STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PREMIERE RASPBERRIES, LLC, Respondent, and UNITED FARM WORKERS OF AMERICA, Charging Party.	)	Case No. 2018-CE-004-SAL (44 ALRB No. 9) (Admin. Order No. 2020-05-P) ORDER DISAPPROVING PARTIES' PROPOSED SETTLEMENT AGREEMENT Admin. Order No. 2020-13-P (May 19, 2020)

This case is pending compliance following the order of the Agricultural Labor Relations Board (ALRB or Board) in *Premiere Raspberries, LLC* (2018) 44 ALRB No. 9. On March 6, 2020, the Board issued an order extending the bargaining makewhole period ordered in 44 ALRB No. 9 until such time as respondent Premiere Raspberries, LLC (Premiere) implements the economic terms of a mandatory mediation and conciliation (MMC) contract previously ordered into effect in *Premiere Raspberries, LLC* (2018) 44 ALRB No. 8. (*Premiere Raspberries, LLC* (Mar. 6, 2020) ALRB Admin. Order No. 2020-05-P.)

Premiere filed a motion for reconsideration of ALRB Administrative Order No. 2020-05-P on March 13, 2020, asserting it and charging party United Farm Workers of America (UFW) had reached a "global" settlement agreement encompassing "Premiere's failure to bargain, and failure to implement the [MMC] contract."[1] We

[1] The background of the parties' ongoing labor dispute involving the certification

ordered the parties to submit their proposed agreement to the regional director for approval pursuant to Board regulation 20298.[2] (*Premiere Raspberries, LLC* (Mar. 24, 2020) ALRB Admin. Order No. 2020-06; *Premiere Raspberries, LLC* (Mar. 25, 2020) ALRB Admin. Order No. 2020-07.) The parties submitted their proposed settlement to the region on April 2, and the region submitted it to the Board on April 10 with a "statement of non-opposition" to the agreement. As set forth below, we do not approve the parties' agreement.[3]

STANDARD OF REVIEW

Board regulation 20298 generally requires Board approval of settlement agreements providing or adjusting remedies in an unfair labor practice proceeding. "While the Board encourages voluntary settlements of labor disputes, the Board only will approve such settlements that are consistent with, and further, the policies of the Agricultural Labor Relations Act [(ALRA or Act)]." (*P&M Vanderpoel Dairy* (July 20, 2017) ALRB Admin. Order No. 2017-07, pp. 1-2, citing *Hess Collection Winery* (2009) 35 ALRB No. 3, p. 9 ["the Board's jurisdiction over settlement agreements requires it to

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of the UFW and the MMC contract ordered into effect by the Board is set forth more fully in our administrative order nos. 2020-04 (case no. 2018-MMC-002) and 2020-05-P (case no. 2018-CE-004-SAL). The parties' agreement also encompasses additional unfair labor practice charge nos. 2018-CE-012-SAL, 2018-CE-035-SAL, 2018-CE-50-SAL, 2020-CE-004-SAL, and 2020-CE-012-SAL.

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

[3] We designate this order as precedential to give guidance to the regions and parties in future proceedings concerning matters relevant to our review of proposed settlement agreements submitted to the Board for approval pursuant to Board regulation 20298. (Board reg. 20287.)

enforce public interests, not private rights, and to reject settlement agreements that are repugnant to the Act"]; *NLRB v. Hiney Printing Co*. (6th Cir. 1984) 733 F.2d 1170, 1171 [noting the NLRB "is charged with serving the public interest to enforce labor relations rights which are public, not private rights"].)

"In deciding whether a settlement effectuates the purposes and policies of the Act, the Board considers 'such factors as the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources.'" (*P&M Vanderpoel Dairy, supra,* ALRB Admin. Order No. 2017-07, p. 2, quoting *Independent Stave Co., Inc*. (1987) 287 NLRB 740, 741.) "The Board additionally considers 'whether the parties to the dispute and the employees affected by the dispute have agreed to the settlement, whether the settlement was the product of a grievance-arbitration mechanism, and whether the agreement was entered into voluntarily by the parties, without fraud or coercion.'" (*Ibid*.) "One additional factor stressed by the Board is that a settlement agreement should be given effect 'only where the unfair labor practices are "substantially remedied" by the agreement.'" (*P&M Vanderpoel Dairy, supra,* ALRB Admin. Order No. 2017-07, p. 2, quoting *Independent Stave Co., Inc*., *supra,* 287 NLRB 740, 741-742; *Robinson Freight Lines* (1957) 117 NLRB 1483, 1485.)

