Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TRI-FANUCCHI FARMS,	)	Case Nos. **2013-CE-008-VIS**
	)	**2013-CE-014-VIS**
Respondent,	)	
and	)	
	)	**52 ALRB No. 1**
	)	(April 27, 2026)
UNITED FARM WORKERS OF AMERICA,	)	
Charging Party.	)	

DECISION AND ORDER ON COMPLIANCE

This case concerns exceptions to the Administrative Law Judge's Decision and Recommended Order on Compliance ("ALJ's Decision" or "ALJD") filed by the Respondent Tri-Fanucchi Farms ("Respondent" or "Tri-Fanucchi") and by the Regional Director ("RD"). The Respondent excepts to the decision of the administrative law judge ("ALJ" or "judge") on a number of grounds, arguing, *inter alia*, that the judge erred in wrongfully including fieldworkers provided through Baloian Packing Co. d/b/a/ Baloian Farms ("Baloian") in the makewhole specification, by calculating backpay using the

contract-averaging methodology rather than a comparable contract methodology adjusting for regional wages and cost of living, and by declining to nullify the election upon which the certification was based following the Supreme Court's decision in *Cedar Point Nursery v. Hassid* (2021) 594 U.S. 139. The Regional Director filed a narrow exception arguing that the judge erred in determining that Baloian is a labor contractor, rather than a grower-shipper. For the reasons set forth below, we deny the Respondent's exceptions, and remand this matter to the Region for the issuance of a revised makewhole specification calculated in accordance with this decision.

BACKGROUND

In *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, the Agricultural Labor Relations Board ("ALRB" or "the Board") determined that the Respondent violated section 1153, subdivisions (a) and (e) of the Agricultural Labor Relations Act ("ALRA" or "the Act")[1] by failing and refusing to bargain with the Charging Party United Farm Workers ("UFW" or "the Union") and refusing to respond to requests for relevant information. (*Id*. at 1.) Accordingly, the Board ordered that the Respondent bargain in good faith with the Union, provide the requested information, and compensate bargaining-unit employees for the Respondent's failure to bargain through the provision of makewhole relief. (*Ibid*.)

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

In *Tri-Fanucchi Farms v. ALRB* (2015) 236 Cal.App.4th 1079 the California Court of Appeal, Fifth Appellate District affirmed the Board's decision as to the Respondent's unfair labor practices, but reversed the Board as to the imposition of makewhole relief. (*Id*. at 1099.) The California Supreme Court reversed the Fifth Appellate District in *Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161 and reimposed the award of makewhole relief. (*Id*. at 1173-1174.)

On March 15, 2022, the Regional Director issued a Notice of Hearing and Makewhole Specification. On September 22, 2022, the Regional Director issued a First Amended Makewhole Methodology. On October 18, 2022, the Regional Director issued a Second Amended Makewhole Methodology and Specification. A compliance hearing was held on various dates between March 7, 2023 and April 17, 2025. On September 24, 2025, Administrative Law Judge Matthew Gauger issued a Decision and Recommended Order on Compliance.

On November 24, 2025, the Respondent and the Regional Director filed exceptions to the decision of the Administrative Law Judge and supporting briefs. On December 11, 2025, the Board issued an administrative order requiring the Respondent and the Regional Director to refile their exceptions to comply with Board Regulation 20282, subdivision (a)(1).[2] (*Tri-Fanucchi Farms* (2025), Admin. Order No. 2025-15.)

[2] The Board's regulations are codified in Title 8 of the California Code of Regulations, section 20100 et seq.

The parties timely refiled exceptions in compliance with the Board's regulations. The Respondent, Regional Director, and Charging Party filed timely answering briefs.

DISCUSSION

I. Inclusion of Baloian Employees in the Tri-Fanucchi Bargaining Unit

On October 21, 1977, pursuant to a secret ballot election, the UFW was certified as the exclusive bargaining representative of the Respondent's employees. (*Joe G. Fanucchi & Sons / Tri-Fanucchi Farms*, 12 ALRB No. 8, p. 2.) As defined in the Certification of Representative, the appropriate bargaining unit was determined to be: "All agricultural employees of Joe G. Fanucchi & Sons[3] in the State of California."

A. The Tri-Fanucchi / Baloian Arrangement

In the mid 1990's, Tri-Fanucchi Farms began a business arrangement with Baloian Packing Co. d/b/a/ Baloian Farms ("Baloian".) Pursuant to this arrangement, Tri-Fanucchi would grow its crops[4] on roughly 75 acres of leased land in Mettler, California. Tri-Fanucchi and Baloian would jointly decide how much and which commodities to plant for the next growing season. Tri-Fanucchi would decide, sometimes after consultation with Baloian, when to plant the crops. Tri-Fanucchi would plant the squash, while Baloian would plant the bell peppers and eggplant. Tri-Fanucchi would handle the

[3] Joe G. Fanucchi & Sons was subsequently renamed Tri-Fanucchi Farms.

[4] Exact crop composition would differ from year to year, but variously consisted of bell peppers, eggplant, and squash.

irrigation and watering of the crops, decide how much water to apply, and pay for the watering costs. Tri-Fanucchi would also apply fertilizer, weed the fields, and handle pesticide application through a contractor. During cultivation and harvest, Tri-Fanucchi representatives would check the crop, inspect for pests, and check the soil for appropriate water levels. Tri-Fanucchi had a farm supervisor present every day during the growing and harvest season.

Baloian Farms harvested the crops. Tri-Fanucchi representatives, specifically Catherine Fanucchi,[5] would be present in the fields to monitor the harvest and to inspect the product for quality. Of Tri-Fanucchi's role, Catherine Fanucchi credibly testified:

> "We are there to ensure food safety issues. We are there to monitor the crop, because it's picked more than once. We are there to make sure that we don't have any pests or diseases and that we've got irrigation. And then we are also there to see what is coming out of the field to ensure that when all is said and done we have a good product that we've made, and that's important to what we've done all year." (Tr. Vol. 6, 77:1-11.)

Baloian utilized farm labor contractor employees, including those from Family Ranch, to harvest the crop. The ALJ found Family Ranch Field Operations Manager Jose Angel Aispiro credibly testified that he would be contacted by

[5] Although Catherine Fanucchi has no official title and, when asked her role, simply stated "I'm a farmer," (Tr. Vol. 6, 15:15-17, 60:14:16), she admitted on cross-examination that she "is also on the management team." (*Id.* at 17-21.) We find that the credited testimony establishes that Ms. Fanucchi has a significant managerial role in Tri-Fanucchi operations.

representatives from Tri-Fanucchi (specifically Catherine Fanucchi), Baloian (Yosh Kamine), and Family Ranch (Mario Morales), regarding the provision of farm labor crews for the Mettler fields harvest.[6] Catherine Fanucchi would talk to Aispiro about "how much crews we are going to need to provide for labor" and they would "more or less plan out the scheduling" for harvest. (Tr. Vol. 7, 58:20-69:13.) During harvest, Catherine Fanucchi also took an active role, speaking to Aispiro about the productivity of his crews.[7]

Following harvest, Baloian paid for the transportation of the crops for packing and cooling. Baloian would then sell the produce.[8] During the season, Tri-

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[6] "Q. And as far as telling you how many employees were needed, that would come from Yosh [Kamine]; correct?
A. From the three sources, Mario [Morales], Cathy [Fanucchi], or Yosh [Kamine]." (Tr. Vol. 7, 61:13-15.)

[7] Q. While harvesting was happening, would Ms. Fanucchi call you or talk to you?
A. While harvest was going? Yes.
Q. And what would — if it's related to the harvest work, what would you talk about?
A. Crews, just the crews. If I was low on crews, they would let me know; right? You know, that crew is low, or this crew is not producing. We would talk about productivity and whatnot, season of the harvest that's going on and the transitioning of the crews when -- when the season was over. It's a conversation we would have.
Q. Productivity? Can you explain that to me?
A. Productivity, like crews, cost of how much — how much they were going through the field and how much they were covering ground, et cetera . . ." (Tr. Vol. 7, 32:10-24.)

[8] The RD filed a narrow exception that Baloian Farms operates as a grower-shipper, rather than as labor contractor as stated by the judge. We find it unnecessary to reach this issue and we do not rely upon the ALJ's finding in this regard. The distinction does not affect our subsequent analysis, but it does attest to the confusion that can arise from a

Fanucchi would track the expenses incurred in cultivating the Mettler fields. Similarly, Baloian would track its expenses and profits from the sale of the crop, including the labor expenses incurred in hiring harvest crews. At the end of the season, Tri-Fanucchi and Baloian would each total their expenses and revenue, and determine whether they incurred a profit or loss. Then, pursuant to an unwritten agreement, Tri-Fanucchi and Baloian would perform a "true-up" of their income and expenses. According to the credited testimony of Baloian's Controller David Cuadros:

> "True-up means at the end of the season, you know, according to my records, I know what expenses that we paid for, for that operation at that time, and they would submit their growing costs, what they incurred, to get the crop up to harvest. And then we would put that in a bucket. And we said that in our case with Tri-Fanucchi, it was 50-50. So if, say, Baloian ended up paying 60 percent, and they paid 40 percent, well, then the true-up means that they would have lost the difference to make it 50-50. They would pay so that the costs would be shared equally at 50 percent." (Tr. Vol. 8 at 20:6-16.)

