

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONDITIONED AIR SYSTEMS, INC.

and

Case 05-CA-079299

PLUMBERS AND GAS FITTERS LOCAL
UNION NO. 5, UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING INDUSTRY
OF THE UNITED STATES AND CANADA,
AFL-CIO

**ANSWERING BRIEF
OF THE ACTING GENERAL COUNSEL**

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I. INTRODUCTION

The evidence shows, and the judge found, that Respondent had a collective-bargaining relationship with the Union through a Letter of Assent signed by Respondent's part-owner and secretary/treasurer Virginia Merrigan. After signing this agreement, Respondent followed (or at least attempted to follow) the terms of the contract for almost four years, and never raised any claim before trial that Ms. Merrigan lacked authority to bind the company.

Beginning in December 2011, Union officials began receiving information that Respondent was operating an alter ego business using the same employees, tools, equipment, materials, vehicles, and address as Respondent. In March 2012, the Union submitted a written information request to Respondent. The Union explained that the request was in response to information about a potential alter ego operation, which the Union suspected Respondent may be using to avoid its obligations under the collective-bargaining agreement. Respondent ignored the Union's information request. At trial, Respondent claimed that it had no bargaining relationship with the Union, and that the request sought irrelevant and confidential information. Having failed to convince the judge, Respondent now raises several new arguments in its exceptions that weren't presented earlier.

As explained below, the judge's decision is fully supported by the record evidence and is consistent with well-established Board precedent, while Respondent's exceptions are contrary to both. The Acting General Counsel respectfully urges the Board to overrule Respondent's exceptions, and to adopt the recommended decision and order of the ALJ.

II. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENT HAS WAIVED

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board (herein call the Board Rules), any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. The following findings and conclusions of the judge are among those not specifically challenged by Respondent:

- a) "...the Union is a labor organization within the meaning of Section 2(5) of the Act." (ALJD 2:2-3)¹
- b) that Virginia Merrigan was Respondent's Secretary-Treasurer, that she was "clearly an agent of Respondent," that Respondent allowed Merrigan to represent it in many of its interactions with the Union, and that Respondent's president Richard Putnam never advised the Union as to any restrictions on Merrigan's authority. (ALJD 2:9-10; 6:1-14)²
- c) "...Virginia Merrigan was clearly an agent of Respondent and thus bound Respondent to the Union's contract with the Mechanical Contractor's Association." (ALJD 6:1-3)
- d) "The Union and the Association entered into a subsequent collective bargaining agreement on or about July 23, 2010, which is effective from August 1, 2010 to July 31, 2014."³
- e) That Respondent paid employees pursuant to the terms of the collective bargaining agreement through March 2012, and that Respondent reported to the Union whenever it hired or terminated employees. (ALJD 3:1-3)
- f) "Respondent also made payments to the Union's various benefit funds. However, it fell behind in making the payments required by the collective bargaining agreement. The trustees of the Union's benefits funds sued Respondent in Federal District Court. On December 14, 2010, Respondent entered into a settlement agreement of that suit with the trustees of the benefit funds. It initially complied with the terms of the settlement agreement and then fell behind again in making the payments required by the agreement." (ALJD 3:5-10)

¹ Respondent denied the Union's Section 2(5) status in its answer to the amended complaint. (GCx 1-I, ¶3; GCx 1-L, ¶3)

² Respondent denied Merrigan's title and Section 2(13) agency status in its answer to the amended complaint. (GCx 1-I, ¶4(b); GCx 1-L, ¶4(b))

³ Respondent denied this fact in its answer to the amended complaint. (GCx 1-I, ¶6(d); GCx 1-L, ¶6(d))

- g) “In about December 2011, a union member reported to Union Business Manager James Killeen that Respondent was using non-union labor on a job at the Northern Virginia Community College. Respondent’s President, Richard Putnam, acknowledged that he was using non-union labor to Killeen and Joseph Savia, a representative of Steamfitters Local Union 602, in a meeting that December.” (ALJD 3:12-16)
- h) “Another Union member reported to Killeen that Respondent had started another company called Complete Air Solutions (“Solutions”) which was using trucks with the name Conditioned Air Systems (“Systems”) still painted on them. In January 2012, Whiting-Turner, the general contractor at the Northern Virginia Community College, entered into a subcontract with “Solutions.” (ALJD 3:18-22)
- i) “The Union’s March 21 letter apprised Respondent of the reasons it suspected that “Solutions” was an alter ego. Moreover, Richard Putnam was aware of the circumstances giving rise to these suspicions.” (ALJD 5:fn4)
- j) The Notice to Employees⁴

III. FACTS

A. Respondent’s Business Operation.

Respondent Conditioned Air Systems is a Maryland corporation. At all material times, Respondent has been a plumbing contractor in the construction industry performing work on residential, commercial, and government projects. (GCx 1-I ¶2; GCx 1-L ¶2) Owner Richard Putnam formed Conditioned Air Systems in 1999 as a sole proprietorship, and the business was incorporated in 2003. (Tr. 67:17-20) Mr. Putnam testified that at the time the business was incorporated, his intention was that he would be an 80% owner and Virginia Merrigan, Respondent’s secretary-treasurer would hold a 20% stake. (Tr. 67-70) By the time of trial, and through hindsight, Mr. Putnam expressed uncertainty about Ms. Merrigan’s precise ownership interest in Respondent (Id). However, Mr. Putnam did not contradict the testimony of Union Business Manager James Killeen III that Ms. Merrigan was held out as a part owner of

⁴The judge inadvertently listed the former address for Region 5 in his notice. The notice should direct employees to: “Bank of America Center – Tower II, 100 S. Charles Street, Suite 600, Baltimore, MD 21201.”

