UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KING'S FIRE PROTECTION, INC. and its *alter ego* WARRIOR SPRINKLER, LLC, Respondents, and ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Charging Party.	NLRB Case Nos. 5-CA-36094, 5-CA-36312

CHARGING PARTY'S LOCAL 669'S OPPOSITION TO RESPONDENTS' EXCEPTIONS

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), hereby submits this opposition to the Exceptions to the Administrative Law Judge's decision by the Respondent *alter egos* King's Fire Protection, Inc. ("King's"), and Warrior Sprinkler, LLC ("Warrior").

Statement of the Case

Respondents have *admitted* their establishment of *alter ego* Warrior to avoid the obligations of King's under its extant collective bargaining agreement with the Union. GC Exh. 14.[1] ALJD 4. And, by doing so, Respondents have *also admitted* that they are both bound as *alter egos* to the current Local 669 collective bargaining agreement "until April 1, 2011, or they go out of business." G.C. Exh. 14, p. 2, para. 45; H. Smith 41.

[1] References to the transcript of the May 25, 2011, hearing are cited by witness and page as "(H. Smith ___);" exhibits are referenced as "(G.C. Exh. ____)." Emphasis is supplied herein unless otherwise indicated.

Respondents' defense is essentially that King's should be permitted *post hoc* repudiations of its express, written recognitions of the Union, pursuant to Section 9(a) of the National Labor Relations Act ("NLRA" or "the Act") -- in 2001, 2005 and 2007 (G.C. Exhs. 3, 4, 7, 22) -- and that the NLRB should conclude that, notwithstanding these voluntary and express Section 9(a) recognitions, the Union never achieved the status as the exclusive representative of the bargaining unit employees. Resp. Brief in Support of Exceptions ("Resp. Br.") 3-7. Respondents' defense cannot be reconciled with the *admitted* facts of this case:

On March 23, 2001, ten (10) years before these proceedings, Respondent King's voluntarily executed an agreement with the Union that provided in material part:

> The Employer executing this document below *has, on the basis of objective and reliable information, confirmed* that a clear majority of the Sprinkler Fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.
>
> The Employer therefore *unconditionally acknowledges and confirms* that Local 669 is the exclusive bargaining representative of its Sprinkler Fitters employees *pursuant to Section 9(a) of the National Labor Relations Act.* G.C. Exh. 3.

On January 18, 2005, six (6) years before these proceedings, Respondent King's voluntarily entered into a second agreement that expressly re-confirmed the Union's NLRA Section 9(a) status:

> The Employer hereby freely and *unequivocally acknowledges that it has verified* the Union's status as the exclusive bargaining Representative of its employees *pursuant to Section 9(a) of the National Labor Relations Act*, as amended for purposes of establishing wages, hours and working conditions for all journeymen sprinkler fitters, apprentices and unindentured apprentice applicants in the employ of the Employer and that *the Union has offered to provide the employer with confirmation of its support by a majority of such employees.* G.C. Exh. 4.

At the time of the 2005 Section 9(a) recognition, *all* of King's twenty-seven (27) unit employees were Union members. G.C. Exh. 5.

In November 2006, five (5) years before these proceedings, Respondent King's voluntarily designated the National Fire Sprinkler Association ("N.F.S.A.") as its bargaining representative (G.C. Exh. 7) in the national Local 669/N.F.S.A. multi-employer bargaining unit that had been governed by NLRA Section 9(a), by virtue of a 1954 NLRB election, for over fifty (50) years. G.C. Exh. 2 (NLRB Case No. 5-RC-1467 (1954)). The 2007-10 national collective bargaining agreement between the N.F.S.A. and the Union, covering the multi-employer unit inclusive of King's employees, provided, in material part:

> RECOGNITION: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, *recognize the Union* as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment *pursuant to Section 9(a) of the National Labor Relations Act.* G.C. Exh. 22, Art. 3 at p. 4.

