

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ENGINEERING CONTRACTORS, INC. AND
ECI OF WASHINGTON, LCC, ALTER EGOS

and

PLUMBERS LOCAL NO. 5, UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO Case 5-CA-36213

STEAMFITTERS LOCAL 602, UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO Case 5-CA-36214

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 100, AFL-CIO Cases 5-CA-36216
5-CA-36306

ASBESTOS WORKERS LOCAL 24 PENSION FUND,
ASBESTOS WORKERS LOCAL 24 MEDICAL FUND,
AND ASBESTOS WORKERS LOCAL 24 APPRENTICESHIP
FUND, AFFILIATED WITH INTERNATIONAL
ASSOCIATION OF HEAT AND FROST INSULATORS
AND ALLIED WORKERS LOCAL 24, AFL-CIO Case 5-CA-36225

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TO RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS**

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I. OVERVIEW

Engineering Contractors, Inc. is a Maryland corporation and an engineering and mechanical contractor in the construction industry, performing construction, maintenance, and repair of heating, ventilation, and air conditioning systems, as well as mechanical systems, for industrial and commercial customers. ECI of Washington, LLC is a District of Columbia corporation, formed in November 2009; it is also an engineering and mechanical contractor in the construction industry, performing construction, maintenance, and repair of heating, ventilation, and air conditioning systems, as well as mechanical systems, for industrial and commercial customers. Engineering Contractors Inc. maintains an office and place of business in Upper Marlboro, Maryland, within this judicial district. ECI of Washington maintains an office and a place of business in Washington, D.C.

This straightforward case involves an employer, Engineering Contractors, Inc., whose employees were represented by four different trade unions. In the spring of 2010, Engineering Contractors, Inc. unilaterally decided that it no longer wanted to be a unionized employer. Consequently, Engineering Contractors, Inc. stopped recognizing the unions that represented its employees, ceased abiding by the contracts (or terms of those contracts) that it had agreed upon with those unions, and summarily discharged virtually all of its employees. Engineering Contractors, Inc. attempted to further skirt its legal obligations by continuing its business in a virtually-unchanged format, ECI of Washington. In doing so, Engineering Contractors, Inc. (and the alter ego/single employer, ECI of Washington)¹ wantonly violated core aspects of the National Labor Relations Act.

¹ Counsel for the Acting General will refer to “Respondents” in this brief when referring to the alleged single employer/alter ego of Engineering Contractors, Inc. and ECI of Washington. Counsel for the Acting General Counsel will otherwise refer to each nominally-distinct entity by its name: Engineering Contractors, Inc., or ECI of Washington.

The four unions which represent Engineering Contractors, Inc.'s employees filed unfair labor practice charges, each alleging that Engineering Contractors, Inc. violated Sections 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3) and (5)). Counsel for the Acting General Counsel ("the GC") investigated the alleged unfair labor practices, and analyzed the facts developed from that investigation. Consistent with the charges, the GC determined the following:

- Engineering Contractors, Inc. and ECI of Washington are a single-integrated enterprise and a single employer, as they have common officers, ownership, directors, management, supervision, labor relations policies, premises and facilities, while holding themselves out to the public as a single-integrated enterprise. Engineering Contractors, Inc. and ECI of Washington are also alter egos, as they have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.
- ECI of Washington is thus bound to the bargaining obligations and the collective-bargaining agreements Engineering Contractors, Inc. was party to with the unions.
- On or about May 7, 2010, Respondents discharged and/or caused the termination of the bargaining unit employees because they joined the unions and engaged in concerted activities, as well as to discourage employees from engaging in these activities. Thus, Respondents have been discriminating in regard to the hire, tenure or terms and/or conditions of employment of its employees, in violation of Section 8(a)(3).
- On or about May 7, 2010, Respondents violated Section 8(a)(5) of the Act by withdrawing recognition from the unions, repudiating the collective-bargaining agreements with the unions, failing and refusing to adhere to the terms of those agreements since that date, and failing and refusing to recognize and bargain with the unions since that date. In sum, Respondents have been failing and refusing to bargain collectively and in good faith with the collective-bargaining representatives of its employees in violation of Section 8(a)(5) of the Act.
- Finally, at all times since on or about May 7, 2010, Respondents have refused to meet and bargain with Local 24 over the terms for a successor collective-bargaining agreement, in violation of Section 8(a)(5). Furthermore, at all times since June 16, 2010, Respondents have, in violation of Section 8(a)(5), failed and refused to provide information requested by Local 100 that is necessary for the administration and enforcement of the collective-bargaining agreement.

Consequently, the GC issued four separate Complaints and Notices of Hearing, each alleging that Engineering Contractors, Inc. (and the alter ego/single employer, ECI of

Washington) engaged in and is engaging in unfair labor practices in violation of the Act. Engineering Contractors, Inc. filed an Answer to each Complaint. Subsequently, Petitioner consolidated the four Complaints, and rescheduled the hearing (GC Exhs. 1-Y-AA).² The parties appeared at a formal hearing before Administrative Law Judge Bruce D. Rosenstein, held from July 11 through July 14, 2011. All parties were afforded a full and fair opportunity to call witnesses and present testimony and documentary evidence, as well as cross-examine witnesses. As described further in the content of this brief, Judge Rosenstein found that the GC had established all of the unfair labor practices pled in the consolidated complaints.