DISCUSSION

I. Regulatory Requirements Governing the Submission of Settlements to the Board for Approval Are Not Met Here.

Board regulation 20298, subdivisions (b)(1) and (c)(2) require a bilateral

formal settlement agreement such as this one be approved and signed by the regional director. In addition, subdivision (f)(1)(A) requires the region to provide a "full statement … on behalf of the General Counsel in support of the agreement" at the time it submits a settlement to the Board for approval. (Board reg. 20298, subd. (f)(1)(A).) None of these regulatory requirements are met here. In fact, the region states it does not "actively support" the settlement, and instead characterizes its position as "non-opposition" to the agreement.

These regulatory conditions serve an important function. They prevent parties from submitting settlement agreements to the Board adjusting unfair labor practice remedies without the approval and support of the General Counsel. The regulation contemplates that the region will be involved in the development of settlement terms. Indeed, the region is charged with the responsibility of prosecuting compliance proceedings, similar to the General Counsel's role in prosecuting unfair labor practice cases (Lab. Code, § 1149; see *United Farm Workers of America (Garcia)* (2019) 45 ALRB No. 4, pp. 12-13; *Casino Pauma v. NLRB* (9th Cir. 2018) 888 F.3d 1066, 1078, fn. 4), and the regulation requires the region to sign any settlement. (Board reg. 20298, subd. (c).) In this case, it does not appear the region was involved in the discussions leading to the parties' proposed settlement. Rather, the record suggests the parties negotiated the proposed settlement and only submitted it to the region after-the-fact. While the regulation does not prohibit a charging party and respondent from *commencing* settlement negotiations on their own, the regulation undoubtedly contemplates the region's involvement in any settlement discussions *before* the terms of any agreement are

finalized, including for the purpose of ensuring that any agreement is consistent with the purposes of the Act.

The Board cannot approve any agreement submitted to it that does not comply with these regulatory requirements.

II. Further Development of the Record Is Necessary to Provide the Board a More Complete Context for Reviewing a Proposed Settlement of This Case.

Our review of the parties' proposed settlement under *Independent Stave* presents some difficult issues. The circumstances of this case, including Premiere's sudden announcement it would be shutting down its operations promptly upon the conclusion of its unsuccessful litigation challenges to our orders in 44 ALRB Nos. 8 and 9, are extremely troubling. (See *Premiere Raspberries, LLC*, *supra*, ALRB Admin. Order No. 2020-05-P, pp. 9-10.)

The region states that Premiere submitted declarations attesting to its financial condition, in addition to financial statements and a bank statement dated April 8, 2020. However, several things are unclear. First, the record does not identify the declarants attesting to Premiere's financial condition, including whether the declarations are from an officer of the company or employee with personal knowledge of the facts asserted. (See *Gerawan Farming, Inc*. (June 19, 2017) ALRB Admin. Order No. 2017-06, p. 6 [declaration from employer's outside counsel lacked personal knowledge of facts asserted], citing *South Lakes Dairy Farms* (2013) 39 ALRB No. 2, p. 10 ["motions filed before the Board in which facts not in the record are alleged should be accompanied by a declaration filed under penalty of perjury by a person with personal knowledge of those

facts"].) The exact date range of the financial statements provided by Premiere also is unclear. In this respect, we note it appears Premiere undertook steps to drastically reduce the size of its workforce or scope of operations following our certification of the UFW. (See *Premiere Raspberries, LLC* (2017) 43 ALRB No. 2.) When the UFW filed its petition for certification on August 2, 2017, Premiere stated it had 588 agricultural employees in the pay period immediately preceding the filing of the petition. At the election a week later 520 total votes were cast.[4] However, the bargaining makewhole calculations as estimated by the region reveal a stark disparity between the amount owed during the roughly eight months encompassed in our original decision in 44 ALRB No. 9 and that owed during the approximately 20 months since we ordered the MMC contract into effect, as encompassed in our administrative order no. 2020-05-P.[5] This disparity suggests a drastic reduction in Premiere's workforce by the time the MMC contract took effect, particularly in light of the economic increases obtained by the UFW in the contract.