Pursuant to this verbal "true-up" agreement, profits and losses were divided between Tri-Fanucchi and Baloian 50-50. At the beginning of the season, Baloian would sometimes prepay growing costs for tax purposes. At the end of the season, if, for example, Tri-Fanucchi only paid 30% of its share of the costs, it would "cut a check" to Baloian for the remaining 20%. This arrangement continued in the same manner from 1993 until 2023.

"handshake" business arrangement that was vague and obscure, perhaps deliberately so, given its unwritten nature.

B. Agricultural Employer Analysis

The judge determined the Tri-Fanucchi bargaining unit consisted of all agricultural employees which the Respondent directly or indirectly employed. This would include the employees hired by Baloian from farm labor contractor Family Ranch to perform harvest work on the crops grown by Tri-Fanucchi pursuant to the Tri-Fanucchi / Baloian arrangement. In the alternative, the judge determined under California law, Tri-Fanucchi and Baloian were also joint employers of the Mettler fields harvest employees. We find that the record demonstrates Tri-Fanucchi operated as the employer of all the agricultural employees it directly or indirectly employed through the Tri-Fanucchi / Baloian agreement.[9]

Pursuant to longstanding Board law, we will find agricultural employer status attaches to the entity which has "the substantial, long-term interest in the ongoing agricultural operation." (*Rivcom Corp. & Riverbend Farms, Inc.* (1979) 5 ALRB No. 55.) In that case, the Board determined Riverbend Farms was the agricultural employer of the harvest employees working on the payroll of labor supplier Triple M. (*Id*. at 3.) Of particular relevance here, the Board noted that Riverbend Farms made substantial management decisions, oversaw the day-to-day harvesting operations, instructed harvest

[9] Given our finding that Tri-Fanucchi operated as the employer of the Mettler fields harvest employees, we find it unnecessary to pass on the judge's finding in the alternative that Tri-Fanucchi and Baloian are joint employers of the Mettler fields harvest employees.

crews, and checked for quality control of the produce. (*Id*. at 2-3.) Similarly, here Tri-Fanucchi made executive decisions about when to plant, water, weed, and apply pesticide to the crops grown on the land it leased. Catherine Fanucchi and Tri-Fanucchi farm supervisors would oversee growing and harvesting, and would inspect the product for quality. Catherine Fanucchi would also discuss issues concerning the staffing, scheduling, and productivity of the harvest crews with Family Ranch Field Operations Manager Jose Angel Aispiro. Like Riverbend Farms in *Rivcom*, it is Tri-Fanucchi farms which possesses "the substantial, long-term interest in the ongoing agricultural operation," and is therefore the employer of the Mettler fields harvest employees. (*Id*. at 3.)

Similarly, in *San Justo Farms*, (1981) 7 ALRB No. 29, the Board looked to the "whole activity" of the parties to determine that San Justo Farms, and not Vessey Foods, was the employer of the garlic harvesters at issue. (*Id*. at 5.) Like Tri-Fanucchi, San Justo grew the crop on its land, as well as irrigated, fertilized, and weeded the crop. (*Id*. at 4.) Like Baloian, Vessey Foods harvested and marketed the crop. (*Id*. at 3.) Further, the parties were in a similar arrangement in which each shared equally in the growing and harvesting expenses and shared equally in the profits. (*Ibid*.) Similar to Catherine Fanucchi's oversight over harvesting in the case at hand, the Board noted: "San Justo's continuing interest in the garlic crop is demonstrated by the presence of its president, David Wyrick, at the garlic harvest each day." (*Id*. at 5-6.) The Board also took into account "the fact that San Justo owns the land, participated in the cultivation and

harvesting of the garlic, and acted on behalf of the garlic venture to negotiate an access agreement with the UFW" to "support[] our finding that San Justo is the primary agricultural employer of the garlic harvesting employees." (*Id*. at 7.) The Board noted that such a finding "will provide a stable collective bargaining relationship and furthers the purposes and goals of the Act to encourage and protect the employees' right to negotiate the terms or conditions of their employment." (*Ibid*.)

As we found in *San Justo*, it is the "nature of the functions performed by each party and the relationship each has to the agricultural employees which are determinative of the party's status under Labor Code section 1140.4, subdivision (c)."[10] (citing *Freshpict Foods, Inc.* (1978) 4 ALRB No. 4; *Grow-Art* (1981) 7 ALRB No. 19.) Examining the nature of the functions of Tri-Fanucchi and Baloian, we agree with the judge that Tri-Fanucchi has operated as an agricultural employer of the Mettler fields harvest employees. Through the "true-up" procedure described by Catherine Fanucchi

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[10] Labor Code section 1140.4, subdivision (c) provides:

> "The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part."

(Lab. Code § 1140.4(c).)

and Baloian Controller David Cuadros, Tri-Fanucchi paid, directly or indirectly, for half the labor cost of the harvest employees hired by Baloian.[11] Further, Tri-Fanucchi's involvement in deciding when to plant, weed, and irrigate the crop, apply pesticide, supervise, schedule, and oversee harvest crews, and inspect the crop for quality, all serve to convince us that Tri-Fanucchi has acted as an agricultural employer of the harvest employees at issue. We therefore adopt the judge's conclusion that such employees are properly included in the bargaining unit of all Tri-Fanucchi agricultural employees.[12]

C. <u>Respondent's Procedural Exceptions</u>

We find no merit to the Respondent's assertion on exception that Baloian employees can only be included in the makewhole specification through the process of accretion or unit clarification. We agree with the judge that here, there is no question concerning representation ("QCR") or competing claim to the bargaining unit which would necessitate the holding of a representation proceeding. (ALJD 81 ["The UFW

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[11] Respondent notes on exception that Family Ranch invoices which billed Baloian harvest labor to an account called "Tri-Fanucchi" were only categorized as such in order to "keep track of the location where the harvest labor was utilized." We find that, regardless of the names on the invoices, the "true-up" procedure between Tri-Fanucchi and Baloian resulted in Tri-Fanucchi directly or indirectly paying for half of the labor costs of the Mettler fields harvest employees.

[12] We reject the Respondent's claim that inclusion of Baloian-contracted harvest employees "creates an issue of whether [these employees] are subject to NLRB jurisdiction." The Respondent has presented no evidence or reasoned argument that the Mettler fields harvest employees are not "agricultural employees" pursuant to Labor Code section 1140.4, subdivisions (a) and (b).

represents all Tri-Fanucchi's agricultural workers. It does not matter if there are one or fifty labor contractors or other employers. The unit is the same."])

We also reject the Respondent's assertion that Tri-Fanucchi and/or Baloian's due process rights were violated by failing to include Baloian as a party to the proceeding during the liability stage, and by raising the issue of Respondent's makewhole liability for Mettler fields employees during compliance. The Board's decision on liability clearly orders the Respondent to "[m]ake whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW." (*Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, p. 32.) The first Notice of Hearing and Makewhole Specification, dated March 15, 2022 and properly served upon the Respondent, clearly states that "the General Counsel's Office sought and collected payroll documents and information related to the payment of wages ***for all direct hires and farm labor contractor (FLC) agricultural employees*** who worked for Respondent since October 19, 2012" (emphasis added) and that the specification covered "approximately 5,795 agricultural employees . . . This total includes direct hires and employees who worked for 8 different FLCs . . ."[13] As we find herein, the Mettler fields harvest employees constitute "present and former agricultural employees" of the

[13] This language is substantially the same in the Second Revised Makewhole Specification filed on October 18, 2022, simply adjusting the total to 6,261 employees.

Respondent for the purposes of the makewhole specification, and the Respondent was clearly provided notice and an opportunity to be heard as to this issue.

We note, even if we were to find derivative liability on the ground that Tri-Fanucchi and Baloian are a single employer of employees hired pursuant to the Tri-Fanucchi / Baloian agreement, there would be no due process concern. (See, e.g., *Bannum Place of Saginaw* (2023) 372 NLRB No. 97, 11 ["The addition of parties in a compliance specification is no barrier to requiring those additional parties be liable when entities are found to be a single employer."], citing *Denart Coal Co.* (1994) 315 NLRB 850, 851; *Air Vac Industries, Inc.* (1987) 282 NLRB 703, 711.) We reiterate, however, that we are *not* finding Baloian Farms liable for the unfair labor practice violations pled and proven against the Respondent in this case. (ALJD 92 ["If the RD sought a makewhole remedy against Baloian, the RD should have named Baloian. The RD makes no such claim."])[14] To the extent the Respondent may wish to seek indemnification from Baloian pursuant to the "handshake" agreement described at length above, such a claim would fall within the purview of the courts, not the Board.

We find that if there is any defect in procedure here, it is on behalf of the Respondent. Board regulation 20292 requires a respondent in a makewhole case to file an

[14] While we note that we find it unnecessary to pass on Baloian Farms' status as a joint employer of the employees hired pursuant to the Tri-Fanucchi / Baloian agreement for the purposes of this compliance proceeding, we make no judgment as to whether the agreement has made Tri-Fanucchi and Baloian joint employers for other purposes under California or federal law.

answer to a makewhole specification which must admit or deny allegations that are within the knowledge or reasonably ascertainable by the respondent or its agents. Additionally, where the respondent disputes the accuracy of facts alleged in the specification, the respondent must affirmatively "set[] forth in detail its position as to the applicable premises and furnish[] the appropriate supporting facts and figures . . .." (Board regulation 20292, subd. (b).) Allegations not adequately denied consistent with the foregoing "shall be deemed admitted, and may be so found without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation." (Board reg. 20292, subd. (c).)

