

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MCD PLUMBING, INC.¹

MICHAEL DIEBOLD

and

Case 03-CA-076777

**UNITED ASSOCIATION, PLUMBERS AND
STEAMFITTERS LOCAL UNION #22**

DECISION AND ORDER

Statement of the Case

On April 4, 2013, MCD Plumbing, Inc., Michael Diebold, (collectively “the Respondents”), United Association, Plumbers and Steamfitters Local Union #22 (the Union), and the Acting General Counsel of the National Labor Relations Board entered into a Formal Settlement Stipulation subject to the Board’s approval, providing for the entry of a consent order by the Board and a consent judgment by any appropriate United States Court of Appeals. The parties waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act, as amended, and the Board’s Rules and Regulations, and the Respondents waived their right to contest the entry of a consent judgment or to receive further notice of the application therefor.

The Formal Settlement Stipulation is approved and made a part of the record, and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of a Decision and Order pursuant to the provisions of the Formal Settlement Stipulation.

Based on the Formal Settlement Stipulation and the entire record, the Board makes the following:

¹ On January 18, 2013, United Association, Plumbers and Steamfitters Local Union #22 requested the withdrawal of those portions of the charge alleging that DMS Mechanical Services, LLC and Michael Stachowiak d/b/a DMS Services violated the National Labor Relations Act, pursuant to a non-Board settlement agreement between the Union and these Respondents. On the same date, based on the non-Board adjustment and the Union’s request to withdraw certain portions of the charge, the Acting Regional Director issued an Order Approving Request for Conditional Partial Withdrawal of Charge and Partially Dismissing Claims Against Certain Parties. Therefore, DMS Mechanical Services, LLC and Michael Stachowiak d/b/a DMS Services are not parties to this stipulation. We have amended the case caption accordingly.

Findings of Fact

1. The Respondents' business

MCD Plumbing, Inc. (Respondent MCD) is a corporation with an office and place of business located in Orchard Park, New York, where it has been engaged in the provision of plumbing services.

In conducting its business operations during the twelve months preceding the Formal Settlement Stipulation, Respondent MCD provided services valued in excess of \$50,000 to Sisters Hospital and Saint Francis High School, entities directly engaged in interstate commerce.

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

At all material times, Michael Diebold (Respondent Michael Diebold) has been an officer and shareholder of Respondent MCD and has been personally responsible for and had full knowledge of its affairs and corporate policies and operations.

At all material times, the Respondents have disregarded corporate form, have transferred corporate assets without fair consideration, have failed to maintain an arm's length relationship between and among themselves, have used corporate assets to pay the personal expenses of Respondent Michael Diebold and have used personal finances to pay the corporate expenses of Respondent MCD.

Since June 1, 2012, Respondent MCD has been a debtor-in-possession with full authority to continue its business operations and to exercise all powers necessary to administer its business.

2. The labor organization involved

United Association, Plumbers and Steamfitters Local Union #22 is a labor organization within the meaning of Section 2(5) of the Act.

3. The appropriate unit

The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing work, as set forth in Article III of the 2004 to 2007, 2007 to 2010, and 2010 to 2014 collective-bargaining agreements between the Union and the Western New York Association of Plumbing and Mechanical Contractors (Association), within the geographic area set forth at Article II of the same agreements.

The Western New York Association of Plumbing and Mechanical Contractors (the Association) is composed of employees engaged in the building and construction

industry and exists for the purpose, inter alia, of representing its employer members in negotiating and administering collective-bargaining agreements with the Union.

About May 1, 2004, the Union entered into a collective-bargaining agreement with the Association, effective from May 1, 2004 through April 30, 2007 (2004 Agreement).

About May 1, 2007, the Union entered into a collective-bargaining agreement with the Association, effective from May 1, 2007 through April 30, 2010 (2007 Agreement).

About May 1, 2010, the Union entered into a collective-bargaining agreement with the Association, effective from May 1, 2010 through April 30, 2014 (2010 Agreement).

About August 4, 2006, Respondent MCD, an employer engaged in the building and construction industry, executed an agreement whereby it agreed to be bound by the 2004 Agreement between the Union and the Association.

By entering into the agreement described above, Respondent MCD recognized the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status has ever been established under Section 9(a) of the Act.

At all material times, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

Respondent MCD, by its conduct, manifested an intent to be bound to the terms of the 2007 and 2010 Agreements with respect to its employees in the unit described above.

Since about April 1, 2011, Respondent MCD has failed and refused to apply the terms and conditions of the 2007 and 2010 Agreements.

By the conduct described in paragraph 1 above, Respondent Michael Diebold, individually, is personally liable, jointly and severally, with Respondent MCD for remedying the unfair labor practices of Respondent MCD, including the payment of any backpay, fund contributions and interest and other relief found appropriate herein.

ORDER

Based on the above findings of fact, the Formal Settlement Stipulation and the entire record and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that Respondents MCD Plumbing, Inc., its officers, agents, successors and assigns, and Michael Diebold, an individual, shall:

1. Cease and desist from:

(a) Failing and refusing to recognize the United Association, Plumbers & Steamfitters Local Union #22 (the Union) as the collective-bargaining representative of all employees in the appropriate bargaining unit set forth below:

All employees performing work, as set forth in Article III of the 2004 to 2007, 2007 to 2010, and 2010 to 2014 collective-bargaining agreements between the Union and the Western New York Association of Plumbing and Mechanical Contractors (the Association), within the geographic area set forth at Article II of the same agreements.