After the hearing before Judge Rosenstein (but before he published his decision), the GC and Respondents appeared before Judge Alexander Williams, Jr. of the United States District Court for the District of Maryland, to argue over the GC's petition for injunctive relief pursuant to Section 10(j) of the Act. On August 4, 2011, Judge Williams issued a memorandum opinion, granting the GC's petition for injunctive relief. ___, F. Supp.2d ___, 2011 WL 3438078 (D. Md. Aug. 5, 2011). Pursuant to Sec. 102.97(a) of the Board's Rules and Regulations, the GC requests an expedited decision in the present matter.

This brief will first describe the facts developed from the July 11-14 hearing. Next, the GC will address each of Respondents' limited exceptions, arguing that each is meritless and that the Board should adopt the decision of Judge Rosenstein that Respondents have violated the Act

² The GC rescheduled the unfair labor practice hearing to a later date at the request of Respondents' counsel. Respondents' request was premised on ongoing litigation in the United States District Court for the District of Maryland against Respondents. That litigation, initiated by the trustees of the benefit funds for Locals 5, 100, and 602, at root, alleges that Respondents breached contractual obligations to make contributions to the respective unions' fringe benefit plans. Respondents' counsel represented that it was seeking the rescheduling in the hopes of reaching a settlement with the unions during a mediation conference with Magistrate Judge Jillyn K. Schulze of this Court. Respondents' counsel met with the benefit funds' counsel (as well as the unions' counsel in the unfair labor practice proceedings) on June 9, but the parties did not reach a settlement. Judge Alexander Williams, Jr. of the United States District Court for the District of Maryland, has subsequently awarded partial summary judgment to the plaintiffs in this litigation (CITE), and the GC requests that the Board take judicial notice of the funds litigation.

as alleged, and that the two nominally-distinct Respondents are a single integrated employer and alter egos.

II. STATEMENT OF THE FACTS

A. CHRONOLOGY OF EVENTS

Formed in 1991, Engineering Contractors, Inc. is a mechanical contractor in the Washington, D.C. metropolitan region, installing, servicing, and repairing heating, cooling, ventilation, air conditioning, sheet metal, plumbing, pipefitting, and insulation services to various commercial, educational, and governmental buildings in the Washington, D.C. metropolitan region (Tr. 56-60, 377; GC Exhs. 37 and 38). Engineering Contractors, Inc. “self-performed” its work—it had its own employees performing its plumbing, pipefitting, insulating, and sheet metal work (GC Exhs. 38). Around October 2008, Engineering Contractors, Inc.’s owners, Steven Griffith and Paul Parker,³ decided it would be beneficial to become a unionized employer, in order to obtain skilled labor (Tr. 35).

Accordingly, Engineering Contractors, Inc.’s marketing director, Bruce Roy, communicated with the Maryland State Pipe Trades Association, a group of organizers from the various plumbers’ and steamfitters’ local unions around Maryland, regarding the possibility of Engineering Contractors, Inc.’s employees being represented by unions (Tr. 34-35). The Pipe Trades Association subsequently notified other trade unions about Engineering Contractors, Inc.’s interest in unionizing, inviting the unions to organize Engineering Contractors, Inc.’s employees, so that Engineering Contractors, Inc. would have greater access to skilled labor, and

³ Griffith owned 51%, and Parker owned the remaining 49% (Tr. 372). In their respective roles as president and vice-president of Engineering Contractors, Inc., Griffith and Parker engaged in accounting, project management, estimating, scheduling employees’ work, and ordering materials, as well as the hiring, firing, and disciplining of employees (Tr. 373-374). Parker was more responsible for bidding jobs, negotiating work, establishing labor and employment policies, and handling all financial accounts and payroll, while Griffith was more responsible for all of Engineering Contractors, Inc.’s post-bidding activities (Tr. 429).

thus be able to obtain larger construction projects (Tr. 113, 161-162, 207).⁴ In early to mid-November 2008, Roy met separately with representatives from four trade unions (Tr. 35-36, 163-166). Griffith and Parker also met with representatives from the four trade unions (Tr. 37, 114-115).⁵

On November 11-12, 2008, Engineering Contractors, Inc. voluntarily recognized Local 24 as the designated exclusive, collective-bargaining representative of its insulation employees (GC Exh. 39; see also Tr. 160-169). On the same date, Engineering Contractors, Inc. signed onto a collective-bargaining agreement that Local 24 maintained with a multi-employer association and several independent employers, which was effective from October 1, 2006 through September 30, 2009 (GC Exh. 40).⁶ On November 14, 2008, Engineering Contractors, Inc. voluntarily recognized Local 100 as the designated exclusive, collective-bargaining representative of their sheet metal employees, and Engineering Contractors, Inc. also became a signatory to a multi-employer collective-bargaining agreement (GC Exh. 43).⁷ Engineering Contractors, Inc.

