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, *et al*.**

Rogan Brothers Sanitation, Inc.

and

Local 813, International Brotherhood of Teamsters,

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RESPONDENT R & S WASTE SERVICES LLC'S STATEMENT OF EXCEPTIONS AND SUPPORTING ARGUMENT TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT R & S WASTE SERVICES LLC STATEMENT OF EXCEPTIONS AND SUPPORTING ARGUMENT TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to § 102.46 of the National Labor Relations Board's Rules and Regulations, the Respondent R & S Waste Services, LLC ("R & S), by its counsel Milman Labuda Law Group PLLC, hereby files the exceptions, with supporting argument, to the Decision and Recommended Order of Administrative Law Judge Raymond P. Green, (herein referred to as the JD).

EXCEPTIONS[1]

1. The Administrative Law Judge ("ALJ") erred in finding that Respondent R &S Waste Services LLC ("R & S") was a single employer of Respondent Rogan Brothers Sanitation, Inc. ("Rogan Brothers"). (Pg 35, Lines 36 and 37).

2. The ALJ erred in finding that "Spiezio, by virtue of the secured collateral agreement, had a substantial potential interest in that company's real and intangible assets". Pg 35, Lines 39 through 40).

3. The ALJ erred in finding in his "opinion the inference can be drawn that they agreed that Rogan Brothers would lay off those drivers who had been working on customer accounts that were now held by R&S and that R&S would directly hire those employees with the caveat that job offers would only be made on condition that the former union drivers of Rogan Brothers would resign from Local 813." (Pg. 44, Lines 11-15.)

4. The ALJ erred in finding that "the evidence shows that the persons designated by both principals [of Rogan Brothers and R & S] to communicate with these employees were Peter Ligouri and Michael Vetrano. As noted above, it was Ligouri who told Roake that he was being let go by Rogan Brothers and that he could apply for a job at R&S. And it was Vetrano who told Revell and Smith that they were being let go by Rogan and could work for R&S." (Pg. 44, Lines 15-19.)

5. The ALJ erred in finding that the "discharges of Roake, Revell and Smith by Rogan Brothers occurred concurrently with the cessation of its joint or single employer relationship with R&S. As such, I conclude that at the time of these discharges, R&S was still a joint or single employer with Rogan Brothers and that it should therefore be held liable for the discharges." (Pg. 44, Lines 35-39.)

[1] The excepted credibility findings underlying these Exceptions are identified herein at the relevant point of argument.

6. The ALJ erred in finding that "each company violated § 8(a)(1) when; (a) Vetrano told Revell that he was being let go because the employer could no longer employ Local 813 drivers and that they were going to bring in another union; and (b) when Liguori told Roake that if he wanted a job at R&S, he would have to resign from Local 813. In either case, it is clear to me that in these transactions, Ligouri and Vetrano were acting as agents for Spiezio and James Rogan." (Pg. 44, Lines 41-46.)

7. The ALJ erred in finding that "until at least August 1, 2011, R&S and Rogan Brothers, *if not exactly fitting the legal definition* of a single employer, acted in a manner that made Joseph Spiezio the person who was in complete control of the financial and business operations of Rogan Brothers. As such, I would conclude that he and his company became a joint employer with James Rogan and Rogan Brothers Sanitation Inc. Under perhaps a *somewhat expansionary definition* of "single employer," I would also conclude that for a period of time, Rogan Brothers and R&S constituted a single employer." (JD, p. 36, Lines 8-14).

8. The ALJ found that an alleged condition of employment at R & S to withdraw from Local 813 was "tantamount to an illegal refusal to hire" and violated § 8(a)(1) and (3) of the Act. (JD p. 43, Lines 23-24.)

9. The ALJ erred in granting the Counsel for the Acting General Counsel's motion to amend the complaint to include single employer allegations against Rogan Brothers Sanitation, Inc. and R & S Waste Services, LLC after it had rested. (JD, p. 4, Lines 11-17.)

PRELIMINARY STATEMENT

The Acting General Counsel ("GC") alleged that R & S should have been obligated to bargain with Local 813, IBT ("Local 813") because R & S was a single employer, alter ego or successor of Rogan Brothers. The ALJ correctly found that the collective bargaining agreement between Local 813 and Rogan Brothers was unenforceable and invalid because it was an unlawful "member's only" agreement. Therefore, the ALJ found that no bargaining obligation could ever attach to R & S under any theory of liability and dismissed the § 8(a)(5) allegations.

The ALJ recognized that the Board has long held that that the Act does not permit § 8(a)(5) bargaining obligation in member's only units:

> Accordingly, we must consider the alleged refusal to bargain against this background of members-only dealing between the parties. We conclude that, in

> the context of events, the Respondent's actions cannot be held violative of Section 8(a)(5). That section, by reference to Section 9(a), requires as a predicate for any finding of violation that the employee representative has been designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms.

