

**US Reinforcing, Inc., and its alter ego, U.S. Steelworkers, LLC and Iron Workers Local Union Nos. 12, 60, 33, and 440.** Case 3–CA–25314

July 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

On February 21, 2006, Administrative Law Judge Richard A. Scully issued the attached decision. Respondent U.S. Steelworkers, LLC filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. OVERVIEW

In this case, we consider whether the Respondents, US Reinforcing, Inc. (Reinforcing) and its alleged alter ego, U.S. Steelworkers, LLC (Steelworkers),<sup>1</sup> violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to honor the collective-bargaining agreement Reinforcing entered into with Iron Workers Local Union Nos. 12, 60, 33, and 440 (the Unions) in September 2003. It is undisputed that, in or around September 2004, Reinforcing stopped complying with the terms of the agreement; it is also undisputed that Steelworkers, which was incorporated on July 1, 2004, never honored the agreement.

In the absence of exceptions by Reinforcing, we adopt the judge's determination that Reinforcing violated Section 8(a)(5) and (1) of the Act by refusing to honor its collective-bargaining agreement with the Unions. The issue that remains is whether that agreement is binding on Steelworkers as the alter ego of Reinforcing, such that Steelworkers' refusal to honor the agreement also violated the Act. Contrary to the judge and our dissenting colleague, we find that the General Counsel failed to establish that Steelworkers was the alter ego of Reinforcing. Accordingly, we shall dismiss the allegations against Steelworkers.<sup>2</sup>

<sup>1</sup> In its exceptions, Respondent Steelworkers denies that the Board has jurisdiction over it. In view of our finding that Steelworkers is not an alter ego of Reinforcing and, accordingly, has not violated the Act, we find it unnecessary to address the jurisdictional issue.

<sup>2</sup> In light of our reversal of the judge's alter-ego finding, we shall modify the judge's recommended Order to limit its provisions to Reinforcing only. We shall also modify the judge's recommended Order to conform to the violation found and to the Board's standard remedial

II. APPLICABLE LEGAL PRINCIPLES

When the General Counsel alleges that an entity is the alter ego of a respondent, subject to the latter's legal and contractual obligations, the General Counsel has the burden of establishing that status. *Crossroads Electric*, 343 NLRB 1502 (2004), *enfd.* 178 Fed.Appx. 528 (6th Cir. 2006). The determination of alter-ego status is a question of fact for the Board, resolved by an examination of all of the attendant circumstances. See *Southport Petroleum v. NLRB*, 315 U.S. 100, 106 (1942); and see *Crawford Door Sales*, 226 NLRB 1144 (1976).

The Board considers several factors when determining whether alter-ego status has been shown. Specifically, the Board considers whether two entities have substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment. *Fallon-Williams, Inc.*, 336 NLRB 602, 602 (2001) (citing *Crawford Door Sales Co.*, *supra*). "The Board also looks to 'whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.'" *Liberty Source W*, 344 NLRB 1127, 1136 (2005) (quoting *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), *enfd.* 725 F.2d 1416 (D.C. Cir. 1984)). No single one among these factors is determinative, and not all of the indicia need be present for the Board to make a finding of alter-ego status. *Id.*; *Standard Commercial Cartage, Inc.*, 330 NLRB 11, 13 (1999); *MIS, Inc.*, 289 NLRB 491, 492 (1988).

While substantially identical ownership is not a *sine qua non* of alter-ego status, it is an important factor. *AC Electric*, 333 NLRB 987, 1001 (2001), *enfd.* sub nom. *ECM Enterprises v. NLRB*, 63 Fed.Appx. 521 (D.C. Cir. 2003). Indeed, the Board has made clear that it will only

---

language; we shall substitute a new notice to conform to the Order as modified.

In addition, we shall modify the judge's recommended remedy to require Reinforcing to reimburse unit employees for any expenses ensuing from its failure to make the required benefit contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd.* mem. 661 F.2d 940 (9th Cir. 1981).

Finally, the complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Unions without regard to whether the Unions had established majority status. By failing to file an answer, Reinforcing has admitted these allegations. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Unions are therefore the limited 9(a) representative of the unit employees for the period covered by the agreement. We also note that the letter of assent that Reinforcing executed bound it to any extension or renewal of the 2003–2006 collective-bargaining agreement it signed. We shall therefore amend the judge's recommended remedy to require Reinforcing to give effect to any automatic renewal or extension of such agreement. See, e.g., *HCL, Inc.*, 343 NLRB 981, 983 (2004).

find alter-ego status absent common ownership in narrowly defined circumstances:

Although common ownership is not a prerequisite for an alter ego finding, the Board has found such a relationship 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 continued to maintain substantial control over the business claimed to have been sold to the new company.

*Superior Export Packing Co.*, 284 NLRB 1169, 1170 (1987), enf. mem. sub nom. *Meadowlands Hy-Pro Industries v. NLRB*, 845 F.2d 1013 (3d Cir. 1988); see also *Hill Industries*, 320 NLRB 1116, 1116 fn. 1 (1996); *Hartman Mechanical, Inc.*, 316 NLRB 395, 401-402 (1995); *Perma Coatings, Inc.*, 293 NLRB 803, 804 (1989). Absent those limited circumstances, “the lack of substantially identical common ownership precludes a finding” of alter-ego status. *Superior Export Packing Co.*, 284 NLRB at 1170.

### III. FACTS

The facts relevant to an analysis of the alter-ego factors are fully set forth in the judge’s decision. Because we find, as more fully explained below, that the General Counsel failed to establish the factor of common ownership and that none of the aforementioned exceptions apply, we focus primarily on those facts relevant to this finding.

#### A. Reinforcing

Reinforcing began operations as a rebar contractor in or about May 2000. Its stock was owned by Christian Redmond, who served as vice president, and his wife Kimberly, who was president. The couple separated in August 2002 and subsequently divorced.

In November 2002, Redmond developed a personal relationship with Denise Herheim. In May 2003, Herheim moved in to Redmond’s residence, where she cared for Redmond’s children who resided there. Redmond testified that he and Herheim were a “committed couple.” After cohabitating with Redmond, Herheim did not obtain any ownership or management interest in Reinforcing. Rather, her only involvement in Reinforcing began in May 2004, when she started performing office work for Reinforcing, for which she was hourly paid.

In September 2003, Redmond, acting for Reinforcing, executed the area agreement between the Unions and the Upstate Iron Employers Association, covering the period May 1, 2003, through April 30, 2006. Reinforcing initially made monthly reports and contributed to the Unions’ fringe benefit funds but, by the spring and summer of 2004, Reinforcing was in financial trouble. As a re-

sult, Redmond stopped bidding on new work and, in September 2004, Redmond informed Gary Robb, business manager of Iron Workers Local 60, that he could not afford to stay in business. Reinforcing ceased doing business in the fall of 2004.

#### B. Steelworkers

Herheim testified that for years she was interested in going into business for herself, but lacked the capital to start a company. In mid-2004, Herheim decided to form her own rebar company, concluding that she could handle it because it involved only providing labor and did not involve substantial overhead or capital. She contacted an attorney, and incorporated Steelworkers as a limited liability company on July 1, 2004. The business was solely in her name, she provided what capital investment was needed to begin operations,<sup>3</sup> and she was the only individual authorized to conduct business on its behalf.