⁴ This case involves two alleged 9(a) representatives (Locals 24 and 100) and two alleged 8(f) representatives (Locals 5 and 602). Regardless, each of the four unions involved represent employees working in the construction industry (Tr. 30-31, 114, 158-159, and 204-205)

⁵ GC Exh. 100 is a photograph taken in the timeframe when Engineering Contractors, Inc. was meeting with representatives from the four unions, in the process of becoming a union contractor (Tr. 39-40).

⁶ In doing so, Engineering Contractors, Inc. and Local 24 agreed that there had been an objective showing that a majority of its insulation employees had authorized Local 24 as their exclusive collective-bargaining representative; Engineering Contractors, Inc. and Local 24 also agreed that “[a]t the time of the making of this Recognition Agreement, [Engineering Contractors, Inc.] has a stable complement of employees and it is the express intention of the parties to enter into a bargaining relationship recognized under Section 9(a)” of the Act (GC Exh. 39). Engineering Contractors, Inc. and Local 24 similarly agreed to such recognition by signing onto the collective-bargaining agreement (GC Exh. 40, p. 5, para. C), and Engineering Contractors, Inc. also agreed to participate in Local 24’s medical and pension funds (GC Exh. 103), to which Engineering Contractors, Inc. was added as a participating employer (CP A Exh. 1). Local 24 Business Agent Lino Cressotti sent an e-mail on December 24, 2008 to Engineering Contractors, Inc., attaching with it, *inter alia*, copies of the authorization cards signed by Engineering Contractors, Inc.’s insulation employees (Tr. 170-172; GC Exh. 41). Cressotti sent the same material to Engineering Contractors, Inc. via certified mail on December 30, 2008 (Tr. 172-173; GC Exh. 42). Engineering Contractors, Inc. and Local 24 agreed that their collective-bargaining agreement would be effective from January 1, 2009, and Engineering Contractors, Inc. was given the opportunity to classify its insulation employees into the job classifications identified in the collective-bargaining agreement (e.g., mechanic; apprentice 1A) (Tr. 171-172).

⁷ In doing so, Engineering Contractors, Inc. acknowledged that Local 100 had established that a majority of Engineering Contractors, Inc. sheet metal workers had authorized to represent them in collective bargaining with

subsequently signed a successor collective-bargaining agreement with Local 100, effective from July 1, 2009 through June 30, 2014 (GC Exh. 44).

Engineering Contractors, Inc. also entered into collective-bargaining agreements with Local 5 and Local 602. On November 13, 2008, Engineering Contractors, Inc. and Local 602 entered into an agreement of assent (GC Exh. 48).⁸ On December 18, 2008, Engineering Contractors, Inc. and Local 5 entered into a nearly-identical letter of assent (GC Exh. 45).⁹ Subsequently, Engineering Contractors, Inc. applied for, and became, a member of the Mechanical Contractors Association of Metropolitan Washington (GC Exhs. 112 and 113).¹⁰ All told, Engineering Contractors, Inc. entered into separate collective-bargaining agreements with each of the four unions. Engineering Contractors, Inc. continued operating as a unionized full-service mechanical contractor, with its plumbers represented by Local 5, its HVAC and

Engineering Contractors, Inc. (GC Exh. 43, at Art. 51). Local 100 demanded recognition, and Engineering Contractors, Inc. affirmed it was extending recognition to Local 100, as the employees' representative under Section 9(a) of the Act (Id.). Engineering Contractors, Inc. and Local 100 entered into a successor collective-bargaining agreement, which also included the same article of voluntary recognition of Local 100 as the employees' 9(a) representative (GC Exh. 44, at Art. 51). Engineering Contractors, Inc.'s sheet metal employees signed authorization cards and completed the necessary paperwork to be represented by Local 100 (Tr. 208).

⁸ In doing so, Engineering Contractors, Inc., *inter alia*, authorized the Mechanical Contractors Association of Metropolitan Washington (MCAMW) as its collective-bargaining representative, and Engineering Contractors, Inc. agreed to be bound by the collective-bargaining agreement negotiated between Local 602 and MCAMW (GC Exh. 48, paras. 1 and 3). Thus, Engineering Contractors, Inc. was bound to the collective-bargaining agreement then in effect between MCAMW and Local 602 (GC Exh. 49). Furthermore, this assent agreement was to remain in effect until terminated by Engineering Contractors, Inc., by a written notice to MCAMW and Local 602 at least 150 days before the expiration of the collective-bargaining agreement then in effect (GC Exh. 48, para. 1). Engineering Contractors, Inc. provided no such notice before March 3, 2010 (150 days before the July 31, 2010 expiration of the collective-bargaining agreement) (Tr. 41, 119, 382). Consequently, Engineering Contractors, Inc. was also bound to a successor collective-bargaining agreement with Local 602 (GC Exh. 101).