Additionally, it is well-established that a party that fails to timely assert an affirmative defense waives that defense. (*George Arakelian Farms* (1982) 8 ALRB No. 36, pp. 9-11, modified & rem. on other grounds (1986) 186 Cal.App.3d 94; *Ace Tomato Co., Inc*. (2015) 41 ALRB No. 7, p. 7, fn. 3 [where respondent asserted affirmative defense not previously raised before the ALJ or in exceptions to the ALJ's decision, the Board held the defense waived].)

The Board's regulations, particularly the heightened pleading requirements for answers to compliance specifications, reflect that a respondent is not permitted to simply rely upon bare denials or vague statements of disagreement with the factual allegations of a compliance specification but must set forth at the pleading stage the factual basis of its own position. (*Certified Egg Farms and Olson Farms* (1993) 19 ALRB No. 9, p. 3 [specification allegations deemed admitted where respondent's "mere

assertion that it disagreed with the [makewhole] period did not meet the specificity requirements of the Board's regulations"].) In other words, the Board's makewhole processes are not a game wherein the respondent keeps its proverbial cards close to the vest only to play them at the most strategically opportune moment. Nor are they a venue for the respondent to delay and prevaricate while it belatedly evolves a theory of its case.

The Region argues that the Respondent failed to meet the pleading requirements of Board regulation 20292 with respect to its contention that workers supplied by Baloian were not employees of Tri-Fanucchi and was therefore waived the issue. We agree. Examination of the Respondent's answers to the initial specification and the second amended makewhole specification reveals that, not only do they not set forth any specific facts concerning the composition of its workforce, they are utterly devoid of any reference of what (eventually) became the centerpiece of the Respondent's defense: that the bulk of the workers harvesting its crops were employees of Baloian and not the Respondent.[15]

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[15] Additionally, at the very outset of this case, in its August 27, 2013 answer to the unfair labor practice complaint, the Respondent incorporated by reference into the answer a declaration of its attorney, Howard Sagaser, which was attached to the answer. Sagaser's declaration included the following statement: "TFF is in the Kern County area. It has approximately 35 year-round employees and **hires several hundred seasonal employees through various labor contractors**." (Emphasis added.) This admission, seemingly directly at odds with the Respondent's later contention that nearly all its workers were someone else's employees, arguably foreclosed that issue. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co*. (1981) 122 Cal.App.3d 834, 850 ["under the doctrine of conclusiveness of pleadings evidence may not be received to contradict an admission on the pleadings and . . . findings contrary to such admissions must be disregarded"].) At the very least, our finding herein that the Respondent is the ALRA

In a case where the issue at hand is the identity of the workers who worked on the respondent's crops, the respondent is uniquely well-positioned to present the relevant facts. Not only did Tri-Fanucchi fail to plead those facts as required by the Board's regulations, it obfuscated its relationship with Baloian and numerous farm labor contractors, refusing to provide the Region with subpoenaed information relevant to its hiring of contract employees until the RD was driven to seek enforcement in Kern County Superior Court. (ALJD 91 ["The parties battled for years for access to the documents. Tri-Fanucchi went to great lengths to hide the identity of those workers."])

We therefore find, in addition to our above agricultural employer analysis, that the Respondent has waived its argument that Baloian is the "true" employer of the Mettler fields harvest employees by failing to timely raise and properly plead this issue in its answer to the Region's compliance specifications as required by the Board's regulations.

D. <u>Policy Concerns</u>

We make the agricultural employer finding described above based upon our analysis of the nature and function of Tri-Fanucchi with respect to the Mettler field employees. In addition, however, we note that to find differently would effectively permit the Respondent to avoid its statutory collective-bargaining responsibility in existence since its employees chose representation by the UFW in 1977. As the Respondent

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employer of the Baloian-supplied workers is consistent with the Respondent's own apparent understanding of those workers' status as of 2013.

attempts to do here, it could simply allege that it is no longer the employer of the employees actually performing its bargaining-unit work, and instead point to an entity like Baloian Farms as the "real" employer. (See, e.g., *Overnite Transportation Co.* (2000) 330 NLRB 1275, 1276 ["We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunion employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees."], aff'd in part, rev'd in part mem. (3d Cir. 2000) 248 F.3d 1131.)[16]

"In enacting the [ALRA], the California Legislature specifically declared the collective bargaining process is the preferred method for attempting to bring peace and stability to California's agricultural fields." (*Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 253; *ALRB v. Superior Court* (1979) 16 Cal.3d 392, 398 ["In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations."]) Applying both our extant precedent and the underlying policies of the ALRA, we decline to permit the Respondent to avoid its statutory bargaining responsibilities by declaring for the first time in compliance that it is not the "true"

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[16] See generally *A-1 Fire Protection, Inc.*, (1980) 250 NLRB 217, 218-219 (collecting cases where "employers, through deception and misrepresentation, used related companies to evade their obligations under collective-bargaining agreements, to deprive bargaining unit employees of the fruits of collective bargaining, and to destroy bargaining units. In those cases, the employers surreptitiously and unilaterally transferred and shifted work away from bargaining unit employees to employees of related companies.")

employer of its agricultural employees. To do so would be anathema to the policies of the Act we are tasked with protecting.[17]

II. The Contract Averaging Methodology

In determining the appropriate amount of makewhole relief, the judge first found no comparable contracts existed that would approximate a contract between Tri-Fanucchi and the UFW. (ALJD 67-73.) Accordingly, the judge utilized the credited testimony of Dr. Philip Martin, a UC Davis Professor of Agricultural and Resource Economics, and subject-matter expert on ALRB remedies. (ALJD 24.) Dr. Martin examined 25 contracts between the UFW and various growers during the relevant makewhole period between 2012 and 2021. (*Id*. at 30.) Accounting for the union wage differential, hourly contributions to UFW's Robert F. Kennedy health insurance plan and the Juan de la Cruz pension plan, paid holidays and paid vacations, Dr. Martin calculated that the UFW wage premium over the California minimum wage was 32.53% excluding holidays and vacations, and 37.01% with paid holidays and vacations included. (ALJD 30-31.) Dr. Martin's calculations did not include any contracts bargained pursuant to Mandatory Mediation & Conciliation ("MMC") procedures. (ALJD 31.)

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[17] See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 359 (holding that finding cucumber sharefarmers constituted independent contractors "would suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of 'employees,' including laws enacted specifically for the protection of agricultural labor [such as] the Agricultural Labor Relations Act (§ 1141 et seq.).")

During the January 9, 2025 Case Status Conference, the judge ordered the parties to brief whether, subsequent to our decision in *Gerawan Farming,* the Board is required to utilize MMC contracts when calculating makewhole relief using a contract averaging methodology. (ALJD at 31; *Gerawan Farming, Inc.* (2023) 49 ALRB No. 2.) Answering in the affirmative, the RD revised its methodology to include seven MMC contracts negotiated during the relevant makewhole period. (ALJD at 31.) Pursuant to Dr. Martin's inclusion of these MMC contracts into his formula, the UFW wage premium dropped slightly, to 25.52% over the California minimum wage excluding holidays and vacations, and 29.39% with paid holidays and vacations included. (*Id*. at 31-32.) The judge found that "nearly all" of the contracts included paid holidays and vacations, and that good-faith negotiations, had these negotiations occurred, would have resulted in the creation of reasonable eligibility requirements "tailored to the workforce." (*Id*. at 32.) Accordingly, the judge adopted the 29.39% figure above minimum wage as the appropriate UFW wage differential. (*Ibid*.)

Next, the judge credited the testimony of RD expert witness Kenneth Creal, a certified public account with experience in calculating legal damages. (ALJD 32.) Applying the wage differential in Dr. Martin's model to the Tri-Fanucchi's payroll, Mr. Creal calculated total makewhole relief during the relevant period of October 19, 2012 through March 27, 2023. (*Id*. at 105.)[18] When adjusted for the interest rate applied by the

[18] The makewhole relief continues to accrue, with interest, until the Respondent begins to bargain in good faith with the Charging Party. (*Ibid*.)

National Labor Relations Board ("NLRB"), compounded daily pursuant to *Kentucky River Medical Center* (2010) 356 NLRB 6 at 9, the total makewhole relief amounted to $7,875,438.87. (ALJD 33.)

The Respondent presented its own expert witness, Dr. Joseph A. Krock, an economist and litigation consultant. Dr. Krock did not present an alternative makewhole formula to the Regional Director's, but asserted that Dr. Martin's analysis was based on flawed assumptions. (ALJD 33; 79-84.) Pursuant to Dr. Krock's calculation, the Respondent asserts that Tri-Fanucchi should only be liable for $191,493.61.

A. <u>General Legal Standard</u>

Bargaining makewhole relief "is a compensatory remedy that reimburses employees for the losses they incur as a result of delays in the collective bargaining process." (*Gerawan Farming, Inc.* (2023) 52 Cal.App.5th at p. 198, quoting *Tri-Fanucchi Farms v. ALRB* (2017) 3 Cal.5th 1161, 1167-1168; Lab. Code, § 1160.3.) In determining the appropriate amount of makewhole relief owed, the Board's task "is to arrive at a reasonable approximation of what the employees lost as a result of the employer's refusal to bargain in good faith, not to arrive at a perfect calculation of the loss." (*Hess Collection Winery* (2005) 31 ALRB No. 3, p. 5; see also *J.R. Norton Co., Inc.* (1984) 10 ALRB No. 42, p. 13 ["we do not require exactitude in our quest to make employees whole especially where . . . the pursuit of exactitude [is] prohibitively time-consuming."])

