

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

McCARTHY CONSTRUCTION COMPANY, INC.

Respondent

and

Case Nos. 7-CA-51474
7-CA-51647

CEMENT MASONS LOCAL 1, INTERNATIONAL UNION
OF BRICKLAYERS AND ALLIED CRAFTWORKERS
(BAC), AFL-CIO

Charging Union

BRIEF IN SUPPORT OF CHARGING UNION'S EXCEPTIONS

I. INTRODUCTION

Respondent McCarthy Construction Co. ("McCarthy") is a general contractor and employer in the construction industry. The Charging Union, Cement Masons Local 1, International Union of Bricklayers and Allied Craftworkers (BAC), AFL-CIO ("Union"), after an election pursuant to § 9(a) of the Act, was certified on March 26, 2008 as the exclusive bargaining representative of McCarthy's full-time and regular part-time employees working on building and construction projects at and out of its facility located at 1033 Rig Street, Walled Lake, Michigan.

Both before and after the Union's certification, McCarthy operated a parallel unincorporated business entity called Kensington Construction, nominally "owned" by Eric Teichner, the former son-in-law of McCarthy's president, Mike McCarthy. Employees on the Kensington payroll, including one who voted as a member of the bargaining unit in the McCarthy certification election, regularly worked side by side bargaining unit members on the McCarthy payroll performing the same work on the same jobs together under the supervision of Teichner. As the ALJ found,

Teichner did not draw a salary from Kensington but worked for and was paid by McCarthy as a foreman to supervise these crews. The overwhelming evidence, reflected in the facts recited by the ALJ in his Decision, and additional facts adduced at trial, shows that the relationship between McCarthy and Kensington was anything but arms-length and that Kensington was apparently part and parcel of McCarthy. *For example*, although almost all of Kensington's work was done for McCarthy on McCarthy projects, there was no subcontract between McCarthy and Kensington. *For example*, Kensington owned no equipment and used McCarthy's equipment. *For example*, Teichner never wrote a check or authorized or directed any electronic fund transactions from Kensington's bank account; all such financial transactions were conducted by McCarthy. *For example*, Teichner had no Kensington records. Whatever Kensington records existed were maintained and possessed by McCarthy.

Based on what appeared to the Union as an extremely close relationship between Kensington and McCarthy, the Union made a simple information request to McCarthy for Kensington payroll records and information about the ownership, control and operations of Kensington "because the men that work for Kensington are in a bargaining unit for McCarthy." McCarthy denied this request and represented (through its attorney) that "McCarthy does not have any knowledge or information with respect to Kensington's current business operations."

The Union filed ULP charges against McCarthy, and the General Counsel eventually issued a consolidated amended complaint, alleging that McCarthy had violated § 8(a)(5) of the Act by failing to provide relevant information in a timely fashion; by engaging in dilatory bargaining tactics; and by refusing to provide information about the relationship between McCarthy and Kensington.

Following a hearing held on March 18-19, 2009, the ALJ issued his Decision in this matter on May 27, 2009. The ALJ properly found that McCarthy violated §8(a)(5) in unreasonably delaying its responses to a June 17, 2008 information request by the Union; and by failing and refusing to meet with the Union at reasonable times for the purposes of collective bargaining as required by §8(d) of the Act. The Union agrees with and does not take exception to those findings.

However, despite the obviously extremely close relationship between McCarthy and Kensington, and the overwhelming evidence showing a lack of arms-length relationship and that Kensington appeared to be essentially indistinguishable from and part and parcel of McCarthy, the ALJ found that the Union did not have a reasonable objective basis for believing that an alter ego relationship existed between McCarthy and Kensington, and therefore was entitled to no information about the close relationship between the two entities. The sole basis for the ALJ's conclusion was a non-binding and incorrect decision of the U.S. Sixth Circuit Court of Appeals which is contrary to applicable Board precedent and which is not even controlling law in the Sixth Circuit. The Union strongly disagrees with and take exception to that finding by the ALJ which is erroneous and incorrect as a matter of law.