⁹ In doing so, Engineering Contractors, Inc., *inter alia*, authorized the MCAMW as its collective-bargaining representative, and Engineering Contractors, Inc. agreed to be bound by the collective-bargaining agreement negotiated between Local 5 and MCAMW (GC Exh. 45, paras. 1 and 4). Thus, Engineering Contractors, Inc. was bound to the collective-bargaining agreement then in effect between MCAMW and Local 5 (GC Exh. 46). Furthermore, this assent agreement was to remain in effect until terminated by Engineering Contractors, Inc., by a written notice to MCAMW and Local 602 at least 150 days before the expiration of the collective-bargaining agreement then in effect (GC Exh. 45, para. 1). Engineering Contractors, Inc. provided no such notice before March 3, 2010 (150 days before the July 31, 2010 expiration of the collective-bargaining agreement) (Tr. 41, 88, 382). Consequently, Engineering Contractors, Inc. was also bound to a successor collective-bargaining agreement with Local 5, effective from August 1, 2010 through July 31, 2014 (GC Exh. 47).

¹⁰ Respondents admit that Engineering Contractors, Inc. was a member of MCAMW, but denied as much for ECI of Washington (Tr. 13).

pipefitters represented by Local 602, its sheet metal workers represented by Local 100, and its insulators represented by Local 24 (see, e.g., Tr. 377-378; GC Exh. 114).¹¹ Engineering Contractors, Inc. subsequently operated as a union contractor, calling on each of the four unions to meet its labor needs (Tr. 50-51, 118-119, 173-175, 210). Engineering Contractors, Inc.'s union-represented employees' terms and conditions of employment, including wage rates and fringe benefits, were set forth in the respective collective-bargaining agreements (Tr. 65, 210).

On November 20, 2009, Paul Parker and Steven Griffith established ECI of Washington, with Griffith owning 51% and Parker owning 49%, and the two men providing ECI of Washington's initial funding of \$5000 total (Tr. 408; GC Exh. 122, p. 7, and CP P/S Exh. 4).¹² From its inception, ECI of Washington was designed to be a "full service mechanical contractor serving the Washington DC [sic] metropolitan area," created to "fill a void in the Washington DC [sic] market for full service mechanical contractors that self perform all aspects of the Mechanical Trades as far as HVAC and Plumbing work,' with a concentration on "local, Federal, and State customers" (GC Exh. 122, pp. 15-17). According to Griffith, the letters "ECI" in ECI of Washington's name have no meaning at all, but rather are just random letters of the alphabet (Tr. 464). In comparison, employees and management commonly and routinely referred to Engineering Contractors, Inc. as "ECI" (Tr. 81, 136, 265, 321, 395). Parker asserts that he and Griffith established ECI of Washington in order to maintain certain certifications as a minority-owned small business in Washington, D.C, just as Engineering Contractors, Inc. had

¹¹ See also CP A Exh. 2 (indicating certain contributions due from Engineering Contractors, Inc. for hours worked by Local 24-represented employees).

¹² At its inception, ECI of Washington indicated to the District of Columbia that its capabilities included plumbing, HVAC, sheet metal/ductwork, and insulation, and that it did all of its work in construction and contracting (GC Exh. 122, pp. 4 and 6). Almost a year later, ECI of Washington registered as a limited liability corporation with the State of Maryland (GC Exh. 51, p.2). In doing so, ECI of Washington represented to the State of Maryland, *inter alia*, that it was engaged in the business of construction in Maryland, and that it had previously done business in Maryland (Id.). ECI of Washington did not pay wages to any employees until May 10, 2010 (Tr. 435).

maintained.¹³ ECI of Washington's D.C. facility is merely an office, with no warehouse space (Tr. 313, 482). ECI of Washington's D.C. facility was in the same location as Engineering Contractors, Inc.'s D.C. office (GC Exhs. 38 and 53).¹⁴ Few, if any, of Engineering Contractors, Inc.'s employees ever worked out of the D.C. facility (Tr. 72-73, 259, 313).¹⁵ In contrast, Engineering Contractors, Inc.'s facility in Upper Marlboro was located in an industrial area, with two bays of warehouse space dedicated for office use, a third bay maintained as a warehouse for Engineering Contractors, Inc.'s materials, equipment, and tools (Tr. 62, 311-312),¹⁶ a separate metal shop for the fabrication of sheet metal fixtures (Tr. 72, 142), and a parking area for vehicles and equipment.¹⁷