As the wrongdoing party, an employer who unlawfully fails to bargain in good faith bears "the burden of any uncertainty concerning what wage rates the parties

likely would have agreed upon in negotiations." (*Kyutoku Nursery, Inc.* (1982) 8 ALRB No. 73, p. 10; see generally *International Brotherhood of Teamsters Local 25* (2018) 366 NLRB No. 99, slip op. at 2 ["It is well established that where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer."]; accord *Lucky Cab Co.* (2018) 366 NLRB No. 56, slip op. at 6, enfd. mem. (9th Cir. 2020) 818 Fed.Appx. 638; *United Aircraft Corp.* (1973) 204 NLRB 1068 [uncertainties should be resolved in favor of the "backpay claimant rather than the respondent wrongdoer"]; *Story Parchment Co. v. Paterson Parchment Paper Co.* (1931) 282 U.S. 555, 564 [where plaintiff establishes damages which were definitively attributable to the defendant's wrong, "the risk of the uncertainty [as to the amount of damages] should be thrown upon the wrongdoer instead of upon the injured party."])

"The Board does not, and indeed cannot, determine that the parties would have agreed to the exact wage rates and benefits the Board is imputing. The damages assessed are of necessity a reasonable estimate of the employees' losses." (*Abatti Farms, Inc.* (1988) 14 ALRB No. 17, pp. 14-15.) Therefore, we will adopt the formula and computations of the RD so long as "the makewhole amounts were calculated in a manner that is reasonable and conforms to the standards set forth in our decisions." (*Kyutoku Nursery, Inc.*, supra, 8 ALRB No. 73, p. 15.) The burden falls upon the Respondent to prove that the RD's method of calculating makewhole relief was "arbitrary, unreasonable, or inconsistent with Board precedents, or that some other method of determining the makewhole amounts is more appropriate." (*Id*. at 15-16.)

B. Comparable Contract versus Contract Averaging Methodology

In calculating makewhole relief, we have announced a preference for utilizing figures derived from comparable contracts. (*Gerawan Farming*, supra, 49 ALRB No. 2, p. 5.) In determining whether a contract is "comparable" to one that would have been negotiated in the absence of a failure to bargain, the Board examines the "similarity of operations with regard to such factors as crops, locale, nature of the industry, methods of operations, and work force." (*Ventura County Fruit Growers*, Inc. (1989) 15 ALRB No. 18, p. 7; *Martori Brothers* (1985) 11 ALRB No. 26, p. 11; *J.R. Norton Co., Inc.*, supra, 10 ALRB No. 42, pp. 10-11; *Holtville Farms, Inc.* (1984) 10 ALRB No. 13, p. 3, affd. (1985) 168 Cal.App.3d 388.)

When no comparable contract exists, "Board precedent clearly permits alternative makewhole formulas," such as the contract-averaging methodology ("CAM"). (*Ace Tomato Company* (2015) 41 ALRB No. 5, p. 39 ["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."]; accord *San Joaquin Tomato Growers, Inc.* (2012) 38 ALRB No. 4, p. 16 ["We find that in the absence of comparable contracts, it is reasonable to measure the average increase in wages as reflected in a broad sample of contracts involving the same union."]; *Hess Collection Winery*, *supra*, 31 ALRB No. 3, pp. 4-5.; *Abatti Farms, Inc.*, *supra*, 16 ALRB No. 17, pp. 15-16; *Adam Dairy* (1978) 4 ALRB No. 24, pp. 18-20.)

C. Analysis

(i) The judge correctly determined there were no comparable contracts

On exception, the Respondent asserts that the judge erred in failing to credit Howard Sagaser's testimony, when acting in his capacity as an expert witness, that comparable contracts existed.[19] Here, we find the judge properly determined that no comparable contract existed. The judge comprehensively examined the *Ventura County / J.R. Norton* factors presented above to find that no comparable contract was presented.[20] (ALJD 67-73; *Ventura County,* supra, 15 ALRB No. 18, p. 7 [examining "similarity of

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[19] The Respondent generally excepts to the failure of the judge to credit Howard Sagasar and Dr. Krock, and the judge's decision to credit the testimony of Dr. Martin. The standards applied by the Board in reviewing such exceptions are well-established. (See, e.g., *George Amaral Ranches, Inc.* (2014) 40 ALRB No. 10, pp. 14-15; *P&M Vanderpoel Dairy* (2014) 40 ALRB No. 8, p. 17.) The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of all the relevant evidence demonstrates that they are in error. (*United Farm Workers of America (Ocegueda)* (2011) 37 ALRB No. 3, p. 2; *P.H. Ranch* (1996) 22 ALRB No. 1, p.1, fn. 1; *Standard Drywall Products* (1950) 91 NLRB 544, 545.) In instances where credibility determinations are based on factors other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7, p. 4.) We have carefully reviewed the record in light of the Respondent's exceptions and find no basis to disturb the ALJ's credibility determinations.

[20] The Respondent argues on exception that Dr. Martin did not examine the terms of the contracts in order to determine whether the growers involved might be comparable to the Respondent, and that Dr. Martin possesses a "clear bias" against the comparable contract methodology. The veracity of these claims is immaterial, as it is the judge, not Dr. Martin, who undertook the extensive comparable contract analysis presented in the decision.

operations with regard to such factors as crops, locale, nature of the industry, methods of operations, and work force."]) The judge determined that while some farms shared one of the same crops as Tri-Fanucchi, no grower grew Tri-Fanucchi's varied crop of wine grapes, eggplant, peppers, squash, potatoes, onions, garlic, and mechanically-harvested commercial tomatoes. (ALJD 11, 71-73.) Examining the method of operations, the judge found Tri-Fanucchi's situation unique, as it was the only grower presented to lease all of its land, to have 50 years of stable water rights, and to be continuously operated by the same family. (*Id*. at 68, 72-73.) Perhaps most importantly, the judge determined that Tri-Fanucchi was uniquely situated with respect to its workforce, as no other grower had an operation similar to the Tri-Fanucchi / Baloian arrangement, where direct hires represented less than one percent of its agricultural labor force. (*Id*. at 67.) For these reasons, we adopt the judge's finding that no comparable contract existed which would approximate a Tri-Fanucchi / UFW agreement.

(ii) The Respondent did not establish that the contract averaging methodology was arbitrary, unreasonable, or that another method was more appropriate

Finding no comparable contract, the judge then examined whether the Regional Director's makewhole specification, which utilized the contract averaging methodology, was a reasonable method to approximate the unrealized losses due to the Respondent's failure to bargain. (ALJD 73-83.) We adopt the judge's recommendation and find the Respondent failed to prove the Regional Director's contract averaging methodology was arbitrary, unreasonable, or that another method of determining

makewhole relief was more appropriate. (See *Kyutoku Nursery, Inc.*, *supra*, 8 ALRB No. 73. p. 15.)

In this case, the RD presented a contract averaging methodology examining twenty-five contracts,[21] some of which were successfully renegotiated for several renewal periods. In *Holtville Farms v. ALRB*, the Court of Appeal noted that:

> "In *Kyutoku Nursery, Inc*. (1982) 8 ALRB No. 73, the Board used one contract, the Pik'd Rite collective bargaining agreement as comparable to calculate make whole. In *Robert H. Hickam* (1983) 9 ALRB No. 6, the Board used a group of 10 comparable contracts. In *Kawano, Inc*. (1984) 10 ALRB No. 17, the Board used a group of eight comparable contracts. In *C. Mondavi & Sons* (1984) 10 ALRB No. 19, contracts with three Napa Valley vineyards were used.
>
> The Board has thus varied from utilizing an average of the wage rate in all UFW contracts to utilization of one contract, in its efforts to determine what the employees would have received had the company not refused to bargain. When utilization of an average versus utilization of one contract is analyzed in light of the applicable principles of law, the Board's choice should be upheld unless it is found to be a 'patent attempt to achieve ends other than those which can fairly effectuate the policies of the Act.' Here, it does not seem to be so. While it is an approximation and alternatives equally or more reasonable may be chosen by this court if it were deciding the case de novo, the Board's choice does seem to be a reasonable approximation of the loss sustained by the employees." (*Holtville Farms v. ALRB* (1985)168 Cal.App.3d 388**,** 391-392.)

Thus, we agree with the judge that Dr. Martin's statewide averaging of UFW wages and benefits across twenty-five contracts represents a reasonable method to

[21] The RD later added seven MMC contracts.

approximate the amounts that would have been earned if the Respondent had bargained in good faith.

We agree with the judge that the Respondent failed to show such methodology was arbitrary or unreasonable, or to present a more appropriate method. The judge determined that the Respondent failed to propose any alternative makewhole methodology, but simply utilized its expert, Dr. Krock, to pick "interpretations of parts of specific contracts," advocate "adjustments based on geographic conditions," and present "alternative math where Krock claims data is missing." (ALJD 80.) These critiques of Dr. Martin's method are reiterated in the Respondent's exceptions, and we reject them for the reasons presented below.