Herheim operated Steelworkers from the residence she shared with Redmond. Steelworkers used the office space, computer, Dodge Report subscription,<sup>4</sup> fax machine, desk, and telephone that were no longer being used by Reinforcing. In exchange, as Herheim testified, she paid Redmond \$100 per week for the space and equipment.<sup>5</sup> Herheim testified that she made this payment, “when I could afford to pay it.”

Steelworkers used the same insurance agency and accountant as Reinforcing. However, there is no evidence that any ongoing financial obligations for these services were not paid by Steelworkers.

Steelworkers worked in the same geographical area as Reinforcing, and served the same customers. Herheim prepared the bids for the jobs, getting advice and explanations from Redmond on the difficult jobs. Herheim was the only individual authorized to enter into contracts for Steelworkers and authorize its employees’ paychecks.

Redmond had no ownership interest in Steelworkers. He did, however, work on almost all of Herheim’s projects. Redmond hired employees subject to Herheim’s approval. Most of Steelworkers’ employees had worked for Reinforcing; the other employees were people Redmond knew.

The judge credited Herheim, who testified that she alone made the decision to go into business and also to

<sup>3</sup> No evidence was presented that Redmond made any contributions to Herheim’s \$1000 capital investment in Steelworkers.

<sup>4</sup> Although Redmond testified that the Dodge Report could have cost several thousand dollars a year, no evidence was presented that he could have canceled his subscription and received a pro rata refund or as to the remaining value of the subscription.

<sup>5</sup> There is no evidence that this payment was less than the prevailing market value of that which Herheim rented.

operate Steelworkers as a nonunion company. Herheim's testimony was also credited that she did not consult with Redmond or tell him of her plans until a couple of days after Steelworkers was formed, and that she was not motivated by a desire to help Redmond or Reinforcing avoid obligations under the Act.

#### IV. ANALYSIS

On these facts, we find that the judge erred in concluding that Reinforcing and Steelworkers were alter egos. While many factors tending to show alter-ego status are present, the crucial factor of common ownership is not. As discussed above, although common ownership is not a prerequisite for an alter-ego finding, in its absence, the Board will only find alter-ego status in limited circumstances. None of those circumstances exists here. Accordingly, the lack of substantially identical common ownership precludes a finding that Steelworkers was an alter ego of Reinforcing. See *Superior Export Packing Co.*, 284 NLRB at 1170. This conclusion is only bolstered by the absence of financial control by Redmond, the absence of operational control, and the absence of a motive to avoid legal and contractual obligations.

##### A. Absence of Common Ownership and Financial Control

Reinforcing and Steelworkers do not share common ownership. Noting many of the above-related facts, the judge acknowledged this conclusion. Nevertheless, relying on the facts that Redmond and Herheim lived together and that Herheim cared for Redmond's children, the judge found that "Redmond and Herheim had a close familial relationship," and that "[u]nder these circumstances a finding of alter ego status is not precluded."<sup>6</sup> Based on the evidence before us, we disagree.

The judge correctly stated that the Board may infer substantially identical ownership, for purposes of alter-ego analysis, where "members of the same family" or "people in a close familial relationship" are owners of the alleged alter egos.<sup>7</sup> Notwithstanding our dissenting colleague's colorful "walk-like-a-duck" metaphor, Redmond's and Herheim's relationship does not warrant the

application of this inference. They have not taken the step of entering into the legal arrangement of a marriage, with the familial connection and attendant presumption of commonality of finances that such a legal arrangement may imply. In no instance has the Board applied this inference in the context of unmarried cohabitating couples.<sup>8</sup> While we do not address whether such a relationship can ever support an inference of substantially identical ownership and control, we find that the General Counsel failed to adduce sufficient evidence to establish that Herheim's relationship with Redmond warrants an extension of the inference here.<sup>9</sup>

The reason that the Board may infer substantially identical ownership in the context of familial relationships is not simply the apparent alignment of interests that family members share. Indeed, as the Board explained in *First Class Maintenance Services*, 289 NLRB 484, 485 (1988):

[A] finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owners of two companies. Rather, each case must be examined in the light of all the surrounding circumstances. In particular, the Board focuses on whether the owners of one company retained financial control over the operations of the other. [Internal citations omitted.]

Applying this principle, the Board has indicated that it will only find common ownership in the "close familial relationship" context when "the owners of one company exercise considerable financial control over the alter ego." *Adanac Coal Co.*, 293 NLRB 290, 290 (1989) (finding no common ownership despite alleged alter egos being owned by brothers); see also *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435 (2004), *enfd.* 408 F.3d 450 (8th Cir. 2005). Thus, the inquiry at the heart of the "close familial relationship" inference concerns the degree of *financial control* the owner of one company has over the other company.

The evidence does not show that Redmond "retained financial control over the operations of" Steelworkers

<sup>6</sup> Thus, the judge apparently based his conclusion on the first of the three exceptions we previously identified, "wholly owned by members of the same family."

<sup>7</sup> Indeed, the Board has frequently found that "where members of the same family are the owners of two nominally distinct entities, which are otherwise substantially the same, ownership and control of both of the entities is considered substantially identical." *Cofab, Inc.*, 322 NLRB 162, 163 (1996), *enfd.* *mem. sub nom. NLRB v. DA Clothing Co.*, 159 F.3d 1352 (3d Cir. 1998); see also *Fallon-Williams, Inc.*, *supra*, 336 NLRB at 602 ("[t]he Board has not hesitated to find alter ego status even though entities had different owners, when the owners were in a close familial relationship.").

<sup>8</sup> We further note that the General Counsel has neither claimed nor presented evidence that Redmond and Herheim's personal arrangement was that of a common-law marriage. Absent such a claim by the General Counsel or an assertion that the same familial assumptions of financial commonality should apply to common-law marriages, we find it unnecessary to address that possibility.

<sup>9</sup> The cases cited by our colleague, *Alexander Painting, Inc.*, 344 NLRB 1346 (2005), *Mastronardi Mason Materials Co.*, 336 NLRB 1296, 1305 (2001), *enfd.* 64 Fed.Appx. 271 (2d Cir. 2003), and *E.G. Sprinkler Co.*, 268 NLRB 1241, 1244 (1984), *enfd.* *sub nom Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2d Cir. 1984), all involved alleged alter-ego companies that were owned by married couples or brothers. As explained below, we find insufficient evidence of shared financial arrangements or control to find those cases applicable here.

such that his relationship with Herheim warrants application of the “close familial relationship” exception. The only evidence presented regarding their relationship was that Redmond and Herheim lived together, cared for Redmond’s children, and were a “committed couple.” As noted above, no evidence was presented regarding any shared financial arrangements between the two<sup>10</sup> or any other indicia of financial control exercised by one over the other. Rather, the undisputed and credited testimony is that Herheim independently incorporated and capitalized Steelworkers and was the only person authorized to conduct business on its behalf.<sup>11</sup> Under these circumstances, we find that the General Counsel failed to demonstrate that the relationship between Redmond and Herheim was so akin to the type of “close familial relationship” the Board requires to overcome the absence of common ownership.

