JD(NY)–32–07
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

WATERMELONS PLUS, INC. and its alter ego, WATERMELONS II, INC.

and **Case No. 29-CA-27150**

MICHAEL SPENCE, An Individual

WATERMELONS PLUS, INC. and its alter ego, WATERMELONS II, INC.

and **Case No. 29-CA-27152**

DAVID PETERS, An Individual

Aggie Kapelman, Esq., Counsel for the General Counsel
Michael Pagano and Anthony M. Pagano appearing on their own behalf

SUPPLEMENTAL DECISION

I. Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this matter on April 12 and June 5, 2007. This is a compliance case based on an Order issued by the Board on April 7, 2006. In that case, it was concluded, *inter alia*, that the Respondent, Watermelons Plus, Inc., illegally discharged its employees, Michael Spence and David Peters on March 15, 2005. [1] That decision was enforced on August 14, 2006, by the United States Court of Appeals for the Second Circuit.

On January 29, 2007, the Regional Director issued a Compliance Specification and Notice of Hearing. As amended on March 22, 2006 it alleged:

1. That on or about June 30, 2006, Watermelons Plus ceased operations.

2. That since in or around January 2006, a company called Watermelons II has been the alter ego of the Watermelons Plus.

3. That the backpay periods for Spence and Peters commenced on March 15, 2005 and continue to run until December 31, 2005 when they would have been laid off due to a reduction in force.

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[1] I note that in the underlying case, the Respondent did not appear in person or by an attorney.

4. That the gross backpay for Michael Spence is based on his rate of pay at $15.00 per hour and based on working 40 hours per week plus one overtime hour per week.

5. That the gross backpay for David Peters is based on his rate of pay at $12.00 per hour and based on working 40 hours per week plus one overtime hour per week.

6. It is conceded by the General Counsel that Michael Spence had interim earnings of $4,297.00 during the 4th quarter of 2005.

7. It is conceded by the General Counsel that David Peters had interim earnings of $2,987.08 during the 2nd quarter of 2005; $4330.63 during the 3rd quarter of 2005; and $4,330.63 during the 4th quarter of 2005.

On April 9, 2007, the General Counsel notified the Respondent that it was amending the Specification. The new specification revised the backpay figures in the following manner: For Spence, the claim now is for $19,688.00, which is down from $21,994.20. For Peters, the backpay figure has been raised from $15,631.20 to $19,188.00.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following:

II. Findings and Conclusions

At the hearing, the Region's Compliance Officer testified as to how the amended gross backpay calculations were made. She also testified about how, after accounting for interim earnings, the net backpay figures were calculated. The Respondents did not challenge the evidence upon which these calculations were made or the formula used for making the ultimate calculations. Accordingly, as there is no dispute regarding the amounts of backpay due, I hereby make the following conclusion.

The backpay owed to Michael Spence is $19,688.00 plus interest.

The backpay owed to David Peters is $19,188.00 plus interest.

The only issue remaining in this case is who is going to pay.

The original Respondent in this case was Watermelons Plus, Inc. At the time of the underlying hearing, its only shareholder was Maurice Taldi but the operation was managed by Michael Pagano and his brother Anthony C. Pagano. In or about June or July, 2005, Taldi, who is Michael Pagano's brother-in-law, transferred all of his shares to Michael who then became the sole shareholder of the corporation.[2] There also were a number of other family members who worked for the corporation. These were Anthony Pagano Jr. who is Anthony C. Pagano's son; Loretta Pagano who is Michael Pagano's wife; Tony Pagano who is Michael and Anthony

[2] According to Michael Pagano, he and his brother, Anthony C. Pagano were the ones who actually started the business back in 1996. From his testimony, its seems that Maurice Taldi may have lent them the money and was merely the titular head of Watermelons Plus. (At the same time he was involved in a completely different business). Michael Pagano testified that Taldi wanted out and transferred the shares of Watermelons Plus to him in June or July 2005 when things were not looking so good for the Company.