II. FACTS

At a bargaining session on October 21, 2008, the Union made a verbal request for information regarding Kensington. Kensington was a business which the Union believed was related to McCarthy Construction Co. The Union asked for Kensington payroll records and the current status of Kensington, including its ownership, control and current operations. (Tr. 32-33;

GC 15)¹ The Union representatives explained that the Kensington information was needed for bargaining because the men who worked for Kensington were in a bargaining unit for McCarthy. (Tr. 33, 52)

At the meeting, Union attorney John Canzano explained to McCarthy attorney Dennis Devaney that the Union had an existing collective bargaining agreement with Kensington Construction; that the Union's understanding had been that Kensington was originally established so that McCarthy Construction could do all its cement finishing using union workers; and that McCarthy's intention had been to do this work through Kensington Construction. Canzano explained that ultimately that did not happen; i.e., that McCarthy continued doing cement finishing nonunion and did not do all of its cement finishing work using union workers through Kensington as promised. Canzano further explained that there was litigation by the fringe benefit funds against Kensington and McCarthy alleging that they were alter egos; that there was a federal district court decision by Judge Rosen in that litigation; and that the Union was not a party to that litigation, was not bound by it, and did not agree with the decision.² Canzano explained that one employee, Arturo

¹ Citations to the transcript are referred to herein as "Tr. ___." Citations to General Counsel, Employer and Charging Party exhibits are referred to as "GC___," "ER___" and "CP___," respectively.

² The decision in any event simply denied summary judgment for the plaintiff funds, meaning that the case was scheduled for trial. Moreover, even that decision was not final, as a motion for reconsideration had been filed by the fund plaintiffs. The record here includes the relevant court documents from that litigation: the district court judge's opinion and order denying summary judgment for the fringe benefit funds on their alter ego claim (ER 4); the fringe funds' subsequent motion for clarification and reconsideration (CP 5); the court's notice of final pretrial conference (CP 6); and the retainer agreement signed by Mike McCarthy "individually, and on behalf of, McCarthy Construction Company Inc., Kensington Construction, and Eric Teichner, as an individual," in which Mr. McCarthy agreed to pay for the litigation on behalf of all parties (CP 7). Notably, and consistent with the Union's position during bargaining that it was not bound by the district court decision (which was not final in any event) and disagreed with it, the motion for

Ramirez, was paid by Kensington but worked on McCarthy Construction jobs and that he was allowed to vote in the McCarthy election. Canzano further explained that Eric Teichner was a supervisor paid by McCarthy but also the owner of Kensington Construction. (Tr. 135-137)

Devaney responded that he would have to discuss the Kensington matter with his client and get back to the Union. (Tr. 33, 137) On December 3, 2008 Canzano wrote to Devaney and repeated in writing the Union's prior verbal request for "information about the current status of Kensington Construction, including its ownership, control and current operations, if any." (GC 15)

In a letter dated February 18, 2002, Devaney purported to advise Canzano about Judge Rosen's decision in the Kensington case and asked Canzano to share the decision with his client (even though it was Canzano who had advised Devaney (Tr. 136-137) about this decision on October 21). Devaney continued that based on this decision "the Union could not have a good faith belief of alter ego status" and "BAC's request to McCarthy for information with respect to Kensington is completely irrelevant . . ." Devaney further represented that "*McCarthy does not have any knowledge or information with respect to Kensington's current business and operations.*" (Id.)