Respondent, had acted on behalf of Respondent when dealing with the Union, and that Mr. Putnam had never told the Union that Ms. Merrigan was not authorized to represent or act on behalf of Respondent. (Tr. 11:10-12; 11:16-24; 37:7-16) The unchallenged findings of the ALJ (discussed in Section II above) are consistent with this testimony.

B. Respondent Enters into a Collective-Bargaining Relationship with the Union.

The Union represents approximately 1,600 employees engaged in the plumbing and gas-fitting trade in the metropolitan Washington, D.C. area. (Tr. 8:8-14.) For the past two years, Mr. Killeen has been the Union's business manager/financial secretary-treasurer, and he has worked for the Union in some capacity for the past six years. (Tr. 7:11-8:7) Mr. Killeen testified that the Union admits employees as members, and that it exists in whole or in part for the purpose of dealing with employers related to those employees' terms and conditions of employment. (Tr. 8:15-20) The judge found, and Respondent has not challenged in its exceptions, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (ALJD 2:2-3)

It is undisputed that The Mechanical Contractors Association of Metropolitan Washington, Inc. (the Association) is an organization composed of employers in the construction industry that exists for the purpose, among other things, of representing its employer members in negotiating and administering collective-bargaining agreements. (GCx 1-I ¶6(c); 1-L ¶6(c)) The Association and the Union have negotiated a series of collective-bargaining agreements, including agreements from August 2007 through July 2010, and from August 2010 through July 2014. (GCx 2 and GCx 3; Tr. 9) Mr. Killeen testified that individual employers agree to be bound to these collective-bargaining agreements by signing letters of assent (LOA). (Tr. 9:22-10:1)

On or about September 22, 2008, Ms. Merrigan signed a LOA on behalf of Respondent binding it to the collective-bargaining agreement between the Association and the Union. (GCx 4; Tr. 11:6-10) The LOA provides, in part, that “[i]t shall remain in effect until terminated by the undersigned employer giving written notice to the Association and the Union at least one hundred fifty (150) days prior to the then-current expiration date of the labor agreement between the Union and the Association.” Mr. Killeen testified without contradiction that the Union has never received a written notice of termination from Respondent.⁵ (Tr. 10:3-5)

At trial, Mr. Putnam admitted that the signature on the LOA was Ms. Merrigan’s, but asserted that she did not have the “legal binding right” to sign the LOA. (Tr. 55:8-11) However, Mr. Putnam conceded that he knew Ms. Merrigan signed documents on behalf of Respondent such as checks and corporate filings with the State of Maryland, and he agreed with Mr. Killeen’s testimony that he never informed the Union that Ms. Merrigan lacked authority to sign the LOA. (Tr. 12:2-4; 59-60; 64-66)

Regardless of whether Ms. Merrigan had explicit authority to enter into the LOA, the evidence shows that Respondent acted in a manner consistent with having a bargaining relationship with the Union. Although Respondent has excepted to the ALJ’s conclusion that it acted consistently with the CBA, it has not challenged the factual underpinnings cited by the judge. The record shows that Respondent, in keeping with the terms of the CBA, sent notices to the Union when employees were separated from service with the company. These documents bear the signatures of either Mr. Putnam or Ms. Merrigan, and were signed as late as January

⁵ Respondent made much of the fact that it did not sign an additional LOA in 2010. (REx 1 and 2) However, Mr. Killeen explained that while it was the Union’s standard practice to send a new LOA every time there was a change to the CBA, employers were not required to sign a new LOA. Instead, the existing LOA, by its explicit terms, carries into the future until a proper notice of termination is provided. (Tr. 30-35) As explained in greater detail below, the ALJ properly found that it is irrelevant whether Respondent signed additional LOAs after Merrigan signed the initial LOA in 2008.

2011. (GCx 5) Additionally, Respondent submitted payments to the Union (also signed by Ms. Merrigan) for fringe benefits owed to employees under the terms of the CBA. (GCx 7; Tr. 15:19-16:4) Mr. Putnam admitted that through at least March 2012, Respondent was trying to pay its employees the wages and fringe benefits owed under the terms of the collective-bargaining agreement. (Tr. 78)

Beginning in mid-2010, Respondent began falling behind on its fringe benefit payments to the Union trust funds. Following a meeting in September 2010, at which Respondent was represented by Mr. Putnam, Ms. Merrigan, and an unnamed consultant, Respondent and the Union trust funds entered into a settlement agreement to plan out a schedule for Respondent to catch up on its delinquent fund contributions. (GCx6; Tr. 13:12-14:2) The settlement agreement provides, in part, “WHEREAS, Conditioned Air owes certain amounts for contributions, interest, liquidated damages, costs and attorneys’ fees to the Local 5 Benefit Funds under the terms of *its Collective Bargaining Agreement with (the Association) and Plumbers Local Union No. 5...*” (emphasis added) Mr. Putnam admitted that he signed this settlement agreement. After providing vague testimony about his understanding of the agreement and how he came to sign it, he finally admitted that he tried to comply with its terms. (Tr. 61-64) Mr. Putnam finally admitted, “Yes, we have been operating as being a part of Local 5.” (Tr. 55:11-12)

C. The Union Begins to Suspect that Respondent is Operating an Alter Ego, and Avoiding its Obligations Under the Collective-Bargaining Agreement.

