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**Rogan Brothers Sanitation, Inc. and International Brotherhood of Teamsters Local 813.** Case 2–CA–40028

December 9, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

The Acting General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. On July 21 and November 23, 2010, respectively, the Union filed a charge and an amended charge alleging that the Respondent, Rogan Brothers Sanitation, Inc., violated Section 8(a)(1) and (3) of the Act. Subsequently, the Union and the Respondent's general manager, Michael Vetrano, purporting to act on behalf of the Respondent, executed an informal settlement agreement, which was approved by the Acting Regional Director for Region 2 on January 28, 2011. The settlement agreement required the Respondent to, among other things, (1) make whole employees Joseph Smith, Anthony Mercado, and Daniel Mattei for losses suffered as a result of their alleged unlawful discharges by paying them \$15,616, \$20,800, and \$21,533, plus interest, respectively; (2) expunge the personnel files of Smith, Mercado, and Mattei of any reference to their discharges; and (3) post a notice to employees. The agreement also contained the following provision:

**Noncompliance with Settlement Agreement**—In the event of noncompliance with any of the terms of the Agreement, the Charged Party/Respondent shall be given written notice that it has seven (7) days to cure its default(s). If it fails to cure the default(s), the Charged Party/Respondent agrees that the Regional Director may issue a complaint based upon the allegations of the charge(s) in the instant case(s) which were found to have merit. Thereafter, the General Counsel may file a Motion for Summary Judgment with the Board on the allegations of the just issued complaint concerning the violations of the Act alleged therein. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings of fact, conclusions of law, and an Order on the allegations of the aforementioned complaint, including a full and complete traditional remedy for all violations of the Act, and any appropriate special

remedies sought. On receipt of said Motion for Summary Judgment, the Board shall issue an Order requiring the Charged Party/Respondent to show cause why said Motion of the General Counsel should not be granted. The only issues that may be raised in response to the Board's Order to Show Cause are whether the Charged Party/Respondent defaulted upon the terms of this Settlement Agreement and/or if it received notice to cure said default. The Board may then, without necessity of trial or any other proceedings, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is customary to remedy such violations, including, but not limited to the remedial provisions of the Settlement Agreement.

On February 1, 2011, the Region mailed to the Respondent's president, James Rogan (J. Rogan), a letter detailing the Respondent's obligations under the settlement agreement and requesting compliance by February 18, 2011.<sup>1</sup> The Region enclosed copies of the settlement agreement, a notice to employees, and a certification of posting form, to be signed by an official of the Respondent and returned to Region 2. On February 18, the Respondent's comptroller, Howard Kassman, via telephone, requested that the Region resend the letter and enclosures. By letter and email dated February 18, the Region resent the letter and enclosures to J. Rogan and again requested compliance, with a new deadline of February 25. By letter dated February 28, Kassman requested that the settlement agreement be withdrawn and the case be allowed to proceed to a hearing. By letter to J. Rogan dated March 9, the Region notified the Respondent that it was in default of the terms of the settlement agreement. The letter stated that if the Respondent did not cure its default within 7 days the Acting Regional Director would revoke the settlement agreement, issue a complaint, and move for summary judgment, as set forth in the default provision of the settlement agreement. Kassman, by letter dated March 14, informed the Region that the Respondent had complied with the notice posting and expunction provisions of the settlement agreement, but implied that it did not intend to pay the alleged discriminatees the amounts owed to them under the make-whole provision of the agreement, due to its position that the agreement was "prejudicial" to its interests. The Respondent again requested that the case be allowed to pro-

<sup>1</sup> All dates are in 2011, unless otherwise indicated.

ceed to a hearing. In response, the Region, by letter to Kassman dated March 15, advised the Respondent that it must immediately comply with all of the provisions of the settlement agreement in order to avoid triggering the default procedures.

On March 23, the Acting Regional Director issued an order revoking approval of informal settlement agreement and issuance of complaint. The Respondent filed an answer on April 5, admitting in part and denying in part the allegations of the complaint and asserting affirmative defenses. On May 13, the Acting General Counsel filed a Motion to Transfer Case to the Board, Motion to Strike Portions of Respondent's Answer, and Motion for Summary Judgment. On May 20, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motions should not be granted. The Respondent filed a response, with supporting affidavits, and the Acting General Counsel filed a reply.