C. Pagano's father; and Anthony M. Pagano who is Michael Pagano's son. (In other words, a family business).

There seems to be no question but that the original Respondent, Watermelons Plus essentially ceased doing business in or about June 2006 after having come to disaster trying to fulfill a contract with the Board of Education. The question is whether a separate corporation, called Watermelons II, owned by Anthony M. Pagano is an alter ego of Watermelons Plus.

Obviously, the reason that this issue has been raised by the General Counsel is that there is doubt as to whether the original Respondent, Watermelons Plus, will be able to pay the backpay owed to the two individuals. According to Michael Pagano, who acknowledges the debt, he is currently in litigation with the City of New York for a sizeable amount of money that he claims is owing to Watermelons Plus. He states that if successful in obtaining either an award or substantial settlement, he will be able to pay those people to whom he owes money, including the discriminatees. At the time of this supplemental hearing, Watermelons Plus was not in Bankruptcy.

Watermelons Plus

According to Michael Pagano, Watermelons Plus, during the period from around 1996 to 2000, was engaged in the business of wholesaling watermelons and other fruits and vegetables to chain supermarkets such as Food Town, Food Emporium, C&S and A&P. In addition, the Company was involved, as a sideline, in the wholesale distribution of wine and flowers. During that period of time, the enterprise's address was 99 Brooklyn Terminal Market. The Brooklyn Terminal Market is a large indoor facility owned by the City of New York and it leases small store spaces to a variety of small enterprises. The address of 99 Brooklyn Terminal Market represents a particular space within the market.

Michael Pagano testified that in or about 2001, after receiving requests to bid for contracts to supply produce to the City of New York, he and his brother, Anthony C. Pagano, decided to bid for governmental business including contracts to provide food to hospitals and to facilities operated by the Departments of Corrections and Juvenile Justice. He testified that the first contract he remembers obtaining was a three-month contract for the jail at Rykers Island.

It appears that during the next couple of years, Watermelons Plus changed its business and bid for and obtained a series of short term city contracts to provide produce to city hospitals and correctional facilities. In this regard, Michael Pagano testified that

> [D]uring the period immediately before we got the Board of Education contract and before we moved to Ave D, I expanded at the Brooklyn Terminal market by renting two more stalls and converting them into a freezer. I did this before I realized how much space I was going to need after we got the contract. For a limited time the two discriminatees worked in the freezer at the Terminal Market. After we moved to Ave D, we gave up the freezer space at the Terminal market.

Michael Pagano testified that in or about 2004, Watermelons Plus bid for and obtained, with two other similar companies, a long-term contract with the Board of Education to start in September 2004. [3] According to Pagano, the Board of Education contract was different from

[3] According to Michael Pagano, Mayor Bloomberg and others in the administration,

Continued

the contracts that the Company obtained for the Departments of Corrections and Juvenile Justice in two respects. First, the amount of food to be provided to the Board of Education was huge compared to the other contracts. And second, the Board of Education contract was a long-term agreement whereas the other contacts were of three months duration and were bid by a number of competitors on periodic basis. That is, once a company became an approved vendor, it could bid for a series of three-month contracts after which the bidding process began again.

Michael Pagano described some of the changes that occurred to his business after obtaining the Board of Education contract:

> This was huge…. Once that happened, you know everything with Watermelons changed. We basically didn't do hardly any watermelons whatsoever. We just didn't have the space. The market is very old and very small and there's not the opportunity to get other stores unless again someone retires or passes on…. [T]he contract required us to get more space and 99 was no longer possible to work from. We and the other two winning vendors were required to take produce from a Federal program and when the City decided that they didn't want to store it, we had to find space to store it ourselves…. We found this place a few miles away on Avenue D, a very large facility… When we went to this facility on Avenue D, there was no office. It was one giant warehouse. No office available….We're in the midst of moving changing the rent four times from 10 to 55,000 a month…. We couldn't even think about changing the office yet.

Thus, according to Michael Pagano, while acquiring this new warehouse on Avenue D and moving most of the Company's operations to that location, Watermelons Plus continued to use its office space at 99 Brooklyn Terminal Market and also used that location to sell flowers and wine. [4] This all occurred in the early part of 2005.