By December 2011, it was clear that Respondent had failed to live up to its promises in the 2010 settlement agreement and a meeting was held between Respondent and the trust fund collections committee. Again, Respondent was represented by Mr. Putnam and Ms. Merrigan. (Tr. 17-18) During this meeting, Mr. Putnam was confronted with allegations that Respondent

was using employees without notifying the Union, as required by the CBA.⁶ (Tr. 18:19-19:1; 19:11-19) At first, Mr. Putnam feigned ignorance, but then admitted that Respondent had hired employees without informing the Union. Mr. Putnam claimed the situation was the result of a pressing work deadline. (Tr. 19:7-10; 53:6-14)

Around the same time as this conversation between the Union and Respondent at the collections committee meeting, Mr. Killeen testified he began hearing from other sources that Mr. Putnam had set up another company called Complete Air Solutions (Solutions), and that Solutions was using the same employees, tools, equipment, material, and vehicles as Respondent, and that jobs that were formerly awarded to Respondent were now being directed to Solutions. (Tr. 20-23) Specifically, Mr. Killeen testified about hearing from employee and Union member Larry Moats that Mr. Putnam was opening another company called Complete Air Solutions and was hiring non-union employees to work on both Respondent's and Solutions' projects. (Tr. 20:19-21:2) Mr. Moats specifically mentioned a project at Northern Virginia Community College (NVCC). (Tr. 20:7-18)

Mr. Killeen also testified that he heard from Jim Stacho, an organizer for Maryland State Pipe Trades, that Mr. Putnam had opened another company that was using non-union employees but using the same tools, equipment, material, vehicles, and business address as Respondent. Mr. Stacho provided Mr. Killeen with documents showing that the work on the NVCC project that was scheduled to be performed by Respondent would now be performed by Solutions. (GCx 8 and 9) Additionally, Mr. Stacho informed Mr. Killeen that the same thing may be occurring at another Respondent jobsite – a firehouse in Fairfax County (Virginia). (Tr. 21:6-23:2)

⁶Although Mr. Killeen testified that this allegation was raised by Steamfitters representative Joe Savia, and Mr. Putnam testified it was raised by Mr. Killeen, the substance of the conversation is undisputed in all material respects. Further, Respondent has not challenged the ALJ's finding that Mr. Putnam admitted to the Union that Respondent was using non-union labor. (ALJD 5:7-9)

D. The Union Makes a Request for Information to Respondent.

Acting on this information, Mr. Killeen and the Union's counsel prepared a request for information, and sent it to Respondent on March 22, 2012. (GCx 10; Tr. 23:19-24:7) In his cover letter, Mr. Killeen stated in part:

As the collective bargaining representative of your employees working as journeymen and apprentice plumbers, we are providing you with this information request to enable Plumbers Local 5 to administer the collective bargaining agreement and determine if there has been any violation of the agreement that warrants further action, such as a grievance. In particular, Plumbers Local 5 is concerned that bargaining unit work is being transferred to and performed by employees of another company – Complete Air Solutions, Inc. – to avoid Conditioned Air Systems, Inc.'s obligations under the Agreement. We have some information to support a conclusion that Complete Air Solutions, Inc., is an alter ego or disguised continuance of Conditioned Air Systems, Inc.

At trial, Mr. Killeen testified consistent with his letter that the Union asked for the information so he could determine whether there was cause to believe that Respondent had violated the CBA, and if the Union had a valid grievance to file with the Association. Mr. Killeen explained that the purpose of each individual question in the information request was to uncover the details of any relationship that may exist between Respondent and Solutions, and if that relationship breached any of Respondent's obligations under the CBA. (Tr. 24-26)

It is undisputed that Respondent received the Union's letter, and that Respondent never responded – in any manner – to the Union's request. (Tr. 24:8-13; 56:19-57:2) Although Respondent has not communicated with the Union about its request for information, Mr. Putnam testified that he understands that the formation of Solutions was taken as establishing an alter ego of Respondent and that Solutions was “hiring non-union people and basically trying to back out of our obligations with creditors.” (Tr. 42:23-43:1)

As of the date of trial, the Union had not filed a grievance over any alter ego relationship between Respondent and Solutions. Mr. Killeen explained that the Union didn't have enough information to support a grievance. He also testified without contradiction that it is still possible for the Union to file a grievance with the Association and thus, the Union still has a need for the information it requested on March 22, 2012. (Tr. 27:8-24)