Don Mendenhall, Inc., 1972 NLRB LEXIS 576, *5-6 (N.L.R.B. 1972)

A union, once certified as the collective-bargaining representative of employees in an appropriate unit has the duty to represent *all* employees within the unit regardless of the way the unit employees may have voted in an election and regardless of their union sentiment. The union cannot betray the trust by bargaining special benefits to union members only. *Queen Mary Restaurants*, 219 N.L.R.B. 776, 797 (1975)

The evidence indisputably established that for nearly all of the 10 years that Rogan Brothers and Local 813 were signatories to a CBA, Local 813 applied the benefits of the CBA to only approximately 10 drivers notwithstanding that the unit description covered all drivers, helpers, welders, and mechanics. In fact, the evidence established that Local 813 and its agents were long aware of the hundreds of employees over the years that worked at Rogan Brothers that fell within the unit description. The evidence unquestionably demonstrated that Rogan Brothers ignored those employees and refused to apply the CBA's terms to those employees. In fact, Local 813's president admitted at the hearing that he had a trusted aid become an employee of Rogan Brothers to provide him intelligence on Rogan Brothers' operation. The organizer admitted under oath that the president told him to distribute union membership cards only to "worthy" people whom he defined as "good drivers". Moreover, former Rogan Brothers' employees testified at the hearing that they asked Local 813's president and his aid to join the union; the requests were denied. The evidence further established that Local 813's benefit funds auditors were provided all relevant payroll documents and financial information of Rogan

Brothers during the audits it conducted of Rogan Brothers over the years. The evidence established that Local 813's business agent (later president) verified the information regarding the employee complement that was performing "covered work". Despite its active and unimpeded knowledge of Rogan Brothers' employee complement, Local 813 knowingly refused to extend the CBA's terms beyond the few chosen drivers that were "good drivers" despite the unit description's definition that all drivers, helpers, welders and mechanics are covered.

Based on the evidence, the ALJ was acutely where that such member's only arrangements render otherwise valid CBA's unenforceable. The ALJ easily understood that the jurisdictional component underlying the § 8(a)(5) allegations was not met in this case and invalidated the CBA based upon the indisputable Board precedent dating back to the inception of the Act. As a result, the ALJ correctly dismissed the § 8(a)(5) allegations in the Second Amended Complaint. The ALJ further found that R & S was neither an alter ego nor successor of Rogan Brothers. Notably, **Local 813 did not file a post-hearing brief** to the ALJ in support of any of the allegations in the Second Amended Complaint.

While the ALJ correctly invalidated the CBA and dismissed the § 8(a)(5) allegations against R & S, the ALJ erred in other matters.

As noted above, the GC offered multiple alternating theories of liability against R & S (alter ego, successor, joint/single employer) to the extent that it abandoned one theory on the first day of the hearing only to request that it be re-introduced after the GC closed its case in chief. Respondent filed a motion opposing the amendment (which was made part of the record). Tr. 8-9. The ALJ erroneously permitted the amendment over R & S's due process objections as documented on the record. Notably, the ALJ stated that "for better or worse" he was granting the motion.

While multiple theories of liability were advanced the main theory of this case was that R & S was an alter ego of Rogan Brothers Sanitation ("Rogan Brothers") in order to saddle R & S with a purportedly valid bargaining obligation with Local 813, IBT ("Local 813"). Since the existence of a valid bargaining relationship was jurisdictional matter, the ALJ first focused on whether there was jurisdiction to proceed against R & S. The ALJ correctly tossed the GC's case out and found that Local 813 maintained an unlawful member's only agreement with Rogan Brothers. The member's only finding invalidated the CBAs that had been signed by Rogan Brothers and Local 813 thereby invalidating and rendering unenforceable any obligation that sprung from the CBAs. An attendant consequence was that the ALJ dismissed the successorship allegations.

The ALJ also correctly found that R & S was not an alter ego of Rogan Brothers.

The ALJ incorrectly found that for a limited period R & S and Rogan Brothers were a single/joint employer. The ALJ drew unsupported conclusions from the evidence that contradicted the record. The ALJ also did not cite any case law to support his novel definition of joint/single employer status. Indeed, the ALJ admits his definition was novel when he stated:

> In my opinion, until at least August 1, 2011, R&S and Rogan Brothers, *if not exactly fitting the legal definition* of a single employer, acted in a manner that made Joseph Spiezio the person who was in complete control of the financial and business operations of Rogan Brothers. As such, I would conclude that he and his company became a joint employer with James Rogan and Rogan Brothers Sanitation Inc. Under perhaps a *somewhat expansionary definition* of "single employer," I would also conclude that for a period of time, Rogan Brothers and R&S constituted a single employer.

(JD, p. 36, Lines 8-14).