During 2005, when Watermelons Plus was attempting to provide services to the Department of Education and also working on short term contracts for the Departments of Corrections and Juvenile Justice, the Company had two locations; a large warehouse on Avenue D where the produce was sorted and from where it was shipped, and an office at 99 Brooklyn Terminal Market. At this time, the people working in the office were Michael Pagano; his wife Loretta who answered the phones; Maria Fusco the bookkeeper; Anthony C. Pagano who did the buying; and Michael's son, Anthony M. Pagano who did the computer work. Michael's father, Tony Pagano, also came in to "work" and schmooze.

At the warehouse on Avenue D, the number of employees fluctuated and ranged from about 45 to as high as 75 people. (Michael Pagano testified that there was a large amount of turnover at this location). Anthony Pagano Jr. was the warehouse manager. (A reminder; Anthony Jr. is Anthony C. Pagano's son). Michael Pagano testified that he spent a portion of his time at the warehouse because he was responsible for getting the trucks out. [5] The two

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expressed a desire to favor smaller companies to bid for the Board of Education contracts.

[4] It appears that a new company leased 99 Brooklyn Terminal Market and subleased the office space to Watermelons Plus.

[5] Although not fully explored, it seems that Michael Pagano may also have owned a separate trucking company that was used to deliver the produce from the Avenue D warehouse to the schools or other facilities. It also seems that after the collapse of Watermelons Plus, the trucks were sold off and the drivers laid off.

discriminatees, Michael Spence and David Peters, started out working in the freezer at 99 Brooklyn Terminal Market and then moved to the Avenue D warehouse when that facility was opened.

Michael Pagano described his company's attempt to fulfill the terms of the Board of Education contract as follows:

> This [the Board of Education contract] is a tremendous deal that the city put together…. [O]ur contract was around three million. It rose to $30 million per year for five years with [a] three-year extension. We're too small for this. We gave it a shot… Lewis Food Service, seen the writing on the wall. He's been in the food service business for 50 years. We're doing it two maybe three. Okay. They seen the handwriting on the wall and opted out of his contract…. We tried and we were able to actually keep our two zones. The other two vendors did so poorly and we did poorly too but we did better than them because I kept firing and hiring, firing and hiring. They did whatever they did and they lost…. We had the larger part of Brooklyn and Staten Island. Then we were told that we had to give us Staten Island. Why? Well the other vendors were taking zones away from them too…. Yes, we were getting fined to death but that was the errors being made by the employees. Can we change it? We swore up and down we were going to change it. Can you do it in three or four weeks? We swore up and down we were going to do in three weeks. We didn't want to lose this contract. We kept it for three weeks. We kept Staten Island. The other guys lost their zones. We should have given it up. We wouldn't be standing here today. If I gave up Staten Island, I would only keep Brooklyn. Half the trucks, half the employees, half the problems, half of everything and we could have made it work.
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> JUDGE GREEN: So I'm going to ask you your opinion. The three smaller guys bit off more than they could chew.
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> THE WITNESS: The two other guys are not small guys. They're big guys.
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> JUDGE GREEN: They're bigger than you?
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> THE WITNESS: Oh 10 times. They've been in the business for 50 years. They're both food service people. This is the first time we ever did food. We've done produce but we never did food. They didn't care. When Bloomberg said we want small and medium size businesses and if they're in the produce business that's good enough. What experience do they have? Oh they did produce. They did some Rykers Island. Good enough. Let them give it a shot. I want small business in there…. [A]t the time it was fortunate that we won; but unfortunately we won.

In short, the testimony of Michael Pagano was that after Watermelons Plus accepted the Department of Education contract, it had to rent a new warehouse facility and had to hire a much larger crew of new workers to do this contract. Pagano testified that he tried to fulfill this contract but was being told by the City that he was not succeeding. Thus, during 2005, Watermelons Plus received notices of penalties and had payments held back by the Board of Education because that entity did not feel that Watermelons Plus was delivering the right stuff to the correct places.