Mr. Putnam gave several explanations, which were not always consistent, for why Respondent has refused to respond to the Union's information request. Initially he testified that the "main reason" why Respondent didn't furnish the information was because in March 2012, he was recuperating from a hospital stay in February. (Tr. 43:12-16) Later, Mr. Putnam testified that Respondent didn't reply to the Union's request because his attorneys advised him not to. (Tr. 43:21-44:6) By the end of the hearing, Mr. Putnam explained that Respondent has not provided the requested information because it asked for irrelevant and confidential information (Tr. 44-47; 50-51; 75-76) and because Respondent had no collective-bargaining relationship with the Union. (Tr. 77-78)

Mr. Putnam conceded that he never informed anyone at the Union that he was advised not to respond to the request for information, or that he expressed concerns about confidentiality. (Tr. 56-58) In fact, Mr. Putnam admitted that he never spoke to Mr. Killeen about the Union's request, and despite offering some vague testimony about a proposed global settlement, Mr. Putnam admitted no one from the Union ever told him not to respond to the information request. (Tr. 47-48; 78-79)

The Union filed an unfair labor practice charge over Respondent's failure to furnish the information requested in its March 22, 2012 letter on April 20, 2012. (GCx 1-A; GCx 1-L ¶1)

IV. ARGUMENT

Respondent's exceptions and brief largely attack the ALJ's findings by improperly raising arguments that it never presented to the judge, presenting arguments that contradict or ignore the evidence, and/or misapply extant Board precedent. As described below, it is respectfully urged that the Board overrule Respondent's exceptions, and adopt the judge's finding that Respondent has and continues to violate Section 8(a)(1) and (5) of the Act.

A. The ALJ's Conclusion that Union's Information Request Sought Relevant Information is Fully Supported by the Record Evidence.

Respondent attacks the judge's conclusion that the Union had a reasonable basis for its information requests and that the Union was entitled to the information it sought concerning any relationship between Respondent and Solutions. (Exceptions 4, 5, and 6) In doing so, Respondent erroneously claims that the Union's request seeks irrelevant information because Solutions has no bargaining relationship with the Union and had no employees. (Exceptions Br. at 7) But this narrow view of the Union's request ignores the other half of the picture; it ignores the Union's explicitly-stated reason for its request, and denies Mr. Putnam's own testimony that he understood the Union viewed the formation of Solutions as establishing an alter ego of Respondent and that Solutions was "hiring non-union people and basically trying to back out of our obligations with creditors." It should be obvious that the Union wasn't asking about information concerning Solutions in isolation, but rather asking about Solutions to compare its operations with those of Respondent. This is evident from even a cursory examination of the information request itself – the questions ask for identical information about each company.

An employer must provide a union that is the collective-bargaining representative of its employees with information that is necessary and relevant for the proper performance of the

union's duties in representing the bargaining-unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The Union's information request is a mix of items with and without a presumption of relevance. Information pertaining to the bargaining unit is presumptively relevant and no particular showing of relevance is required (e.g. Question 13: "Identify all field employees of [Respondent] by name and title."). *Aerospace Corp.*, 314 NLRB 100, 103 (1994); *Pennsylvania Power and Light Company*, 301 NLRB at 1105. This includes information necessary for processing grievances under a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, *supra*; *Eazor Express*, 271 NLRB 495, 496 (1984); *Bickerstaff Clay Products*, 266 NLRB 983, 985 (1983). However, the Board has held that where the requested information concerns the existence of an alter ego operation, it is not presumptively relevant and the union has the burden of establishing its relevancy. *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988). With or without the presumption of relevancy, the test for relevance is a liberal, "discovery-type standard." *Id.* at 437; *Knappton Maritime Corp.*, 292 NLRB at 238-239.

As explained in *Knappton Maritime Corp.*,

The test for determining whether two companies should be treated as one includes such factors as interrelation of business operations, common management, and common ownership. If an alter ego relationship exists, a collective bargaining agreement signed by one entity will bind its nonsignatory alter ego. Information concerning an alter ego may, therefore, be relevant and useful to the union in negotiating terms and conditions of employment with the employer or administering and enforcing the collective-bargaining agreement. To establish the relevancy of such information, the union must, as stated above, show that it had a reasonable belief that enough facts existed to give rise to a reasonable belief that one entity was the alter ego of another.

Here, the explicit language of the Union's information request coupled with the surrounding circumstances show the relevancy of the Union's information request. In his cover letter, Mr. Killeen explained to Respondent that that Union had information that bargaining unit work was being transferred to Solutions, and that Respondent was trying to avoid its obligations

under the contract. Respondent was therefore on notice of why the Union was making the attached information request, and that the Union intended to use this information to determine whether to file a grievance.

