UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

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R &S Waste Services LLC
and **Case No.: 2-CA-065928**

Local 813, International Brotherhood of Teamsters,

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Respondent R &S Waste Services LLC ("R & S") submits this motion under § 102.24 to dismiss the Complaint in its entirety.

I. Preliminary Statement

Charging Party alternatively alleges that R & S is either an alter ego or successor of Rogan Brothers Sanitation, Inc. ("Rogan Brothers".)[1] R & S is not any of those but is an independent entity that has no obligation to recognize and bargain with Charging Party. As set forth below, the tests for both theories cannot be established. Notably, the General Counsel did not issue a complaint on the Charging Party's allegation that R & S and Rogan Brothers are a single employer, which underscores the baseless allegations of liability. See Complaint attached at Exhibit S.

The region investigated the charge for more than 9 months, issued numerous investigatory subpoenas, interviewed witnesses and received reams of information from R & S. The information gathered by the region from all of those sources establishes that R & S is neither a disguised continuance of Rogan Brothers or its successor, notwithstanding that, a Complaint was issued alleging those alternating theories of liabilities. Perhaps one of the clearest signs that the General Counsel is aware of the invalidity of the alternating theories is the Complaint's ambiguous usage of the term "Respondent". Each allegation cites the "Respondent" but the General Counsel is not sure as to whom it is referring to: R & S or Rogan. It is clear that the General Counsel and Charging Party has no credible evidence to support its alternate theories of liability and has advanced the instant charges simply because Charging Party did not perform its due diligence in trying to organize R & S legitimately. The NLRB must not have its mission and its personnel perverted in such a manner. The claims are speculative and without merit. While the charges have purportedly been considered for injunctive relief, the case has languished for a year. In fact, the region inexplicably failed to follow its own rules for timely opposing R & S's

[1] The Regional Director decided not to issue a complaint on a third theory of liability, single employer, even though it was alleged by Charging Party. Charging Party also withdrew its charge that "Since on or about August 1, 2011 Rogan Brothers Sanitation, Inc. transferred and/or subcontracted work and employees covered by its collective bargaining agreement with Local 813 to a newly formed sanitation company in order to seek to prevent those employees from becoming Local 813 members and to seek to avoid and evade its collective bargaining agreement with Local 813."

petition to revoke investigatory subpoenas. In any event, the standard for attorneys in filing meritorious claims in federal court prevents such relief and R & S will avail itself of the rules of civil procedure in that regard.

It is also clear that the NLRB has failed to explain that R&S and Rogan have no nexus and never conducted a transaction. .

The NLRB and the Union have the facts and conclusions deliberately confused and mixed to benefit and advance a hypothetical theory that is factually and legally incorrect.

Pinnacle Equity Group, LLC ("Pinnacle") is the entity that concluded an arm's length transaction with Rogan Brothers Sanitation, Inc. There was never a transaction between Rogan Brothers and R& S.

The Board must realize and understand the transaction in determining the charges. Pinnacle was the lender and Rogan was the debtor and R&S was not even formed when the transaction was completed.

R&S concluded an arm's length transaction from Pinnacle not Rogan Brothers. R&S was the recipient of collateral agreed to between Pinnacle and R& S.

The charging party wants to forget about the fact that Pinnacle was the party involved and not R&S and that the NLRB does not have jurisdiction over Pinnacle.

R & S was organized by Local 726, IUJAT, as any proper union seeks to organize: it made its case to the employees who voluntarily signed authorization cards. Now, Charging Party seeks to penalize R & S, Local 726 and R & S's employees for Charging Party's failure to conduct its own organizing campaign. Astoundingly, Charging Party by its now President James Troy asked R & S to voluntarily recognize R & S when it did not have a showing of interest and proposed terms for a CBA that were substantially different from those in effect at Rogan Brothers; this act alone defeats any claim that R & S is a disguised continuance of Rogan Brothers or successor to Rogan Brothers.

Rogan Brothers is still operating and is performing work that would is covered by the CBA with Charging Party. The General Counsel seeks to impose a bargaining relationship still in existence at Rogan on to R& S without any fact or basis.

The issuance of the Complaint in this case is arbitrary and capricious and it must be dismissed in the interest of justice and under the law.