These are the ALJ's words, not R & S's. Under any interpretation, the ALJ's statement here acknowledges that the recognized legal definitions of the theories of liability for which he based his findings are not present but rather based upon some other definitions unrecognized

under the NLRA. The ALJ therefore had no legal basis to find R & S a joint/single employer. In fact, the allegations in the 2nd Amended Complaint do not allege the novel theory of "single employer" that the ALJ has based his finding upon. The allegations are the traditional definitions – the ones recognized under the NLRA for which the ALJ has authority to issue rulings on and the ones that R & S prepared its defense in this matter to align with. The ALJ's heretofore unrecognized definitions deprived R & S of its due process right to defend itself. This fact alone requires the ALJ's findings of single/joint employer to be reversed and the Exception to this finding be granted.

In any event, as discussed below, under the recognized definition of joint/single employer, the record is devoid of evidence to support the joint/single employer finding.

The erroneous joint/single employer finding caused the erroneous findings that R & S was jointly liable under § 8(a)(1) and (3) of the Act for allegedly unlawful statements by alleged agents of R & S and Rogan Brothers. Essentially, the ALJ found that within a short period of weeks, Michael Vetrano and Peter Liguori uttered statements to several Rogan Brothers employees that in order to obtain jobs at R & S they would have to withdraw from Local 813. The ALJ found that Vetrano and Ligouri were agents of R & S and Rogan Brothers and therefore found those entities jointly liable for the statements and the alleged unlawful refusal to hire by R & S. As discussed below, the evidence did not support the findings and the ALJ should be reversed and this Exception be granted.

Finally, the ALJ found that an alleged condition of employment at R & S to withdraw from Local 813 was "tantamount to an illegal refusal to hire" and violated § 8(a)(1) and (3) of the Act. (JD p. 43, Lines 23-24.) The ALJ cited no support that such an alleged condition is in fact an illegal refusal to hire. This point is underscored by the fact that one of the alleged

discriminatees, Michael Roake, did not seek employment at R & S. Therefore, as a simple matter of logic, there was no refusal to hire. Consequently, the ALJ's finding that R &S (and Rogan Brothers) refused to hire alleged discriminatees must be reversed and this Exception be granted.

POINT I
THERE IS NO EVIDENCE THAT VETRANO OR LIGUORI WERE AGENTS OF R & S

The question at issue is whether Michael Vetrano ("Vetrano") and Peter Liguori had the apparent authority to issue any statement or make any representation on behalf of R & S. As a general matter, the Board applies common law principals of agency, which incorporate principles of implied and apparent authority, *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996). Apparent authority "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question." *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such belief." *Id.*, cited with approval in *Mastec Direct TV*, 356 NLRB No. 110, slip op. 1-2 (2011). The burden of proof is placed on the party asserting the agency relationship. *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993).

Neither of these situations is present here. Contrary to the ALJ's finding, there is no evidence that R & S's leadership, i.e. Spiezio, gave any signal to any Rogan Brothers employees that Vetrano or Liguori were acting in R & S's interests. Nor was there any evidence that Rogan Brothers communicated to its employees that Vetrano and Liguori could act on its behalf with respect to employment at R & S. Quite to the contrary, there is no evidence that any authority was granted by R & S or Rogan Brothers to Vetrano or Liguori to make any statement or representation on their behalf. James Rogan did not testify nor was he compelled to testify.

Vetrano and Liguori did not testify and were not compelled to testify. There is no document in evidence that supports such authority was granted therefore the ALJ did not have a legal basis to find such authority. *Pa. State Corr. Officers Ass'n*, 2012 NLRB LEXIS 145, 22-23 (N.L.R.B. Mar. 23, 2012)(reversing ALJ's finding of apparent authority).

Conversely, there is ample evidence in the record demonstrating that no authority was granted to Vetrano or Liguori. Spiezio repeatedly testified that he is the sole decision-maker for R & S and that no employee had any authority to make any representation on behalf of R & S. Spiezio and Rogan further submitted affidavits that are in evidence that they did not give Vetrano or Liguori any authority to act on their behalf with respect to any statements about not working at Rogan Brothers or setting a condition of employment at R & S on withdrawing membership. The fact that two witnesses testified to alleged statements made by Vetrano and Ligouri is not evidence of agency. *Pa. State Corr. Officers Ass'n*, 2012 NLRB LEXIS 145 (N.L.R.B. Mar. 23, 2012) (**"**it is well settled under general agency principles that the statements of a purported agent cannot establish the existence of an agency relationship") citing *Karavos Compania Naviera S. A. v. Atlantica Export Corp.*, 588 F.2d 1, 11 (2d Cir. 1978). Moreover, the fact that Vetrano worked at Rogan Brothers prior to working at R & S is not proof of agency status as the Board similarly held in *Friedrich Truck Services,* 259 N.L.R.B. 1294, 1301 (N.L.R.B. 1982).

During the course of Region 2's investigation into the underlying unfair labor practice charges, Vetrano and Liguori submitted affidavits that they had no authority to act on Rogan Brothers' behalf or R & S's behalf. Unsurprisingly, the General Counsel did not introduce the affidavits into evidence. However, they are in evidence because the ALJ granted R & S's motion that all motions and correspondence related to the charges at issue be made part of the record. Tr.