Similarly, there is no evidence that Redmond and Herheim consolidated their finances so as to support an assertion that either Reinforcing or Steelworkers were co-owned by Redmond and Herheim, or that the two businesses were “nearly totally owned by the same individual.” Indeed, no evidence was presented regarding any shared financial arrangements between the two. In sum, the evidence fails to show joint ownership.<sup>12</sup>

Our dissenting colleague would find that Redmond and Herheim’s relationship was sufficient to support a finding of common ownership, largely because Redmond was actively involved in Steelworkers’ operations. However, it is important to recognize the difference between *such active involvement* and owning and financially *controlling* the company. Here, although Redmond was a key employee of Steelworkers, he was not an owner or a financial controller.<sup>13</sup> Nor has it been shown that he participates in the profits of the company.

<sup>10</sup> This could have included readily obtainable evidence such as shared bank accounts, or mortgages or other contracts with both names signatory. The latter could include, for example, property, health, or life insurance policies. The record is devoid of any such or similar evidence.

<sup>11</sup> It is for these very reasons that this case is distinguishable from *Kenmore Contracting Co.*, 289 NLRB 336 (1988), *enfd.* 888 F.2d 125 (2d Cir. 1989). In that case, there was record evidence that the owners of the nonunion company were “financially dependent” on their parents, the owners of the union company, and that the parents had provided the money to capitalize the nonunion company. 289 NLRB at 337.

<sup>12</sup> For similar reasons, we find no support for an assertion that Reinforcing “continued to maintain substantial control over the business claimed to have been sold to” Steelworkers.

<sup>13</sup> Cf. *Alexander Painting, Inc.*, *supra*, at 1352, where the president of one company acknowledged that her husband, the president of the company found to be its alter ego, made all the corporate decisions for her company. She further testified that, while she signed some checks and contracts for her company, she signed without question whatever

Further, even as to nonfinancial matters, Redmond was not the final authority. Thus, while Redmond provided assistance and input to Steelworkers on job bids and hires, Herheim retained final authority over these decisions. This is consistent with the judge’s specific finding, mentioned above, that Herheim alone was authorized to conduct business on Steelworkers’ behalf.

Nor is this a case where the owner of the prior company has capitalized the new company. Indeed, as our colleague acknowledges, only minimal capital was necessary to start the new business.

Further, although Redmond may have been flexible with Herheim with respect to Steelworkers’ rental of office space and equipment, the evidence falls far short of showing a less than arm’s-length relationship. Given that it is the General Counsel’s burden to prove an alter-ego relationship, we find that the General Counsel has failed to substantiate that the rental rate was so far less than the prevailing market rate as to warrant a finding of a sham.<sup>14</sup>

For all the above reasons, we are not persuaded that Redmond’s involvement with Steelworkers supports a finding of common ownership.

---

documents her husband presented her. Thus, contrary to our colleague’s description, the authority of the president’s husband in *Alexander Painting* extended far beyond managing the new company into exercising financial control.

Similarly, in *E.G. Sprinkler Corp.*, *supra* at 243, the duties of the husband of the new company’s owner (found to be an alter ego of the prior company) were not simply managerial, but also involved making financial decisions, including setting salaries and signing company checks and all of the company’s contracts.

<sup>14</sup> We note that the cases which our dissenting colleague cites to show the lack of an arm’s-length relationship involve not only familial relationships between the owners of the companies found to be alter egos (*McDonald’s Ready-Mix Concrete*, 246 NLRB 152, 154 (1979); *SRC Painting, LRC*, 346 NLRB 707, 721 (2006); *AC Electric*, 333 NLRB 987, 1001 (2001), *enfd.* sub nom. *ECM Enterprises v. NLRB*, 63 Fed.Appx. 521 (D.C. Cir. 2003)), but also evidence of significantly more substantial financial interconnection between the earlier and the latter companies. First, in *McDonald’s Ready-Mix Concrete*, *supra* at 153, *inter alia*, a bill of sale and promissory note were executed by the majority shareholder of the second company for \$116,000 for company equipment and office machines for which no down payment was made or security interest retained by the first company (whose majority shareholder was the father of the second company’s majority shareholder).

In *SRC Painting, LRC*, *supra*, not only was there no documentary evidence between the companies, found to be alter egos, for leases, but also for the sale of equipment and for apparently substantial loans. Similarly in *AC Electric*, *supra* at 993, 1001, the evidence, *inter alia*, showed cancelled checks for the payment of the transfer of rights in equipment between the two companies, found to be alter egos, drawn on a bank account of both alter egos. Evidence also established that the first company sold vans to the second for sums well below market price.

### B. Absence of Unlawful Motivation

We may assume *arguendo* that Reinforcing went out of business for antiunion reasons.<sup>15</sup> However, the issue is whether Steelworkers went into business with an anti-union motive, i.e., whether Steelworkers permitted Reinforcing to remain in business through the guise of Steelworkers. The General Counsel has not shown that Steelworkers had that motive.<sup>16</sup> Indeed, as described above, the judge credited Herheim's testimony, including her statements that she alone made the decision to go into business, that she did not consult with Redmond or tell him of her plans until a couple of days after Steelworkers was formed, and that she was not motivated by a desire to help Redmond or Reinforcing avoid obligations under the Act.<sup>17</sup>

Neither does the evidence show that Steelworkers was created to evade Reinforcing's contractual and statutory obligations. The dissent claims that because Herheim had the opportunity to start Steelworkers precisely because Reinforcing was going out of business, this demonstrates that Herheim's intent in creating Steelworkers was to assist Reinforcing in avoiding its obligations.

<sup>15</sup> Such a decision is not unlawful. *Textile Workers v. Darlington Manufacturing*, 380 U.S. 263, 273–274 (1965).

<sup>16</sup> Chairman Battista adheres to his position that the General Counsel must show, among other things, an intent to avoid legal obligations under the Act in order to prove alter-ego status. See *Crossroads Electric, Inc.*, supra, 343 NLRB 1502 at fn. 2. Because the General Counsel here has failed to show such intent by Herheim, he would a fortiori find that the General Counsel has failed to show an alter-ego relationship between Reinforcing and Steelworkers.

<sup>17</sup> Cf. *Alexander Painting, Inc.*, supra at 1349–1353 in which Alexander Pamphilis, the owner of Alexander Painting, incorporated Silver Palette and, less than 9 months later, transferred all shares in Silver Palette to his wife. In that case, Pamphilis admitted not only that he terminated Alexander Painting's contract with the union because of the company's financial problems, but also that he sought to operate Silver Palette as a nonunion company to avoid the "constrictions" and fund requirements of the union's contract. However, even in those circumstances, the Board found, that although Silver Palette had been used to avoid Alexander Painting's contractual and statutory obligations, the evidence failed to show that Silver Palette was created for that purpose.