As we explained in *Premiere Raspberries, LLC, supra,* ALRB Admin. Order No. 2020-05-P, at page 9, footnote 10, "An employer's conduct in repudiating and attempting to avoid a collective bargaining agreement by closing down its business is 'inherently destructive of important employee rights' under our Act." (Citing *Esmark,*

[4] There were 517 valid ballots cast and three void ballots.

[5] The region estimates Premiere owes about $1,856,639 during the period preceding the effective date of the MMC contract, and $895,583 for the period since the MMC contract was ordered into effect.

Inc. v. NLRB (7th Cir. 1989) 887 F.2d 739, 749, quoting *NLRB v. Haberman Construction Co.* (5th Cir. 1981) 641 F.2d 351, 360.) Premiere flouted its obligations under our Act and prior orders by refusing to implement the MMC contract, and then announced its impending closure promptly upon the conclusion of its unsuccessful attempt to challenge the contract in litigation. At this time, however, it appears Premiere only has stated it is ceasing its farming operations. There is no mention in the record of this case of any bankruptcy proceeding involving Premiere. Nor is there any indication Premiere has filed the appropriate paperwork to commence a winding up of its operations or dissolution or cancellation of the LLC. (See Corp. Code, § 17707.01 et seq.)[6]

In sum, Premiere's blatant disregard for its legal obligations under our Act, the apparent reductions in its workforce following our certification of the UFW, and the lack of clarity in the record surrounding its current status all weigh against approval of this settlement. As we previously noted, Board regulation 20291, subdivision (f) authorizes the region to join in a compliance proceeding other persons or entities that may be derivatively liable to satisfy our bargaining makewhole order. (*Premiere*

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[6] There is no indication in the record that Premiere's officers have voted to dissolve or wind up the LLC or that any condition identified in the LLC's operating agreement has triggered such events. (See Corp. Code, § 17707.01.) We believe Premiere's operating agreement may shed light on its current status and members. In this respect, we note the pending litigation between Premiere and the successor trustee of the trust of a deceased member of the LLC, *Premiere Raspberries, LLC v. Dutra*, Sixth App. Dist. case no. H045594. The court issued an opinion in that matter on May 14, 2020, which identifies M & J Processing, LLC as the managing member of Premiere. (*Premiere Raspberries, LLC v. Dutra* (May 14, 2020, H045594) [nonpub. opn.], available at <https://www.courts.ca.gov/opinions/nonpub/H045594.PDF>.)

Raspberries, LLC, supra, ALRB Admin. Order No. 2020-05-P, p. 10.) This may include any alter ego company or Premiere's officers personally if the circumstances warrant. (*Ibid*.; *NLRB v. Dane County Dairy* (7th Cir. 1986) 795 F.2d 1313, 1321; *Barker v. A.D. Conner Inc.* (N.D. Ill. 2011) 807 F.Supp.2d 707, 720-721.) We cannot treat lightly this employer's egregious violations of our Act and the suspicious circumstances of its sudden closure announcement on the heels of its unsuccessful litigation challenges to our prior orders. Such conduct is inherently destructive of employee rights under our Act, and the current record prevents us from concluding the parties' proposed agreement is consistent with or furthers the policies of the Act.

The region estimates the $800,000 value of the settlement proceeds is about only 29% of the total amount Premiere owes pursuant to the Board's bargaining makewhole award. (See p. 6, fn. 4, *infra*.) In light of the various uncertainties discussed above, the proportion of the settlement that would be paid under the proposed agreement compared to the region's calculation of the total back wages owed causes us serious concern. (See *International Shipping Agency, Inc*. (Apr. 20, 2015, case no. 24-CA-091723) 2015 NLRB LEXIS 288, *4 [rejecting settlement providing only 32% of backpay due according to General Counsel's calculations].) And while the UFW and Premiere voluntarily have agreed to this amount, we note the region — also a party to the proceeding — does not support it.