8-9; 727-728; 1226. R & S's motion for summary judgment submitted on July 17, 2013, included the affidavits. R & S also attached the affidavits to its post-hearing brief for convenience sake. As such, the affidavits should have been considered by the ALJ. If the ALJ had considered the evidence then the ALJ could not have found that Vetrano and Ligouri acted as agents. Therefore, no statements could have been attributed to R & S and no liability could flow to R & S to be responsible for back pay. Consequently, the ALJ's finding that R & S (and also Rogan Brothers) committed violations of §§ 8(a)(1) and (3) should be reversed.

Additionally, the ALJ has determined that the joint/single employer period between R & S and Rogan Brothers ended when Local 813's counsel sent a letter demanding an end to what it considered to be a subcontracting agreement in violation of the CBA between Local 813 and Rogan Brothers (although as the ALJ correctly found, the CBA was unenforceable). The alleged statements of Vetrano and Ligouri to the Rogan Brothers employees who performed work pursuant to an arm's length agreement between R & S and Rogan Brothers in August and September 2011 were made after the letter. Therefore, since the ALJ has determined that the joint/single employer status ended with the receipt of the letter, any statements after that time are not attributable to R & S. Consequently, R & S is not liable for any statement allegedly made by Vetrano and/or Liguori.

Further points must be considered in demonstrating the necessary reversal of the ALJ's finding that Liguori and Vetrano were agents and that any statement they allegedly made is attributable to R & S (or Rogan Brothers).

It is alleged that Roeke was unlawfully denied employment at R & S. The allegation fails because Roeke testified that he never applied for a position at R & S. Tr. 502. Moreover, he claims that Liguori told him he needed to withdraw from 813 because Rogan Brothers "wasn't

going to pick it up anymore." Tr. 499. Roeke does not attribute any other statement to Liguori or anyone else. Roeke testified that Liguori did not tell him what would happen if he did not withdraw. Tr. 509. As such, the allegation with respect to Roeke is restricted to that alleged statement. Even in the most elastic interpretation of the alleged statement it does not link any consequence for failure to obey nor is there a link to R & S. Therefore, the statement is cannot be considered a coercive statement. Consequently, there is no legitimate basis to conclude that an unlawful condition was placed upon Roeke and even if there was it cannot be imputed to R & S; as such the finding must be reversed.

Furthermore, Roeke did not know where Liguori worked at the time of the alleged statement (Tr. 508) so he could not have been under the impression that R & S required the withdrawal for employment.

There is simply no evidence to establish that Roeke was denied employment at R & S at all let alone under the condition that he withdraws from Local 813. Moreover, Liguori did not testify despite being subpoenaed by the Acting General Counsel therefore any alleged statement is not supported by the record. The Acting General Counsel's failure to move to enforce the subpoena to compel Liguori requires an adverse inference be drawn. *Dodge of Naperville, Inc.*, 2012 NLRB LEXIS 6, fn. 6 (N.L.R.B. Jan. 3, 2012). Additionally, Liguori was a long time member of 813 so it is illogical that he would have hostility towards 813. Consequently, the charge must be dismissed.

Additionally, devastating to the claim is that there is no evidence that Liguori was a supervisor at R & S or Rogan Brothers. Roeke testified that when he worked out a yard in Yonkers, he no longer reported to Liguori rather he reported to James Rogan and that James Rogan was his sole supervisor. There is no evidence that Liguori was a supervisor at R & S or

directed Roeke in any way while performing work for Rogan Brothers. Revell testified that he did not know who runs the R & S yard. Tr. 695. Revell never mentioned Liguori' s name once throughout his testimony. Liguori' s salary for a limited period was because of his role in helping maintain two customer relationships for R & S (Fordham University and NY Presbyterian Hospital) not because he was performing supervisor duties. Tr. 1131. Again, Acting General Counsel could have forced Liguori to testify and chose not to pursue enforcement thereby leaving a void in the government's burden to establish § 2(11) supervisor status or agent status. Without any evidence of Liguori' s status as a supervisor or agent any alleged statement to Roeke or any other employee is insufficient to establish the unlawful refusal to hire charge.

It is also alleged that Joseph Smith was unlawfully denied employment at R & S. Smith testified that he never applied at R & S. Tr. 412. Smith even testified that James Rogan notified him that R & S was hiring and he still did not apply. Tr. 411. There is no evidence of Smith being denied employment by R & S or Spiezio or told to withdraw from 813 as a condition. Without any evidence to sustain the allegation of unlawful refusal to hire, the ALJ's finding must be reversed.

It is alleged that Revell was refused employment unless he withdraw from 813; the record does not support the charge and it must be dismissed.

