicial review.[1] In *Premiere Raspberries, LLC* (2018) 44 ALRB No. 9, the Board found Premiere engaged in an unfair labor practice by refusing to bargain with the UFW and ordered, among other things, bargaining makewhole relief. Premiere filed a petition for writ of review challenging both our order certifying the UFW and our bargaining makewhole award. The petition was summarily denied, and thus the Board's orders upheld.

[1] See *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 27; *F & P Growers Association v. ALRB* (1985) 168 Cal.App.3d 667, 680, fn. 10.

We released our order in 44 ALRB No. 9 to the region for compliance on January 7, 2020. On February 13, 2020, the regional director of the ALRB's Salinas office filed a request asking the Board to "clarify the proper application" of the mandatory mediation and conciliation (MMC) contract ordered into effect in *Premiere Raspberries, LLC* (2018) 44 ALRB No. 8 in determining the bargaining makewhole award ordered in 44 ALRB No. 9.[2] For the following reasons, we find it necessary to clarify the scope of the bargaining makewhole period defined in our order in 44 ALRB No. 9. Bargaining makewhole relief generally covers the period of time in which an employer fails to bargain in good faith, starting when the employer refused to bargain or began bargaining in bad faith and continuing until such time as the employer begins or resumes good faith bargaining. We defined the end-date of the makewhole period in 44 ALRB No. 9 as when the MMC contract between Premiere and the UFW was ordered into effect — August 27, 2018, which also represents the date Premiere became legally obligated to implement the terms of the contract. (*Premiere Raspberries, LLC*, *supra*, 44 ALRB No. 9, p. 9.) However, it is undisputed Premiere did not implement the contract on that date, and thus the unlawful refusal to bargain found in our prior order

[2] We note the regional director filed her request under the case no. 2018-MMC-002 designation, which is the case number for the MMC proceeding between Premiere and the UFW. We understand this to have been a typographical error, and that the filing appropriately is considered in the context of the pending unfair labor practice compliance proceeding in this matter (case no. 2018-CE-004-SAL). The case caption otherwise designates Premiere and the UFW as "Respondent" and "Charging Party," respectively, and the request ultimately concerns calculation of the bargaining makewhole relief we ordered in the unfair labor practice proceeding, which we released to the region for compliance.

continued unabated.[3] Accordingly, and to ensure our prior remedial order effectively makes whole Premiere's employees for losses incurred during the entire course of Premiere's unlawful refusal to bargain, we now clarify the bargaining makewhole period in this case shall run until such time as the economic provisions of the contract are implemented.[4] (*Verde Produce Co., Inc.* (1984) 10 ALRB No. 35, pp. 6-7.)

DISCUSSION[5]

I. In Light of the Unique Circumstances Present Here, the Bargaining Makewhole Period Should Not Be Limited by the Effective Date of the Unimplemented MMC Contract.

Section 1160.3 of the Agricultural Labor Relations Act (ALRA or Act)[6] empowers the Board to order an employer to make its employees whole for any loss of pay resulting from the employer's failure or refusal to bargain in good faith. (Lab. Code, § 1160.3.) "This bargaining makewhole remedy compensates employees for the differential between their actual wages and benefits and the wages and benefits they

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[3] We take administrative notice of the record in case no. 2018-MMC-002, including the parties' January and February 2020 filings concerning the status of the implementation of the MMC contract.

[4] We designate this order as precedential pursuant to Board regulation 20287 to give guidance to the regions and parties in future cases in determining the extent of bargaining makewhole relief available in circumstances where an employer's refusal or failure to bargain in good faith is followed immediately by a failure to implement an MMC contract ordered into effect by the Board. (Cal. Code Regs., tit. 8, § 20287.)

[5] The background of the parties' dispute, including both Premiere's refusal to bargain and the MMC proceeding, is more fully set forth in our separate administrative order issued today, which we incorporate here. (*Premiere Raspberries, LLC* (Mar. 6, 2020) ALRB Admin. Order No. 2020-04.)