#### Ruling on Motion for Summary Judgment

In its response to the Notice to Show Cause, the Respondent contends that the settlement agreement is unenforceable because General Manager Michael Vetrano, who signed the agreement on behalf of the Respondent, did not have actual or apparent authority to bind the Respondent; Vetrano was coerced into signing the settlement agreement by the Board's agents; the alleged unlawful discharges should be deferred to the grievance and arbitration mechanism in the parties' collective-bargaining agreement; and discriminatee Smith has waived his claims against the Respondent and his right to receive backpay.

We find that the Respondent has failed to raise any issue warranting a hearing. Even assuming Vetrano did not possess the requisite authority to enter into the settlement agreement, the Respondent subsequently ratified it, and thus became bound by its terms. Ratification is "the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988). Affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. *Id.* In the Respondent's February 28 and March 14 letters to the Region, the Respondent acknowledged that the parties had reached an agreement to settle the charge allegations. In its March 14 letter, the Respondent also notified the Region that it had complied with the notice posting and expunction provisions of the settlement agreement. Although the Respondent refused to comply with the financial terms of the agreement, its refusal was

based, not on Vetrano's alleged lack of authority, but on its opinion that the agreement that had been struck was prejudicial. While the Respondent now asserts that Vetrano did not have independent authority to enter into the agreement, it did not raise that defense until nearly 2 months after the Acting Regional Director approved the settlement agreement and after the complaint in the instant case had issued.

We also find that the Respondent has not raised a material issue concerning whether Vetrano was coerced into signing the settlement agreement. The Respondent's argument is based on a Board agent's alleged statement to Vetrano that if he did not sign the settlement agreement, the Board would issue a complaint and find that the Respondent violated the law. The Acting General Counsel maintains that this was not a threat, but rather a "statement . . . of the Region's lawful process." We agree that the first half of the Board agent's alleged statement—that a complaint would issue absent settlement—was merely a statement of fact concerning the Board's processes. See the NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 10126.2 ("when . . . it is clear that settlement at this stage will not be achieved, complaint should issue immediately."). The second half of the statement—that the Board would find that the Respondent violated the law—although not a statement of fact, was not coercive. The Board agent was simply informing Vetrano of the possible consequences of refusing to settle. Parties often use their respective estimations of the likely outcome of litigation as a basis to negotiate a settlement agreement, and we find that the Board agent's statement was not coercive in this context.

As to the Respondent's contention that the dispute should be deferred to the grievance and arbitration procedures in the parties' collective-bargaining agreement, we find that the Respondent voluntarily agreed to have the parties' dispute resolved through the informal Board settlement agreement and, in doing so, it necessarily waived its right to have the matter resolved in any other forum, including arbitration.

Finally, we find that Smith's alleged release and waiver does not preclude summary judgment. After the parties entered into the settlement agreement, Smith signed an affidavit stating, in pertinent part, that he "waives any and all back pay that is allegedly owed or due according to the National Labor Relations Board in its arbitrary decision that I requested not to be part of." The Respondent claims that Smith's affidavit constitutes a settlement agreement, which effectively overrides the informal Board settlement agreement. On its face, Smith's affidavit is not a settlement agreement; rather, as

argued by the Acting General Counsel, it is “a naked waiver of rights with no consideration.” It was executed after the Respondent had already agreed to pay Smith \$15,616 in backpay and after the Respondent had reinstated Smith. Further, it does not appear that Smith received any consideration in exchange for executing the waiver. In these circumstances, we find that the public interest in the vindication of statutory rights would not be effectuated by acceptance of the purported “settlement agreement.”

In sum, we find that no material issues of fact exist in this proceeding that warrant a hearing. Accordingly, we grant the Acting General Counsel’s Motion for Summary Judgment.<sup>2</sup> Consequently, pursuant to the default provision of the settlement agreement set forth above, we find that all of the allegations in the complaint are true.<sup>3</sup>

On the basis of the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a domestic corporation, with an office and principal place of business at 1014 Saw Mill River Road, Yonkers, New York (the Yonkers facility) has been engaged in the business of waste removal and disposal including at private homes and residences.

Annually, the Respondent, in conducting its operations described above, derives gross revenues in excess of \$500,000.

Annually, the Respondent, in conducting its operations described above, purchased and received at its facility in the State of New York goods valued in excess of \$5000

<sup>2</sup> We also grant the Acting General Counsel’s motion to strike pars. 1–14, 24–30, 32–37, 41, and 48 from the Respondent’s answer. These paragraphs contest the validity of, or assert affirmative defenses to, the 8(a)(1) and (3) unfair labor practice allegations in pars. 1–10 of the complaint. As indicated above, under the default provision of the settlement agreement, the Respondent waived its right to file an answer contesting the validity of the unfair labor practice allegations of the complaint and it is limited to contesting the complaint allegations concerning its alleged failure to comply with the terms of the settlement agreement.