As noted above, when it first requested information regarding Kensington at the October 21, 2008 meeting, the Union both explained the relevance of that information and the basis for its belief

reconsideration argued that there were genuine fact issues for trial regarding the alter ego status of McCarthy and Kensington, including that the two entities did not have separate ownership; that Kensington owned no equipment and thus must have used McCarthy's; that McCarthy undertook Kensington's legal defense; that both performed the cement work at issue; that the two had the same work force; and that the two had common management. (See CP 5, Brief in Support of Motion). These documents were a matter of public record, and thus the funds' own allegations and arguments in the case, including those in the motion for reconsideration (CP 5) are more than enough to establish relevance and the Union's reasonable basis to investigate the close relationship between Kensington and McCarthy.

that there was a close relationship between the two companies about which the Union was entitled to information. In particular, as Union Business Agent Paul Dunford testified, the Union needed information about Kensington for negotiations “because the men that work for Kensington are in a bargaining unit for McCarthy.” (Tr. 52) In addition, Arturo Ramirez, who had previously been on the McCarthy payroll, was an employee on the Kensington payroll but voted in the NLRB McCarthy election as a member of the McCarthy bargaining unit. (Tr. 53-54) And, Kensington employees worked side by side with the McCarthy employees, on the same crew, under the direction of McCarthy foreman and Kensington owner Eric Teichner³ (Tr. 47-48, 53-55), who had established Kensington at the direction of Mike McCarthy so that McCarthy Construction could do all of its cement finishing work using union employees. Although the parties in bargaining discussed the fringe benefit fund litigation before Judge Rosen, which was based on an alter-ego theory, the Union never expressly based its request exclusively on the alter ego theory nor limited its claim of relevance to that theory alone. The Union was not focused on the fine technical distinctions between the “alter ego” “single employer” or “double breasted” theories. Rather, the Union was looking at the very close relationship between the companies and sought the information “because the men that work for Kensington are in a bargaining unit for McCarthy.” (Tr. 32-33, 52, 135-137)

While these facts are obviously enough to establish the relevance of the Union’s information request, there is much more.

Union business agent Dunford testified that when Kensington owner Teichner signed Kensington’s collective bargaining agreement with the Union, he stated he was doing so “per Mike

³ As the ALJ correctly noted, Teichner was also the ex-son-in-law of McCarthy owner Mike McCarthy. (Slip op. at 5-6)

to perform all McCarthy's concrete." (Tr. 44-46) He testified that after Kensington signed, Dunford repeatedly observed on numerous occasions that Kensington employees Carlos Perez and Arturo Ramirez worked side by side on a crew with McCarthy employees on cement finishing jobs, that Kensington paid fringe benefits on Perez and Ramirez pursuant to the Union contract, that Kensington employees used McCarthy's tools and equipment, and that the McCarthy and Kensington employees were supervised by Eric Teichner, Kensington's owner, who was employed by McCarthy.⁴ (Tr. 46-51, 53-55, 93)

Dunford also testified regarding a 2008 project at Somerset Mall. The project was bid by and awarded to McCarthy, but because the mall had an all-union policy McCarthy could not perform the job. After McCarthy was awarded the job, Teichner called Dunford asking for men to work on the project through Kensington. Dunford referred two men, whom he observed working on the project under McCarthy supervision using McCarthy tools and equipment. (Tr. 49-51)

The Employer's claim that it supposedly knows nothing about Kensington's status or operations is transparently false and shows that McCarthy officials were lying to the Union (and their attorney) in an attempt to deceive the Union about the status of the relationship between Kensington and McCarthy. First, several 2007 and 2008 IRS W-2 forms were introduced into evidence for Kensington employees Arturo Ramirez (CP 2), Joseph Montalto (CP 1) and Eduardo Delacruz (CP 8). All three show the employer's name as Eric Teichner but the employer's address as 1033 Rig Street, Walled Lake, MI. That is the address of McCarthy Construction, not Eric Teichner or Kensington Construction. Dunford testified that Ramirez and Montalto told him that

⁴ There is no dispute that Teichner was always paid by McCarthy. Teichner himself testified that he was paid by McCarthy and never Kensington (Tr. 229), and the Employer produced no evidence to the contrary.