Even if there were some questions in Respondent's mind about why the Union was asking for this information, the answers should have been apparent from the surrounding circumstances. The Board has held that when the circumstances surrounding an information request are reasonably calculated to put an employer on notice of a relevant purpose the Union has not specifically spelled out, the employer is obligated to divulge the requested information. *Audio Engineering Inc.*, 302 NLRB 942, fn. 5 (1991). Here, the Union had received several reports beginning in December 2011 that Respondent was diverting bargaining unit work to Solutions, and that Solutions was using the same tools, material, vehicles, and business address as Respondent. Further, while at the collections committee meeting in December 2011, the Union confronted Mr. Putnam with allegations that Respondent was using employees to perform unit work without going through the Union. At trial, Mr. Putnam himself explained that he understood that setting up Solutions was seen by the Union as an attempt to establish an alter ego operation to avoid Respondent's liabilities. Thus, the relevance of the Union's information request should have been apparent to Respondent. In fact, Respondent has not challenged the judge's finding that "Putnam was aware of the circumstances giving rise to [the Union's] suspicions." (ALJD 5:fn4)

Denying these circumstances, Respondent appears to argue that even though the evidence and unchallenged findings prove Respondent knew the purpose of the Union's information request, the Union didn't have sufficient facts to form a belief that Solutions was an alter ego of Respondent. Specifically, Respondent excepts to the judge's finding that the Union had

documentary evidence showing work was transferred from Respondent to Solutions. (Exception 4)

Respondent misreads the evidence and misapplies the law. First, the letter in GCx8, which is addressed to Respondent, provides that the general contractor, Whiting-Turner Construction, was “rescinding a letter of intent for the Mechanical package for the NVCC – Support Services Building, and terminating the subsequent subcontract...that was issued for this project.” The letter then continues that Solutions “will be performing *this work* under subcontract...and is subject to all terms and conditions of the *original contract*.” (emphasis added) In its brief, however, Respondent writes in additional (and irrelevant) facts. Respondent argues that “[t]he letter from Whiting Turner rescinded any intent to give Systems a contract due to its falling behind on schedule, bonding and other issues...The documents reflect that Systems could not do the work and that Solutions could subcontract the work to another entity.” (Exceptions Br. at 9) Nowhere does the letter mention the reason for Whiting-Turner’s decision to rescind the award to Respondent, why Respondent couldn’t perform the contract, or why it was awarded to Solutions.

Moreover, it is legally irrelevant whether Respondent was, in fact, able to fulfill its contractual obligations to Whiting-Turner. The issue in this case, and purpose of this evidence, is to show that the Union had a reasonable, objective basis for its belief that work was being transferred from Respondent to Solutions.

Respondent, however, argues at length that the Union’s information “was incorrect and was third and fourth-hand information,” and “the Union still had mere suspicions that an alter ego existed with no objective, factual basis for [this belief].” (Exceptions Br. at 9) The sum of its arguments show that Respondent is seeking to elevate the relevance standard from an “objective,

factual basis for believing and alter-ego relationship exists” to one of *proof* that it exists. Board law makes clear that information requests can be based on hearsay, and that a union is not required to show that the facts it relied on to support its information requests are accurate or ultimately reliable. *Shoppers Food Warehouse*, 315 NLRB 257, 258 (1994); *Magnet Coal*, 307 NLRB 444 fn. 3 (1992). Thus, it is immaterial whether work was, in fact, transferred from Respondent to Solutions, or whether, in fact, Respondent was capable of performing the work for Whiting-Turner. Instead, what is relevant here is that one reasonable conclusion from the contents of GCx8 is that work that was previously awarded to Respondent would now be completed by Solutions. And, it is certainly reasonable that the letter’s discussion of work ending for Respondent and beginning for Solutions, coupled with the words “this work” and “the original contract” could mean that specific work on a specific project was being transferred from one company to the other. Additionally, the Union had received reports that Respondent and Solutions were sharing tools, equipment, material, vehicles, and a business address. The Union also had Mr. Putnam’s admission of using non-union labor to perform unit work. Further, Mr. Putnam’s testimony confirmed his belief (or at the very least intent) that at some points in time Respondent and Solutions shared him and Ms. Merrigan as common owners or officers. (e.g. Tr. 42:11-14; 71:5-14) Taking all of these facts together, the ALJ properly concluded that the Union had an objective, factual basis for its information request, and that Respondent understood the Union’s basis for its request.

B. Respondent’s Arguments that the Union Acted in Bad Faith and that the Request for Information is Unduly Burdensome are Meritless.

Respondent argues that it is relieved of any obligation to respond to the Union’s information request because the request’s timing, questions, and surrounding circumstances

show that the Union acted in bad faith. (Exceptions Br. at 11) At the outset, this argument should be rejected by the Board because Respondent is raising this claim for the first time in its exceptions. “A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.” *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989), *enfd.* 922 F.2d 832 (3rd Cir. 1990). See also, *Laurel Baye Healthcare*, 355 NLRB No. 118 (August 24, 2010), adopting the holding of *Laurel Baye Healthcare of Lake Lanier*, 352 NLRB 179, 179 (2008).

Besides being untimely, this argument is factually and legally unsupported. Respondent claims that the Union’s request for information “was designed to collect confidential information,” (Exceptions Br. at 11) but Respondent makes no argument for why asking for allegedly confidential information means that the Union’s request was made in bad faith. Similarly, Respondent has not alleged facts showing the Union’s request is motivated by any improper, ulterior motive, or so much as even *identified* this supposed ulterior motive.