The NLRB is complicit in Charging Party's efforts to deprive R & S's employees of their constitutional right to express themselves and associate themselves with whomever they wish. A hearing in this matter would be a monumental waste of taxpayer money and of a small business providing jobs in an economy that is struggling. R & S's employees are happy with their chosen representative and the government's effort in interfering with their choice is wrong.

As set forth below, R & S and Rogan Brothers are separate and unrelated entities that are neither alter egos or stand as predecessor and successor. In establishing the independency under Board law every derivative charge against R & S must be dismissed without any further burden and cost to R&S.

UNDISPUTED FACTS[2]

- R & S Waste Services LLC was formed by Joseph F. Spiezio, III ("Spiezio") under the laws of the State of New York in February 2011 and maintains 100% ownership.[3] Region 2's investigation did refute not this fact.

- Spiezio is the only person authorized to legally bind R & S in respect to all matters. Region 2's investigatory subpoenas to the banks did not refute this fact.

- R&S Waste Services, LLC headquarters is located at 500 Mamaroneck Avenue, Harrison, New York 10528, which is the existing headquarters for Spiezio related entities. Region 2's investigation did refute not this fact.

- All of the R& S owned and operated vehicles are parked at its leased yard located at 1016 Saw Mill River Road, Yonkers, New York 10710, which is owned by Leighton Construction Corp. for which R & S has no ownership interest in. Region 2 subpoenaed Leighton Construction and it corroborated this fact.

- R & S advertised and hired personnel, including drivers, helpers, sales staff and administrative staff and all were approved with application by Joseph F. Spiezio, III. Region 2's investigation did refute not this fact.

- R & S is a full service licensed waste hauler in Westchester County, New York

- R & S purchased its own vehicles. Region 2's investigation did refute not this fact.

- R & S has a Class A Hauler License, New York State Highway Use Tax and Sales tax certificates as well as a Westchester County Health permit and various other municipalities. The permit is in R & S's name and Spiezio is the only person authorized to file for said permit. Region 2's investigation did refute not this fact.

- New York State Sales tax for R&S has its responsible officer as Joseph F. Spiezio, III in the event of any monies that would become due and owing.

[2] The facts cited herein are supported by the exhibits attached to this motion.

[3] R & S stands for reliable and safe. Spiezio holds a Bachelor of Science degree from St. Johns University and obtained a juris doctorate degree from City University of New York Law School. Spiezio's core business is as a real estate developer and has no previous experience in the waste removal business.

- Spiezio is the sole guaranty of the numerous loans with various banks for R&S, that requires each and every officer of any LLC to execute, leaving him as the only member to guaranty repayment. Region 2's investigation did refute not this fact.

- Spiezio has no financial or other interests in Rogan Brothers. Region 2's investigation did refute not this fact.

- Spiezio has no family connection to Rogan Brothers. Region 2's investigation did not refute this fact.

Pinnacle Equity

- Pinnacle Equity Group ("Pinnacle") is an entity formed, owned and operated by Spiezio.

- In January 2011, Pinnacle did business with Rogan in providing a loan of $850,000.00. The loan was embodied in a security agreement dated January 3, 2011. ("Security Agreement" at Exhibit B).

- Rogan Brothers pledged specific assets to Pinnacle under the Security Agreement.

    - Several trucks of limited value were posted. There value was based on an agreed upon value between Pinnacle and Rogan Brothers.

    - 100 percent of Rogan Brothers customers with contracts were posted as collateral. Rogan Brothers had in excess of 500 customers with contracts and most were expiring when the loan was extended.
    - Pinnacle agreed with Rogan Brothers to only commercial contracts. Those finally agreed upon were customers within Westchester County where R & S is licensed to operate.

- Pinnacle secured the collateral (equipment and routes) with a UCC lien on May 11, 2011. The lien was significantly greater in value than what was settled upon by Pinnacle. See attached at Exhibit D.

- Spiezio, as managing member of Pinnacle, decided that he would establish an independent entity whose sole member would be Spiezio in the event Rogan defaulted. Many lenders started to do that with Real Estate as well in the event of a default to limit the exposure and liability that a default presents.

- The purpose of the new entity would be that if a default occurred, Pinnacle would claim the collateral and assign it to the newly established entity: R&S.