¹³ Parker and Griffith established ECI of Washington after learning in October 2009 that Engineering Contractors, Inc. would no longer be permitted to retain its certification with the District of Columbia as a local, small, disadvantaged business enterprise; subsequently, Engineering Contractors, Inc. decided to voluntarily forfeit various business certifications to allow ECI of Washington to have those same certifications (GC Exh. 52). Griffith acknowledged that Engineering Contractors, Inc. had obtained work due to the fact that it was a certified business enterprise, that it lost that status in October 2009, that ECI of Washington was formed the following month, and that ECI of Washington applied for such certified business enterprise status (Tr. 452-453). Parker acknowledged that Engineering Contractors, Inc. could have had a major subcontract for working on the Washington metrorail system terminated if Engineering Contractors, Inc. lost its certification (Tr. 552-553). Furthermore, Griffith acknowledged that he could not maintain other, similar certifications with dual firms, so he allowed the certifications for Engineering Contractors, Inc. to expire (Tr. 454). However, Griffith claims that ECI of Washington was formed because he wanted to be a general contractor (rather than a mechanical contractor) (Tr. 510). Yet ECI of Washington bids on plumbing, HVAC, sheet metal, and insulating jobs within the Washington, D.C. metropolitan region, just as Engineering Contractors, Inc. had done. Furthermore, Griffith acknowledged that none of the documents filed regarding ECI of Washington's inception, nor its current advertisements, reference it being a general contractor (Tr. 519-520). Griffith further admitted that ECI of Washington has been operating as a mechanical contractor in order to generate revenue (Tr. 522).

¹⁴ GC Exh. 127 is the lease for the D.C. office. The lease is signed by Engineering Contractors, Inc. as the listed tenant; however, Article 1 indicates ECI of Washington as the tenant, though the lease was entered on February 2, 2009—more than nine months before ECI of Washington existed. The lease indicates that the tenant's trade name is "Engineering Contractors, Inc." (GC Exh. 127). Engineering Contractors, Inc. paid the rent for the D.C. office to the landlord, WCS Construction, until as recently as August 2010 (CP P/S Exh. 5; see also Tr. 499-501, 568-569).

¹⁵ Griffith testified that the D.C. facility has been occupied full-time by Ronald Cusic and David Packianathan, project manager for both Engineering Contractors, Inc. and ECI of Washington; Griffith also claims that he and others on ECI of Washington's staff occasionally work out of the D.C. facility (Tr.482-484).

¹⁶ Employees would go to the Upper Marlboro facility to pick up tools, equipment, and materials (Tr. 62). ECI of Washington's employees also go to the Upper Marlboro facility to pick up tools, equipment, and materials.

¹⁷ Engineering Contractors, Inc. signed an amendment to its lease for the Upper Marlboro facility on July 1, 2010, covering a period up to August 31, 2012 (GC Exh. 126).

At some point in 2010,¹⁸ the four unions stopped receiving their respective monthly remittance reports and contributions from Engineering Contractors, Inc, detailing its contributions to each of the unions' health and welfare benefit funds (Tr. 92, 103-104, 123, 175-176, 191, 226-227). When Engineering Contractors, Inc. stopped paying contributions for its employees' pension and medical benefits, some employees were required to pay for their own benefits in order to maintain them (Tr. 191).¹⁹ However, Engineering Contractors, Inc. never refused to submit a remittance to any of the unions (Tr. 104, 124, 176, 191, 227).

Later in the spring of 2010, Engineering Contractors, Inc. began to experience some financial issues with its business (Tr. 554).²⁰ On April 27, Griffith and Parker discussed, via e-mail, three scenarios for Engineering Contractors, Inc.'s business (GC Exh. 113). Under the first scenario, Engineering Contractors, Inc. would shut down its jobsite at Takoma Park Elementary School, terminate all the employees working there, and turn the job over to the bonding company; however, under this scenario, Engineering Contractors, Inc. would complete its remaining jobs with its existing unionized workforce (Id.). Under the third scenario, Engineering Contractors, Inc. would maintain all of its jobs, but "hire non-union guys for [ECI of Washington] or sub out work," "try to get as much completed on [Washington metrorail jobs] as possible," and "bid all news jobs in the name of [ECI of Washington]" (Id.).²¹

¹⁸ Unless otherwise noted, all subsequent dates are 2010.

¹⁹ Griffith admitted that he was in arrears in not making payments to the unions' fringe benefit funds (Tr. 427).

²⁰ Testifying to these financial problems, Parker stated that Engineering Contractors, Inc. was still owed more than \$1,000,000 for work that Engineering Contractors, Inc. had performed, and Engineering Contractors, Inc. was continuing to not get paid by their general contractors (Tr. 605). Parker testified that Engineering Contractors, Inc. was experiencing cost overruns from its labor, yet its jobs at the time were jobs that Engineering Contractors, Inc. had bid, with an estimate of its labor costs (Tr. 608-612). Furthermore, few of Engineering Contractors, Inc.'s field employees were working any overtime in the relevant timeframe (GC Exh. 116, Tr. 612-614).

²¹ On April 29, ECI of Washington submitted bids for six different construction projects, involving plumbing and HVAC work (GC Exh. 155). The bids, submitted on ECI of Washington's letterhead and identifying the Upper Marlboro facility (suite B3) as the mailing address, state "Engineering Contractors Inc. proposes to furnish the necessary labor, materials and equipment to complete the following scope of work" (Id.).