First, Revell testified that Vetrano was not a supervisor at R & S. Revell testified that he never considered Vetrano his supervisor at R & S. Tr. 696. In fact, he testified that he was told "not to listen to" Vetrano. Tr. 696. Revell also testified that he never saw Vetrano hire any person at R & S. Tr. 672. Revell testified that he never heard Vetrano when Vetrano spoke with other employees. Tr. 671. Revell stated in his affidavit (GC Ex. 109) that Vetrano was not his

supervisor nor was Liguori. GC Ex. 109.[2] Revell testified that he barely saw Vetrano at R & S. Tr. 668-669. Revell offered no evidence that Vetrano was a supervisor at R & S. Since there is no evidence that Vetrano was a supervisor at R & S when he made the alleged statements (or any alleged unlawful statement to anyone for that matter), the allegations of unlawful refusal to hire fails and the ALJ's finding must be reversed. Notwithstanding the lack of supervisory status or agent status, the charge still fails because Revell testified without contradiction that **he was never told by anybody that he needed to withdraw from 813** in order to get a job at R & S. Tr. 679. Revell further testified that Vetrano invited Revell to apply for a position at R & S. Tr. 680. Revell testified that he did not ask Vetrano for an application for R & S. Tr. 679. Revell testified that when he told Troy about the conversation he never told Troy that he would not be hired at R & S unless he withdrew. Tr. 681. Revell averred in his affidavit that he withdrew from 813 without being forced to withdraw and that it was of his own free will. GC Ex. 109. Revell stated that neither Spiezio nor Vetrano nor James Rogan forced him to do anything he didn't want to do with respect his employment anywhere or his choice of union representative. *Id*. Revell further testified that Spiezio never threatened him or forced him to do something he did not want to do. Tr. 676. Spiezio did not tell Revell that he would lose his job if he didn't do something Spiezio wanted Revell to do. Tr. 676-677. Also, it is a fact that Rogan Brothers was losing business rapidly and that there was little work left so it had to lay off employees. Indeed, Troy testified that Rogan Brothers' work for 813 drivers fluctuated. So it is entirely consistent with Rogan Brothers business that it had to lay off the 813 drivers. Therefore, an alleged comment that they were being laid off cannot be seen as statement designed to coerce but rather a reflection of reality. In any event, he filled out an application for R & S a few days later. Tr.

[2] Under questioning from the ALJ Revell acknowledged that he was presented the affidavit, given time to read it, read it and agreed with all of the statements contained within the affidavit.

661. These facts do not establish unlawful coercion, consequently, the ALJ's finding of an unlawful condition to hire made by an agent of R & S must be reversed.

There is no question that Revell's testimony on direct and cross and through his affidavit fails to establish that Vetrano was supervisor at R & S or an agent of R & S. The evidence also establishes that there was no denial of employment by anyone and that there was no condition on employment by withdrawal of membership. In fact, the evidence establishes that Revell was offered employment at R & S and within a few days he filed his application and was hired. Consequently, the ALJ's finding with respect to Revell being forced to resign from 813 in order to be hired at R & S must be reversed. Furthermore, the findings that Vetrano and Ligouri were agents of R & S must reversed along with the findings that R & S, through its alleged agents, imposed an unlawful condition in order to be hired upon Revell, Roeke and Smith. Consequently, the Exceptions must be granted.

POINT II

THE EVIDENCE AND LAW DOES NOT SUPPORT A FINDING THAT R & S AND ROGAN BROTHERS WERE JOINT OR SINGLE EMPLOYER FOR EVEN A LIMITED PERIOD

The ALJ struggled for a way to find that R & S and Rogan Brothers were a single employer and/or joint employer for at least a limited period of time. As a result of the erroneous finding, the ALJ erroneously concluded that R & S is liable for unfair labor practices that may have been committed by Rogan Brothers. The finding fails for three reasons. First, the ALJ cited no case law to support his finding; instead he based it on a hunch. Second, the evidence contradicts the finding. Third, the ALJ based his decision on an undefined, unrecognized novel definition of joint/single employer that was addressed in the "Preliminary Statement", *supra*. For

any of these reasons, and for all of these reasons, the ALJ's finding of joint/single employer status must be reversed.

The ALJ relies on two bases in finding that at least for a limited period Rogan Brothers and R & S were a joint or single employer for a limited period in August through September 2011. The first basis is that Joseph Spiezio, R & S's sole owner, virtually made all decisions for Rogan Brothers for a limited period. The second basis is an agreement between R & S and Rogan Brothers whereby Rogan Brothers agreed to perform subcontract work for R & S that lasted less than two months.