- Within weeks of making the disbursements of the loan, the staggering depth of Rogan Brothers' financial disrepair Pinnacle was aware of or was revealed. For example:

    - It was discovered that Rogan Brothers accountant underreported Rogan Brothers sales tax to the New York State Department of Taxation by nearly $1,900,000.00 plus penalties and interest totaling $3,800,000.00. Rogan Brothers was forced to file amended returns in that amount. In addition, statutory penalties have yet to be assessed but will likely be in the hundreds of thousands of dollars.

    - Rogan Brothers was also sued by the benefit funds of Local 282, IBT, Local 456. The lawsuits sought nearly a million and a half dollars in delinquent contributions to the various funds.

    - In May 2011, Wecare Transportation LLC, a vendor of Rogan Brothers secured a default judgment against Rogan Brothers in the amount of $253,584.41. Wecare Transportation LLC has a lien against Rogan Brothers' bank account that maintains a significant balance.

- Pinnacle also became aware that Rogan's business had fallen dramatically.

- Pinnacle recognized that Rogan Brothers financial condition jeopardized its ability to obtain repayment of the loan.

- Both companies mutually agreed that Rogan Brothers would not be able to repay the loan under any circumstances without causing them to completely go out of business.

- Both lender and borrower mutually agreed that instead of proceeding to litigation Rogan Brothers agreed to relinquish its right to the collateral posted when it obtained the loan. Pinnacle agreed.

- On or about July 1, 2011 Pinnacle assigned the collateral it obtained from Rogan Brothers to R & S. See copy of annexed assignment of collateral**.**

- R & S hired Michael Vetrano ("Vetrano"), a longtime employee at Rogan Brothers, because Spiezio lacked the operational knowledge of the waste removal business and this was the best way for all parties to proceed and the most advantageous way for Spiezio. (See Spiezio affidavit at Exhibit T.)

- Vetrano was not a supervisor of roll off work at Rogan Brothers. He was most familiar with the sanitation collection business and was able to handle all aspects needed by Spiezio. See Vetrano affidavit attached hereto. Vetrano submitted an application to R & S prior to the resignation and Spiezio agreed to his

compensation package based upon his functionality and experience. Vetrano has now resigned from R&S and retired.

Local 813 attempts to negotiate a new contract for R & S employees without a showing of interest or presenting any authorization cards to negotiate on behalf of R & S employees

- Starting in or about July 2011 Local 813, by James Troy, the current President of Local 813, spoke with Spiezio at his office about R & S to see if R & S would consider joining his union and enter into a collective bargaining agreement with Local 813. The reason was that Local 813 knew that R&S was non-union and felt Local 813 could offer an alternative to certain benefits.

- R & S was not under any collective bargaining agreement and Local 813 was clear on Spiezio' position. But, as a businessman, Spiezio was open to ideas. Exhibit M.

- Local 813 has never had any authorization cards of R & S employees for union representation. Exhibits M & T.

- Troy had submitted via email a proposal to R & S for a contract with various talked about terms to consider. See attached.

- Among the terms were:
    - A contract term from 9/1/11 to 8/30/14 (The contract term between Local 813 and Rogan Brothers is 12/1/08 to 11/30/11. If Local 813 believes that R & S is an alter ego or successor or single employer or joint employer than Local 813 would not have been negotiating a new contract but rather seeking enforcement of the Rogan Brothers. This alone establishes the fraud that the charges are frivolous against R & S and they must be dismissed in the interest of justice.)

    - The proposed economic terms were different than the terms in the CBA between Rogan Brothers. Troy knew very well that he was attempting to negotiate a first contract with R & S because James Troy had actual knowledge that R & S was a different entity and the discussions were completely surrounded around if R&S would consider becoming a union shop. This discussion should not have even been with Spiezio, but rather should have been done organically by first organizing R & S's employees.

- Local 813 and R & S spoke several more times in August and September after R&S began its operations.