Cf. also *Diverse Steel, Inc.*, 349 NLRB 946 (2007), where the Board found that two companies were alter egos because, among other things, the second company was formed to evade the first company's responsibilities under the Act. (The first company had been owned by a husband, wife, and the wife's mother. The second company was owned by the wife and her father.) Among the evidence the Board relied on was: the wife's testimony that one reason she formed the second company was because she had wanted the earlier company to go nonunion; and her husband's testimony that his wife asked him to identify union-affiliated employees so that she could avoid hiring them.

We note that in *Mastronardi Mason Materials Co.*, supra at 1305, cited by our colleague, where the Board found that the alter-ego companies had an intention to avoid obligations under the Act, the second company was owned by one of two brothers who had owned the earlier company and both of whom had expressed an interest in going nonunion.

Herheim credibly testified to the contrary. She stated that, in acting on her longstanding goal of owning a business, she was not motivated by a desire to help Redmond or Reinforcing avoid its statutory or contractual obligations.<sup>18</sup>

### C. Conclusion

Finally, our colleague asserts that our conclusion regarding alter-ego status is based solely on the absence of common ownership. As shown, we rely on this factor and others: the absence of financial control by Redmond, the absence of operational control, and the absence of a motive to avoid legal and contracted obligations.

Having found that the General Counsel has failed to prove an alter-ego relationship between Reinforcing and Steelworkers, we dismiss the allegations that Steelworkers violated Section 8(a)(5) and (1) of the Act by refusing to honor Reinforcing's collective-bargaining agreement with the Unions, or any automatic renewal of that agreement.

### ORDER

The National Labor Relations Board orders that the Respondent, US Reinforcing, Inc., Gouverneur, New York, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Refusing to honor the collective-bargaining agreement entered into with Iron Workers Local Union Nos. 12, 60, 33, and 440 (the Unions) on September 8, 2003, and any automatic renewal or extension of it. The bargaining unit is:

All journeymen and apprentice iron workers employed by the Respondent within the geographical area of the Unions; excluding all other employees, office clericals, guards, and supervisors, as defined in the Act.

(b) Failing to pay its employees the contractually established wage rates.

(c) Failing to make contractually required contributions to the benefit funds prescribed in the collective-bargaining agreement.

(d) Failing to deduct union dues and remit them to the Unions for any employees who have signed dues-deduction authorizations.

<sup>18</sup> Cf. *Alexander Painting, Inc.*, supra at 1352–1353, where after Pamphilis, owner of the first company, started the second company and later transferred all the stock to his wife, his wife remained nothing more than a "figure-head" for the second company. As noted above, Pamphilis testified that he sought to operate the second company as a nonunion company to avoid the first company's contractual obligations.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give full force and effect to the terms and conditions of employment provided in the 2003–2006 collective-bargaining agreement with the Unions and any automatic renewal or extension of it.

(b) Make whole unit employees for any loss of earnings and other benefits resulting from the Respondent's failure to honor the terms of the 2003–2006 agreement, and any automatic renewal or extension of it, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Remit the benefit fund payments that have become due and reimburse unit employees for any expenses arising from the Respondent's failure to make the required payments, in the manner set forth in the remedy section of the judge's decision, as modified by footnote 2 of this Decision.

(d) Deduct and remit to the Unions union dues for all employees who have signed dues-deduction authorizations, with interest computed in the manner set forth in the remedy section of the judge's decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Gouverneur, New York, copies of the attached notice marked "Appendix."<sup>19</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facil-

ity involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER WALSH, dissenting in part.

"For purposes of this case, we wholeheartedly embrace the now-infamous 'duck test,' dressed up in appropriate judicial garb: 'WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.'"—*Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989).

This is a classic alter-ego case. A unionized company is unable to meet its obligations under a collective-bargaining agreement and goes out of business. With no hiatus in operations, a nonunion company comes into existence at the same address to perform the same work, operating out of the same office, with essentially the same employees, supervisors, managers, equipment, and customers. The new company is ostensibly owned and operated by an individual who has absolutely no relevant business experience, but who lives with the owner of the unionized company, with whom she shares a close personal relationship. The owner of the unionized company confesses to the union that "he was having a little financial problem," that "he was more or less thinking of going nonunion," and that "he wanted to go with his girlfriend [who] was going to start another company."

The facts and the law overwhelmingly support the judge's finding that the new company is an alter ego of the unionized company. Unable to discern the obvious, the majority disagrees.

In my view, the new company is unquestionably an alter ego, and it therefore violated Section 8(a)(5) and (1) of the Act by failing to abide by the collective-bargaining agreement previously entered into by the unionized company. The majority's decision, despite its appearance of reasoned analysis, ignores the reality staring us in the face. I dissent.<sup>1</sup>

#### I. FACTS

US Reinforcing, Inc. (Reinforcing) was a rebar contractor: it provided labor to install steel rods used to rein-

<sup>19</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> I concur in the majority's finding that the unionized company violated Sec. 8(a)(5) and (1) of the Act by failing to abide by that agreement.

force concrete structures during construction. Reinforcing began operating in about May 2000, and its stock was owned by Christian Redmond (Redmond) and his former wife, Kimberly Redmond (Kimberly). Redmond estimated and prepared bids, hired and fired employees, and supervised employees on the jobsites; Kimberly did the office work. They operated the business out of their home in Gouverneur, New York. They separated in August 2002 and subsequently divorced. After the separation, Redmond remained in the home and continued operating Reinforcing alone.

In November 2002, Redmond entered into a personal relationship with Denise Herheim, who worked as a clerk at a gas station convenience store. In May 2003, Herheim moved into Redmond's home and took care of Redmond's children while continuing to work at the convenience store.

In September 2003, Redmond executed the area agreement between the Unions and the Upstate Iron Employers Association covering the period May 1, 2003, to April 30, 2006. Initially, Reinforcing met its monthly obligations to the Unions' fringe benefit funds under that agreement, but by the spring of 2004, Reinforcing was in financial trouble. As a result, Redmond stopped bidding on new work. In September 2004, Redmond informed the Unions that he could not afford to keep Reinforcing in business. At the time, Reinforcing owed the benefit funds approximately \$120,000, but had only \$17,000 on hand.

In May 2004, at the same time that Reinforcing began experiencing increasing financial difficulties, Herheim began doing office work for Reinforcing. She had no prior experience in the rebar business. Nevertheless, after less than 2 months on the job, Herheim contacted an attorney about starting her own rebar business. With an investment of \$1000, Herheim formed U.S. Steelworkers, LLC (Steelworkers) on July 1, 2004,<sup>2</sup> while she was still working for Reinforcing.

Having no capital assets, Herheim began operating Steelworkers out of Redmond's home, using the same office space, computer, Dodge Report subscription,<sup>3</sup> fax machine, desk, and telephone that were owned either by Redmond or Reinforcing and being used by Reinforcing. Herheim testified that she rented the space, equipment, and services from Reinforcing for \$100 a week, paid mostly in cash, that is, "when I could afford to pay it." Steelworkers also used the same insurance agency and

accountant as Reinforcing. Steelworkers operated as a nonunion company.