On December 9, 2005 the Department of Education sent a letter to Watermelon Plus that stated in pertinent part;

> The Department of Education (DOE) is dissatisfied with your performance in the distribution of food under contract 1C168. Reports of incomplete deliveries and failure to deliver to our schools have been problematic since the beginning of the contract in September 2004. A letter sent to you by the DOE on April 18, 2005 requested that you voluntarily relinquish the Borough of Staten Island to avoid a default. You opted not to relinquish, promising that your performance would significantly improve.
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> While there was some improvement in performance for a period of time, new performance data reveals pervasive failures to perform. The DOE cannot continue to accept such inferior service, so we are absolutely committed to finding alternate providers that will service Brooklyn II and Staten Island effective July 1, 2006. In the interim, it is expected that Watermelon Plus will exercise good faith in attempting to perform as required by contract 1C168 so as to avoid a default.

During the last week of December 2005, Watermelons Plus moved out of the Avenue D warehouse and the remaining work force worked out of the sublet office at 99 Brooklyn Terminal Market.

Nevertheless, while Watermelons Plus was struggling with the Department of Education contract, it continued to bid for the short-term contracts from the Department of Corrections and the Department of Juvenile Justice. In this respect, it obtained a three- month contract for the period from October 3, 2005 through December 30, 2005. It also obtained another contract with the Department of Juvenile Justice for the period from January 3, 2006 through March 31, 2006. This latter contract was the result of a bid made in November 2005, before Watermelons Plus received its final notice from the Board of Education.

The documentary evidence, (GC 22), indicates that on or about February 21, 2006, Michael Pagano, in the name of Watermelons Plus, made a final bid for another three month contract to supply fresh fruit and vegetables to the Department of Corrections for the period from April 3, 2006 to June 30, 2006. He states that this was an unsuccessful bid.

The payroll records for Watermelons Plus for the week ending December 28, 2005 listed 14 employees. These records indicate that as of that week, there were five warehouse employees, (including Anthony C. Pagano); six office employees, (including Loretta Pagano, Maria Fusco and Tina Figueroa); one manager, (Eddie Gonzalez); one supervisor (Steve Sacco); and one salesman, (Anthony M. Pagano). All of the other people who had been employed at Avenue D were let go.

For the period from January 13, 2006 through March 17, 2006, the payroll records for Watermelons Plus list six employees. These were Anthony M. Pagano, Tony Pagano, Tina Figueroa, Maria Fusco, Steve Sacco and Anthony C. Pagano.

For the week ending March 24, 2006, the payroll records for Watermelons Plus lists only four employees. These were Tony Pagano, Maria Fusco, Steve Sacco and Anthony C. Pagano.

The payroll records indicate that by April 7, 2006, Steve Sacco was no longer in its employ and that by June 23, 2006, Tony Pagano was off its payroll. By the week ending June

31, 2006, Fusco was the only employee on the final payroll record of Watermelons Plus.

When Michael Pagano was asked what Watermelons Plus was doing from about the spring of 2006, he testified that he basically was gathering papers, invoices and other records in preparation for a lawsuit against the Board of Education.

On May 30, 2006, Michael Pagano sent a letter to the City's administrator, Kelly Taylor, informing her that Watermelons Plus had ceased conducting business as of January 1, 2006.

Watermelons II

The evidence shows that on September 23, 2005 a certificate of incorporation was filed for a company called Watermelons II. Anthony M. Pagano, (Michael's son), received 100% of the stock and the record shows that he remained the sole shareholder of this new corporation. As indicated in its 2005 income tax return, this enterprise essentially did no business during that year and did not employ any persons. Its mailing address is listed as 97 Brooklyn Terminal Market where it occupied a single store space consisting of about 2000 square feet. The nature of its business was to sell, at wholesale, fresh fruits and vegetables.