- On October 3, 2011, Local 726 filed its petition for an election without any involvement by management of R&S. Vetrano and Liguori submitted affidavits to the region that they did not coerce or threaten any one to sign any cards. See attached. Local 726's agent submitted an affidavit to the region that he did not solicit nor did he accept any assistance from R & S in securing authorization cards. Wayne Revell, a

driver at R & S, and former Local 813 member at Rogan Brothers, submits an affidavit herein that he was not coerced or threatened to withdraw from Local 813 as a condition of employment at R & S nor was he threatened or coerced into signing an authorization card for Local 726. Exhibit R.

- James Troy and Local 813 had ample time to act in a lawful manner and not use the NRLB after they missed an opportunity to organize another union as the case at bar.

POINT I

R & S IS NOT THE ALTER EGO OF ROGAN BROTHERS

In determining whether an alter ego relationship exists, the Board considers whether the two business entities have substantially identical ownership, management, and supervision, business purpose, operations, customers, and equipment. *Fallon-Williams, Inc.*, 336 NLRB No. 54 (2001); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Another relevant factor is whether one entity was created in an attempt to avoid its obligations under the Act, although such a motive is not necessary for finding alter ego status. *Fallon-Williams, Inc.*, supra; *APF Carting, Inc.,* 336 NLRB No. 4, fn. 4 (2001); see also *NLRB v. Allcoast Transfer, Inc.* 780 F.2d 576, 579 (6th Cir. 1986); *Wilson v. Teamsters Local 507*, 83 F.3d 747, 756 (6th Cir. 1982). The test of alter ego status is flexible one, and the Board must "weigh the circumstances of each individual case." *Newspaper Guild of New York Local No. 3 v. NLRB,* 261 F.3d 291, 299 (2d Cir. 2001). No one factor is controlling, and all need not be present. *Fugazy Continental Corp.*, 265 NLRB 1301, 1301-1302 (1982); see also *Newspaper Guild of New York*, supra; *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982)

a. There is no substantially identical ownership.

R & S is owned by one person, Joseph F. Spiezio, III as evidenced multiple documents and official licensing records and files, including the corporate formation documents, certifications from banks that Spiezio is the sole person authorized to conduct transactions from R & S bank account, R & S's operating license in Westchester County.

Additionally critical is that Local 813's benefit funds filed ERISA actions against Rogan Brothers for alleged unpaid funds contributions. The benefit funds did not name R & S as a necessary party as required for liability of Rogan Brothers alleged delinquent contributions to attach to R & S. The failure to name R & S is dispositive of this entire matter in that there is no question that R & S is an independent, i.e. neither alter ego nor successor of Rogan Brothers. Under Fed. R. Civ. P. 11, counsel for Local 813's benefit funds (the same for the charging party here) could not assert claims against R & S because she would have violated Rule 11. The ALJ must dismiss this frivolous complaint immediately or else be party to a fraud.

The Pinnacle loan to Rogan Brothers does not render R & S an alter ego of Rogan Brothers. The loan and collateral were embodied in a written agreement and Pinnacle filed a UCC lien against the collateral. These acts by Pinnacle are the hallmarks of the arm's length transactions that the Board finds in dismissing an alter ego allegation. *Friederich Truck Service, Inc., 259 NLRB 1294, 1300 (1982).*

Additionally, Board precedent supports R & S's argument and the complaint must be dismissed. In *Friedrich Truck Service*, 259 N.L.R.B. 1294, 1300 (N.L.R.B. 1982) the General Counsel alleged that FTS was the alter ego of FTL, Inc. Frank Tempia, Sr. owned FTL, Inc. and his son $5,000 to start FTS. The General Counsel argued, *inter alia*, that common control was established between the two entities because of the loan. The ALJ and the Board quickly rejected the theory because the loan was secured by a series of promissory notes which were set to mature in September 1983. The Board concluded that the transaction was done at "arm's length" and prevented a finding of common control or ownership. The Board admonished the General Counsel by further noting that, "To say this loan provided Mr. Tempia, Sr. with a financial control over his sons' enterprise would require rank speculation." *Id.* The Board in also agreed that centralized labor control was not found simply because some of FTL, Inc. employees went to work at FTS. *Id.* at 1301.