Within a week of its formation, Steelworkers began bidding on jobs, notwithstanding Herheim's lack of experience. In its second week, Steelworkers secured its first contract.

Because Herheim had no experience in the rebar field, or, indeed, in managing a business of any kind, she was necessarily dependent upon Redmond's expertise. When bid preparation required the examination of blueprints, Redmond explained the blueprints to Herheim. Redmond also advised her on the size and shape of the rebar called for, and the difficulty involved in its installation.

In the field, Redmond served as the foreman on Steelworkers' first job, which ran from October 2004 to January 2005. Redmond did all of the initial hiring for Steelworkers, with Herheim's approval. Four of the six employees on the first job had previously been employed by Reinforcing; the other two were people Redmond knew.

Prior to the hearing in this case, Steelworkers performed work on five other projects. Redmond was foreman on one of those, and he worked on three of the others. Lee Hance, an employee of Reinforcing, was the job foreman on three of the jobs, and Redmond's brother was the foreman on the remaining job. On each of those jobs, again owing to Herheim's lack of rebar experience, she relied on the job foreman to tell her the number of employees needed and anything related to the installation of the rebar.

At the time that Redmond commenced working for Steelworkers, Reinforcing was completing its final job and was not bidding on any new jobs. At about the same time, the Unions learned of Redmond's involvement with Steelworkers. When confronted by them, Redmond acknowledged that he was working for "Denise [Herheim]" because it was the only way that he could earn enough money to pay his arrearages to the union funds.<sup>4</sup> Redmond also told the Unions that he was "more or less thinking of going nonunion," that he wanted to work for "his girlfriend [who] was going to start another company," that some of his employees would be working with him on a nonunion job, and that Reinforcing was going to go out of business because Redmond could not make a go of it at union rates.

---

<sup>4</sup> The Unions offered to work out a payment plan to enable Redmond to remain a union contractor, but Redmond did not pursue this offer.

---

<sup>2</sup> All dates hereafter are 2004, unless otherwise indicated.

<sup>3</sup> The Dodge Report was used to identify jobs on which to bid. Redmond's testimony establishes that this report alone could cost several thousand dollars a year.

## II. ANALYSIS

A. *Relevant Legal Principles*

“In determining whether an alter ego relationship exists, the Board considers whether two entities have substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment.” *Fallon-Williams, Inc.*, 336 NLRB 602 (2001) (footnote omitted). “Another relevant factor is whether one entity was created in an attempt to enable another to avoid its obligations under the Act.” *Id.* “[N]o one factor is determinative, nor do all of the above indicia need to be present to find that an alter ego relationship exists.” *Cofab, Inc.*, 322 NLRB 162, 163 (1996), *enfd. mem. sub nom. NLRB v. DA Clothing Co.*, 159 F.3d 1352 (3d Cir. 1998). “In particular, identical ownership is not a prerequisite for finding an alter ego relationship.” *Id.* (footnote omitted); *cf. Crossroads Electric, Inc.*, 343 NLRB 1502, 1506 (2004), *enfd. mem. 178 Fed.Appx. (6th Cir. 2006)* (recognizing that “[t]o focus upon the formality rather than the reality would ‘distort the picture’ of what actually occurred”).

B. *Application of Principles*

A quick look at the record shows that uncontested evidence establishes the presence of all of the factors relevant to an alter-ego finding. Indeed, the majority takes issue with only two: substantially identical ownership and intent to evade responsibilities under the Act.

## 1. Substantially identical management and supervision

Redmond managed Reinforcing, and he was intimately involved in the management of Steelworkers. As the judge found, Herheim had no experience in rebar installation, and she relied on Redmond’s expertise in preparing bids. He explained the blueprints to Herheim and estimated the difficulty of the jobs. Herheim also relied on Redmond to hire Steelworkers’ work force, as he had done for Reinforcing. In addition, Redmond, his brother Ryan, and Lee Hance were the supervisors for Steelworkers, and they all had performed similar duties for Reinforcing. See *Alexander Painting, Inc.*, 344 NLRB 1346, 1353–1354 (2005) (fact that owner of union painting company managed nonunion painting company owned by his wife supported alter-ego finding); *E.G. Sprinkler Corp.*, 268 NLRB 1241, 1243 (1984) (union company owner’s hiring and firing of employees of non-union company owned by his wife supported alter-ego finding), *enfd. sub nom. Goodman Piping Products, Inc. v. NLRB*, 741 F.2d 10 (2d Cir. 1984).

## 2. Substantially identical business purpose and operations

The purpose of both Reinforcing and Steelworkers was to install rebar, and both companies operated in the same way—as contractors providing rebar installers but not the rebar itself. Both companies also operated from the same location, and there was no hiatus between the cessation of Reinforcing’s business and the commencement of Steelworkers’. See *Mastronardi Mason Materials Co.*, 336 NLRB 1296, 1305 (2001), *enfd. 64 Fed.Appx. 271 (2d Cir. 2003)*. In addition, both companies employed basically the same contingent of workers; most of Steelworkers’ employees had worked for Reinforcing, and the few who had not were prior acquaintances of Redmond. See *Alexander Painting*, *supra*, 344 NLRB at 1353 (same employees a factor supporting alter-ego finding).

## 3. Substantially identical equipment

Both Reinforcing and Steelworkers operated out of Redmond’s residence, and used the same telephone, fax machine, computer, Dodge Report subscription, insurance agency, and accountant. See *Alexander Painting*, *supra*, 344 NLRB at 1353 (same daily business operations from same building, with same fax number and some of same phone numbers support alter-ego finding).

## 4. Substantially identical customers

Steelworkers and Reinforcing served the same customers, doing projects for at least three of the same general contractors. See *Alexander Painting*, *supra*, 344 NLRB (essentially same customers a factor supporting alter-ego finding). Indeed, Steelworkers actually obtained some of its jobs through bid solicitations that had been sent to Reinforcing. See, e.g., *E.G. Sprinkler Corp.*, *supra*, 268 NLRB at 1244 (union company performed work on behalf of nonunion company pursuant to work order received by union company). Not surprisingly, given that they served primarily the same customers, both companies performed most of their work in the same geographical area, Central New York State.

## 5. Substantially identical ownership

As stated above, “common ownership is *not* an absolute prerequisite to a finding of alter ego status.” *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1420 (D.C. Cir. 1984) (emphasis in original). Common ownership, moreover, should be a lesser factor in cases like this one, where the capitalization of the enterprise is minimal.

In any event, that factor is satisfied here. As the majority acknowledges, the factor of common ownership can be satisfied when the owners of the alleged alter egos have a close familial relationship. See *Cofab, Inc.*, 322 NLRB 162, 163 (1996), *enfd. mem. sub nom. NLRB v.*

*DA Clothing Co.*, 159 F.3d 1352 (3d Cir. 1998). The judge properly found that Redmond and Herheim had such a relationship.

Shortly after Redmond separated from his former wife, Herheim moved into Redmond's residence and began taking care of his children. Redmond testified that he and Herheim were a "committed couple," and they both testified that they had lived together for 2-1/2 years. The facts establish that Redmond and Herheim thought of themselves and functioned as a familial unit.