<sup>3</sup> See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

In its answer to the complaint, the Respondent denies, without elaboration, the material allegations in pars. 11–15 of the complaint, which concern its alleged failure to comply with the terms of the settlement agreement. The Respondent’s denials appear to be based on its arguments challenging the validity of the settlement agreement. The Respondent does not contend that it has complied with the financial terms of the settlement agreement, nor does it contend that the Acting General Counsel failed to provide the 7-day notice to cure required under the agreement. Accordingly, we find that the Respondent has not raised a genuine issue of material fact with respect to the allegations in pars. 11–15 of the complaint.

from suppliers of fuel and automotive parts and materials located within the State of New York, each of which other enterprises has received these goods directly from points outside the State of New York.

We find that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent, acting in its behalf:

James Rogan	Owner
Brett Rogan	Supervisor

2. At material times Howard Kassman has held the position of the Respondent’s comptroller and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

3. On about the dates set forth opposite their names, the Respondent discharged the employees named below:

Joseph Smith	July 20, 2010
Anthony Mercado	July 20, 2010
Daniel Mattei	July 21, 2010

4. From about July 20 until about November 11, 2010, the Respondent failed and refused to reinstate Joseph Smith to his former position of employment.

5. From about the dates of their discharges set forth above opposite their names, the Respondent has failed and refused to reinstate Mercado and Mattei to their former positions of employment.

6. The Respondent engaged in the conduct described above because Smith, Mercado, and Mattei joined the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

7. The Respondent, by James Rogan, at the Yonkers facility, on or about June 20, 2010, instructed employees not to join the Union and, on or about October 12, 2010, impliedly threatened an employee with unspecified reprisals by suggesting that joining the Union was an act of disloyalty to the Respondent, and informed an employee that he would never be rehired because the employee engaged in union activity.

8. The Respondent, by Brett Rogan, at the Respondent’s Yonkers facility, threatened to use physical violence against an employee because that employee joined the Union.

## CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 3 through 6, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

2. By the conduct described above in paragraphs 7 and 8, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by terminating employees Joseph Smith, Anthony Mercado, and Daniel Mattei, we shall order the Respondent to make these employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them.

In this regard, the Respondent agreed in the settlement agreement to pay backpay to Smith, Mercado, and Mattei in the amounts of \$15,616, \$20,800, and \$21,533, plus interest, respectively. In his Motion for Summary Judgment, the Acting General Counsel states that the Respondent reinstated Smith before the settlement agreement was executed. Accordingly, his backpay period is closed and he will be made whole by payment to him of the amount set forth in the settlement agreement. Accordingly, we shall order the Respondent to immediately remit \$15,616 to the Region for payment to Smith, with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

As to Mercado and Mattei, however, the Acting General Counsel states that their backpay period remains open, and he requests that the Respondent be required to make them whole for any loss of earnings and other benefits, computed from the date of discharge to the date of a proper offer of reinstatement, with interest. As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could "issue an Order providing full remedy for the violations found as is customary to remedy such violations, including but not

limited to provisions of this Settlement Agreement." Pursuant to this language, we find that it is appropriate to provide the "customary" remedies of reinstatement, full backpay, expunction of the Respondent's personnel records, and notice posting. The backpay due Mercado and Mattei shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.<sup>4</sup>

We shall also order the Respondent, if it has not already done so, to offer Mercado and Mattei full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Further, the Respondent shall be required to remove from its files any reference to the unlawful layoffs and/or discharges of Smith, Mercado, and Mattei, and to notify them in writing that this has been done and that the unlawful layoffs and/or discharges will not be used against them in any way.

## ORDER

The National Labor Relations Board orders that the Respondent, Rogan Brothers Sanitation, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Instructing employees not to join the Union.

<sup>4</sup> In its response to the Notice to Show Cause, the Respondent contends that Mercado and Mattei are exempt from the overtime payment requirements of the Fair Labor Standards Act, and therefore "any calculation for backpay based upon overtime hours . . . is not an appropriate remedy." Mercado's and Mattei's backpay will be calculated at the compliance stage, and any issue concerning whether they are entitled to overtime payments as a component of backpay would be more appropriately dealt with at that time.