This is precisely the situation presented here. The loan to Rogan Brothers was secured with a promissory note and specific collateral. The collateral had a UCC lien filed against it. When Rogan Brothers could not pay, the collateral was foreclosed on. These facts exhibit all the hallmarks of an arm's length transaction that the Board in *Freidrich Truck Services* recognized in concluding that there was no evidence of common control or ownership. Moreover, the fact that Vetrano worked at Rogan Brothers prior to working at R & S is not proof of common control of labor relations as the Board similarly held in *Friedrich Truck Services*. Therefore, the alter ego charge against R & S must be dismissed.

In *Reigel*, Reigel Electric was owned 78% by Lyle Reigel. Central, the alleged alter ego, was owned 100% by Dan Reigel. The Board found that Central was not an alter ego because, *inter alia*, the lack of common ownership. 341 NLRB 198, 201. Also, transfer of equipment from Reigel Electric to Central was properly valued at market rate, as such, the transfer was arm's length which weighed against finding alter ego status. The owner of the alleged alter ego owned 100% of it and did not have any ownership in the other company.

In *Summit Express, Inc.*, 350 N.L.R.B. 592 (N.L.R.B. 2007) the Board reversed the ALJ's finding of alter ego where there was no evidence of common ownership or substantial control. In *Summit* the alleged alter ego had a contract with the primary company that negotiated the terms and conditions of the employment of the alleged alter ego's employees. The Board held that without common ownership there could be no finding of alter ego. The Board found that such an arrangement did not indicate alter ego status. Since those facts drew the two corporations close and the Board did not find alter ego status, the omission of those facts here requires dismissal of the alter ego charge.

Reigel and *Summit* forecloses a finding of alter ego here. There is not a scintilla of evidence of common ownership and no familial relationship. The collateralized property was valued by Pinnacle and Rogan and had nothing to do with R & S. Rogan Brothers' financial state was dire and it could not repay the loan. Pinnacle, in accordance with the Security Agreement, foreclosed on the collateral. Pinnacle then assigned certain collateral to R & S, a standalone entity. It was also understood that Rogan sold other portions of his business and routes to other entities. R & S maintains its own routes, operates out of a different location, has its own

corporate office, own vehicles, own hauling license and James M. Rogan has no interest in the business or control of R & S. Rogan has no control over R & S business, personnel, labor relations, or bank accounts. There are none of the hallmarks of alter ego status. Consequently, the charge must be dismissed.

Here, as set forth above, there is no common ownership and there is no common control of labor relations. There is not one element present to advance this position. Board law is clear that under such circumstances there can be no finding of alter ego status. Consequently, the Complaint allegations of alter ego must be dismissed.

b. There is no common management or supervision

Joseph F. Spiezio is vested with sole authority in personnel decisions including directing work, hiring, firing and discipline as evidenced by his affidavit and the affidavits of Michael Vetrano, Peter Liguori. The fact that Vetrano was a supervisor for Rogan Brothers is irrelevant to his position at R & S. As set forth in the Spiezio affidavit, Spiezio sought to utilize Vetrano's decades long experience in the industry to assist R & S grow its business and not in a supervisory authority. As for Liguori, he never was an employee of Rogan Brothers. See attached affidavit. As such, this factor requires dismissal of the alter ego charge. *See Chem. Solvents, Inc.*, 2012 NLRB LEXIS 264 (N.L.R.B. May 15, 2012) *see also Reigel Electric & Central Electric Services*, 341 NLRB 198, 201 (2004) (absent common ownership, old company must exercise "very substantial control" over new company to support alter ego finding).

c. R & S's business purpose is distinct from Rogan Brothers.

The Board's has stated that the required analysis of "business purpose" should steer clear of "overly simplistic" comparisons of business purposes. NYP Acquisition Corp., 332 NLRB 1041, 1044 (2000), aff'd. 261 F.3d 291 (2d Cir. 2001). The Board has concluded that financial and strategic goals may be considered among the attributes of a company's business purpose.

In *Blazer Corp.*, 236 N.L.R.B. 103 (1978) the Board held that a purchaser of assets at auction in bankruptcy was not the alter ego of either the receiver or the debtor in possession, because the purchaser was running a "vital, vibrant, and growing manufacturing enterprise." *Id.* at 109. "Respondent," the Board reasoned, "has a production and maintenance work force, not merely a skeletal holding and sales cadre as did the receiver." *Id.* at 110.