when they received no W-2s for their Kensington work in 2008 and asked Teichner, Teichner told them to call McCarthy, and that the W-2s were then sent by McCarthy. (Tr. 58-62)

Teichner himself testified that even though he was the owner of Kensington, and that Kensington has had a checking account from its inception, he never wrote any checks from the account nor made any electronic transactions. He testified that all such transactions was performed by Pat Smalley, who was a McCarthy employee (and never a Kensington employee) and who was never paid by Kensington for her services. (Tr. 214-217) Teichner testified that Kensington owned no tools or equipment and that it used McCarthy's. (Tr. 217-218) He testified that when he was subpoenaed to produce Kensington documents for the hearing, he had none in his possession and that he obtained them, after the subpoena was served, from McCarthy representative Denise McCarthy. (Tr. 218-219) He testified that there was an audit of Kensington performed by the fringe benefit funds, that he had no involvement in the audit, and that he understood that Kensington records for the audit were delivered to a CPA office by someone else (he was not sure who). (Tr. 219-220) He testified that all of Kensington's work except for two jobs was for McCarthy. (Tr. 223) Notably, when McCarthy and Kensington were sued by the fringe benefit funds, Mike McCarthy agreed to pay to defend the litigation "individually, and on behalf of, McCarthy Construction Company, Inc., Kensington Construction, and Eric Teichner, as an individual." (CP 7)

With respect to the audit of Kensington by the fringe benefit funds, the audit was performed in 2008 by auditor Wayne Kless. Kless did not obtain any Kensington documents from Teichner. Instead, Kless obtained the Kensington documents, including the 2007 Delacruz W-2 form (CP 8) from Denise McCarthy, who obtained them from Pat Smalley. (Tr. 231-232)

III. ARGUMENT

A. The ALJ Erred by Concluding That the Sixth Circuit’s *Resilient Floor* Case Was as a Matter of Law “Dispositive of the Union’s Claim That Kensington and McCarthy Are Alter Egos.” That Case Is Not Binding on the Board, Conflicts with Established Board Precedent, and Is Not Controlling Even in the Sixth Circuit, Where it Conflicts with Earlier and Later Decisions.

As the facts outlined above show, the relationship between Kensington and McCarthy was the opposite of an arms-length relationship: Kensington was apparently controlled by, and part and parcel of, McCarthy.⁵ In short, the two were essentially one and the same.

The ALJ nonetheless concluded that a single Sixth Circuit case, *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations*, 395 F.3d 244 (6th Cir. 2005) (“*Resilient Floor*”) was “dispositive” and that as a matter of law -- despite the overwhelming facts -- this single case prevented the Union from having a reasonable objective basis for its belief that Kensington and McCarthy were alter egos. (Slip op at 7) This conclusion was error and must be reversed for several separate and independent reasons as set forth below.

1. The *Resilient Floor* Case upon Which the ALJ Relied Is Not Binding on the Board, Let Alone “Dispositive.”

It is well established that the Board accords no precedential value to federal appellate court decisions inconsistent with Board law, and that Board ALJs are required to follow Board precedent rather than contrary court of appeals precedent. *See, e.g., Ford Motor Co.*, 230 NLRB 716, n.12 (1979) (“By relying on U.S. court of appeals decisions which are contrary to applicable Board

⁵ The ALJ did not disagree. Thus, he found that virtually all of Kensington’s work was performed without a subcontract. He found that Kensington did not have its own equipment but used McCarthy’s equipment. He found that Kensington’s checking account and finances were managed, and that its records were maintained, by McCarthy personnel. He found that Kensington owner (and former son-in-law of McCarthy owner Mike McCarthy) was never paid by Kensington but was paid by McCarthy to supervise Kensington and McCarthy employees working on McCarthy jobs and doing the same kind of work. (Slip op at 5-7)

precedent, the Administrative Law Judge in this case has committed an error.”); *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488 (1979). As explained below, the *Resilient Floor* case conflicts with applicable Board law and is not at all “dispositive.” It was error for the ALJ to so find. Moreover, the case is not “dispositive” for an equally important reason: *Resilient Floor* was an ERISA fringe benefit fund collection case, not a case interpreting the Act or reviewing an unfair labor practice decision of the Board. Its rationale is simply inapplicable (and inappropriate) in this case, which involves an interpretation of Board law governing an employer’s duty to provide information under Section 8(a)(5) of the Act.