In early May, Parker's and Griffith's plans were realized (Tr. 554-556).²² On Friday, May 7, Engineering Contractors, Inc.'s employees were told that as of Monday, May 10, Engineering Contractors, Inc. was "going non-union" (Tr. 67, 89, 239-240, 328),²³ but that employees who wanted to remain could continue working, but without their union representation (Tr. 144-145, 328-329, 425-427, 549-550).²⁴ Employees then returned to Engineering Contractors, Inc.'s Upper Marlboro facility to pick up their separation notices and collect their final paychecks (GC Exh. 54). While employees returned to the Upper Marlboro facility to return their equipment and pick up their separation notices and checks (Tr. 395), several other individuals were at the facility, responding to job opening advertisements and applying for work (Tr. 69). Engineering Contractors, Inc. terminated its 32 union-represented employees, although it was actively working on construction projects and had construction projects lined up to begin in the future (Tr. 547;-548 GC Exh. 54).²⁵ Griffith went so far as to request a stop-payment order from Engineering Contractors, Inc.'s bank for a check made out to Local 602 in the amount of \$22,840.16 (GC Exh. 131). At the time it terminated its union-represented employees, Engineering Contractors, Inc. was still actively working on several projects as a full mechanical

²² In late April, Local 5's then-assistant business manager, Jim Killeen, went to the Upper Marlboro facility and met with Griffith and Parker to discuss the fact that Engineering Contractors, Inc. was delinquent in remitting its payments to Local 5's fringe benefit funds, as prescribed in the collective-bargaining agreement (Tr. 91-92). At this meeting, Griffith and Parker did not give Killeen any indication that Engineering Contractors, Inc. would soon be "going non-union" or ceasing operations (Id.).

²³ When asked whether he told employees that Engineering Contractors, Inc. was going non-union, Griffith did not deny making the statement (Tr.385-387). Rather, Griffith acknowledged that he may have told employees that Engineering Contractors, Inc. was going non-union (Tr. 387). Similarly, Griffith did not deny asking some employees to work non-union (Tr. 425-427).

²⁴ The following week, employee Phillip Fowler, a steamfitter and a member of Local 602, went to the Upper Marlboro facility to get his final wages, since he had been unable to cash the check that Engineering Contractors, Inc. issued to him on May 7 (Tr. 70-72). While there, Fowler spoke with Griffith, who was apologetic for taking Engineering Contractors, Inc. non-union (Id.).

²⁵ All but two of the separation notices are signed by Opare Densua (identified on the notices as an HR assistant), and all indicate that the reason for termination was a reduction-in-force. Although Engineering Contractors, Inc. terminated all of its union-represented employees, some remained working, without union representation (Tr. 43, 188-189).

contractor, including major projects at Bread for the City in Washington, D.C., and Takoma Park Elementary School in Takoma Park, Maryland, as well as at the University of Maryland, the University of the District of Columbia, and the Governor Harry M. Nice Bridge (Tr. 42, 154-155, 175, 239, 326-330, 331-332, 383-384).²⁶

On or about May 7, after receiving the termination notices for employees represented by Local 100, Local 100 Business Agent Milo Chaffee went to the Upper Marlboro facility and met with Parker (Tr. 211-214). At this meeting, Chaffee asked Parker why Engineering Contractors, Inc. had terminated all of its employees and whether Engineering Contractors, Inc. was going non-union (Tr. 212). Parker replied that Engineering Contractors, Inc. was going non-union, explaining that Engineering Contractors, Inc. could not afford to be a unionized contractor anymore (Tr. 212).²⁷ Subsequently, representatives from each of the four unions learned of Engineering Contractors, Inc.'s termination of union-represented employees (see, e.g., Tr. 89, 120, 181, 211).²⁸ Representatives from the other unions attempted to contact Engineering Contractors, Inc. regarding the mass termination, but did not reach anyone with Engineering Contractors, Inc. (Tr. 95, 183).

²⁶ In this period, Engineering Contractors, Inc. terminated its work on five of its projects, including the Takoma Park Elementary School job, where there were bonds issued on behalf of Engineering Contractors, Inc. by the Hanover Insurance Company (Tr. 598; R Exh. 1 at pp. 1 and 4-7). Engineering Contractors, Inc. had been notified a few days earlier that it was in default on its contract for the Takoma Park Elementary School job (Id. at p. 2). However, Griffith testified that, with his reliability as a contractor in mind, he had no intention of walking away from Engineering Contractors, Inc.'s other jobs, but rather complete the jobs with ECI of Washington, despite the fact that he had just terminated his entire field workforce (Tr. 388-389). Parker also admitted as much (Tr. 548). Griffith admitted that he intended to terminate his union-represented workforce and hire a non-union workforce (Tr. 394).

²⁷ A large portion of Engineering Contractors, Inc.'s work, as of May 7, was immediately assumed by ECI of Washington (GC Exh. 55).