(iii) Statewide averaging is appropriate

The Respondent asserts on exception that the contract averaging methodology fails to account for regional cost of living in the San Joaquin Valley, arguing this region has lower wages than other areas in California. However, Board law makes clear that makewhole relief is intended to be a "reasonable approximation" of the loss suffered by employees, not "a perfect calculation of the loss." (*San Joaquin Tomato Growers*, *supra*, 38 ALRB No. 4, pp. 16–17.) Without comparable contracts from similar growers in the Kern County / San Joaquin Valley area, we find a statewide average appropriately balances differences in cost-of-living between various areas and serves as a reasonable approximation of employee losses.

(iv) Dr. Martin's contract averaging methodology utilized reasonable assumptions

Next, the Respondent attacks on exception various assumptions made by Dr. Martin in his comparable contract methodology, such as the inclusion of retirement benefits for direct hires (which Respondent asserts most direct hires do not elect) and the provision of holiday and vacation pay for employees despite Respondent's claim that "most would not qualify for holiday pay based on hours worked."

It is undoubtably true that as part of his contract averaging methodology, Dr. Martin made a number of assumptions in an attempt to approximate the economic benefits that would have accrued to employees if a contract were reached. For example, Dr. Martin made reasoned assumptions to account for the seasonality of Tri-Fanucchi's vegetable operations, as opposed to, for example, a year-round dairy farm. To account for this, Dr. Martin tailored his methodology so that Tri-Fanucchi workers would be compensated only for half of the average 6.4 paid holidays calculated by a statewide averaging of the contracts. Similarly, to calculate vacation pay, Dr. Martin examined contractual requirements and found some growers provided paid vacation after as little as 400 hours of work, while some required as many as 1,000 hours. Dr. Martin calculated the average agricultural employee with five years of experience would receive at least four percent of their earnings in the form of paid vacation. Accordingly, to variously account for employees with decades of experience and those with only a few years of experience, Dr. Martin used the 4% paid vacation owed to an employee with five years of tenure, and then divided it in half. The Board has explicitly approved of such reasoned assumptions in order to approximate fringe benefits owed to employees. (See, e.g., *Ace*

Tomato, *supra*, 41 ALRB No. 5, pp. 41-42 ["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."]; *Adam Dairy*, *supra*, 4 ALRB No. 24, p. 26 [analyzing each employee's work history to determine vacation eligibility "would be unwieldy, time-consuming, and not conducive to fostering a future course of good faith bargaining between the parties."]) Accordingly, we find such assumptions permissibly and reasonably estimated the monetary losses incurred by employees as a result of the Respondent's failure and refusal to bargain with Charging Party UFW.

(v) The contract averaging methodology does not result in a windfall for Tri-Fanucchi direct hires

The Respondent argues on exception that Tri-Fanucchi Farm direct hire employees "were actually paid rates in excess of minimum wage and in excess of the rates cited by Dr. Martin, and as such, there should be no makewhole adjustment for direct hire employees." The Board has squarely rejected this argument in *San Joaquin Tomato Growers, supra*, 38 ALRB No. 4. There, the respondent claimed that because the employer was already paying the highest piece rate for tomato harvesters, it should owe no makewhole relief. (*Id*. at 14.) The Board dismissed the employer's argument that "paying the highest rate in a geographic area means that nothing more would have been obtained as a result of good faith negotiations." (*Ibid*.) Instead, as could have been the case here if the Respondent had engaged in good-faith bargaining, the Board found that "effective collective bargaining may have achieved not only higher wages, but also

benefits such as health insurance and pension contributions." (*Ibid*.) In fashioning makewhole relief, the Board is under no obligation to accept that Tri-Fanucchi's payment of lower wages to contracted labor constitutes a cost ceiling that we cannot exceed. After all, labor unions can, and regularly do, raise the wages of their members through collective bargaining above the level of nonunion competitors, and an award for makewhole relief may certainly take such factors into account. We therefore deny the Respondent's exception.

(vi) The contract averaging methodology correctly included benefits for Tri-Fanucchi / Baloian employees and farm labor contractor employees

The Respondent argues on exception that the judge erred in including makewhole relief for farm labor contractor employees, citing sixteen contracts that "either excluded farm labor contractor employees or limited benefits to them." However, the judge correctly determined the "supermajority" of contracts in evidence provide the same pay and benefits for farm labor contractor employees as for direct hires. (ALJD 38.) In fact, the contract between UFW and Papagni Fruit Company, which Respondent claims is the most comparable to Tri-Fanucchi, includes employees provided by farm labor contractors in the contract's economic provisions.

Additionally, the Respondent argues on exception that Baloian workers were improperly included in the makewhole specification. As discussed at length above, we adopt the judge's conclusion that Tri-Fanucchi / Baloian employees are properly included in the makewhole bargaining unit. Accordingly, we find that farm labor

contractor employees, including those hired by Baloian to work as the Respondent's Mettler fields harvest employees, are properly included in determining the amount of makewhole relief owed.

III. The Effect of *Cedar Point Nursery* on the Respondent's Liability

In 1977, Charging Party UFW prevailed in the aforementioned representation election to represent the agricultural employees of Joe G. Fanucchi & Sons ("JFS"). While the employer filed unfair labor practice charges alleging improper conduct by UFW during the organizing campaign, these charges were dismissed by the RD. (ALJD 2.) On January 12, 2022, Charles Fanucchi attested a sworn declaration regarding his version of the events surrounding the 1977 election. Fanucchi described that prior to and immediately after the election, UFW organizers took access to various JFS fields to speak to employees, and that these actions were condoned by ALRB agents.

In 2021, over four decades after the certification election, the United States Supreme Court held in *Cedar Point Nursery v. Hassid* that the ALRB regulation granting union organizers a limited right to access agricultural employers' private property constituted a *per se* physical taking under the Fifth and Fourteenth Amendments. (*Cedar Point Nursery v. Hassid* (2021) 594 U.S. 139, 162.) The Court accordingly invalidated the regulation. (*Ibid*.)

During a January 9, 2025 Case Status Conference, the ALJ requested briefing with respect to the effect of *Cedar Point* on the extant compliance proceedings.

On exception, the Respondent makes a "fruit of the poisonous tree" argument, asserting the 1977 election was tainted by permitting union organizers to access employees without providing just compensation for the governmental taking. Respondent extends this argument to assert all proceedings stemming from this 1977 election should be dismissed.

A. Respondent's *Cedar Point* claim is precluded by *res judicata*

We agree with the judge that Respondent's attempt to overturn the election results at this eleventh hour is barred by the doctrine of *res judicata*. Pursuant to California law, *res judicata* "not only precludes relitigation of claims resolved in a prior action, but it also precludes litigation of claims that ***could have been*** brought in the prior action but were not." (*Franceschi v. Franchise Tax Bd.* (2016) 1 Cal.App.5th 247, 258 [emphasis original].) Accordingly, "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it ***could*** **have been** raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." (*Id*., quoting *Warga v. Cooper* (1996) 44 Cal.App.4th 371, 377–378 [emphasis original].)

Here, the Respondent never pled in its objections to the 1977 election, in its 1994 and 1997 unfair labor practice charges, or in the liability portion of the instant unfair labor practice proceeding that any alleged conduct by the ALRB in 1977 constituted an unconstitutional taking. (ALJD 57.)[22] The Respondent could have

[22] We are unpersuaded by Respondent's assertion that presenting such an argument would have been futile because the Supreme Court of California upheld the

presented its Fifth Amendment Takings Clause argument at any one of numerous occasions during the lengthy procedural posture of this case, but decided to raise it only during the compliance stage of the proceedings. Therefore, we find the claim is precluded pursuant to the doctrine of *res judicata.*

B. Respondent's *Cedar Point* argument is barred by the law of the case

Additionally, we deny the Respondent's *Cedar Point* exception based on the law-of-the-case doctrine. (ALJD 58-61.) Pursuant to this legal principle, where an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal. . ." (*People v. Barragan* (2004) 32 Cal.4th 236, 246; quoting *Kowis v. Howard* (1992) 3 Cal.4th 888, 893.) This doctrine has been applied in the past to ensure the finality of ALRB decisions.

In *George Arakelian Farms*, the Board determined the employer had violated the Act by failing to bargain with the collective-bargaining representative of its unit employees, and ordered a makewhole remedy. (*George Arakelian Farms, Inc*. (1982) 8 ALRB No. 36, p. 19.) Subsequently, the California Court of Appeal, Third Appellate

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constitutionality of the ALRB regulation in question. We note that Respondent's counsel, Howard Sagasar, was co-counsel for the plaintiffs and co-authored the initial compliant in *Cedar Point Nursery v. Hassid* (9th Cir. 2021) 5 F.4th 1098; (see *Cedar Point Nursery v. Gould*, *supra*, 2016 U.S.Dist.LEXIS 51819.) Accordingly, such an argument could have been, and subsequently was, advanced before the courts.

District issued the *Dal Porto* decision, modifying the standard by which parties must establish, by burden of persuasion, whether makewhole liability should be owed. (*William Dal Porto & Sons, Inc. v. ALRB* (1987) 191 Cal.App.3d 1195, 1208-1209.)