At some point during the first quarter of 2006, Watermelons II commenced operations. The second quarter tax return for Watermelons II shows that wages were paid to Tina Figueroa ($700), and to Anthony M. Pagano ($1,600). The third quarter tax return shows wages were paid to Anthony M. Pagano ($10,400); Jerry Caropolo ($4,200); Tina Figuaroa ($4,550); Anthony C. Pagano ($1,700); Michael Pagano (11,900); Tony Pagano ($1,800); and Daniel Vasquez ($2,800). The fourth quarter tax return shows wages were paid to Anthony M. Pagano ($10,400); Jerry Caropolo ($7,800); Tina Figuaroa ($4,500); Maria Fusco ($3,600); Edward H. Gonzalez ($4,800); Anthony C. Pagano ($22,100); Loretta Pagano ($4,400); Michael Pagano ($22,100); Tony Pagano ($1,950); and Daniel Vasquez ($5,200).

Reviewing the tax returns, the names of the people employed by Watermelons II looks very familiar. Moreover, by the forth quarter of the year, (at least represented by these tax returns), the two people drawing the largest share of the money from Watermelons II, are the two people who did so when Watermelons Plus was operating. Thus, notwithstanding the fact that Watermelons II was solely owned by Anthony M. Pagano, the largest percentage beneficiaries were Michael Pagano and Anthony C. Pagano, the two people who essentially started and ran Watermelons Plus. [6]

The General Counsel points to evidence that on May 15, 2006 Anthony M. Pagano, in the name of Watermelons II, submitted a bid to provide fresh fruit and vegetables to the Departments of Corrections and Juvenile Justice for the period from June 3, 2006 through September 29, 2006. It seems that Watermelons II won that bid and that Anthony C. Pagano, now employed at Watermelons II, was the contract person between the city agency and the Company. The amount of that contract was more or less the same as similar three month contracts previously obtained by Watermelons Plus.[7]

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[6] General Counsel Exhibit 12 also shows some checks made out to various members of the Pagano family in October 2005 including to Anthony Pagano and Tony Pagano.

[7] General Counsel Exhibit 24 indicates that the dollar amount of a contract with Watermelons Plus to deliver produce from April 4, 2005 to July 1, 2005 was $304,850.00. General Counsel Exhibit 25 indicates that the dollar amount of a contract with Watermelons II to deliver produce from July 3, 2006 to September 29, 2006 was $393,382.37.

General Counsel Exhibit 26 is a summary of a three month contract, in the amount of $26,449.80 that was given by the City to Watermelons II for the period from October 2, 2006 to December 29, 2006. And General Counsel 27 shows that Watermelons II received a three month contract in the amount of $314,533.50 for delivery of fruits and vegetables for the period from January 1, 2007 to March 31, 2007. (It should be recalled that the hearing in this case started on April 12, 2007).

According to Michael Pagano, at the time of this hearing, the only people who still worked at Watermelons II were Anthony M. Pagano, Tina Figueroa, (the bookkeeper), and a driver. Michael Pagano testified that he and all of the other Paganos were no longer on the payroll of Watermelons II.

I also note that the General Counsel presented Fey Madrigal, employed by the City, who testified that in her personal dealings with both Watermelons Plus and Watermelons II, she dealt with the same individuals, (Anthony C. Pagano and Anthony Pagano Jr.)

III. Analysis

As noted above, the only question in the present case is whether Watermelons II is an alter ego of Watermelons Plus and is therefore derivatively liable for whatever backpay is owed to Michael Spence and David Peters.

In 2007, the Board had occasion to issue at least two decisions dealing with the issue of alter ego. *Cadillac Asphalt Paving Company*, 349 NLRB No. 5 (2007) and *Diverse Steel, Inc*., 349 NLRB No. 90 (2007) serve to illustrate the legal principles involved and the types of factual situations that would result in opposite findings.

In *Cadillac*, supra, the Board stated:

> The Board generally will find alter ego status where two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. Not all of these indicia need be present, and no one of them is a prerequisite to an alter ego finding. The Board also considers whether the second company was created in order to allow the old employer to evade responsibility under the Act. However, unlawful motivation is not a necessary element of an alter ego finding. If an employer is found to be an alter ego of another employer that has a contract with a union, the alter ego is also bound by that union contract. Although common ownership is not a prerequisite for an alter ego finding, the Board has found an alter ego relationship in the absence of substantially identical ownership only where both companies were either wholly owned by members of the same family or nearly totally owned by the same individual, or where the older company maintained substantial control over the new company.