R & S was taking a whole new direction to run a vibrant new operation with new equipment to focus on commercial sanitation within Westchester County. Spiezio saw a dynamic opportunity to apply his business skills in an industry he had no prior experience in to develop a highly profitable company. Consequently, under the Board's precedent as affirmed by the Second Circuit, R & S's business purpose was distinct from Rogan Brothers' and therefore this factor weighs against a finding of alter ego. Consequently, the Complaint allegations of alter ego must be dismissed.

d. R & S's operations are distinct from Rogan Brothers

R & S maintains its own work force separate from Rogan Brothers workforce, including drivers, helpers and sales representatives.

e. R & S's customers are distinct from Rogan Brothers' customers.

R & S maintains its own customer base solicited through its own sales staff. As noted above, R & S does not have any customers in the residential sanitation business. R & S does not have any customers in New York City or Connecticut as it does not have a license to operate in those jurisdictions.

As for commercial clients in Westchester County, a "customer" does not belong to any particular waste hauling company. The companies are free to terminate the services of any carter and engage a new one at any time. As such, it is improper to be under the impression that a customer is required to stay with a particular carter to the point where the customer has no ability to terminate the services and can be assigned to another waste hauler. The fact that R & S continued to service some of the routes Rogan posted as collateral that were assigned by Pinnacle to R & S is irrelevant to the analysis here because the customers can leave at any time. In fact, of the 15% of Rogan Brothers' customer list posted as collateral, 70% of those Rogan customers have never been serviced by R & S. Over 85% of R & S's revenue is derived from customers that were not within the collateral posted by Rogan Brothers to Pinnacle.

f. R & S's equipment is distinct from Rogan Brothers' equipment.

R & S has purchased its own vehicles including, front-end loaders, rotator trucks, packer trucks and dumpsters. See Spiezio affidavit. R & S provided support of the vehicle purchases and titles to Region 2 during the course of the investigation of the underlying charges. The vehicles were purchased by R & S and financed through banks and R & S holds the title. .

G. No evasion of bargain responsibility.

It is frivolous for the General Counsel to maintain that the establishment of R & S is an act of Rogan Brothers to evade its bargaining responsibility. Rogan Brothers is still operating and has work being performed that is covered by the CBA's unit definition. The bargaining obligation between Charging Party and Rogan Brothers is intact and has not transferred to R & S under any theory of law. In fact, it would be a violation of § 8(b)(4) for Charging Party to decline to bargain with Rogan Brothers.

Additionally, in July 2011, Charging Party by its now President James Troy asked R & S to voluntarily recognize Local 813 even though he did not present a showing of interest to R & S. Troy presented R & S with proposed contract terms that differed from the CBA terms Charging Party had with Rogan Brothers Sanitation. It is clear that Charging Party knew that R & S was not the alter ego of Rogan Brothers because a true alter ego, under Board law, adopts the CBA terms. Troy would have simply told R & S that R & S is bound by the CBA Rogan

Brothers has with Local 813. The import of this is that Charging Party knew the establishment of R & S was independent of Rogan Brothers and had nothing to do with any alleged attempt by Rogan to evade its bargaining obligations. Consequently, there is no basis for a finding of alter ego status and the Complaint must be dismissed.

Moreover, Charging Party also withdrew its charge that "Since on or about August 1, 2011 Rogan Brothers Sanitation, Inc. transferred and/or subcontracted work and employees covered by its collective bargaining agreement with Local 813 to a newly formed sanitation company in order to seek to prevent those employees from becoming Local 813 members and to seek to avoid and evade its collective bargaining agreement with Local 813." The withdrawal is an admission that R & S's establishment was not a disguised evasion of Rogan Brothers' bargaining obligation.

In sum, each element of the alter ego claim weighs against a finding of alter ego status. The fact is that the heavy burden of establishing that R & S is a "disguised continuance" of Rogan Brothers is factually impossible: no common ownership, management, equipment, personnel, customers, or business purpose. Consequently, the alter ego charge must be dismissed immediately.