2. The *Resilient Floor* Case Is Contrary to Applicable Board Precedent.

The *Resilient Floor* case is clearly contrary to applicable Board law. In *Resilient Floor*, a panel of the Sixth Circuit declined to find an alter ego relationship where a nonunion company established a union company; i.e. where the nonunion entity chronologically preceded the union company. The lynchpin of the Sixth Circuit’s conclusion was its finding that “intent to evade” preexisting obligations is the *sine qua non* of establishing an alter ego relationship. 395 F.3d 244, 248. (“[A]n intent to evade” preexisting obligations is “clearly the focus of the alter ego doctrine.”) That conclusion cannot be squared with applicable Board law. It is well established Board law that illegal motive or intent to evade responsibilities under the Act is *not* necessary to a finding of alter ego status. *See, e.g., APF Carting, Inc.*, 336 NLRB 73, n.4 (2001); *Johnstown Corp.*, 313 NLRB 170, 171 (1993); *Hysota Fuel Co.*, 280 NLRB 763, n.2 (1986); *Allcoast Transfer*, 271 NLRB 1374, 1378 (1984), *enfd.*, 780 F.2d 576 (6th Cir. 1986).⁶ And there is no Board case, let alone a

⁶ For the same reason, it was error for the ALJ to conclude that *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989) meant that the “union has not established that it had such a reasonable belief pursuant to prevailing Board law.” (Slip op at 7) The ALJ found the *C.E.K.* was

“dispositive” case, holding that alter ego status cannot be established where the non-union entity precedes the union entity. More importantly, there is no Board case, let alone a “dispositive” case, holding (as the ALJ here concluded) that a union *is not entitled to information* because it cannot have a reasonable objective basis for its belief about alter ego status in such circumstances.

As started in *Johnstown, supra*, the Board “generally [has] found *alter ego* status where the two enterprises have ‘substantially identical’ management, business purpose, operation, equipment, customers, and supervision, as well as ownership.” 313 NLRB at 170. (Citations omitted.) A finding of illegal motive to evade responsibilities under the Act is not required by the Board. *Id.*, 171. With respect to the element of “substantially identical” ownership, “the Board places particular emphasis on whether the owners of one company retained financial control over the operations of the other.” *Id.* n. 4. (Citations omitted.)⁷ Under this controlling Board law, and based on the facts

distinguishable because there were facts in that case showing an intent to avoid collective bargaining obligations. ***But that is a distinction without a difference.*** As explained above, it is established Board law the “intent to evade” is *not* necessary to show alter ego status.

⁷ The ALJ’s hypertechnical focus on the alter ego doctrine, to the exclusion of the related single employer, joint employer and double breasted doctrines, was also error. Even if intent to evade were a necessary element (it is not) of the alter ego doctrine, it is not an element at all of the related doctrines. Thus, for example, in *Merchants Iron and Steel Corp.*, 321 NLRB 360, n. 1 (1996), the Board found both alter ego and single employer status were established, agreeing with the ALJ that the two doctrines were substantially similar. *See also, Vallery Electric, Inc.*, 336 NLRB 1272, 1274 (2001) finding both alter-ego and single employer status, and noting that the elements to prove both are substantially the same; and *Allcoast Transfer, Inc.*, 271 NLRB 1374, 1378-9 (1987) (discussing the elements of both single employer and alter ego relationships, and concluding that respondents “are alter egos and merely twin facets of a single business activity” and that the term “double breasted operation” was also applicable.