As to the first basis it contradicts the record. The record establishes beyond doubt that Spiezio functioned solely as consultant to Rogan Brothers. In evidence are multiple affidavits from Spiezio attesting to the fact that he did not have any authority on behalf of Rogan Brothers. (GC Ex.45; 46; 48; 49; 56). In evidence is an affidavit from James Rogan, sole owner of Rogan Brothers, that only he had the authority to make decisions on behalf of Rogan Brothers. (GC Ex. 50; 56.) Spiezio testified repeatedly that he did not have any authority with respect to Rogan Brothers instead he merely acted as a consultant through Spiezio Organization LLC; an entity he solely owned. (GC Ex. 46.) The terms of the consultancy were embodied in an agreement between Spiezio Organization LLC and Rogan Brothers. (GC Ex. 56.) The agreement states as follows:

> 2. Duties, Responsibilities
>
> (a) Consultant will consult on the following matters subject to approval by James M. Rogan.
>
> 1. Retain counsel for labor related matters.
> 2. Retain a CPA
> 3. Negotiate contracts
> 4. Review of internal controls
> 5. Company policies in place

6. Meeting on CBA with Locals 456, 282, 813
7. Retain IT personnel to review software
8. Set up systems for operations of business
9. Review land at Bedford for operations and transfer station
10. Refer to bankers for operating accounts and payroll services
11. Funding sources

The language is clear: Spiezio had no authority to make any decisions on behalf of Rogan Brothers. The General Counsel did not ask one question on this document of any witness. There is no evidence contradicting this limit to Spiezio's involvement on behalf of Rogan Brothers. It must be recalled that the General Counsel failed to enforce its subpoena to compel the appearance of James Rogan. The General Counsel did not impeach Spiezio to demonstrate that he in fact exercised full authority in Rogan Brothers matters in derogation of the consulting agreement. The record further includes letters from Spiezio to James Rogan contemporaneous with Pinnacle Equity's loan to Rogan Brothers that a consulting agreement would be set up and Spiezio would not have any control but would retain relevant outside assistance and suggest business controls. (GC Ex. 9.) The GC's witnesses did not refute the letter.

Additionally, emails are in evidence where Spiezio clearly states to James Troy, Local 813, IBT's then business agent that Spiezio was not acting on behalf of James Rogan and Rogan Brothers during the period of August 2011 to October 2011. The emails also demonstrate that Troy knew that Rogan was the sole person making decisions on behalf of Rogan Brothers. For example, Troy repeatedly urged Spiezio to ask Rogan to put additional employees into the Union to satisfy a memorandum of agreement's provision. (GC Ex. 92.) Troy filed a grievance regarding the agreement and sent it to Spiezio; Spiezio responded to Troy via email that he would "send it to Jim Rogan". (*Id.*) Moreover, the memorandum of agreement was signed by James Rogan on January 18, 2011 weeks after Spiezio assumed his role as consultant. (*Id.*)

Spiezio referred to himself as representative of Rogan Brothers in an email exchange with Troy. (GC Ex. 93.) In an email from Spiezio to Troy on August 24, 2011, Spiezio refers to himself as a consultant for Rogan Brothers and specifically states that Rogan Brothers' operation is James Rogan's and distinct from R & S. (GC Ex. 95.) In an email from Spiezio to Troy dated September 14, 2011, Spiezio states that he is merely facilitating resolution of issues between James Rogan and Troy and has no other role. (GC Ex. 96.)

As the Board in *Mercy General Health Partners,* reiterated the *Dow Chemical* standard:

> No single-employer relationship exists where the actual day-to-day management and labor relations functions are carried out by each entity's own managers and officers. In the instant case, each entity has its own managers who supervise their distinct group of employees; there is no "cross supervision"; employees are subjected to different personnel policies; and labor relations functions are handled by separate individuals

331 N.L.R.B. 783, 785 (N.L.R.B. 2000). Based on the testimony, affidavits, and email exchanges there is no legitimate basis to conclude that Spiezio in fact controlled any decision that Rogan Brothers made. Moreover, there was no evidence adduced by the GC to demonstrate that Spiezio in fact actually made decisions on behalf of Rogan Brothers. This negative proposition is based on an absence of evidence on the points. The General Counsel has the burden of proving that Rogan Brothers and R & S were a single employer; the Respondents do not have the burden of proving that they are not. *Masland Industries*, 311 NLRB 184, 186 (1993.) The GC did not call any witness to establish in fact decision-making – in fact the Rogan Brothers employees who testified on behalf of the GC, never saw Spiezio or heard Spiezio's name before the hearing in the instant matter. Since there is no evidence that establishes that Spiezio had any in fact control over Rogan Brothers, then there is no evidence to support the ALJ's finding that Spiezio had control over Rogan Brothers' operations and decision-making. It's not for the ALJ to assume facts not in evidence. Consequently, the ALJ's finding must be reversed. *Dow Chemical Co.*,

326 NLRB No. 23 (1998) ("single-employer relationship will be found only if one of the companies exercises *actual or active control* over the day-to-day operations or labor relations of the other") (emphasis added).