[6] The ALRA is codified at Labor Code section 1140 et seq.

would have earned under a contract resulting from good faith bargaining between their employer and their union." (*Premiere Raspberries, LLC*, *supra*, 44 ALRB No. 9, p. 4.) In other words, this is not a punitive remedy nor is it ordered as a penalty for unlawful conduct; rather, it is designed to make employees whole for losses of pay suffered as a result of delays in the bargaining process by providing them the economic benefits they would have received had a timely contract been reached. (*Gerawan Farming, Inc.* (2018) 44 ALRB No. 1, p. 51; *George Arakelian Farms, Inc. v. ALRB* (1989) 49 Cal.3d 1279, 1286, fn. 3; *J.R. Norton Co.*, *supra*, 26 Cal.3d at p. 36.)

As a general rule, the Board will define the period of time covered by a bargaining makewhole award by identifying the beginning and end dates for such relief. Typically, a makewhole award will run from the date of the violation (i.e., when the employer refused to bargain or began bargaining in bad faith) until such time as the employer commences or resumes good faith bargaining. (*Gerawan Farming, Inc.*, *supra*, 44 ALRB No. 1, p. 51, citing *Mario Saikhon, Inc.* (1987) 13 ALRB No. 8, p. 16.) In the context of an employer's technical refusal to bargain, the Board previously has measured the makewhole period as running from the date of the initial refusal to bargain until such time as the employer commences, and continues, good faith bargaining resulting in a contract or bona fide impasse. (*D. Papagni Fruit Co.* (1985) 11 ALRB No. 38, p. 15; *Holtville Farms, Inc.* (1981) 7 ALRB No. 15, p. 14; see also *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, at ALJ Dec. p. 7 [applying a similar benchmark for determining the end-date of the makewhole period in a non-technical refusal to bargain case].)

Our prior order in this case defined the makewhole period to run from Premiere's initial notice to the UFW of its refusal to bargain until the effective date of the MMC contract we ordered into effect in *Premiere Raspberries, LLC, supra*, 44 ALRB No. 8. (*Premiere Raspberries, LLC, supra*, 44 ALRB No. 9, p. 9.) The Board's determination to terminate the makewhole period as of that time was consistent with the provisions of the MMC statute requiring immediate implementation of a contract ordered into effect by the Board. However, it now is clear our basis for terminating the makewhole period at that time fails to remedy the effects of Premiere's unlawful refusal to bargain, which undeniably continued beyond the effective date of the MMC contract and our order in this case. As a result of Premiere's conduct, our prior remedial order does not make the employees whole because it does not restore them to the economic position they would be in but for Premiere's unlawful conduct. Premiere, rather than its employees, appropriately bears the financial consequences of its unlawful actions. (*Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1170; see *San Clemente Ranch, Ltd.* (1984) 10 ALRB No. 21, p. 9 ["No purpose of the ALRA would be served by insulating Respondent from responsibility for the losses suffered by its employees over the seven years since Respondent's initial refusal-to-bargain"].) Unfortunately, because the MMC contract was not implemented, our prior order does not fully restore Premiere's employees to the economic position they would have been in had it not refused to bargain in the first place. Indeed, in the absence of the MMC contract Premiere's bargaining makewhole liability would have continued to run until such time as it commenced good faith bargaining with the UFW. It makes no sense to terminate that liability at the

effective date of an MMC contract Premiere refused to implement in its continued and ongoing refusal to recognize the UFW as its employees' bargaining representative.

Our conclusion that the effective date of the unimplemented MMC contract should not cut off the makewhole remedy is consistent with the fact that an employer's repudiation of or failure to implement a collective bargaining agreement violates the duty to bargain in good faith. (Lab. Code, §§ 1153, subd. (e), 1155.2, subd. (a); see 29 U.S.C. § 158(a)(5), (d).)[7] While Premiere may not have "agreed" to the contract with the UFW, it nonetheless is bound by the contract imposed upon it by operation of law pursuant to the MMC statute. (See *Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118, 1133; *Hess Collection Winery v. ALRB* (2006) 140 Cal.App.4th 1584, 1597.) The MMC statute is abundantly clear that the parties are required to implement a contract ordered into effect by the Board immediately unless a party obtains an order staying enforcement of the contract. (See Lab. Code, §§ 1164.3, subds. (b), (f), 1164.10, subd. (a).) Absent such an order, a party is not excused from its obligations to implement and abide by all terms of the collective bargaining contract. As demonstrated on the record before us, it would be anomalous to hold that a bargaining makewhole period, which under established precedent runs until an employer complies with its good faith