In concluding that the two entities were not alter egos, the Board noted that the facts did not reach the level of commonality to reach an alter ego conclusion. The Board stated:

> Paving was wholly owned by Levy and Levy had complete operational control over Paving. Under the joint venture agreement, however, LLC is owned 50 percent by Levy and 50 percent by MPMC; neither Levy nor Paving has any

operational control over LLC. Rather, MPMC has complete operational control over LLC.

LLC is also not managed by the same company or individuals as Paving. Paving was managed and controlled by Levy and specifically by Levy employee Andy Schmidt. LLC is managed and controlled by MPMC, and Schmidt was not hired to manage LLC. Alan Sandell, a former MPMC employee, was hired as the general manager of LLC and had operational responsibility for all five operating divisions. In addition, only 6 of 15 management employees at Paving were offered employment with LLC.

The record does show that supervision and operations of the Teamsters unit under Paving and LLC are substantially identical. The record also shows that the business purposes, equipment, premises, and customers of Paving and LLC are substantially identical. However, this evidence does not outweigh the aforementioned evidence showing separate ownership and control and the lack of identical management, as well as the lack of evidence to suggest that LLC was formed for other than legitimate business reasons. "Simply put, too many of the critical factors traditionally relied upon by the Board to support alter ego findings are absent here."

In *Diverse Steel*, supra, the Board, using the same legal standard, came up with a different result.[8] The Board stated:

> Here, the relevant facts are that Troy Noe, his wife Gwen Noe, and Gwen Noe's mother, Joan Drilling, incorporated Diverse Steel in May of 1997 to perform structural steel erection, rebar installation, rigging, and machinery moving work. At all times relevant, Diverse was a member of the association of steel erector employers and signatory to the Union's collective-bargaining agreement. In February 1998, Pinnacle Steel was incorporated by Gwen Noe and her father, John Drilling, to perform the same type of work as Diverse. After Pinnacle began operations, Diverse ceased operations. Pinnacle has never recognized any union as representative of its employees. On August 30, 2001, Gwen Noe documented her resignation as a corporate officer of Diverse with the State of Arkansas. In November 2001, Pinnacle began work within the Union's jurisdiction.
>
> The judge correctly found that Diverse and Pinnacle shared substantially identical ownership, business purposes, operations, equipment, customers, supervision, and management. However, the judge also found that there was insufficient evidence to conclude that Pinnacle was specifically created with the intention to avoid Diverse's contractual obligations. Contrary to the judge, we find that there is sufficient evidence to establish that Pinnacle was formed in part in order to avoid Diverse's contractual and statutory obligations under the Act. The record shows that Gwen Noe stated that she wanted to resign from Diverse because she felt her husband, Troy Noe, did not get his "money's worth" from the Union. Union secretary Doris Mae Eoff testified that Gwen Noe told her that, according to Diverse's accountant, Diverse would be better off if it went nonunion.

[8] The Board further stated that: "Where there is evidence that the second company was formed to take over the business of the first—in order to reduce its labor costs by repudiating the union's collective-bargaining agreement—the Board has found that the second company was formed with the unlawful motive of avoiding the first company's responsibilities under the Act. *Midwest Precision Heating & Cooling, Inc.*, supra, 341 NLRB at 439."