(b) Failing and refusing to apply to unit employees the 2007 and 2010 Agreements between the Association and the Union.

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

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

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

(b) Make whole the employees in the unit in the manner and amounts specified in Attachment A, with interest, in accordance with the Board's decisions in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(c) Make whole the Union's employee benefit funds in the manner and amount specified in Attachment A, with interest, in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979).

(d) Within 14 days of service by the Region, post at its Orchard Park, New York facility copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by Region 3, after being signed by the Respondents' authorized representative(s), shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the Respondents shall distribute notices electronically, by e-mail, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. The Respondents will take reasonable steps 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, Respondent MCD has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former bargaining unit employees employed by Respondent MCD, DMS Services or DMS Mechanical Services, LLC since April 1, 2011.

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

BANKRUPTCY

The parties hereto acknowledge that on June 1, 2012 (the Petition Date) Respondent MCD filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Western District of New York (the Bankruptcy Court), Case No. 1-12-11759-CLB (the Bankruptcy Case) and that the Bankruptcy Case remains pending.

The amounts for which Respondent MCD is responsible for paying pursuant to subparagraphs VI(2)(b) and (c) of the Settlement Stipulation constitute claims in the Bankruptcy Case which are liquidated and allocated as set forth in Attachment A. The parties hereto agree that the claims arising from this Agreement shall be allocated and allowed as set forth on Attachment A. No claims arising from this Agreement shall be asserted against Respondent MCD other than as set forth and allocated on Attachment A and the Respondents agree that they will not contest or object to the allowance of such claims under 11 U.S.C. Section 507(a)(2), 11 U.S.C. Section 507(a)(4) and 11 U.S.C. Section 507(a)(5), as so allocated. The parties hereto agree the claim under 11 U.S.C. Section 507(a)(2) may be paid over a period following confirmation of a Chapter 11 plan of reorganization, which period shall not exceed eighteen (18) months from the effective date of confirmation.

The parties hereto agree that this Agreement is subject to the approval of the Bankruptcy Court on notice to creditors and interested parties. Upon execution of this Agreement by the parties hereto, Respondent MCD shall forthwith file and serve a motion in the Bankruptcy Case seeking approval of this Agreement.

The parties agree that upon approval of this Agreement by the Bankruptcy Court, the claims liquidated hereby shall be deemed allowed for purposes of treatment and distribution in connection with the Bankruptcy Case.

Dated, Washington, D.C. May 21, 2013.

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

PURSUANT TO A STIPULATION PROVIDING FOR A BOARD ORDER AND A CONSENT JUDGMENT OF ANY APPROPRIATE UNITED STATES COURT OF APPEALS

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and
protection;
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail and refuse to recognize the United Association, Plumbers & Steamfitters Local Union #22 (Union) as the collective-bargaining representative of all employees in the appropriate bargaining unit set forth below:

All employees performing work, as set forth in Article III of the 2004 to 2007, 2007 to 2010, and 2010 to 2014 collective-bargaining agreements between the Union and the Western New York Association of Plumbing and Mechanical Contractors (Association), within the geographic area set forth at Article II of the same agreements.

WE WILL NOT fail and refuse to apply to unit employees the 2007 and 2010 Agreements between the Association and the Union.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL make whole the employees in the unit, with interest, for any loss of wages or other benefits or expenses they incurred as a result of our failure to adhere to or apply all of the terms of the 2007 and 2010 Agreements between the Association and the Union.

WE WILL make whole the Union's employee benefit funds, with interest, for contributions owing on behalf of the employees in the unit under the terms of the 2007 and 2010 Agreements.

MCD PLUMBING, INC.
(Employer)

ATTACHMENT A

Administrative post-petition wage and Union Benefit Fund claims pursuant to 11 U.S.C. 507(a)(2):

	<u>Wages</u>	<u>Union Benefit Fund</u>	<u>Total</u>
Frank Capozzi	\$3,904.36	\$1,188.72	\$5,093.08
John McGuire	\$23,232.17	\$7,073.30	\$30,305.47
Jason Dusel	\$1,384.26	\$421.45	\$1,805.71
Dan Schrum	\$12,777.05	\$3,890.12	\$16,667.17
Totals	\$41,297.84	\$12,573.59	\$53,871.43

Priority pre-petition wage and Union Benefit Fund claims pursuant to 11 U.S.C. 507(a)(4) and (5):

	<u>Wages</u>	<u>Union Benefit Fund</u>	<u>Total</u>
Frank Capozzi	\$8,989.92	\$2,737.08	\$11,727.00
John McGuire	\$8,989.92	\$2,737.08	\$11,727.00
Jason Dusel	\$8,989.92	\$2,737.08	\$11,727.00
Dan Schrum	\$8,989.92	\$2,737.08	\$11,727.00
Totals	\$35,959.67	\$10,948.33	\$46,908.00

Non-priority unsecured pre-petition wage and Union Benefit Fund claims:

	<u>Wages</u>	<u>Union Benefit Fund</u>	<u>Total</u>
Frank Capozzi	\$29,711.05	\$9,045.87	\$38,756.92
John McGuire	\$131,849.47	\$40,143.06	\$171,992.53
Jason Dusel	\$11,658.68	\$3,549.61	\$15,208.29
Dan Schrum	\$98,559.33	\$30,007.50	\$128,566.83
Dan Brennan	\$2,063.69	\$628.31	\$2,692.00

Totals	\$273,842.22	\$83,374.35	\$357,216.57
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