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[7] See *New Process Steel, LP* (2010) 355 NLRB 586, 586 [affirming recommended order requiring employer to comply with collective bargaining agreement; see (2008) 353 NLRB 111, 119]; *Victory Can Corp.* (2004) 341 NLRB 219, 220; *Harris Glass Industries, Inc.* (1995) 317 NLRB 595, 595; *Tri-Produce Co.* (1990) 300 NLRB 974, 987; *B.C. Hawk Chevrolet, Inc.* (1976) 226 NLRB 527, 530, enfd. (9th Cir. 1978) 582 F.2d 941; *Big Run Coal & Co.* (1965) 152 NLRB 1144, 1148, enfd. (6th Cir. 1967) 385 F.2d 788.)

bargaining obligation, should terminate upon the effective date of an MMC contract the employer refuses to implement — itself a continuing violation of the employer's duty to bargain in good faith.

Premiere never obtained an order staying its obligation to implement the contract, and it thus remains in violation of our Act and its obligation to bargain in good faith each day the contract remains unimplemented. (Lab. Code, § 1153, subd. (e).) That Premiere was pursuing litigation challenging the Board's underlying order certifying the UFW is of no moment. Premiere undertook such a course at its own risk. (*NLRB v. Allied Products Corp.* (6th Cir. 1980) 629 F.2d 1167, 1171; *Anchortank, Inc. v. NLRB* (5th Cir. 1980) 618 F.2d 1153, 1157.) Premiere lost that gamble, and it now must face the consequences of its unsuccessful endeavor. (*NLRB v. Chicago Tribune Co.* (7th Cir. 1991) 943 F.2d 791, 794 [judicial review of certification order "is extremely limited" and "[t]he burden on the party challenging an election is a formidable one"]; *Wilkinson Manufacturing Co.* (1971) 187 NLRB 791, 795 [the fact employer refused to bargain "to challenge the validity of the certification does not absolve it from liability, nor entitle it to any special consideration"].) The bargaining makewhole remedy is designed to make employees whole for economic losses incurred as a result of their employer's failure to bargain in good faith. As set forth above, Premiere's failure to implement the MMC contract vitiates the prior rationale for terminating the makewhole period at the effective date of the contract. Under the circumstances now presented, it is clear our prior order indisputably fails to serve the "make whole" purpose of the remedy we awarded, and thus deprives the employees the full extent of the economic relief they are due as a result of

their employer's unlawful behavior. This must be corrected.

Accordingly, we conclude the bargaining makewhole remedy awarded in our prior order should not be terminated by the effective date of the MMC contract. Under the well-established general rule, the makewhole period should continue until such time as Premiere complies with its duty to bargain in good faith, which in the context of this case means the date on which it implements the wages and other economic benefit provisions of the MMC contract. (See *Verde Produce Co., Inc.*, *supra*, 10 ALRB No. 35, pp. 6-7 [modification of prior remedial order in the course of compliance proceedings may be warranted "where the facts and the law make modification appropriate"].) Therefore, in preparing the bargaining makewhole specification pursuant to our order in 44 ALRB No. 9, the regional staff shall include such contractual wages and other economic benefits as have been denied the employees from the time we ordered the contract into effect on August 27, 2018, and continuing until such time as the economic provisions of the contract are implemented.[8]