Even assuming for the sake of argument that the information sought by the Union is confidential, the evidence shows that Respondent completely failed to satisfy its obligation to bargain with the Union. It is well-established that when an employer objects to providing information which it asserts is confidential, it must (1) explain why the information is confidential, and (2) come forward with some offer to accommodate its concerns. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Assn. of D.C. Liquor Wholesalers*, 300 NLRB 224, 229 (1990). It is the employer, not the Acting General Counsel, that bears the burden of proving confidentiality, and it must prove that its confidentiality interest is legitimate and substantial. The Board has held that blanket claims of confidentiality are insufficient to satisfy an employer’s

Section 8(d) obligation to bargain in good faith. *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991).

Here, Respondent met neither of the two legal requirements to successfully assert a confidentiality defense. Respondent did not explain to the Union why the information was confidential, and Respondent did not offer the Union any alternative that would accommodate its purported confidentiality concerns. Lest there be any doubt, Mr. Putnam's own testimony confirms that he never tried to seek an accommodation with the Union over any purportedly confidential information. (Tr. 56:19-58:1)

While Respondent admittedly provided the Union with no response at all, it may believe the Board should find that some of the information requested by the Union is confidential on its face. Even assuming for the sake of argument that this is true, Respondent has not satisfied its duty to bargain with the Union because it failed to come forward with an offer that would accommodate its purported confidentiality concerns. Respondent did not ask the Union, for example, to narrow the scope of its requests to see if it could limit the amount of confidential material disclosed; it did not offer to redact any confidential information and provide the non-confidential parts; and it did not ask the Union to enter into a confidentiality agreement regarding any confidential information disclosed.

Respondent also suggests – without any evidence whatsoever – that the Union timed its information request and NLRB charge to coincide with Respondent's financial troubles and Mr. Putnam's health problems. These allegations were not presented to the judge, and thus, they should be deemed waived.

Respondent fails to support its argument that the Union's information request was seeking to capitalize on Respondent's financial troubles. Since this issue wasn't raised at the

hearing, the Union didn't have the opportunity to offer any testimony on this subject; however, the fact that Respondent was having financial difficulties *supports* the Union's information request. The evidence shows that the Union had information suggesting that Respondent was setting up a non-union alter ego to avoid its creditors, and Mr. Putnam testified he understood this was the impression created by the formation of Solutions. Therefore, the Union's knowledge of Respondent's financial troubles would serve as yet another objective and reasonable basis for believing that Respondent was diverting unit work to Solutions in violation of the CBA.

Additionally, Respondent cites no record evidence that the Union was aware of Mr. Putnam's health problems, hospital stay, or subsequent recovery. As Respondent has no evidence the Union knew about Mr. Putnam's health issues, *a fortiori*, it has no evidence that the Union sought to take advantage of these health problems.

Finally, Respondent claims the Union's information request was made in bad faith because it was unduly burdensome and excepts to the judge's finding that Respondent neither advised the Union that its request was unduly burdensome, nor sought clarification from the Union to narrow its request. (ALJD 4:27-31; Exceptions 2 and 3)

Once again, Respondent never raised an objection to the Union directly, or during the hearing, that the Union's information request was unduly burdensome, and this argument should be deemed waived. Mr. Putnam gave varying reasons for not responding to the Union's request, but none of them were because of undue burden. But regardless of whether Respondent *subjectively* believed the Union's request to be burdensome, it is undisputed that Respondent never responded – in any manner – to the Union's request (Tr. 24:8-13; 56:19-57:2), and therefore, it certainly failed to fulfill its legal obligations to timely raise this objection or to

bargain with the Union to reduce any undue burden. *Pulaski Construction Co.*, 345 NLRB 931, 937 (2005).

C. Respondent's Claim that it Made a Good-Faith Effort to Respond to the Union's Request for Information is Baseless.

In its brief, Respondent claims it made a good-faith effort to discuss the information request with the Union. Yet what Respondent claims was a "good-faith effort" was actually quite feeble, and if adopted, would completely redefine the phrase "good-faith effort" to make it devoid of any natural meaning. Respondent argues that Mr. Putnam called the Union on several occasions to discuss the Union's request, but because the Union never returned these calls, it was the Union that failed to make a good-faith effort to reach an agreement. (Exceptions Br. at 14)

As Respondent did not cite its phone calls as defense to the judge, the record is naturally devoid of any details about them, such as when the calls were made, how many were made, whom (if anyone) Mr. Putnam spoke with, what he said, or even, whether he left a message or what that message was. In fact, when he was given the opportunity to do so, Mr. Putnam never questioned Mr. Killeen about whether he'd received any of Mr. Putnam's alleged messages or why they weren't returned. In fact, the only evidence that these calls occurred at all is Mr. Putnam's own vague testimony. Moreover, Respondent has offered no evidence that it sought to communicate with the Union through other means, such as mail, facsimile, e-mail, or face-to-face conversations, when these alleged phone calls failed in reaching the Union.