An important point must be raised here. Charging Party asserted a third theory of liability: single employer. The test for finding single employer is similar to alter ego but less expansive than that regarding alter ego**:** (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *Broadcast Employees Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). The evidentiary burden on the General Counsel to establish single employer would appear to be less than to establish ego status. *Commercial Cabinets*, 2002 NLRB LEXIS 611, 33-34 (N.L.R.B. Dec. 4, 2002). Despite the easier test, the Regional Director did not issue a complaint asserting that theory. Obviously, the Regional Director believes there is insufficient evidence to prevail on the single employer theory. Thus, since the single employer test is easier to establish than alter ego, and the regional director abandoned the single employer theory then it logical flows there is insufficient evidence to prevail on the longer since the Regional Director concluded that there was insufficient evidence to establish the single employer theory then there is insufficient evidence to establish the more rigorous standard of alter ego. Consequently, the alter ego allegation against R & S must be dismissed.

POINT II

R & S IS NOT ROGAN BROTHERS' SUCCESSOR

The test for determining successorship under *NLRB v. Burns Security Services, 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972)* is well established. An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "'substantial continuity' between the enterprises." *Island Oasis Mfg., LLC*, 2011 NLRB LEXIS 574 (N.L.R.B. Oct. 6, 2011) citing *Fall River Dyeing Corp. v. NLRB, 482 U.S. 27, 41-43, 107 S.*

Ct. 2225, 96 L. Ed. 2d 22 (1987). The Board will normally assess whether an employer is a successor as of the time a union makes its demand for recognition and bargaining, provided the employer has already hired a substantial and representative complement of employees. *See MSK Corp*., 341 NLRB 43, 44-45 (2004)

In determining whether an employer is obligated to bargain with the exclusive representative of a predecessor employer's employees, the traditional test is whether there is substantial continuity in the employing enterprise. *Lincoln Private Police, 189 NLRB 717 (1971); see also NLRB v. Burns Security Services*, 406 U.S. 272, 279-281 (1972). Where there is such continuity, the presumption of majority status by the union under the predecessor is not affected by a change in ownership. The traditional criteria for this test include whether there has been substantial continuity in the following: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service. *E.g., Premium Foods*, 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (CA 9, 1983). Continuity of customers has also been considered as a factor in determining continuity in the employing industry. *See, e.g. Stewart Chevrolet*, 262 NLRB 362, 364 (1982).

The question of the substantial continuity of the enterprise is to be analyzed primarily from the "employees' perspective." *Fall River*, 482 U.S. at 43. In its analysis, the Board is mindful of whether "'those employees who have been retained will understandably view their job situations as essentially unaltered.'" *Id.* (quoting *Golden State Bottling*, 414 U.S. at 184); *Vermont Foundry*, 292 NLRB 1003, 1008 (1989) (calling this "the core question"); *Derby Refining*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990).

Under any interpretation of the facts, R & S is not a successor. First, R & S did not hire substantial and representative complement of employees from Rogan. As a general rule, the relevant measuring day to determine if the Company employed a majority of union members is the initial date it began operating." *Id.* That was the case in *Burns*, where the successor began operating the day after the predecessor ceased operations with a majority of its employees drawn from the predecessor's workforce. *Burns*, supra. "In other situations . . . there is a start-up period by the new employer while it gradually builds its operations and hires employees. In these situations, the Board, with the approval of the Courts of Appeals, has adopted the 'substantial and representative complement' rule for fixing the moment when the determination as to the composition of the successor's work force is to be made." *Fall River*, 482 U.S. at 40.

In the instant case Rogan Brothers is still in operation performing work covered by the CBA it had with Charging Party. As such, R & S is not a successor and the charge must be dismissed.

R & S began operating, August 1, 2011, with its first payroll period ending August 13, 2011. The General Counsel is selective in choosing October 2011 as the date in which to calculate the representative complement; there is no basis for that date other than a results-oriented approach to ensure Local 813's goal to sneak into R & S without a vote of the employees is to be accomplished. The NLRB must stop the repression of employees' rights to freely express themselves and to freely associate with whomever they wish. In fact, by the first payroll period the job classifications designated for the operation were filled or, at a minimum,

substantially filled and the operation was in normal production. The employee roster in August was virtually unchanged by the beginning of October 2011, the time period the General Counsel wishes to use. Additionally, R & S had substantially all of the equipment it needed in August 2011 and its customer base quickly accumulated by end of August 2011 but did not increase much further by October 2011. These facts require the measuring date for the calculating whether a majority of R & S's employees were comprised of the Rogan Brothers Local 813 unit. As the records show, a majority did not exist. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