²⁸ Employee Sandra Rice, an insulator and a member of Local 24, was asked to continue working for the alleged alter ego/single employer, ECI of Washington (Tr. 326-333). Rice informed Local 24 Business Agent Lino Cressotti about this solicitation, while giving Cressotti the application to ECI of Washington that she had received (Tr. 182, 334; GC Exh. 56). ECI of Washington's application includes an applicant waiver and release, which begins "I give *Engineering Contractors Inc.* permission to use any information shown on this application..." (GC Exh. 56)(emphasis added).

Also on May 7, Local 24 requested to bargain with Engineering Contractors, Inc. for a successor collective-bargaining agreement (GC Exh. 57).²⁹ On June 29, Local 24 again requested to bargain with Engineering Contractors, Inc. for a successor agreement (GC Exh. 59). However, Engineering Contractors, Inc. did not respond to either of Local 24's requests (Tr. 179, 423, 502). After May 7, Engineering Contractors, Inc. ceased abiding by its contracts with Local 5, Local 602, and Local 100, and Engineering Contractors, Inc. ceased abiding by the terms of its expired collective-bargaining agreement with Local 24 (Tr. 419).

On May 10, Chaffee visited the Bread for the City jobsite in Washington, D.C., where Engineering Contractors, Inc. had been working on May 7 for Turner Construction, the general contractor (Tr. 214-222). At the Bread for the City jobsite (where the facility was being renovated and expanded), Chaffee saw that Engineering Contractors, Inc.'s sheet metal material and equipment was still on the jobsite (Id.).³⁰ Chaffee also saw that three individuals with Engineering Contractors, Inc.-labeled hardhats and safety vests, as well as sheet metal tools, were arriving to perform sheet metal work; Chaffee did not recognize the individuals as Local 100 members or prior employees of Engineering Contractors, Inc. (Tr. 219-221).³¹ Two days later, Chaffee returned to the Bread for the City jobsite, with the impression that ECI of Washington was performing the sheet metal work at the jobsite (Tr. 222-223).

²⁹ Although its collective-bargaining agreement with Engineering Contractors, Inc. had expired on September 30, 2009, Local 24 had not requested to negotiate a successor agreement because, in part, Engineering Contractors, Inc. had not notified Local 24 that it was terminating the contract, and Engineering Contractors, Inc. was current with its benefit funds contributions through the year 2009 (Tr. 176-180; GC Exh. 57). Furthermore, Local 24 understood that Engineering Contractors, Inc. was complying with the terms of the new multi-employer collective-bargaining agreement that Local 24 had negotiated, though Engineering Contractors, Inc. had not become a signatory to that successor agreement (Tr., 178; GC Exhs. 57 and 102). Nearly a year earlier, Local 24 had provided Engineering Contractors, Inc. with written notice of Local 24's intent to terminate and/or modify their then-existing collective-bargaining agreement, along with a reciprocity agreement for Local 24's collective-bargaining with the area multi-employer bargaining association (Tr. 176-180).

³⁰ GC Exh. 60 is a series of photographs Chaffee took when he went to the Bread for the City jobsite, showing that the materials and equipment on the jobsite belonged to Engineering Contractors, Inc.

³¹ ECI of Washington first paid wages to employees (seven individuals) on May 10, 2010 (GC Exh. 61, p. 2).

On May 12, Bobby Jones, an insulator who began working for Engineering Contractors, Inc. in January 2008 and was discharged on May 7, went to the Upper Marlboro facility to speak with Griffith about continuing work without union representation (Tr. 240-243).³² Joe Burnette was also present, completing an application to continue working (Tr. 241). Jones spoke with Griffith, who said that he was changing the name of his company to ECI of Washington, and that the pay would be less than Jones had been making when he was represented by Local 24, with no benefits (Tr. 242). Jones was given an application, along with a series of forms and policies, by Opare Densua, who had worked for Engineering Contractors, Inc. in human resources and accounting and who continued working for ECI of Washington as its Office Manager, also performing human resources and accounting/bookkeeping tasks (Tr. 242-250, 400-402).³³ Jones completed the paperwork (Tr. 243-250; see, e.g., GC Exhs. 62-66),³⁴ and began working for ECI of Washington the following day (Tr. 252). While working for ECI of Washington, Jones primarily worked at the Bread for the City jobsite, a major project that was substantially completed by Engineering Contractors, Inc. and its union-represented workforce (Tr. 250-253). ECI of Washington terminated Jones on June 11 (GC Exh. 67).³⁵

³² Jones was originally hired by Engineering Contractors, Inc. as a sheet metal worker and an insulator, prior to the time when Engineering Contractors, Inc. became a unionized contractor (Tr. 233-237).

³³ See GC Exhs. 107 (Densua signing Jones' I-9 form as Office Manager; see also GC Exh. 114 and 118, p. 7 (indicating Densua's jobs with Engineering Contractors, Inc.); Tr. 288, 400 (Densua's accounting and bookkeeping duties with Engineering Contractors, Inc.). For Engineering Contractors, Inc., two individuals worked with Densua as office administrators (Tr. 401-402).