At the time King's joined the N.F.S.A. national Section 9(a) multi-employer unit in 2006, sixteen (16) of the seventeen (17) bargaining unit employees were Union members. G.C. Exh. 8.

At no time during the ten (10) years before these proceedings did King's ever express the slightest doubt as to the Union's status as the exclusive bargaining representative of its bargaining unit employees pursuant to Section 9(a) of the Act. In

May of 2011, immediately before the hearing, *all* of King's five (5) unit employees were members of the Union. H. Smith 38-39; G.C. Exh. 15.

Argument

Respondents contend that, notwithstanding the foregoing undisputed facts, the Union never achieved Section 9(a) status with regard to King's employees (Resp. Br. 6) a claim that is also contrary to well settled NLRB precedent:

I. The 2001 and 2005 Section 9(a) recognition agreements each unequivocally states that Local 669 has requested Section 9(a) recognition and that King's voluntarily granted recognition after the Union showed or offered to show majority support: G.C. Exh. 3 (2001) ("The Employer … has, *on the basis of objective and reliable information*, *confirmed* that a clear majority of its employees … are represented by … [the Union] for purposes of collective bargaining. The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive representative of its Sprinkler Fitter employees *pursuant to Section 9(a)* of the National Labor Relations Act."); G.C. Exh. 4 (2005) ("The Employer hereby freely and unequivocally acknowledges that it *has verified* the Union's status … *pursuant to Section 9(a)* of the National Labor Relations Act … and that the Union *has offered to provide the Employer with confirmation of its support by a majority of such employees*.").

Thus, the plain language of the successive, written Section 9(a) recognition agreements to which King's elected to be bound in 2001 and 2005 each easily satisfies the prerequisites for the contractual establishment of Section 9(a) status. *Madison Industries*, 349 NLRB 1306, 1307-8 (2007) (citing *Staunton Fuel & Material*, 335 NLRB

717, 719-20 (2001)). *See also American Firestop Solutions, Inc*., 356 NLRB No. 71 (2011)(slip op. at 1); *J.T. Thorpe and Son, Inc*., 356 NLRB No. 112 (2011)(slip op. at 1, n. 5); *Diponio Construction Co*., 357 NLRB No. 99 (2011)(slip op. at 2, n. 3); *Allied Mechanical Services, Inc.*, 351 NLRB No. 5 (2007) (slip op. at 19-25).

And, over the course of the last eighteen (18) years, the Board has repeatedly upheld the validity of these particular Local 669 recognition agreements as sufficient to establish NLRA Section 9(a) status. *E.g., Triple A Fire Protection, Inc.*, 312 NLRB 1088, 1088-1089 (1993), *enf'd*, 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999); *MFP Fire Protection, Inc.*, 318 NLRB 840, 842 (1995), *enf'd*, 101 F.3d 1341 (10th Cir. 1996); *American Automatic Sprinkler Systems, Inc*., 323 NLRB 920, 920-921 (1997), *enf'ment denied in part,* 163 F.3d 209 (4th Cir. 1998), *cert. denied*, 528 U.S. 821 (1999).

II. The decision by King's to voluntarily join the N.F.S.A./Local 669 national multi-employer bargaining unit in 2006, a bargaining unit that had been governed by NLRA Section 9(a) for over fifty (50) years, independently established the Union's status as the Section 9(a) representative of King's employees. ALJD 6. *Comtel Systems Technology, Inc.*, 305 NLRB 287, 289 (1991). When King's subsequently left the N.F.S.A. national multi-employer bargaining unit for purposes of bargaining the subsequent collective bargaining agreement, it did so as a Section 9(a) employer. ALJD 6. *Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976), *enf'd*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Nevada Club, Inc*., 229 NLRB 1186, 1186 (1977), *enf'd in part*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