Further support for a finding of substantially identical ownership is the evidence showing that Redmond and Herheim, and their respective businesses, did not operate at arm's length. As stated above, either Redmond or Reinforcing owned the office space and all of the equipment that Herheim used to operate Steelworkers. Herheim's statement that she paid Redmond \$100 per week, usually in cash and when she could afford it, hardly establishes that Steelworkers compensated Reinforcing fairly. The Board has often found that such irregular or undocumented accounting supports a finding of alter-ego status. See, e.g., *SRC Painting, LRC*, 346 NLRB 707, 721 (2006) (irregular transactions, including alleged loans without documentation, sales without receipts, and lease relationships without documents or terms, indicate lack of arm's-length relationship and support alter-ego finding); *AC Electric*, 333 NLRB 987, 1001 (2001) (in case of two companies technically owned separately by husband and wife, finding of substantially identical ownership was enhanced by evidence showing stark absence of arm's-length dealings), enfd. sub nom. *ECM Enterprises v. NLRB*, 63 Fed.Appx. 521 (D.C. Cir. 2003).<sup>5</sup>

My colleagues acknowledge that the common ownership factor can be satisfied by evidence of financial control "by the owners of one company . . . over the operations of another," but claim that the General Counsel failed to produce that evidence here. They are simply mistaken. The evidence plainly shows that Redmond exerted control over Steelworkers in crucial areas of the business. Redmond subsidized Steelworkers' operations as needed, formulated (or, on other occasions, had indispensable input into) Steelworkers' job bids, acted as a foreman on Steelworkers' jobs, and, as a practical matter,

<sup>5</sup> The majority points out that Herheim independently incorporated and capitalized Steelworkers. That evidence, however, is outweighed by the reality that Redmond effectively subsidized Steelworkers' actual day-to-day operations by allowing Herheim to use Reinforcing's assets at little or no cost. Cf. *McDonald's Ready-Mix Concrete*, 246 NLRB 152, 154 (1979) (finding father's and son's businesses to be alter egos, even assuming truth of son's assertion that he capitalized his corporation with \$20,000 of personal proceeds, in light of shared premises, employee interchange, sharing of facilities, and commonality of customers).

was in charge of all personnel decisions and all decisions requiring technical knowledge of the rebar business.<sup>6</sup> On that record, Redmond's role in operating Steelworkers clearly amounted to financial control sufficient to satisfy the common ownership standard.<sup>7</sup>

My colleagues also make much of the fact that Redmond and Herheim were living together but not married. They say that the absence of marriage means that there can be no "attendant presumption of commonality of finances . . ." I know of no such presumption in Board law. And, in any event, our precedent does not require proof of a commonality of finances to establish an alter-ego relationship. Certainly, the Board has had no difficulty finding the common ownership standard satisfied in cases involving ownership by siblings, see, e.g., *Volk & Huxley*, 280 NLRB 219 (1986), enfd. sub nom. *NLRB v. Amateyus*, 817 F.2d 996 (2d Cir. 1987), cert. denied 484 U.S. 925 (1987), or by parents and their adult children, see, e.g., *Kenmore Contracting Co.*, 289 NLRB 336 (1988), enfd. mem. 888 F.2d 125 (2d Cir. 1989). No presumption of commonality of finances is appropriate in those situations.

In sum, the record establishes that the ownership of Reinforcing and Steelworkers was substantially identical. This conclusion is supported by Redmond's and Herheim's committed familial relationship, by Redmond's financial support of Steelworkers, and by his continuing and substantial role in Steelworkers' operations.

#### 6. Intent to evade responsibilities under the Act

Finally, there is compelling evidence that Redmond, through his involvement with Steelworkers, was seeking to evade Reinforcing's responsibilities under the Act. As stated above, Redmond acknowledged to union represen-

<sup>6</sup> Although Herheim's testimony was that her approval was necessary for all hiring decisions, there is no evidence that Herheim ever overruled one of Redmond's selections. Indeed, there is no evidence that Herheim ever disagreed with, modified, or overruled any management decision that Redmond made for Steelworkers.

<sup>7</sup> The majority's reliance on *Hill Industries*, 320 NLRB 1116 (1996), *Hartman Mechanical*, 316 NLRB 395 (1995), and *Superior Export Packing Co.*, 284 NLRB 1169 (1987), enfd. mem. sub nom. *Meadowlands Hy-Pro Industries, Inc. v. NLRB*, 845 F.2d 1013 (3d Cir. 1988), is misplaced for two reasons. First, in those cases there were no familial ties at all between the alleged alter-ego companies. Second, there was no evidence in those cases that the owner of the old company exercised any significant control over the business operations of the new company. Similarly, in *Adanac Coal Co.*, 293 NLRB 290, 294 (1989), the owner of the old company had "no real connections" with the new company, which was independently run by the new owner. The same was true in *First Class Maintenance*, 289 NLRB 484 (1988). *Perma Coatings*, 293 NLRB 803 (1989), is also distinguishable. There, unlike here, the old business was completely defunct when the new business began operating and, in addition, there was no evidence that the owner of the old business was seeking to evade any responsibilities under the Act.

tatives that he had abandoned Reinforcing to “go nonunion” and work for “his girlfriend,” because he could not get enough jobs or make enough money as a union contractor. Those admissions are sufficient to establish unlawful motive. See, e.g., *Alexander Painting*, supra, 344 NLRB at 1352 (finding alter-ego status where the president of the union company admitted that he sought to terminate the company’s union contract because it was in debt and “the only hope I had of paying those debts down was to get out of the Union and start making some money”); see also *Mastronardi*, supra, 336 NLRB at 1305 (finding alter-ego status where the respondent’s statement that it was going “nonunion” because the union contract was too expensive indicated motive to evade bargaining responsibility under the Act). Thus, this factor, too, supports the finding that Steelworkers and Reinforcing were alter egos.<sup>8</sup>

### III. CONCLUSION

This is an easy case. Every one of the relevant factors militates in favor of finding alter ego status. Regrettably, the majority falls for the Respondents’ clumsy stratagem for “going nonunion,” and permits them to avoid their legal responsibilities at the expense of their employees.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to honor the collective-bargaining agreement entered into with Iron Workers Local Union

<sup>8</sup> The majority notes that the judge credited Herheim’s testimony that she was not motivated by a desire to assist Redmond or Reinforcing in avoiding obligations under the Act. The judge, however, also found it unlikely that Herheim would have begun operating Steelworkers when and as she did if Reinforcing was not having problems meeting its union obligations. That finding by the judge, in conjunction with Redmond’s admissions, establishes that the factor of intent also militates in favor of finding alter-ego status.

Nos. 12, 60, 33, and 440 (the Unions) on September 8, 2003, and any automatic renewal or extension of it. The bargaining unit is:

All journeymen and apprentice iron workers employed by the Respondent within the geographical area of the Unions; excluding all other employees, office clericals, guards, and supervisors, as defined in the Act.

WE WILL NOT fail to pay the contractually established wage rates.

