

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ACE TOMATO COMPANY, INC., ) Case No. 93-CE-037-VI  
A California Corporation, DELTA PRE- ) (20 ALRB No. 7)  
PACK CO., A California Company, )  
BERENDA RANCH LLC, A Limited )  
Liability Company, ) DECISION OF THE  
CHRISTOPHER G. LAGORIO, An ) ADMINISTRATIVE LAW  
Individual, CHRISTOPHER G. ) JUDGE  
LAGORIO TRUSTS, CREEKSIDE )  
VINEYARDS, INC., A California )  
Corporation, DEAN JANSSEN, )  
An Individual, JANN JANSSEN, An )  
Individual, KATHLEEN LAGORIO )  
JANSSEN, An Individual, KATHLEEN )  
LAGORIO JANSSEN TRUST, K.L.J. )  
LLC, Limited Liability Company, )  
K.L. JANSSEN LIVING TRUST, )  
JANSSEN PROPERTIES, LLC, A )  
Limited Liability Company, JANSSEN )  
& SONS LLC, Limited Liability )  
Company, LAGORIO FARMING CO., )  
INC., A California Corporation, )  
LAGORIO FARMS, LLC, A )  
Limited Liability Company, )  
LAGORIO LEASING CO., )  
A California Company, LAGORIO )  
PROPERTIES LP, A Limited )  
Partnership, ROLLING HILLS )  
VINEYARD LP, A Limited )  
Partnership, QUAIL CREEK )  
VINEYARD, a California Company, )  
)  
Respondents, )  
)  
and )  
)  
UNITED FARM WORKERS OF )  
AMERICA, )  
)  
)  
Charging Party. )

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Appearances:

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

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

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

By Post-Hearing Brief:

Mario Martinez  
United Farm Workers Legal Department  
Bakersfield, California

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

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<sup>1</sup> General Counsel initially prosecuted this case, but the Board subsequently reassigned the matter to the Visalia Regional Director.

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

## **FINDINGS OF FACT**

### **Background**

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

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

<sup>3</sup> (1992) 18 ALRB No. 9.

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

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

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

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

<sup>5</sup> See Administrative Order 2015-2.

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

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

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

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

### **Bargaining Makewhole**

#### **The Makewhole Period:**

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

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

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

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

### **Workers Entitled To Receive Bargaining Makewhole:**

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

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

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

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

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

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

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

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

<sup>8</sup> The Regional Director counts 2045 names.

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

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

### **Makewhole Methodology:**

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

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

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

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

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

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

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

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

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<sup>10</sup> Magula was qualified as an expert in economic damages, while Rosenberg was qualified as an expert in California agricultural human resources issues.

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

### **Derivative Liability**

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

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

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

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

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

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

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

<sup>13</sup> At one point, Lagorio Properties sold about half the tomatoes purchased by Respondent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>17</sup> Lipman agreed to allow Respondent to complete the 2012 season, and leased back the operation, until December 31, 2012.

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

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

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

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

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

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

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

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

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<sup>18</sup> The record does not explain the source of this debt.

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

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

### **ANALYSIS AND CONCLUSIONS OF LAW**

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

### **Bargaining Makewhole**

#### **Respondent's Equitable Defenses and Piecerate Defense:**

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

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

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

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

**The Makewhole Period:**

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

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<sup>21</sup> The California Court of Appeal has granted a writ of review in that case, which is pending.

<sup>22</sup> In this regard, counsel indicated that Janssen discovered the notes during his testimony. In making this representation, counsel was not testifying, and such

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

**The Makewhole Class:**

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

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

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

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

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

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

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

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

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

**Makewhole Methodology:**

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

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

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

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

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

applied to the higher-paid employees herein. Based on the foregoing, the makewhole calculations per employee will be as follows:<sup>24</sup>

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

Health plan contributions: \$.99/hour.

Pension plan contributions: \$.11/hour.

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

### **Derivative Liability**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **ORDER**

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

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<sup>26</sup> In the event no exceptions are filed, this Decision will become the Decision of the Board.

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

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

Dated: April 14, 2015

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Douglas Gallop  
Administrative Law Judge, ALRB