The Union here never focused exclusively, nor based its information request solely, on the technicalities of the “alter ego” formulation. Rather, the Union was simply seeking information about what clearly appeared to be an extremely close relationship between McCarthy and Kensington. The Board should not elevate form over substance by requiring unions to articulate the fine points of these legal doctrines -- which the Board itself has often had trouble distinguishing -- in order to establish a right to information about closely related business entities. *See, H&R*

which the ALJ recited in his opinion, as well as the additional facts adduced at trial, the Union clearly has established a right to the information requested.

This is *not* a case where the union had a “mere suspicion” about the close relationship between Kensington and McCarthy. This case is just *the opposite*. There was overwhelming evidence that Kensington is essentially indistinguishable from McCarthy. This evidence was more than enough to establish a reasonable objective basis to support the Union’s information request about the relationship between Kensington and McCarthy.

The ALJ’s decision effectively required the Union to *prove* alter ego status before it was entitled to information about the relationship between Kensington and McCarthy. This is plainly improper and contrary to Board law. In *Racetrack Food Services, Inc.*, 353 NLRB No. 76 (2008), the Board recently summarized the applicable law here:

The relevance of the information request is evaluated by a liberal, discovery-type standard. Information that is potentially relevant and will be of use to the union in fulfilling its duties as bargaining representative must be provided. The requested information need not be dispositive of the issue for which it is sought, but need only have some bearing on it. An employer must furnish information of even probable or potential relevance to the union’s duties. . . .

. . . Where the requested information involves matters outside the bargaining unit, the union has the burden of establishing its relevance and need. In keeping with the liberal standard of relevance, this burden is not a heavy one and only requires the union to demonstrate more than a mere suspicion of the matter for which the information is sought. . . .

Industrial Services, 351 NLRB 1222, 1224 (2007) (finding that union was entitled to information about relationship between two companies based on finding that “union had a reasonable belief that Respondent and Maintenance were closely related companies.”)

Here, the Union undeniably had a reasonable objective basis for believing that Kensington and McCarthy were closely related companies. That is all that should be required in order to entitle it on the facts here to the information requested.

Where information concerns a purported single-employer relationship between the Respondent and a nominally separate employer, the Union bears the burden of establishing the relevance of the requested information. The Board need only decide whether the information has some bearing on these issues, or would be of use to the union.

The union must have a reasonable objective basis for believing that an alter ego or single employer relationship exists. The union need not inform the employer of the factual basis for its requests, but need only indicate the reason for its request. However, when the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose, which the union has not specifically spelled out, the employer is obligated to divulge the requested information.

A union has satisfied its burden when it demonstrates that it had, at the relevant time, a reasonable belief supported by objective evidence, for requesting the information. A union may rely on hearsay or other type of evidence which may not be reliable or accurate to demonstrate that its belief of single employer or alter ego status is reasonable. . . .

Id., slip op at 12 (internal citations omitted). The Board noted that a union may reasonably rely on objective information “even if it were hearsay and possibly unreliable and incorrect.” Slip op. at 13, and that if relevance is established under this test, an employer has the duty to provide this information even if the union is “mistaken in its claims.” Slip op at 14. *See also, The Earthgrains Co.*, 349 NLRB 389, 393-4 (2007).

As noted above, the Union’s burden is not a heavy one. Here, the Union has more than met its burden. Certainly, the Union has demonstrated “more than a mere suspicion” regarding the close relationship between Kensington and McCarthy, whether termed an alter ego, single employer or double breasted relationship. The Union does not have to prove that the two companies are alter egos, a single employer, or double breasted at this stage, and it is entitled to the information requested even if it ultimately turns out that the Union was incorrect. Simply put, the Union has more than established relevance to entitle it to the information requested, so that it may investigate

whether there is merit to its claims regarding the close relationship between Kensington and McCarthy.