In their attempt to avoid the legal effects of the 2006 designation of the N.F.S.A. by King's as its multi-employer representative in the NLRA Section 9(a) Local 669 national bargaining unit, Respondents have attempted to rewrite the undisputed facts of the case. Specifically, Respondents contend that the parties did not consider the multi-employer designation by King's in 2006 to be "valid" (Resp. Br. 6), because, while a member of the N.F.S.A. multi-employer unit, King's entered into a *temporary* "interim" agreement with the Union on April 4, 2007. G.C. Exh. 20. Such temporary "interim" agreements with employers within the multi-employer unit, entered into during negotiations for the next multi-employer agreement and that expire by their terms when supervening *final* multi-employer agreement is reached, are common and not in any way inconsistent with, much less preclusive of King's status in 2007 as a continuing member of the N.F.S.A. multi-employer NLRA Section 9(a) bargaining unit, bound to the 2007-10 N.F.S.A./Local 669 national agreement (G.C. Exh. 21). *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 415 (1982); *Expert Electric, Inc.*, 347 NLRB 18, 29 (2006).

III. The attempt by King's to repudiate its repeated voluntary NLRA Section 9(a) recognitions of the Union, in 2001, 2005 and 2006, is time-barred by Section 10(b) of the Act. ALJD 6. *Local Lodge 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411, 419 (1960); *Casale Industries, Inc.*, 311 NLRB 951, 952 (1993); *Triple A Fire Protection*, 312 NLRB at 1099; *MFP Fire Protection*, 318 NLRB at 842; *American Automatic Sprinkler Systems, Inc.*, 323 NLRB at 920. This is so because the elements of, and requirements for, Section 9(a) recognition are the same for construction unions and employers as they are for their counterparts "outside the construction industry."

John Deklewa & Sons, 282 NLRB 1375, 1387 n.53 (1987), *enf'd*, 843 F.2d 770 (3d Cir.), *cert. den*., 488 U.S. 889 (1988).

IV. Respondents' attempt to revoke its Section 9(a) recognitions of the Union by citing the D.C. Circuit's decision in *Nova Plumbing v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), is unavailing on several grounds. Resp. Br. 4. The Board has never adopted the D.C. Circuit's decision in *Nova Plumbing*, despite having several recent opportunities to do so. And, unlike the facts in *Nova Plumbing*, it is undisputed that the Union enjoyed majority support among unit employees for at least the past six (6) years including at the time of the hearing. G.C. Exhs. 5, 8, 15. *Compare M&M Backhoe Service Inc. v. NLRB*, 469 F.3d 1047, 1050-51 (D.C. Cir. 2006) (distinguishing *Nova Plumbing*). Finally, as noted, NLRA Section 10(b) precludes Respondents' *post hoc* untimely challenge to its previous Section 9(a) recognitions of the Union, *Bryan Mfg.,* 362 U.S. at 419 -- an issue that was never raised or addressed by the D.C. Circuit in *Nova Plumbing*. 330 F.3d at 538-39.

Conclusion

For the reasons stated above, and in our previous submissions, Respondents Exceptions should be denied.

Respectfully submitted,

/s/ William W. Osborne, Jr.

William W. Osborne, Jr.
Natalie C. Moffett
Osborne Law Offices, P.C.
4301 Connecticut Avenue, N.W.
Suite 108
Washington, DC 20008
Counsel for the Charging Party

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Certificate of Service

I hereby certify that on November 28, 2011, I electronically filed Local 669's Opposition to Respondents' Exceptions to the Decision of the Administrative Law Judge with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

Thomas R. Davies, Esq.
Harmon & Davies, P.C.
2306 Columbia Ave.
Lancaster, PA 17603
tdavies@h-dlaw.com

Wayne R. Gold
Regional Director
Region 5
National Labor Relations Board
103 South Gay St., 8th Floor
Baltimore, MD 21202
wayne.gold@nlrb.gov

/s/ William W. Osborne, Jr.
William W. Osborne, Jr.