The employer thereafter appealed, arguing that *Dal Porto* constituted a change in law which entitled it to reopen the liability phase of the case and reconsider the makewhole order. (*George Arakelian Farms v. ALRB* (1989) 49 Cal.3d 1279, 1285.) However, in *George Arakelian v. ALRB*, the California Supreme Court stressed that "the doctrine of the law of the case serves to promote finality of litigation by preventing a party from relitigating questions previously decided by a reviewing court." (*Id*. at 1291.) While noting three narrow exceptions, the Court "caution[ed] that the Board should not lightly presume the existence of these exceptions. . ." (*Ibid*.) Thus, while recognizing that *Dal Porto* represented a change in law, the Court determined that "not all changes in the law justify disregarding the established law of the case. Instead, there must be a change in the *controlling* rules of law," such as when the changed provision may control the outcome of the proceeding. (*Id*. at 1292 fn. 9.) The Court observed: "We recognize there are occasional instances in which, to prevent injustice, the Board may reopen a case after a decision by an appellate court because of a change in the controlling rule of law; but we again caution that such cases will arise infrequently and observe that this is not such a case." (*Id*. at 1295.) Accordingly, the Court reversed the Court of Appeal, and the respondent was found liable for the makewhole relief it had owed before the intervening issuance of the *Dal Porto* decision. (*Ibid*.)

Similarly, here, we adopt the judge's determination that UFW's status as exclusive bargaining-unit representative is the law of the case. The Supreme Court's decision in *Cedar Point* simply found that the Board's access regulation constituted a Fifth Amendment "taking" without just compensation. (*Cedar Point Nursery, supra*, 594 U.S. 139 at 162.)[23] This is not a change in a *controlling* rule of law which "would alter the outcome of the proceeding": specifically, whether or not Charging Party UFW prevailed in the 1977 election. (*George Arakelian Farms v. ALRB*, *supra*, 49 Cal.3d 1279 at 1292 fn. 9.) Accordingly, UFW's legal status as exclusive collective-bargaining representative for Tri-Fanucchi employees, and Tri-Fanucchi's concomitant obligation to bargain with the union in good faith, is the law of the case under California Supreme Court precedent.

C. <u>The holding of *Cedar Point* is irrelevant to this compliance proceeding</u>

Although we find that the Respondent's Cedar Point arguments are barred, even if we were to consider them, we agree with the judge that the Respondent's *Cedar Point* exception has no merit. As a threshold issue, the Respondent has not met its burden

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[23] We note that in *Cedar Point*, the U.S. Supreme Court did not order the retroactive invalidation of all elections where a union had taken access under the ALRB's access regulation. Nor is the adoption of a "fruit of the poisonous tree" doctrine urged upon us by the Respondent the inevitable consequence of the *Cedar Point* decision. The Supreme Court's *Cedar Point* decision left open the option for a labor board, such as the ALRB, to fashion an access regulation that provided the payment of "just compensation" for the governmental taking. (See, e.g., 594 U.S. 139 at 152 [noting that it was the growers' claim for an "***uncompensated*** taking" which was found to be violative of the Fifth and Fourteenth Amendment] [emphasis added].)

of establishing that during the 1977 election, UFW utilized the 3-hour per day, 120-day per year access regulation found infirm in *Cedar Point*. (ALJD 62-63.) As found by the judge, the declaration by Charles Fanucchi simply states that in 1977, JFS was "served with various papers . . . that we had to give access." We are persuaded by the judge that the Respondent failed to establish, through a 2022 deposition about an event four decades prior, that the ALRB "appropriated a right to invade" during the election in 1977. (ALJD at 61-62.) If Charging Party UFW truly utilized the access regulations found to constitute a taking in *Cedar Point*, the Respondent would have been permitted to limit access to certain times and locations, a fact of which Charles Fanucchi makes no mention. (*Cedar Point Nursery v. Gould* (E.D.Cal.2016) No.1:16-cv-00185-LJO-BAM, 2016 U.S.Dist.LEXIS 51819 at 11 ["To the extent that [the regulation] requires owners to allow access to those they want to exclude, such access is limited to certain times and locations."]; see also Cal. Code Regs., tit. 8, § 20900(e)(3)-(4).)

The Respondent has also produced no evidence to support the facts alleged in Charles Fanucchi's declaration, such as the documentary evidence allegedly served upon JFS by the UFW or the Board. Given these vague claims, we find, in agreement with the judge, that there is insufficient evidence to substantiate the assertion that the UFW utilized the ALRB access regulation during the 1977 election.[24]

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[24] This is further evidenced by the Respondent's filing of a subsequent ULP charge against UFW, which was eventually dismissed and which the Respondent did not appeal. (ALJD at 65.) Furthermore, even if we assumed that the UFW did take access pursuant to the access regulation, and even if we further assumed that the access was improperly

For the above reasons, we agree with the judge and reject Respondent's exceptions regarding any potential legal impact of *Cedar Point Nursery* on the compliance stage of the proceedings.

IV. The Judge's Refusal to Toll the Respondent's Makewhole Liability

A. Background

On December 15, 2017, UFW negotiator Armando Elenes sent an information request to Respondent's counsel seeking employee payroll records, including those of farm labor contractor ("FLC") employees. Tri-Fanucchi provided a partial response on February 8, 2018, providing information on direct hires but failing to include payroll records from FLC-provided employees. The UFW reiterated its request for the payroll records of FLC-provided employees on November 30, 2018. The UFW received some of the FLC-provided employee records in February of 2020, but only after the ALRB secured a judicial order compelling the Respondent to provide the requested information. The UFW again reiterated its request in April of 2021. The Respondent claimed such information was immaterial to bargaining a future agreement. On June 9, 2022, Respondent again asserted that information about FLC-provided employees was

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taken, this would not require invalidation of the election. (See *Coastal Berry Company, LLC* (2000) 26 ALRB No. 1, p. 15 [affirming dismissal of alleged access violations "absent a showing of intimidation or coercion that would tend to interfere with employee choice."]; see also *Carl Dobler and Sons* (1985) 11 ALRB No. 37, p. 9 ["incidents of access abuse will not in themselves constitute grounds to set aside an election" when unaccompanied by other objectionable conduct.]) While the Charles Fanucchi declaration asserts that UFW organizers engaged in repeated trespass and severe intimidation, these claims are uncredited by the judge. (ALJD 60-61.)

unnecessary for negotiations. To date, good-faith negotiations between the parties have not commenced.

The Respondent concedes it failed to provide payroll information regarding FLC-provided employees. The Respondent states it failed to such information because this information "is only potentially relevant for a backpay specification proceeding and not for negotiation of a collective bargaining agreement that applies to ***future years***." (Emphasis original.) The Respondent posits, "it is still unknown why such information would be relevant to negotiations of future potential wages and/or benefits in a collective bargaining agreement." The Respondent asserts its counsel, Howard Sagaser, has since negotiated collective-bargaining agreements on behalf of two other employers with less information than requested by the UFW from Tri-Fanucchi.

On exception, the Respondent alleges any backpay liability should be tolled as of February 8, 2018, the date upon which it provided to UFW "all the information necessary to negotiate a collective bargaining agreement." However, Respondent concedes it failed to provide Charging Party UFW with information about FLC-provided employees.

B. <u>Analysis</u>

"One aspect of the duty to bargain 'collectively in good faith with labor organizations' (Lab. Code § 1153, subd. (c)) requires the employer to make a reasonable and diligent effort to comply with the union's request for relevant information." (*Cardinal Distributing Co. v. ALRB* (1984) 159 Cal.App.3d 758, 762, citing *O. P.*

Murphy & Sons (1978) 5 ALRB No. 63.) "Information pertaining employees in the bargaining unit," including farm labor contractor employees, "is presumptively relevant to a union's representational duties. . ." (*Gerawan Farming, Inc.* (2018) 44 ALRB No. 1, p. 37, quoting *Ralphs Grocery Co.* (2008) 352 NLRB 128, 134, affd. and incorporated by reference in (2010) 355 NLRB 1279.)[25]

An employer's failure to provide requested relevant information makes it impossible for the union to create proposals or counterproposals, and thus, to engage in meaningful collective bargaining. (See, e.g., *E.I. du Pont & Co.* (2006) 346 NLRB 553, 558, enfd. (D.C. Cir. 2007) 489 F.3d 1310; *CP Anchorage Hotel 2, LLC d/b/a Hilton Anchorage* (2021) 370 NLRB No. 83, slip op. at 3 fn. 11, 4 [finding respondent violated Sec. 8(a)(5) and (1) by declaring impasse and unilaterally implementing proposal, even where union had not made a counterproposal, as "the Respondent's failure to timely provide the information precluded a valid impasse."], enfd. mem. *sub nom*. *UNITE HERE! Local 878 v. NLRB* (9th Cir. 2002) 2022 WL 3010171; *Arbah Hotel Corp. d/b/a Meadowlands View Hotel* (2019) 368 NLRB No. 119, slip op. at 21 ["It is well-settled that a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties."] [internal quotations omitted], enfd. (3d Cir. 2021) 845 F. Appx. 181; accord *Hendrickson Trucking*

[25] Additionally, Labor Code section 1695.55 requires that farm labor contractors provide growers with payroll records of employees, and growers are required to retain such records for a period of years thereafter. (Lab. Code § 1695.55, subds. (a) & (b).)

Co. (2017) 365 NLRB No. 139, slip op. at 2, 2 fn. 6, enfd. (D.C. Cir. 2019) 770 Fed. Appx. 1, 5 ["the Board's holding that Hendrickson Trucking could not declare an impasse because it had failed to provide the Union the financial information it needed to evaluate the Company's representations was grounded in settled law."])