Because Respondent didn't raise this issue at the hearing, it wasn't necessary for the judge to make a credibility determination about whether these calls were made. But, as Respondent cites no authority supporting its claim that nondescript (and possibly unanswered) phone calls satisfy its obligation to bargain with the Union, the Board should overrule this claim

on the basis that even if Mr. Putnam did call the Union, he admittedly never spoke to anyone about the information request, and took no other steps to communicate with the Union, and that these meager steps do not amount to a “good-faith effort.”

D. Respondent Had a Collective-Bargaining Relationship with the Union.

The evidence overwhelmingly supports the judge’s conclusions that Respondent had a collective-bargaining relationship with the Union, and in any event, Respondent’s exceptions are largely based on new arguments that were not presented to the judge, and accordingly, should be deemed waived.

1. Respondent’s claim about ambiguous contract language is both untimely and without merit.

Respondent claims for the first time in its exceptions that the word “or” in the 2008 LOA makes it hopelessly ambiguous and relieves Respondent of its obligation to bargain. (Exception 1) The Board should deem this argument waived because it wasn’t raised before the judge. *Yorkaire, Inc.*, 297 NLRB at 401.

On the merits, however, this argument also fails. The evidence shows that on September 28, 2008, Respondent entered into an 8(f) collective-bargaining relationship when its part-owner/secretary-treasurer Virginia Merrigan signed the LOA agreeing to be bound to the extant collective-bargaining agreement between the Association and the Union. At trial, Mr. Putnam admitted that the signature was Ms. Merrigan’s, and that he knew she signed documents on behalf of the Company. The LOA explicitly requires 150-days notice to terminate the collective-

bargaining relationship, and it is undisputed that Respondent never gave the Union this required notice.⁷

Respondent now claims that by using the word “or” instead of “and” the LOA bound Respondent to the then-extant CBA *or* any subsequent agreements, but not both. (Exceptions Br. 15) However, this argument simply misreads the LOA by taking this phrase out of context. Contrary to Respondent’s argument, this phrase doesn’t purport to bind Respondent to any particular agreement (and thus, somehow is defective by failing to unambiguously state which agreement Respondent is bound to.) Rather, this clause defines the *subjects* about which the Association is authorized to serve as Respondent’s collective-bargaining representative. The plain language of the LOA states that Respondent is authorizing the Association to act as its collective-bargaining representative “for all matters contained in or pertaining to the current or subsequently negotiated labor agreements between the Association and Plumbers Local Union No. 5...” Accordingly, the Board should overrule Respondent’s claim that the LOA is ambiguous, assuming the Board determines this argument was timely raised.

2. *Respondent’s exception that the judge failed to consider its exceptional circumstances in determining the Respondent’s withdrawal was untimely is meritless.*

Respondent claims that the ALJ failed to take into consideration the exceptional circumstances in this case, such as Respondent’s financial strain, in his determination that Respondent’s withdrawal was untimely. (Exception 10) Ironically, it is Respondent’s argument that is untimely – Respondent can hardly claim it has been prejudiced by the judge’s failure to consider an argument that Respondent never made. *Yorkaire, Inc.*, 297 NLRB at 401.

⁷ It is because of this unambiguous 150-day withdrawal deadline, and Respondent’s failure to provide any withdrawal notice, that the judge was correct in deciding that it was irrelevant whether Respondent signed subsequent letters of assent. (ALJD 6:27-30 and Exception 9)

Although Respondent's exception doesn't define what "withdrawal" it's talking about, its brief suggests that it withdrew from the Association. However, there is no record evidence that Respondent *ever* submitted a withdrawal request – timely or untimely – to the Association or the Union. Even Respondent's exceptions never claim that Respondent submitted such a request.

Putting these already-fatal flaws aside, Respondent has also failed to explain why its financial difficulties are exceptional circumstances that relieve it of its legal obligation to furnish the Union with relevant information. The cases cited by Respondent are factually inapposite. In those cases, the employers were seeking to avoid their contractual obligations because of dire economic circumstances. Here, the Union isn't seeking payments or other economic action from Respondent; it is seeking *information*. Respondent's arguments fail to explain how responding to the Union's information requests would exacerbate its financial problems. But perhaps, for the sake of argument, Respondent is claiming that if it provides this information to the Union, a grievance could follow, which if successful, could add to Respondent's financial woes. If this is Respondent's theory, it is not only speculative and unsupported in the cases it cites, but it also presumes a grievance about diverting unit work to an alter-ego would have merit, and thereby only serves to further undercut its earlier argument that the Union has no reasonable basis for believing such an improper alter-ego exists.

3. *Respondent ratified the Letter of Assent by abiding by the terms of the collective-bargaining agreement.*

Respondent claims that the judge erred by concluding Respondent ratified the LOA by abiding by the terms of the collective-bargaining agreement because Respondent "never intended to bind itself to the present collective bargaining agreement." (Exception 7)

At the outset, Respondent has not excepted to the judge's findings showing that it *did* act (or attempted to act) in a manner consistent with the CBA. Respondent only claims that it never intended to bind itself to the present CBA. Moreover, Respondent fails to appreciate that the judge's entire line of reasoning on this issue is based on the doctrine of equitable estoppel, which in this case focuses on what *the Union was led to believe*, not what was in Respondent's mind.