In its answer to the complaint, the Respondent contends, without elaboration, that it is required to comply with Federal immigration laws. We leave to compliance questions concerning the effect, if any, of the discriminatees' immigration status on the reinstatement and make-whole remedies. See, e.g., *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003) ("Questions concerning the employee's status and its effect on the remedy are left for determination at the compliance stage of a case.").

In the complaint, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enf. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

(b) Impliedly threatening employees with unspecified reprisals by suggesting that joining the Union is an act of disloyalty to the Respondent.

(c) Informing employees that they will never be rehired because they engaged in union or other protected concerted activities.

(d) Threatening an employee with physical harm because the employee joined the Union.

(e) Terminating and refusing to rehire, or otherwise discriminating against, any employee for engaging in protected concerted activities or assisting the International Brotherhood of Teamsters Local 813, or any other labor organization, or to discourage employees from engaging in these activities.

(f) 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) Remit to Region 2 the amount of \$15,616 owed to Joseph Smith, plus interest, as set forth in the remedy section of this decision.

(b) Make employees Anthony Mercado and Daniel Mattei whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against them, with interest, as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, if it has not already done so, offer Anthony Mercado and Daniel Mattei full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations and/or layoffs of Joseph Smith, Anthony Mercado, and Daniel Mattei and, within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful terminations will not be used against them in any way.

(e) Preserve, and within 14 days of a request, or such additional time as the Acting 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 compensation due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Yonkers, New York, copies of the attached

notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Acting Regional Director for Region 2, 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.<sup>6</sup> In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 facility 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 June 20, 2010.

(g) Within 21 days after service by the Region, file with the Acting 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.

Dated, Washington, D.C. December 9, 2011

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would deny the Acting General Counsel's Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment. The pleadings and supporting materials establish that there is a genuine issue of material fact concerning whether General Manager Michael Vetrano possessed actual or apparent authority to enter into the settlement agreement on behalf of the Respon-

<sup>5</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>6</sup> Pursuant to the default provision of the settlement agreement, the Respondent may be required to post notices in more than one language as deemed appropriate by the Acting Regional Director.

dent.<sup>1</sup> Further, and contrary to the majority, I would not find that the Respondent ratified the settlement agreement by failing to raise Vetrano's lack of authority in its February 28 and March 14, 2011 letters to the Region. The Respondent's February 28 and March 14 letters requested that the settlement agreement be withdrawn, made clear that it would not comply with the backpay provision of the agreement and demanded that the case be allowed to proceed to a hearing. It is illogical, in my view, to find that the Respondent ratified the settlement agreement while it was, at the same time, expressly repudiating the agreement and demanding that the case be allowed to proceed to a hearing. The majority has not cited any cases in which the Board or the courts have found ratification in circumstances analogous to these. In sum, I believe that the Respondent has raised a genuine issue of material fact, and therefore, a hearing is warranted.

Dated, Washington, D.C. December 9, 2011

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

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

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<sup>1</sup> In its answer to the complaint, the Respondent denied that Vetrano was authorized to enter into the settlement agreement. Further, in opposition to the Acting General Counsel's Motion for Summary Judgment, the Respondent submitted affidavits signed by Vetrano and the Respondent's president and owner, James Rogan, attesting to Vetrano's lack of authority. Moreover, the uncontested facts alleged by the Acting General Counsel are insufficient, as a matter of law, to establish that Vetrano possessed actual or apparent authority to enter into the settlement agreement.

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 instruct you not to join a union.

WE WILL NOT impliedly threaten you with unspecified reprisals by informing you that joining a union is an act of disloyalty.

WE WILL NOT threaten you that we will not rehire you if you engage in protected concerted activities or join a union.

WE WILL NOT threaten you with physical harm for engaging in protected concerted activities or supporting the International Brotherhood of Teamsters Local 813 or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities or supporting the International Brotherhood of Teamsters Local 813 or any other labor organization, or to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remit to Region 2 the amount of \$15,616 owed to Joseph Smith in accordance with the January 28, 2011 settlement agreement, with interest.

WE WILL make employees Anthony Mercado and Daniel Mattei whole for any loss of earnings and other benefits suffered as a result of our unlawful actions against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Mercado and Daniel Mattei full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Joseph Smith, Anthony Mercado, and Daniel Mattei, and we will, within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations and/or layoffs will not be used against them in any way.

ROGAN BROTHERS SANITATION, INC.