Finally, while it is not necessary to support the Union's right to the requested Kensington information, the facts here support an inference of McCarthy's "intent to evade" its obligations. The Union could reasonably conclude that McCarthy, using the sham Kensington enterprise, entered into a collective bargaining agreement with the Union with the fraudulent intent of not fully honoring that agreement. In other words, instead of honoring the agreement "on all McCarthy's cement work" as promised, McCarthy entered into the agreement using the subterfuge of a nominally separate Kensington so that McCarthy could "pick and choose" when to honor the agreement, and so that McCarthy could have the benefits of a union contract without the obligations. And when McCarthy's shell game started to become obvious, and the Union asked McCarthy for information about Kensington, McCarthy intentionally misrepresented to the Union that "McCarthy does not have any knowledge or information with respect to Kensington's current business and operations."

3. The *Resilient Floor* Case Is Not Controlling Even in the Sixth Circuit.

Not only does the *Resilient Floor* case conflict with applicable Board precedent, it is not even controlling law in the Sixth Circuit. As noted, *Resilient Floor* is premised on the notion that "intent to evade" is an essential element of the alter ego test. However, both prior and subsequent Sixth Circuit decisions have categorically rejected this premise. *See, N.L.R.B. v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986) ("employer intent [to evade] is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors which the Board can consider, along with the well-established factors of substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership, in determining alter ego

status.”) *See also, Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 587 (6th Cir. 2006) (“this Court . . . has made clear that ‘common ownership or an intent to evade federal labor law obligations are not necessary prerequisites to a finding of alter ego status’”) (Citation omitted.)

Because of this conflict with prior and subsequent case law, district courts in the Sixth Circuit have criticized *Resilient Floor*, and have declined to follow its holding that intent to evade is an essential element of alter ego status. *See, Michigan Glass and Glazing Industry Defined Contribution Pension Plan v. CAM Glass, Inc.*, 2008 WL 506350 (E.D. Mich. 2008); *Florida Carpenters Regional Council Training Trust Fund v. Colasanti Group Inc.*, 2008 WL 4186267 (E.D. Mich. 2008). In *Florida Carpenters*, the court explained that it is “far from settled law” in the Sixth Circuit whether intent to evade is a necessary alter ego element. Accordingly, the court granted a motion to compel discovery (similar to the Union’s information request here) regarding the relationship between the alleged alter ego companies. The Court stated:

Even if Sixth Circuit precedent was clear on this issue, the matter before the Court is a discovery request and therefore the key question is one of relevance, and not whether an intent to evade is a prerequisite of applying the alter ego doctrine... [T]he Court finds that the disputed interrogatories are relevant under Fed. R. Civ. P. 26, as they question the organizational relationship between the Defendants. Therefore, the motion to compel will be granted and all Defendants are to reply to Plaintiff’s discovery requests regarding their “management, business purpose, operation, equipment, customers, supervision and ownership.” (Internal citations omitted.)

2008 WL 4186267, *2.

In *Michigan Glass*, **as here**, the union entity was established **after** the non-union entity. Despite that fact and despite the lack of evidence of unlawful motive, the district court found that the two companies were alter egos. The district court specifically declined to follow *Resilient Floor* because that case was in conflict with the Sixth Circuit’s earlier holding in *N.L.R.B. v. Allcoast Transfer*, 780 F.2d 576 (6th Cir. 1986)

In short, *Resilient Floor* is neither controlling nor “dispositive,” and it was error for the ALJ to rely on it instead of applicable (and contrary) Board law.

IV. CONCLUSION

For the reasons stated, the Union respectfully requests that the Board grant its exceptions, overrule the ALJ on this point only, find that Respondent unlawfully refused to provide the requested information about Kensington, and order an appropriate remedy for that refusal to provide information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of Brief in Support of Charging Union's Exceptions in this matter on the following parties by e-mail on this date.

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