Preliminarily, the Acting General Counsel's position is that the undisputed documentary evidence shows that Respondent established a collective-bargaining relationship with the Union by signing the LOA in September 2008. However, even if one assumes for the sake of argument that the LOA suffers from some technical deficiency, the doctrine of equitable estoppel bars Respondent from escaping its bargaining obligation because the Union has relied to its detriment on statements and conduct by Respondent that were consistent with a bargaining relationship.

In *Red Coats, Inc.*, 328 NLRB 205, 206-207 (1999), the Board found that the principles of equitable estoppel applied in circumstances involving voluntary recognition. The Board cited McClintock, *In Principles of Equity*, at 80 (2d ed. 1948):

The gist of equitable estoppel is that a party who has by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts, whereby he has obtained a benefit from another party, cannot later assert that those facts are not true if thereby the other party will be prejudiced.

The Board added that it "has long identified the essential elements of equitable estoppel as knowledge, intent, mistaken belief, and detrimental reliance."

In *RPC, Inc.*, 311 NLRB 232, 233 (1993), the Board discussed the meaning of the estoppel doctrine, citing *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1382-1383 (1987):

[...] a party that, in obtaining a benefit, engages in conduct that causes a second party to reasonably rely on the "truth of certain facts" that are assumed may not controvert those facts later to the prejudice of the second party. The gravamen of the harm is not the first party's original conduct but rather the inconsistency of its later position. A party may be estopped from denying representations even though

that party had no timely knowledge of their falsity. Thus, the estoppel doctrine does not operate only when a party makes an assertion or acts in accord with a valid belief. Rather, the key is that the estopped party, by its actions, has obtained a benefit. Basically, as discussed in *Lehigh*, the validity of a party's belief is irrelevant. Otherwise, a party to be estopped could often escape the application of the estoppel doctrine by simply claiming that it was unaware of all the facts when it acted. Here, the General Counsel has made a persuasive case for application of the estoppel doctrine. The elements of estoppel – knowledge, intent, mistaken belief, and detrimental reliance – have all be satisfied.⁸

The evidence in this case shows that Respondent acted as though it had a collective-bargaining relationship with the Union, and that the Union has relied on Respondent's representations to its detriment. Respondent admits that it complied with, or at least attempted to comply with, the terms of the CBA since Ms. Merrigan signed the letter of assent in 2008 until at least March 2012. Among other things, Respondent sent required separation notices to the Union and remitted fringe benefit payments to the Union trust funds. When it fell behind on its benefit contributions, Respondent engaged in settlement discussions with the Union and signed a settlement agreement reciting that it owed monies as a result of "its Collective Bargaining Agreement with (the Association) and Plumbers Union Local No. 5..." If Respondent harbored any doubts as to the validity of the LOA, it never informed the Union. Respondent admittedly never informed the Union that Ms. Merrigan lacked the authority to sign the LOA. Finally, at trial, Mr. Putnam succinctly admitted, "Yes, we have been operating as being a part of Local 5."

Given this undisputed factual history, Respondent certainly believed and intended for the Union to believe that they had a collective-bargaining relationship. Thus, even if Respondent later realized in good faith that Ms. Merrigan lacked the authority to sign the LOA, the Union (and by extension Respondent's employees) have relied to their detriment on Respondent's statements and actions. The Union and the employees operated for nearly four years under a

⁸ This analytical framework was relied on by the ALJ in *Raymond Interior Systems*, 357 NLRB No. 193, slip op. at 14 (December 30, 2011), and the ALJ was affirmed by the Board.

belief that Respondent was complying with all of the obligations imposed by the Act and the CBA attendant to a bargaining relationship with the Union. Yet, now that the Union is asking Respondent to provide necessary and relevant information, the Company is seeking to escape its bargaining obligation after having received the benefits of its bargain.

V. CONCLUSION

Based on the foregoing, there is abundant evidence to support the findings in the judge's decision. The record establishes that Respondent entered into and maintained a collective-bargaining relationship with the Union since 2008. Upon receiving information suggesting that Respondent had formed an alter-ego company, the Union submitted a request for information to Respondent. It is undisputed that Respondent received the Union's information request, and that it failed to furnish the requested information. Despite Respondent's arguments to the contrary, the evidence also shows and the judge properly found that Respondent failed to respond to the Union's information request in any meaningful way or otherwise fulfill its obligations under the Act.

The information request explained that the Union was concerned about Respondent forming an alter ego company to avoid its obligations under the contract, which Respondent's owner testified he understood. Nevertheless, Respondent asserted at trial, and without explanation to the Union, that the information request sought irrelevant and confidential information. In its exceptions, Respondent has raised new defenses that are both untimely and meritless. Under Board law, Respondent has completely failed to fulfill its obligation under the Act to bargain in good faith with the representative of its employees. It is respectfully urged that

the Board overrule Respondent's exceptions, and adopt the judge's recommended decision and order.

Respectfully submitted,

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Dated this 23rd day of May, 2013.

STATEMENT OF SERVICE

I hereby certify that on May 23, 2013, copies of the Answering Brief of the Acting General Counsel were served by e-mail on the following parties:

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