Here, FLC-provided employees constitute over 99% of the employees in the bargaining unit. Accordingly, the Respondent's refusal to provide the UFW with information about FLC-provided employees has prevented the union from crafting meaningful proposals or counterproposals, effectively foreclosing good-faith bargaining between the parties. (See *D'Arrigo Bros. Co. of California* (2006) 32 ALRB No. 1, p. 19 [declining to toll the makewhole period even after the union stopped requesting bargaining, as the employer's failure to respond to information requests "had given [the union] every reason to believe further bargaining was going to be futile."], vacated by Board on other grounds per settlement agreement (2007) 33 ALRB No. 5.)

In these circumstances, we find the judge properly declined to toll the Respondent's makewhole liability, and, consistent with longstanding Board precedent, hold that the Respondent's liability continues to accrue until it begins bargaining in good faith with Charging Party UFW. (See *Ruline Nursery Co. v. ALRB* (1985) 169 Cal.App.3d 247, 263.)

V. Respondent's Allegations of Perceived Bias

In its exceptions, the Respondent alleges that the ALJ's makewhole award should be dismissed with prejudice because of perceived bias. Alternatively, the

Respondent requests that the case be remanded and decided *de novo* by a different ALJ. We reject the Respondent's request and find no actual or perceived bias on the part of Judge Gauger.

Labor Code section 1145 provides that employees, including administrative law officers, "shall perform their duties in an objective and impartial manner without prejudice toward any party subject to the jurisdiction of the board." (Lab. Code § 1145.) Here, while the judge actively asked questions of witnesses and objected to improper questions, this conduct was within the judge's authority under Board regulation 20262, subdivision (c) to "regulate the course of the hearing" and subdivision (j) to "call, examine, and cross-examine witnesses." (See Cal. Code Regs., tit.8 § 20262, subds. (c) & (j).)

Having fully examined the record, we are convinced that the judge showed no evidence of bias and avoided even the appearance of partiality. We decline to find, as requested by the Respondent, that Judge Gauger should have made a preemptive disclosure on the record as to whether his former law firm, Weinberg, Roger & Rosenfeld, had engaged in any representation of Charging Party UFW. The Respondent presents no evidence that Judge Gauger himself, or his former firm in general, represented the Charging Party during the relevant time period or in the past. Further, while David A. Rosenfeld, a named partner at Weinberg, Roger & Rosenfeld, co-

authored an amicus brief in *Cedar Point Nursery* along with counsel from other firms,[26] Respondent presents no evidence Judge Gauger was involved in the drafting or submission of this brief. Finally, we decline to find Judge Gauger's former email address, "emgauger@unioncounsel.net," indicates any bias against the Respondent or towards unions. We take judicial notice of the fact that "unioncounsel.net" is simply the domain name for Weinberg, Roger & Rosenfeld, P.C.

Given our thorough examination of the record and determination that the judge avoided even the appearance of partiality, we deny the Respondent's exception and request for dismissal or *de novo* review of the decision.

VI. The Judge's Imposition of a Bar from Practice before the ALRB

The judge determined that Respondent's primary counsel, Howard Sagaser, advanced a number of frivolous claims alleging that the Respondent failed to receive information which had already been provided. (ALJD 102.) The judge also found that when counsel Sagaser was testifying as an expert witness in the area of comparable contracts, he made a number of false or misleading statements. (*Id*. at 102-103.) Finally, the judge found counsel Sagaser's comportment in the hearing, including the presentation of allegedly meritless claims and presentation of unnecessary and redundant motions, was intended to vexatiously delay or prolong the proceedings. (*Id*. at 103.) Accordingly, the

[26] https://www.supremecourt.gov/DocketPDF/20/20-107/168796/20210211155605647_CALIFORNIA%20LABOR%20AMICUS%20BRIEF%20IN%20CEDAR%20POINT.pdf

judge recommended the Board bar Howard Sagaser from practice before the ALRB for a period of two years.

On exception, Respondent asserts the judge's recommendation is unlawfully punitive. In addition to arguing that Respondent's counsel acted permissibly and testified truthfully, Respondent asserts that penalizing its counsel for actively pursuing its defense would be a violation of Respondent's First Amendment rights and counsel Sagaser's due process rights.

The judge based his two-year recommended suspension, at least in part, on the NLRB's authority to discipline attorneys. (ALJD 104.) The NLRB's authority is set forth in section 102.177 of its regulations. Specifically, subdivision (a) provides that "[a]ny attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section." (29 CFR §102.177, subd. (a).) Subdivision (b) states: "misconduct by any person at any hearing before an Administrative Law Judge, Hearing Officer, or the Board may be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (c) of this section for handling allegations of misconduct, the Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing." (29 CFR §102.177, subd. (b).) Of greatest relevance here, subdivision (d) provides that:

"[m]isconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, may be grounds for discipline. Such misconduct of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions." (29 CFR §102.177, subd. (d).)

The subsequent subdivision (e) parts (1) – (12) then set forth in great depth the procedural requirements surrounding the hearing that must be held in order to impose attorney discipline. (29 CFR §102.177, subd. (e).) The NLRB's general practice, set forth in the NLRB Bench Book § 6–630 – Suspension of Counsel, is to refer the attorney subject to a misconduct allegation to the "Investigating Officer," which at the NLRB is the Associate General Counsel in the Division of Operations Management. (See, e.g., *Station Casinos LLC d/b/a Palms Casino Resort*, req. for expedited review den. 8/2/22, at p. 1 fn. 1 [referring counsel to Investigating Officer for repeatedly referring to National Right to Work Legal Defense Fund with the pejorative "Right to Shirk"); compare with *Laborers' International Union of North America Local 872* (2023) 372 NLRB No. 41, slip op. at 1-2 (warning, but declining to refer counsel to Investigating Officer *sua sponte* in the absence of a specific misconduct allegation].)

The ALRB regulations contain a roughly-parallel provision in Board regulation section 20800 – Practice Before the Board. (Cal. Code Regs., tit. 8, § 20800.) Subdivision (a) provides: "[a]ttorneys and other representatives of parties appearing before the Board or engaged in any hearing or proceeding institute pursuant to the Act

shall not engage in disruptive or abusive conduct with respect to persons operating under authority delegated by this Board or any hearings convened pursuant to the authority conferred upon this Board. Such conduct during the course of any official proceedings including, but not limited to, pre-election conferences, conduct of elections, and any hearings under the Board's auspices shall be grounds for summary exclusion from the proceeding by the agent of the Board in charge of such proceeding." (Cal. Code Regs., tit. 8, § 20800, subd. (a).) Subdivision (b) states: "[a]ggravated misconduct, when engaged in by a non-attorney representative of a party during the course of any official proceedings including, but not limited to, pre-election conferences, conduct of elections, or any investigations or hearings conducted under the Board's auspices, shall be grounds for suspension or disbarment from practice before the Board after due notice is given and a hearing is held. Attorneys who engage in aggravated misconduct during any Board proceeding shall be reported to the State Bar for disciplinary action." (Cal. Code Regs., tit. 8, § 20800, subd. (b).)

Read plainly, this regulation states that (a) ***attorneys*** may be summarily excluded from Board proceedings for disruptive or abusive conduct, and (b) ***non-attorneys*** may be suspended or disbarred from practice after notice and a hearing. The only remedy specifically provided for aggravated misconduct by attorneys is referral to the State Bar. Thus, in contrast with the NLRB, the Board's regulations lack a specific mechanism for suspending attorneys from practice before the ALRB.

Accordingly, given the regulations as they currently stand, we deny the judge's recommendation to bar counsel Sagasar from practice before the Board for a period of two years. We note the Board's current regulations do not provide a mechanism to suspend or disbar attorneys from practice, only to report them to the State Bar. We decline to do so in the instant case.[27]

VII. The Interest Rate for Makewhole Relief under the ALRB

In calculating the interest on the makewhole amount owed by the Respondent, the judge denied Charging Party UFW's request, made in response to the January 9, 2025 Case Status Conference, that the Board adopt California's statutory 10% interest rate for the payment of back wages. (ALJD 96.) Finding that the Board was bound by NLRB precedent, the judge determined the makewhole amount should follow the formula set forth in *Kentucky River Medical Center* (2010) 356 NLRB 6 at 9, which calculates interest based on the rate used for the underpayment of taxes, namely the "short-term Federal rate,"[28] plus three percent, compounded daily.

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[27] The Board recognizes the Administrative Law Judges and Investigative Hearing Examiners must have tools to both maintain the integrity of our processes and run their hearings efficiently and in accordance with professional rules of conduct and ethics. The ALJ's allegations of misconduct and proposed bar in this matter, in combination with other disruptions and allegations of unprofessional conduct by attorneys in other matters within the past year, have demonstrated the Board needs to review and revise its processes to address professional misconduct for attorneys and non-attorneys participating in our proceedings. The Chair is calling on the Regulations Subcommittee to review our regulations governing discipline of participants and review other regulations for discipline in other areas of administrative law and provide a recommendation to the Board regarding what changes it may make to improve our processes in this regard.

[28] *New Horizons* (1987) 283 NLRB 1173 at 1173.

In contrast to the National Labor Relations Act (NLRA),[29] California Labor Code section 98.1, subdivision (c) mandates that all backpay awards issued by the Labor Commissioner accrue interest at the rate prescribed by subdivision (b) of Section 3289 of the Civil Code, which sets forth the rate for a breach of contract. (Lab. Code § 98.1, subd. (c).) The current interest rate prescribed in Section 3289 is 10%. (Civ. Code § 3289, subd. (b).)