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[8] We cited *Arnaudo Brothers, LP* (2018) 44 ALRB No. 7, p. 8, and *Gerawan Farming, Inc.*, *supra*, 44 ALRB No. 1, p. 59, as supporting our earlier determination that the makewhole period should cease as of the effective date of the MMC contract. (*Premiere Raspberries, LLC*, *supra*, 44 ALRB No. 9, p. 9.) We found in those cases that extending a bargaining makewhole period past the effective date of an MMC contract would be punitive, and thus beyond the scope of our remedial "make whole" authority. However, no such concerns are present on the undisputed record before us. Premiere never implemented the contract we ordered into effect, and its past economic obligations thereunder are clear. Premiere's refusal to bargain with the UFW did not cease upon issuance of our order in 44 ALRB No. 9. Premiere's unlawful conduct is continuing until such time as the contract is implemented. In these circumstances where an employer refuses to bargain with a certified union and then subsequently continues in such a refusal to bargain by failing to implement an MMC contract ordered into effect by the Board, the ongoing nature of the employer's unlawful conduct is clear. The harm to

II. Regarding Premiere's Closure Announcement.

We are compelled to acknowledge here the issue of Premiere's sudden announcement it is shutting down its farming operations in April 2020, which comes directly on the heels of its unsuccessful litigation challenging our orders certifying the UFW and directing implementation of the MMC contract.[9] Certainly, the timing and circumstances of Premiere's announcement are suspicious and have the potential to impact the effectuation of the Board's makewhole remedy.[10]

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the employees throughout this time also is clear. Our duty to effectuate the policies of the Act by remedying the effects of a party's unfair labor practices compels us to ensure the makewhole remedy we ordered in 44 ALRB No. 9 fulfills its compensatory purpose: the employees must be made whole for economic losses incurred throughout the time of Premiere's unlawful refusal to bargain, from the date it began until such time as the MMC contract, including specifically the economic provisions thereof, are implemented. To extend the bargaining makewhole period in this manner does not result in a punitive remedy in this case. During the contract period, the economic terms of the MMC contract supply the measure of the makewhole remedy, and the employees simply receive what they are entitled to — the difference between what they actually earned during this period and what they should have earned under the contract Premiere refused to implement.

[9] Premiere's motivations for shutting down its farming operations are not presently before us, and we make no findings on such issues.

[10] An employer's conduct in repudiating and attempting to avoid a collective bargaining agreement by closing down its business is "inherently destructive of important employee rights" under our Act. (*Esmark, Inc. v. NLRB* (7th Cir. 1989) 887 F.2d 739, 749, quoting *NLRB v. Haberman Construction Co.* (5th Cir. 1981) 641 F.2d 351, 360, and citing *Los Angeles Marine Hardware Co. v. NLRB* (9th Cir. 1979) 602 F.2d 1302, 1307 [employer's midterm repudiation of contract unlawful and "inherently destructive" of employee rights where employer closed unionized business and reopened under separate corporate entity to avoid collective bargaining agreement], MacDonald, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations* (1988) 86 Mich. L.Rev. 1024, 1043-44 [repudiation of collective bargaining agreement through sham corporate reorganization "inherently destructive" of employee rights].)

We trust the regional staff handling this matter will take appropriate and prompt steps to identify and trace Premiere's assets towards enforcing and fulfilling its financial obligations under the Board's order, in addition to identifying alternative sources from which to satisfy Premiere's obligations to the extent necessary to address any efforts by Premiere to avoid its obligations through its anticipated shut down. (See Board reg. 20291, subd. (f).)[11] In this respect, we note the alter ego doctrine may apply if it appears or is discovered Premiere has closed down only to reopen or reappear in a "disguised" form. (*NLRB v. Dane County Dairy* (7th Cir. 1986) 795 F.2d 1313, 1321; *Barker v. A.D. Conner Inc.* (N.D. Ill. 2011) 807 F.Supp.2d 707, 720-721.) Under this doctrine, an alter ego company may be held derivatively liable for the prior company's backpay obligations, and personal liability further may be imposed where the owner of a business closes it and then commences doing business under a new name. (*Dane County Dairy, supra*, 795 F.2d at p. 1321.)

[11] The Board's regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

CONCLUSION

The regional director shall continue processing compliance of our order in *Premiere Raspberries, LLC*, *supra*, 44 ALRB No. 9, including our bargaining makewhole award consistent with this order. (See Lab. Code, § 1149.3, subd. (b).)

DATED: March 6, 2020

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member