The successorship theory also fails even assuming *arguendo* that representative complement was hired. The employees hired by R & S could not be under any impression that they still worked for a continuance of Rogan in another form. The analysis under the alter ego test is similar in many respects to the successorship test. R & S incorporates the arguments set forth above detailing the distinction and disconnection between R & S and Rogan Brothers. Notwithstanding that, numerous distinguishing features need to be pointed out:

- James Rogan is not an employee or owner of R & S and occupies a separate location from R & S
- R & S solicited applications to the public.
- Those interested in employment fill out applications bearing the R & S logo.
- Applicants are interviewed by Spiezio.
- Spiezio offered the employment to worthy applicants.
- The employees wear uniforms bearing R & S's logo.
- The employees use newly purchased vehicles and equipment to operate bearing R & S's logo.
- Spiezio is the sole person who has the ultimate final say with hires, fires, and disciplines.
- R & S's employees operate out of a location separate and distinct from Rogan Brothers.
- Michael Vetrano is no longer an employee of R & S and he was not a supervisor at R & S.
- The operations yard is not shared by any other company.
- There is no comingling of equipment, personnel, money or bank accounts between R & S and Rogan Brothers.
- They have separate tax identification numbers, separate phone numbers, separate sales staff, separate accounting departments.
- The customers that employees service are different from Rogan Brothers' customers.
- They do not perform work in Connecticut or New York City.

At every turn, R & S's employees have no basis to be under an impression that they were working for Rogan Brothers with nothing more than a name change. R & S was an entirely new and distinct operation from Rogan Brothers. The instant situation is the same as the Board confronted in *Lincoln Private Police, Inc.*, 189 N.L.R.B. 717 (N.L.R.B. 1971) , in which the Board found no successor relationship where the alleged predecessor hired less than the majority of the predecessor's work force and acquired substantially new customers. The Board additionally found dispositive that the alleged successor purchased new uniforms, vehicles, and equipment, occupied different premises than did its predecessor and while there was some

overlap in customers most of the customers of the alleged predecessor were unique to the alleged predecessor. The facts of *Lincoln* mirror the facts here and as such the allegations against R & S are purely frivolous and the complaint must be dismissed immediately.

POINT III

LOCAL 726, IUJAT WAS RECOGNIZED LAWFULLY

The General Counsel asserts that Local 726, IUJAT was unlawfully recognized because two of R & S's alleged supervisors intimidated employees to sign authorization cards. R & S submitted affidavits from Spiezio, Michael Vetrano and Peter Liguori explaining that neither Vetrano or Liguori are supervisors because they did not have the authority to hire and fire, discipline or responsibly direct employees. See attached. Vetrano's former status as supervisor at Rogan Brothers is irrelevant because his duties were changed, as evidenced by the affidavits, when Vetrano began his employment at R & S. Wayne Revell, an R & S driver and member of Local 726, IUJAT, has submitted the attached affidavit attesting that Vetrano and Ligouri were not supvervisors at R & S. Moreover, Local 726, IUJAT's agent submitted an affidavit that he had no knowledge of any alleged intimidation nor did he request the intimidation be imposed. Additionally, Revell, an R & S driver and member of Local 726, IUJAT, has submitted the attached affidavit attesting that he was never coerced or threatened by anyone to withdraw his membership from Local 813, IBT as a condition to obtaining employment at R & S. Exhibit R. Revell further attest that he was not threatened or coerced by anyone to sign an authorization card for Local 726, IUJAT; he attests that he voluntarily decided to become a member of Local 726, IUJAT. Consequently, there is no basis to support the charge and it must be dismissed.

CONCLUSION

The Complaint must be dismissed because there is no evidence to support any allegation against R & S. The issuance of the Complaint was arbitrary and capricious based upon the evidence adduced by R & S and Rogan and verified by Region 2's investigation. In addition, to dismissing the complaint, R & S is entitled to its costs under the Equal Access to Justice Act.

Dated: July 17, 2012 **MILMAN LABUDA LAW GROUP PLLC**

By:/s/_____
Michael J. Mauro, Esq.