> The Chairman of Arkansas Best Contractors' Association, Boyd Sanders, stated that, during a meeting with Troy Noe to discuss negotiations with the Union, Noe stated: "Well, this is all I can do and if I can't get a contract for this, I'll just have to open shop." In addition to those three statements, all of which the judge credited, Gwen Noe testified that (1) one of the reasons she formed Pinnacle was because she wanted Diverse to go nonunion and that she urged Troy Noe to follow this advice; (2) her concern was "mainly a financial issue"; and (3) her accountants (and others) advised her to get Troy Noe to leave the Union because the benefits required under the collective-bargaining agreement were too costly. Troy Noe testified that, to ensure Pinnacle did not become unionized, Gwen Noe consulted with him before making hiring decisions in order to determine whether he knew a particular applicant from his previous involvement in organizing and "salting" jobs for the Union. Troy Noe further testified that Pinnacle employed Diverse's unit employees on the Rave 18 Theatre Project, and did not pay them benefits required under Diverse's collective-bargaining agreement.
>
> Considered as a whole, the foregoing evidence establishes that Pinnacle was formed in an attempt to evade Diverse's responsibilities under the Act, because the Respondent felt that Diverse's labor costs were too great. Thus, in addition to the reasons cited by the judge for finding Diverse and Pinnacle to be alter egos, we find that the formation of Pinnacle in order to avoid Diverse's responsibilities under the Act further supports an alter ego finding.

In the present case, the facts show that Watermelons II is a separate and separately owned corporation than Watermelons Plus, albeit with essentially the same name. Although they occupied different spaces in the Brooklyn Terminal Market, those spaces were next to each other as Watermelons II is located at 97 BTM whereas Watermelons Plus had its office space at 99 BTM.

As noted by city representative Fey Madrigal, during her dealings with Anthony C. Pagano and Anthony Pagano Jr., she believed that she was dealing with only one company. Thus, its seems to me that in creating a new company with essentially the same name as Watermelons Plus, and utilizing the same people doing the same jobs, the Paganos were holding out to its relevant public, that the new company was a continuing entity with the old one.

The evidence does not show that Watermelons II was created for the purpose of evading any responsibility under the National Labor Relations Act to any labor organization or to its employees. But this is not necessary under Board law assuming that the other factors predominate. [9]

Starting in June or July 2005, the sole shareholder of Watermelons Plus was Michael Pagano. The sole shareholder of Watermelons II is his son, Anthony M. Pagano. Many of the former employees of Watermelons Plus became employees of Watermelons II, including the members of the extended Pagano family. Indeed, those Paganos continued to do the same job functions at Watermelons II as they had done at Watermelons Plus. (Purchasing, estimating and making bids, supervision, bookkeeping, etc.)

The scope of the two businesses is clearly different. The evidence shows that Watermelons Plus, before it lost the Board of Education contract, probably did at least 4 to 5

[9] However, it is conceivable that Watermelons II was created, in part, to isolate and draw a fence around the potential receivables and potential liabilities of Watermelons Plus.

times the amount of business as Watermelons II. But the fact is that these two businesses were engaged in the wholesaling of food, mainly fruits and vegetables. Additionally, Watermelons II continued to bid for city contracts and has obtained a series of three month contracts, the last of which, in the amount of $314,533.50, ran until March 31, 2007. Thus, while we can say that the volume of business done by Watermelons II has been substantially smaller than Watermelons Plus, (and that it employs far fewer non-Pagano workers), I cannot say that the nature of the business is really all that different.

It seems to me that these two corporations are really run by the same family, are located in substantially the same place, are engaged in essentially the same business and have been held out to their respective customers as essentially the same company. Moreover, the evidence shows that although Watermelons II employs far few employees than Watermelons Plus, the people it did employ have all come from the prior company. Indeed the bulk of those people who have received remuneration from Watermelons II have been the same members of the Pagano family that had previously worked at Watermelons Plus. On balance, I therefore conclude that Watermelons II is an alter ego of Watermelons Plus and that it is derivatively liable for the backpay owed to Michael Spence and David Peters.

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended [10]

ORDER

The net backpay due and owing for Michael Spence is $19,688.00 plus interest.

The net backpay due and owing for David Peters is $19,188.00 plus interest.

The Respondent, Watermelons Plus and its alter ego, Watermelons II are ordered to pay the above amounts to Michael Spence and David Peters.

Dated, Washington, D.C., July 18, 2007.

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Raymond P. Green
Administrative Law Judge

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.