While the judge recommended "that the Board has discretion to apply the 10% rule," the judge found that the Board was bound "to follow applicable precedents of the National Labor Relations Board, as amended," pursuant to Labor Code section 1148. However, in the interim since the issuance of the ALJ's decision, AB 288 (Stat. of 2025, Ch. 139, McKinnor) has modified Labor Code section 1148, which now provides that "[t]he board ***may*** follow applicable precedents of the National Labor Relations Act, as amended, which shall constitute persuasive authority in the interpretation and application of this part, ***but shall not be obligated*** to follow those precedents where the board deems it inappropriate to do so." (Lab. Code § 1148 [emphasis added].) In instances in which NLRB precedent conflicts with state law, the Board should follow California law. (See, e.g., *Belridge Farms v. ALRB* (1978) 21 Cal.3d 551, 557 ["Although the state statute was patterned after the federal act, decisions construing the federal act are not binding on our construction of the ALRA."]; *J.R. Norton Co. v. ALRB* (1979) 26 Cal.3d 1, 29 ["When

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[29] The National Labor Relations Act (NLRA) is codified at 29 U.S.C. § 151 et seq.

the board relies upon precedents under the National Labor Relations Act, it must do so in light of the language and intent of our statute. Federal precedents are not controlling where inconsistent with the Agricultural Labor Relations Act or its policies."])

We find that makewhole relief and other forms of Board-ordered backpay constitute backpay awards comparable to those issued pursuant to Labor Code § 98.1(c). Accordingly, and especially in light of the revised language of Labor Code § 1148, we hold that the Board will calculate backpay using California's statutory 10% interest rate in this and future cases. While the Charging Party did not except to the judge's adverse finding in this respect, the Board may issue remedies even where they are not raised in a party's exception. (See *Voorhees Care & Rehabilitation Center* (2021) 371 NLRB No. 22, slip op. at 4 fn. 14 ["[T]he Board may award a remedy on its own initiative."], citing *J. Picini Flooring* (2010) 356 NLRB 11, 12 fn. 5 ["[I]t is well settled that the Board has the authority to consider remedial issues sua sponte."]; *Danbury Ambulance Service, Inc.* (2020) 369 NLRB No. 68, slip op. at 3 fn. 3 ["[R]emedial matters are traditionally within the Board's province and may be addressed sua sponte."]; *HTH Corp.* (2014) 361 NLRB 709, 710 ["We have broad discretion to exercise our remedial authority under Section 10 (c) of the Act even when no party has taken issue with the judge's recommended remedies."], enfd. in rel. part (D.C. Cir. 2016) 823 F.3d 668.)

Here, there is no valid argument against retroactively adopting the Charging Party's request for an interest rate that conforms with California state statute during the compliance portion of the proceedings. As a threshold issue, the judge

permitted the parties to thoroughly brief the issue during the January 9, 2025 Case Status Conference. (ALJD 96.) Next, it is NLRB policy to apply changes to its remedial schema retroactively "all pending cases in whatever stage," provided there is no "manifest injustice" in doing so. (*King Soopers, Inc.* (2016) 364 NLRB 1153, 1160 [finding no manifest injustice where case "involves a remedial issue, and thus, reliance on preexisting law is not an issue," respondent was on notice remedial issue would be raised, and parties had an opportunity to litigate the issue], enfd. in relevant part (D.C. Cir. 2017) 859 F.3d 23; accord *Pressroom Cleaners*, (2014) 361 NLRB 643, 648 [finding no manifest injustice in applying a remedial change retroactively].)

For the reasons set forth above, we overrule the judge in this respect and will apply California's statutory rate for back wages, as determined by Labor Code section 98.1, subdivision (c) and Civil Code section 3289, subdivision (b), to the Board's makewhole relief and other forms of Board-ordered backpay. Consistent with Board precedent, we will apply this remedy retroactively in this and all other pending cases.[30]

ORDER

The Board ORDERS that this case be remanded to the Region for further proceedings consistent with this Decision, specifically to utilize the interest rate for backpay awards set forth in Labor Code section 98.1, subdivision (c) and Civil Code

[30] Further, consistent with *Kentucky River Medical Center, supra*, 356 NLRB 6 at 9, this amount will be compounded daily.

section 3289, subdivision (b) and adopted in this Decision. Pursuant to California Code of Regulations, title 8, section 20292, the parties shall have the opportunity to file an answer to the specification, 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. 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: April 27, 2026

Victoria Hassid, Chair

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member

CASE SUMMARY

TRI-FANUCCHI FARMS Case Nos. 2013-CE-008-VIS
(United Farm Workers of America) 2013-CE-014-VIS

Background

In *Tri-Fanucchi Farms* (2014) 40 ALRB No. 4, the Board found that Tri-Fanucchi Farms ("Tri-Fanucchi" or "the Respondent") violated section 1153, subdivisions (a) and (e) of the Agricultural Labor Relations Act ("ALRA" or "Act") by failing and refusing to bargain with the Charging Party United Farm Workers ("UFW") and refusing to respond to requests for relevant information. The Board ordered a bargaining makewhole remedy be paid to Tri-Fanucchi's agricultural employees who worked for the Respondent during the makewhole period of October 19, 2012 until the date at which the Respondent commences bargaining in good faith. After appeal through the state courts, the matter was released to the Board's Visalia Regional Office for compliance with the Board's order on May 16, 2018.

On March 15, 2022, the Regional Director issued a Notice of Hearing and Makewhole Specification. On September 22, 2022, the Regional Director issued a First Amended Makewhole Methodology. On October 18, 2022, the Regional Director issued a Second Amended Makewhole Methodology and Specification, setting forth a makewhole amount of $4,517,190.76, plus interest, payable to approximately 6,261 employees. The formula used to calculate this amount was based on average wages and benefits found in 25 collective-bargaining agreements between the UFW and various growers that were in effect during the makewhole period of October 19, 2012, through June 30, 2021. Tri-Fanucchi's November 15, 2022 answer to the makewhole specification opposed the Region's method of calculating the specification, and invoked, *inter alia*, the doctrine of laches, unclean hands, and failure to mitigate damages.

ALJ Decision

The Administrative Law Judge ("ALJ" or "judge") issued a recommended decision on September 24, 2025. The judge found the Regional Director met her burden of establishing that the makewhole formula used to calculate the remedy was reasonable, and that Tri-Fanucchi failed to meet its burden of showing that the Regional Director's formula was unreasonable, arbitrary, or inconsistent with Board precedent. The judge also concluded that Tri-Fanucchi failed to establish that there was a more appropriate method of calculating bargaining makewhole. The ALJ rejected Tri-Fanucchi's arguments that harvest employees hired from Baloian Packing Co. d/b/a/ Baloian Farms ("Baloian") should be excluded from the makewhole specification, that makewhole backpay should be tolled after February 18, 2018, and that the intervening decision in *Cedar Point Nursery v. Hassid* (2020) 594 US 139 invalidated the 1977 election upon which the UFW was certified. Applying the interest rate utilized by the National Labor Relations Board ("NLRB"), the judge determined that the Respondent's makewhole liability for the period of October 19, 2012, through March 27, 2023, including interest through March 31, 2025, was $7,875,438.87, and continued to accrue. Finally, the judge found that the comportment of Respondent's counsel during the hearing, including the submission of allegedly meritless claims and the advancement of unnecessary and redundant motions to delay the proceedings, warranted a suspension of practice before the Board for a period of two years.

Board Decision

The Board substantially adopted the findings and determinations of the ALJ. The Board found that the harvest employees hired by Tri-Fanucchi through Baloian pursuant to an informal "true-up" agreement were properly included as Tri-Fanucchi bargaining-unit employees in the makewhole specification. The Board found that the judge correctly determined there were no comparable contracts to approximate the economic harm caused by the Respondent's failure to bargain, and found the statewide contract averaging methodology advanced by the Regional Direct was a reasonable and

appropriate method of calculating employees' loss. The Board determined that the Respondent's *Cedar Point* argument was precluded by *res judicata* and the law-of-the-case doctrine, and that *Cedar Point* was irrelevant to this compliance proceeding. The Board upheld the judge's refusal to toll the Respondent's makewhole liability, finding that Tri-Fanucchi's failure to provide necessary and relevant information requested by the Union precluded good-faith bargaining. The Board dismissed Tri-Fanucchi's allegations of perceived bias on the part of the ALJ. The Board found that under its current regulations, the only remedy permitted for the conduct of Respondent's counsel would be to report such conduct to the state bar. Accordingly, the Board declined to adopt the judge's recommended two-year suspension. Finally, the Board determined that its makewhole relief and other forms of Board-ordered backpay constituted backpay awards comparable to those issued pursuant to Labor Code § 98.1(c), which sets forth an interest rate different than that applied by the NLRB. In light of the revised language of Labor Code section 1148, which was modified to state the Board "shall not be obligated to follow [NLRB] precedents where the board deems it inappropriate to do so," the Board determined that it would no longer apply the NLRB's interest rate but would follow the interest rate prescribed by California statute. The Board thus remanded the matter to the Region for the issuance of a revised bargaining makewhole specification calculated in accordance with interest rate set forth in its Decision.

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