WE WILL NOT fail to make contractually required contributions to the benefit funds prescribed in the collective-bargaining agreement.

WE WILL NOT fail to deduct union dues and remit them to the Unions for any employees who have signed dues-deduction authorizations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed above.

WE WILL give full force and effect to the terms and conditions of employment provided in the 2003–2006 collective-bargaining agreement with the Unions and any automatic renewal or extension of it.

WE WILL make whole unit employees for any loss of earnings and other benefits resulting from our failure to honor the terms of the 2003–2006 agreement, and any automatic renewal or extension of it, with interest.

WE WILL remit the benefit fund payments that have become due and reimburse unit employees for any expenses arising from our unlawful failure to make such payments, with interest.

WE WILL deduct and remit to the Unions union dues for all employees who have signed dues-deduction authorizations, with interest.

US REINFORCING, INC.

*Alfred Norek, Esq.*, for the General Counsel.

*Roger Bradley, Esq.*, of Syracuse, New York, for the Respondent, U.S. Steelworkers, LLC.

*Christian Redmond*, for US Reinforcing, Inc.

*Jennifer A. Clark, Esq.*, of Syracuse, New York, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. The original charge in this case was filed on March 10, 2005, by Iron Workers Local Union Nos. 12, 33, 60, and 440 (the Unions) and an amended charge was filed on April 26. On June 29, 2005, the Regional Director for Region 3, National Labor Relations Board (the Board), issued a complaint alleging that US Reinforcing, Inc. (Reinforcing) and its alter ego, U.S. Steelworkers, LLC (Steelworkers), had committed certain violations

of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Steelworkers filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Syracuse, NY, on August 23, 2005, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all times material, Reinforcing was a New York corporation with an office in Gouverneur, New York, engaged in business as a contractor in the construction industry installing steel rebar. During 2004, Reinforcing derived gross revenues from its business operations in excess of \$100,000, of which in excess of \$50,000 was derived from providing services in the Commonwealth of Pennsylvania. I find that at all times material, Reinforcing was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Although Respondent Steelworkers denies that the Board has jurisdiction over it, given my findings that it is an alter ego of Reinforcing, the argument has no merit.

##### II. THE LABOR ORGANIZATIONS INVOLVED

The Respondents admit and I find that at all times material the Unions were labor organizations within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this matter are not really in dispute. The sole issue is whether Steelworkers is an alter ego of Reinforcing and therefore obligated to honor the collective-bargaining agreement Reinforcing had with the Charging Party Unions when it performed rebar work.

Reinforcing began operating as a rebar contractor, providing labor to install steel rods to reinforce concrete structures during construction, in or about May 2000. All of its stock was owned by Christian Redmond who served as vice president and his former wife Kimberly Redmond who was president. Reinforcing obtained work through competitive bidding on projects it learned about through industry sources and the "Dodge Report," a subscription service which listed and described upcoming construction projects. Christian Redmond did the estimating and preparation of bids on jobs and was responsible for hiring, firing, and supervising employees on the jobsites. Kimberly did all of the office work, including, bookkeeping, tax returns, accounts receivable and payable, and secretarial duties. The business was operated out of their residence at 121 Barnes Street in Gouverneur, New York. The couple separated in August 25 2002, and subsequently divorced. Kimberly had no actual involvement in the business after the separation. After Kimberly left, Redmond took over most of her office duties but also engaged the services of an accountant.

Denise Herheim has had a personal relationship with Redmond since November 2002. She has resided at the Barnes

Street residence since May 2003 where she has cared for Redmond's children who reside there. She began working for Reinforcing in May 2004, doing its office work, and was paid on an hourly basis.

In or about September 2003, Redmond contacted Gary Robb, business manager of 35 Local 60, and discussed becoming a union contractor. On September 8, 2003, Redmond executed the area agreement between the Unions and the Upstate Iron Employers Association covering the period May 1, 2003, through April 30, 2006. The bargaining unit consisted of all journeymen and apprentice ironworkers employed by the Respondent in the geographical area of the Unions; excluding all other employees, office clericals, guards and supervisors. On September 20, 2003, Redmond and several Reinforcing employees went to the Local 60 office and executed applications for membership and dues authorization cards. Under the terms of the area agreement, Reinforcing was required to make monthly reports and remit contributions to the Unions' fringe benefit funds. Initially, it did so, but by December 2004, its reports and contributions were late and eventually it ceased making payments altogether.

Redmond acknowledged that by spring or summer 2004 he had concluded that Reinforcing could not get contracts or make sufficient money to sustain a work force whether it was union or nonunion. The costs were too great, the returns too small, and the company was headed for bankruptcy. He stopped bidding on new work in the spring of 2004. In September, 2004 he told Robb that he could not afford to stay in business and that there was only about \$17,000 in retention money due which could be applied to the more than \$120,000 in delinquent payments to the union funds.

Herheim testified that several years prior to 2004 she had decided to go into business for herself but did not have enough money to start a company. Prior to going to work for Reinforcing, she had no experience in the rebar business, having worked for 6 years at a gas station and convenience store. However, in 2004, she undertook to form her own company to do rebar work since it involved only providing labor to do the rebar work on projects and did not involve a lot of overhead or require a lot of capital. In June, she contacted an attorney to find out what she had to do to start her own business. Steelworkers came into existence as a limited liability company on July 1 while she was still working for Reinforcing. She testified that she made a conscious decision that Steelworkers would operate as a nonunion company. She said that she had seen the problems that Redmond had as a union contractor and "when you work in a business, if you see something that doesn't go very well, you're not going to do it." She said that she did not consult with Redmond or tell him of her plans until a couple of days after Steelworkers was formed.

Steelworkers began bidding on jobs during the first week of July. Herheim operated her business at the Barnes Street property using the same computer, fax machine, desk, and telephone she used while working for Reinforcing. She said that she rented this equipment from Redmond and paid him \$100 a week when she "could afford to pay it depending on whether I got paid for my contracts." She testified that in mid-July, Steel-

workers got its first contract and she stopped working for Reinforcing.

Steelworkers' first project was Ithaca Apartments and the general contractor was Pike Company. Redmond was the job foreman throughout its duration, from about October to 2F, January 2005. The employees on the job were Anthony Tehonica, Lee Hance, Brad Blackburn, Ryan Redmond, Brian Smith, and Kory Bailey. The first four had previously worked for Reinforcing and the latter two were people Redmond knew. All were hired by Redmond with Herheim's approval. The next job was at Wal-Mart in Ithaca with Redmond as foremen and Tehonica also working. Steelworkers did two jobs for Continental Construction, a Messina job and Watertown Correctional Facility. Lee Hance was the job foreman on both and Blackburn, Redmond, and his brother Ryan worked on them. It did a job at Fort Drum on which Ryan Redmond was the foreman and Redmond, Hance, and Blackburn worked. Its final job was for Northeast at Colgate University with Hance the foreman and Blackburn also working.