To be clear, the parties may submit a revised settlement agreement negotiated with the participation of the region and with the formal support of the regional

director, and we encourage them to do so.[7] However, in light of the circumstances described above, if the region recommends that the Board approve a settlement that offers employees only a fraction of the total amount they are owed based upon the purported inability of Premiere to pay a larger amount, we expect that the region will demonstrate that it has taken appropriate steps to substantiate Premiere's claims. This would include verifying Premiere's purported inability to pay, and fully exploring whether other entities or individuals with derivative or successorship liability, if any, should contribute towards payment of the bargaining makewhole amount. Without such substantiation, the Board would have great difficulty approving a settlement agreement that allows the vast majority of the makewhole amount to go unpaid.

We also note that the MMC contract includes provisions protecting the workers in the event Premiere sells, transfers, or assigns any of its operations. (Art. 27 [Successorship].) It is not clear in the record whether such protections were triggered by any conduct of Premiere since the contract took effect, and we are concerned the agreement fails to afford the workers adequate protection in the event Premiere recommences operations, including preferential rehiring status. In any renegotiation of the settlement agreement, we expect the region to be cognizant of these issues and ensure, to the extent possible, that employees are afforded protections in the event of a continuance of operations by Premiere, an alter ego company, or a successor employer.[8]

[7] The parties in their agreement commit to using their best efforts to obtain our approval of any settlement of this case, and to arbitrate any disputes that may arise as to whether all efforts to secure our approval have been exhausted.

[8] It is the responsibility of the region, which should be an active participant in any

This is particularly important if the region's recommendation is that the Board approve a settlement providing only a fraction of the makewhole owed to employees. We also note that the UFW may be entitled by a successor employer to be recognized as the exclusive bargaining representative and, perhaps, even for such a successor to be bound by the terms of the MMC contract.

III. Certain Terms of the Parties' Proposed Agreement Require Correction.

In addition to the development of a further record on the matters discussed above, several provisions of the agreement between Premiere and the UFW must be corrected as a condition of our approval of any subsequent proposed settlement agreement.

First, the settlement characterizes the proceeds as "non-wage makewhole compensation." By characterizing the proceeds in this manner the employer apparently seeks to avoid certain tax obligations, which instead are shifted to the workers and reportable on IRS 1099 forms. Clearly, a bargaining makewhole award constitutes wages owed by the employer to the employees. (*Premiere Raspberries, LLC, supra*, ALRB Admin. Order No. 2020-05-P, at pp. 3-4 [bargaining makewhole remedy compensates employees for losses of pay incurred as a result of their employer's delays or bad faith during the bargaining process].) It is a form of backpay the employer owes

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settlement negotiations, to ascertain all facts necessary to negotiating the best possible settlement for aggrieved workers. In this case, that not only means reaching an understanding of the financial history of Premiere, as discussed *infra*, but the nature of interlocking or related ownership interests between Premiere and other entities, including land ownership.

its employees. Like a typical backpay award, it thus constitutes wages and must be treated accordingly for tax purposes. (See NLRB Gen. Counsel Memo. OM 07-27 (Dec. 27, 2006) [2006 NLRB OM Memo LEXIS 285], *14 ["Long-established policy provides that backpay paid as the result of an unfair labor practice proceeding be treated as wages for tax purposes …"].) We will not approve a settlement that fails to characterize proceeds consistent with their actual nature and that is not consistent with applicable tax laws. (See *id*. at *14-16; *Cifuentes v. Costco Wholesale Corp*. (2015) 238 Cal.App.4th 65, 77 ["the IRS's position is that judgment and settlement payments for backpay and front pay … are subject to income and FICA tax withholding and are reportable as wages on a form W-2, rather than as non-wage income on a form 1099-MISC"]; *Trotter v. Perdue Farms, Inc*. (D.Del. 2003) 253 F.Supp.2d 812, 816-817; IRS Memo. (Oct. 22, 2008), *Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements*, PMTA 2009-035, p. 2 ["Whether a payment is includable in gross income and whether it is wages for purposes of employment taxes depend upon the character of the payment"]; see also, e.g., 26 C.F.R. §§ 31.3121(a)-1(c), 31.3306(b)-1(c), (i), 31.3401(a)-1(a)(2), (a)(5).)