The ALJ also erred in relying upon the vendor agreement between R & S and Rogan Brothers as a basis for finding that the entities were integrated and Spiezio had control. The agreement was embodied in a written instrument whereby Rogan Brothers would perform certain limited work for R & S. (GC Ex. 56.) The agreement provided that R & S would pay Rogan Brothers "costs plus 10%". In evidence are the invoices from Rogan Brothers to R & S for the work performed (Resp. Ex. 19) and R & S checks paid to Rogan Brothers to pay the invoices. (GC Ex. 74.) The agreement and related documents establishes this was an arm's length transaction that did not involve common resources, employees or decision-making.[3] In fact, no witness testified that Spiezio directed or controlled the work performed by Rogan Brothers personnel. Indeed, the ALJ expressly noted that the employees in question did not testify in the proceeding. (ALJ Decision, p. 44, Line 21-23). Again, it was the GC's burden to produce evidence of such control and none was produced. As such, the ALJ had no evidence to conclude that Spiezio controlled the performance of the work performed under the agreement or that R & S and Rogan Brothers were an integrated enterprise within the confines of that work. The fact that the agreement was terminated in response to a letter from Local 813 about an alleged unlawful subcontract does not convert an independent relationship to an interrelated relationship for a finding of single or joint employer status. In fact, the cessation was the responsible action

[3]Even if the few employees of Rogan Brothers that performed work under the agreement could be considered commonly shared with R & S, such sharing is irrelevant because the few employees were no more than a tiny percentage of Rogan Brothers work force in August and September 2011 based upon the record. (GC Ex 47). Consequently, there is no basis to find single/joint employer status. *National Mobile Television*, 2000 NLRB LEXIS 253 (N.L.R.B. Apr. 27, 2000) (no single employer finding where company had *de minimis* sharing of employees).

to take to avoid any perception of single or joint employer status – R & S wanted no entanglements with Rogan Brothers. The ALJ infers that the agreement was something that it was not. The inference is not sufficient to base the joint or single employer finding, there must be evidence. On this point, there was no evidence to refute the record that establishes that the agreement was at arm's length and did not constitute joint or common or single control or integration between Rogan Brothers and R & S even for a limited time. Consequently, the ALJ's finding of single and joint employer for the limited period must be reversed. *Accord Toering Elec. Co.*, 351 N.L.R.B. 225 (N.L.R.B. 2007) (dismissing single employer allegation despite that there was common management, and ongoing relationship between the two entities); *V & S ProGalv, Inc.*, 323 N.L.R.B. 801 (N.L.R.B. 1997) (dismissing single employer allegation even where there was some interrelation of operation).

It will be recalled that Local 813 initially filed an unfair labor practice charge alleging that Rogan Brothers was alleged to have engaged R & S in an unlawful subcontracting scheme. Despite maintaining the charge for nearly 8 months, Region 2 notified R & S shortly before issuance of the complaint that the charge was withdrawn. Obviously, it was withdrawn because it undermined the alter ego theory that the ALJ ultimately denied. The point is that Local 813 and Region 2 knew all along that the agreement was an arm's length transaction but had to deceptively abandon the charge to advance the alter ego theory.

The ALJ's final point is that Spiezio controlled Rogan Brothers because Spiezio had the potential to take control of a substantial amount of Rogan Brothers assets. This finding is astoundingly wrong. First, the evidence does not demonstrate that Spiezio or any entity he owned had the right to take possession of a substantial amount of Rogan Brothers' assets. The

evidence established that of the universe of Rogan Brothers assets, only a small percentage was posted as collateral for the loan Pinnacle Equity issued to Rogan Brothers.

The loan made to Rogan Brothers was secured with a promissory note and specific collateral. The collateral did not include the entire universe of Rogan Brothers property and Rogan Brothers continued to operate in the effected period with tens of employees. The collateral did not include a majority of the numerous vehicles and equipment that Rogan Brothers insured as evidenced by the insurance policies in evidence from Rogan Brothers' insurance broker, Fairmont Insurance. GC Ex. 7, 46, 48, 50; Resp. Ex. 15(a)-(c); Tr. 983-992. Rogan Brothers did not post its roll-off work or its dirt and rock containers either. *Id*.

Approximately 15% of Rogan Brothers customers were posted as collateral. Rogan Brothers had in excess of 6800 customers in early 2011 when the loan was extended. Rogan Brothers posted only commercial contracts of approximately 1100. Those customers were chosen because they were less than 90 days in arrears and were within Westchester County where R & S is licensed to operate. Accounts over 90 days in arrears, residential customers, and customers outside Westchester were not considered for collateral posting. GC Ex. 50.

The evidence establishes that Pinnacle Equity's loan was secured with a fraction of Rogan Brothers equipment. Pinnacle Equity did not have the right to any of the vast amount of assets in the Rogan Brothers universe. It is simply wrong for the ALJ to find that Spiezio had the "potential" to take control of a substantial amount of Rogan Brothers' assets. The ALJ based his joint/single employer finding, in part, on this clear error; the error cannot stand. The overwhelmingly evidence contradicts the ALJ's finding. Consequently, the finding must be reversed.