Herheim prepared bids on these jobs after receiving invitations to bid or looking at the Dodge Report. The bid invitations were faxed to the fax number used by Reinforcing and the Dodge Report was the subscription purchased by Reinforcing. She prepared bids based on the tonnage of rebar to be installed and usually bid between 28 to 32.5 cents per pound depending on the nature of the job. When preparing a bid required examining blueprints, Redmond explained the blueprints to her because she had no experience using them. Redmond also advised her on the size and shape of the rebar called for and the difficulty involved in its installation. Similarly, since she had no experience working in the rebar field, she relied on the job foremen concerning the number of employees needed and anything relating to the installation of the rebar. Steelworkers did jobs in the same geographical area as Reinforcing and for some of the same general contractors, including, Northeast, Purcell, and Continental. Steelworkers paid its employees \$15 to \$22 per hour on nonprevailing wage jobs and provided no fringe benefits. During September and October 2004, Redmond performed work for Steelworkers while Reinforcing was still finishing its last project and not bidding on any new contracts.

Herheim admitted that while working for Reinforcing she was generally aware of the fact that reports and remittances had to be sent to the Unions on a monthly basis and while she did not prepare them she had gone over the reports that Reinforcing's accountant had prepared to see that they were correct. She was aware, after receiving several calls from the Unions in May and June 2004, that remittance reports were missing and that required contributions were not being made. She was also aware that Reinforcing was having financial difficulties.

Gary Robb credibly testified that in September 2004, he heard that Redmond was working as a nonunion contractor. When asked about it by Robb, Redmond said that he had bid a job involving a Wal-Mart in Ithaca but did not get it. After the rebar contractor that got the job ran into difficulty and was removed from the project, Redmond was asked to finish the work. He said that he was doing so as "an open shop contractor" Robb asked if this was his company and Redmond said that he was working for Herheim, as it was the only way he could

earn enough money to pay his arrearages to the union funds. Robb told Redmond that he wanted him to continue as a union contractor, that the Union would attempt to work out a payment schedule, and that as a union iron worker he could not operate another nonunion enterprise. In a subsequent meeting, Robb told Redmond that the Union would be taking legal action against him and had an audit of Reinforcing done.

Peter Cossack is the business manager of Iron Workers Local 12 which has jurisdiction over the area which includes Lake Placid, New York, where Reinforcing did some work. Redmond signed a letter of consent similar to the one he signed with Local 60. In September 2004, after Reinforcing fell behind in its payments to Local 12, Cossack called Redmond about it.

Redmond told him that he was going to work nonunion with his girlfriend's company and that some of his employees would also be working with him on a nonunion job. Cossack told

Redmond that it sounded like an alter-ego situation which could get him into trouble, but Redmond responded that he didn't think it would be a problem.

#### Analysis and Conclusions

In determining whether an alter ego relationship exists, the Board considers several factors. They are whether the two entities have substantially identical ownership, management, business purpose, operations, equipment, customers, supervisors, and shared premises and facilities. Also relevant is whether one entity was created in an attempt to enable the other to avoid its obligations under the Act, but this is not essential to a finding of alter ego status. The Board has found alter ego status even though the entities had different owners when the owners 3E were in a close familial relationship. E.g., *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435 (2004); *Crossroads Electric, Inc.*, 343 NLRB 1502, 1506 (2004); *Fallon-Williams, Inc.*, 336 NLRB 602 (2001).

Each case turns on its own facts. Here, all of the factors pointing to alter ego status are 40 present. Herheim testified that she made the decision to start up Steelworkers on her own without consulting Redmond and that she was not motivated by a desire to assist him and/or Reinforcing in avoiding obligations under the Act. While I credit this testimony, I find it unlikely that she would have begun operating Steelworkers when and in the manner she did if Reinforcing was not having problems meeting its obligations to the Unions. I also recognize that the business was solely in Herheim's name, that she provided what little capital investment was needed to start a rebar operation, that she submitted bids on Steelworkers behalf, and that she was the only one authorized to sign contracts and payroll checks. However, none of these factors are determinative of alter ego status and they are far outweighed by those that are relevant under Board law.

Redmond managed Reinforcing and was involved in the management of Steelworkers. Although Steelworkers argues that Herheim alone had the final say on all the decisions affecting Steelworkers, she admittedly had no experience in the installation of rebar and relied on Redmond's expertise in preparing bids on contracts, hiring workers, and supervising them in the field. It appears that the bids Herheim prepared involved little more than computing the bids by multiplying the number

of pounds of rebar called for times between 28 and 35.5 cents per pound. Any bid that involved reading blueprints or depended on the size or complexity of the rebar installation required Redmond's assistance. One of Steelworkers' Wal-Mart jobs resulted from a request by a general contractor that it take over a job that another rebar contractor had made a mess of and left the scene. Steelworkers agreed to take it on only after Redmond went to the project to check it out because It wasn't something that was just plain and simple."

Reinforcing and Steelworkers did the identical type of work, installing steel rebar in structures under construction. Both operated out of the same address the residence at which Redmond and Herheim resided, both entities carried on their business operations using the same telephone, fax machine, computer, Dodge Report subscription, and had the same insurance agency and accountant.

The majority of the employees Steelworkers employed had previously worked for Reinforcing. The two employees who had not worked for Reinforcing were hired by Redmond who knew them. Redmond, his brother Ryan, and Lee Hance were the supervisors for Steelworkers. All three had performed similar duties for Reinforcing.

Both entities performed rebar work in the same geographical area, primarily in Central New York. While Reinforcing did some work in Pennsylvania and Steelworkers only worked in New York, I do not consider this significant. Both entities served the same customers doing projects for at least three of the same general contractors, Purcell, Northeast, and Continental. Moreover, it appears that Steelworkers got some of its jobs through bid solicitations sent to Reinforcing's telephone or fax number.

While Reinforcing and Steelworkers had different ownership, Redmond and Herheim had a close familial relationship, residing together and caring for Redmond's children. Under these circumstances a finding of alter ego status is not precluded. *Fallon-MI/lams, Inc.*, above, at 602. Based on all of the foregoing, I find that at all times material Steelworkers was an alter ego of Reinforcing.

#### CONCLUSIONS OF LAW

1. The Respondents, US Reinforcing, Inc. and U.S. Steelworkers, LLC, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. All journeymen and apprentice iron workers employed by the Respondents in the geographical area of the Unions; excluding all other employees, office clericals, guards, and supervisors, as defined in the Act, constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act.

4. The Unions are the designated exclusive collective-bargaining representative of the employees within the appropriate unit.

5 By failing to abide by the terms of the collective-bargaining agreement with the Unions, the Respondents, US Reinforcing, Inc. and its alter ego U.S. Steelworkers, LLC, committed unfair labor practices affecting commerce in violation of Section 8(a)(5) and (1) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents, US Reinforcing, Inc. and its alter ego U.S. Steelworkers, LLC, having failed and refused to give effect to the collective-bargaining agreement in effect with the Unions, must make all unit employees whole for any loss of earnings and other benefits resulting from such failure and refusal. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents shall make all payments required by the collective-bargaining agreement to the Unions' benefit funds as prescribed in *Menyweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and comply with the collective-bargaining agreement's provisions concerning deductions of union dues and remit all amounts due to the Unions.

[Recommended Order omitted from publication.]