Second, the terms of the parties' agreement regarding the redistribution of proceeds due to workers who cannot be located are both internally inconsistent and also inconsistent with the provisions of Labor Code section 1161. In one instance the settlement proposes that the proceeds due to workers who are unreachable and fail to cash their checks within 180 days will be redistributed to other employees. In another instance the settlement states the ALRB will notify the parties regarding employees who

have not cashed their checks 90 days after issuance, and that the proceeds due those employees will be redistributed if their checks remain uncashed 100 days after issuance. As far as locating employees is concerned, the agreement purports to direct the methods by which the ALRB is to perform a search for each employee's current mailing address. Labor Code section 1161, subdivision (c)(1) requires the ALRB to make diligent efforts to locate employees on whose behalf the Board has collected a monetary remedy for at least two years. We cannot approve a settlement providing for this type of redistribution of funds in a manner inconsistent with these statutorily mandated duties and timeframes.[9] The parties may not curtail or restrict the ability of the region to comply fully with its statutory obligation to use diligent efforts to locate employees. The region is required to undertake all reasonable efforts to locate workers, including through whatever outreach methods may be available to ensure effective dissemination of information concerning the settlement and the means by which workers may come forward to confirm their eligibility to receive a portion of the proceeds. Indeed, the farmworkers whom we serve, and who often live migratory lives, must be confident that we will do everything in our power to give them the wages they are due.

Third, the agreement ignores our non-monetary notice remedies ordered in 44 ALRB No. 9.[10] Our notice remedies serve important purposes aimed at dispelling

[9] We refer the parties, including the region, to the redistribution terms contained in the settlement agreement approved by the Board in *Ace Tomato Co., Inc.* (Feb. 26, 2016) ALRB Admin. Order No. 2016-04 [case no. 93-CE-037-VI]), which we deem instructive to the parties in restructuring the redistribution provisions of their agreement.

[10] The record is unclear whether the region has communicated with Premiere or

the coercive effects of a party's unfair labor practices, informing the workers of the outcome of the unfair labor practice proceedings, and educating workers of their rights under our Act. (*United Farm Workers of America (Lopez)* (2018) 44 ALRB No. 6, p. 15; *M. Caratan, Inc*. (1980) 6 ALRB No. 14; *Jasmine Vineyards, Inc. v. ALRB* (1980) 113 Cal.App.3d 968, 979-982.) If Premiere has closed and there no longer exists a physical site where the notice may be posted or read to employees in compliance with our order, those remedies unfortunately may be moot now. (*NLRB v. Continental Hagen Corp*. (9th Cir. 1991) 932 F.2d 828, 835 [notice posting remedy moot where employer closed business].) However, even if that is the case, the notice mailing remedy ordered in 44 ALRB No. 9 remains viable. (*L.A. Soap Co*. (1990) 300 NLRB 289, 296 [ordering employer to mail notices to affected employees where employer's business was dissolved and only location closed], citing *Benchmark Industries, Inc*. (1984) 269 NLRB 1096, 1099 ["In view of the fact that there is apparently no place left in the plant for a notice to be posted, and since, in any event, all the employees were terminated, I shall recommend that Respondent be ordered to mail notices to the terminated employees"].)

ORDER

For all the foregoing reasons, the Board does not approve the proposed agreement between the UFW and Premiere. In sum, the record in this matter includes various uncertainties and items requiring correction that prevent us from concluding the parties' proposed agreement furthers the policies of our Act or substantially remedies the

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engaged in efforts to secure Premiere's compliance with our notice remedies.

unfair labor practices at issue. We trust the region and parties will engage in their best efforts to address the issues we have identified above.

DATED: May 19, 2020

Isadore Hall, III, Member

Barry D. Broad, Member

Ralph Lightstone, Member