Moreover, the bulk of Rogan Brothers' assets were transferred by James Rogan to his other sanitation company, ARJR Trucking. Rogan Brothers transferred assets to ARJR Trucking (ARJR) an entity wholly owned by James Rogan in summer 2011. Tr. 1011-1012. The transferred assets include trucks, equipment, and routes. Tr. 1012. James Rogan sought to continue Rogan Brothers under the ARJR rubric. Tr. 1012; 1140; 1144. Rogan Brothers had contracts with customers that needed to be fulfilled and James Rogan used his ARJR to perform the work that Rogan Brothers was under contract to perform. Tr. 1012. Rogan formed another company called Classic. *Id*. Rogan Brothers also sold some of its routes to Capital Waste and Triple A – more evidence that R & S had no purported potential right to Rogan Brothers' assets. Tr. 1012. Joseph Smith, an alleged discriminatee, testified that Rogan Brothers operated as ARJR while he was employed at Rogan Brothers and then Rogan Brothers ran under ARJR completely at some point. Tr. 404. Wayne Revell, another alleged discriminate, testified that Rogan Brothers and ARJR vehicles operated out of the same yard on Saw Mill River Road doing the same work. Tr. 654.

Furthermore, bank records establish that Rogan Brothers transferred assets and operated under the ARJR umbrella. Resp. Ex. 19. The bank records provided particular detail of Rogan Brothers' assets and activity transferred to ARJR solely by James Rogan:

Rogan Brothers' checks deposited in ARJR's account

- JV State Electrical
- 645 Burkes LLC
- Lincoln Barbecue Corp.
- Almi Construction

Rogan Brothers' employees paid through ARJR's account

- Joe Gray
- Stephanie Mazella
- Brett Rogan

- Andrew Head
- Steven Palmiotta
- Alfred Collazzi
- Doug Costa
- Peter Scudieri
- Luis Panta
- Raul Maldenado Garcia
- Daniel Scudieri
- Peter Glynn
- Dan Scudieri
- Angela Scocozza
- John Ciancianino
- Patricia Kolodzinski

ARJR check payable to recycling company owned by James Rogan

ARJR check to City of Yonkers for carting license

Rogan Brothers' rent paid for by ARJR for 1164 Saw Mill River Road

ARJR check for Solid Waste for garbage collection permits

ARJR Check to ARJR other accounts

Bank of America print out for payments made for Rogan Brothers' by ARJR Trucking

ARJR checking account under Aida Rogan's name

ARJR check payable New Haven Solid Waste for Rogan Brothers' disposal permit

ARJR check for painting of Rogan Brothers' trucks to reflect the new name: ARJR - ABC Body

ARJR checks to contractors for Rogan Brothers' balances, for example, payable to:

- Latella Rubbish Removal
- Phil LoPresti
- Emjay Recycling

James Rogan/ARJR checks for Rogan Brothers Sanitation, Inc. Equipment Loan-All Points Capital Corp.

Rogan Brothers Sanitation, Inc. Customer for Sanitation - Metro North Commuter Railroad

Rogan Brothers Sanitation, Inc. customer for containers

- CCA Halmar
- Brookfield Dorex

ARJR checks to pay for registrations of trucks from Rogan Brothers Sanitation, Inc.

The evidence establishes that Rogan Brothers' assets were not all "potentially" owned by R & S, Spiezio or Pinnacle. There was a universe of assets outside the collateral posted by Rogan Brothers to secure the loan from Pinnacle that R & S, Spiezio and Pinnacle never had a potential right to own. Indeed, the evidence demonstrates that far more than the majority of Rogan Brothers' assets were beyond R & S, Spiezio and Pinnacle's right to claim and that those assets were in fact transferred by James Rogan to ARJR at James Rogan's sole direction. There simply is no evidence to support the ALJ's finding that R & S's "potential" right to a "substantial" amount of Rogan Brothers' assets requires a finding of single employer or joint employer for any period of time and it must be reversed.

Even if the ALJ correctly concluded that Spiezio could "potentially" take control of a substantial amount of assets, ALJ erroneously concluded joint/single employer as a matter of law. For example, if a bank makes a loan to company that is secured with a "substantial" amount of company's assets, the bank will not be considered a joint/single employer that would be liable for any unfair labor practices. The Board recognizes this kind of common sense argument. *Ronan & Kunzl*, 1993 NLRB LEXIS 1310 (N.L.R.B. Dec. 23, 1993) (dismissing single employer allegation where new entity was created as a means to protect investment into entity that needed capital infusion.) In fact, the ALJ cited no Board precedent for his finding. Consequently, there is no legal basis for the ALJ's finding and it must be reversed.

CONCLUSION

The ALJ has issued findings that are not supported by the evidence and contravene established Board precedent. Consequently, the ALJ's findings must be reversed.

Dated: August 5, 2013 **MILMAN LABUDA LAW GROUP PLLC**

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