³⁴ The introductory paperwork that Jones completed on May 12 when he was hired includes several ECI of Washington policies which blur the lines between the two nominally-distinct companies. ECI of Washington's Equal Employment and Affirmative Action plan begins by stating the purpose of "Engineering Contractors, Inc. (ECI of Washington, LLC)" plan (GC Exh. 66, p. 3). ECI of Washington's attendance policy, dated April 1, provides that ECI of Washington will remove from its payroll employees who are absent for two days "without notifying Engineering Contractors Inc" (GC Exh. 62). Finally, ECI of Washington's consent and general release form for drug and alcohol testing refers to "ALL EMPLOYEES AND FUTURE EMPLOYEES OF ENGINEERING CONTRACTORS INC" in its title (GC Exh. 63)(emphasis in original).

³⁵ Jones' termination letter from ECI of Washington was signed by Opare Densua in Human Resources. At that time, Densua was the only individual performing human resources and office administrative tasks for ECI of Washington (Tr. 257, 272).

On June 15, Local 100 sent a letter to Engineering Contractors, Inc., requesting information pertaining to the businesses of Engineering Contractors, Inc. and ECI of Washington, and their relationship (Tr. 223-225; GC Exh. 68).³⁶ Engineering Contractors, Inc. did not respond to Local 100's request, though it received the request (Tr. 225, 424, 585). At some point in the summer after the mass termination, business agents from each of the four unions met with Paul Parker at the Upper Marlboro facility (Tr. 98, 121, 183). The business agents asked Parker what was happening with Engineering Contractors, Inc. Parker provided each of the four union representatives with a spreadsheet pertaining to Engineering Contractors, Inc.'s existing jobs and mentioned that Engineering Contractors, Inc. was losing money on its jobs, referencing the overall economic recession (Tr. 99-102, 105-106, 184; CP P/S Exh. 1).³⁷ Parker indicated that he could not afford to be a union contractor any longer (Tr. 122). Parker also mentioned that Engineering Contractors, Inc. had fallen behind on its fringe falling behind on its fringe benefit funds contributions, but that the unions would be paid from Engineering Contractors, Inc. turning over their existing jobs to the bonding company, but that if the unions continued to pressure him, he could just close the business (Tr. 185-186). Local 602 Business Manager Joe Savia, who had known Parker for over 30 years, asked Parker why he had not called Savia; Parker responded that he didn't think to call Savia (Tr. 122). Local 24 Business Manager Lino Cressotti asked Parker if he was going to sign on with Local 24 again; Parker responded that he was not (Tr. 184-186). Parker said that he had one last big job involving the Washington metrorail system

³⁶ Local 100's request, addressed to Paul Parker, was received by Engineering Contractors, Inc. on June 17; Brian Parker signed for the delivery (GC Exh. 68, p. 12).

³⁷ During this meeting, Parker referenced productivity problems with employees' work, complaining that some work had to be redone (Tr. 101). According to Killeen, Parker had never previously complained about employees' performance or productivity (Id.). Furthermore, Engineering Contractors, Inc. had continued to look to the unions for manpower needs (Tr. 196-197). On this point of employees' performance, Griffith also testified that he made several calls to the unions regarding employees' quality of work (Tr. 512), yet Griffith could only specifically recall two or three calls (Tr. 522-525), and he admitted that Engineering Contractors, Inc. continued to look to the unions for skilled labor (Tr. 525).

that he wanted to complete, and that the only trade unions he wanted to sign on with again were Local 5 and Local 602 (Tr. 99-100, 185-186). Outside of a confidential settlement conference involving the U.S. District Court for the District of Maryland, the four unions have not met with Engineering Contractors, Inc. since this meeting (Tr. 102-103, 123, 187).

***B. COMPARISON OF ENGINEERING CONTRACTORS, INC. AND
ECI OF WASHINGTON***

The owners and principal agents of Engineering Contractors, Inc. are Steven Griffith, president, and Paul Parker, vice president (Tr. Tr. 408-409). These two individuals hold the same position and responsibilities with ECI of Washington that each holds with Engineering Contractors, Inc. (Tr. 428). The managerial structure of Engineering Contractors, Inc. and ECI of Washington, viewed from May 2010, included the following:

Steven Griffith	President (both)
Paul Parker	Vice President (both)
Opore Densua	Office Manager (ECI of Washington)
Greg Absher	Safety Director (both)
Brian Parker	Manager of Dispatching, Purchasing, and Information Technology (both)
Kyle Parker	Estimating Coordinator (both)
Ronald Cusic	Project Manager (both) ³⁸
Dave Packianathan	Project Manager (both) ³⁹
Clinton Parker	Project Manager and Estimator (both)
Jason Absher	Project Manager (both)

(Tr. 12; GC Exhs. 115 and 118).⁴⁰

Just like Engineering Contractors, Inc., ECI of Washington performs plumbing, HVAC, pipefitting, insulation, and sheet metal work, employing individuals to performing such work (Tr. 275, 411-415, 438-450; GC Exhs. 115 and 118).⁴¹ Though it was employing plumbers, pipefitters, insulators, and sheet metal workers, ECI of Washington did not abide by the terms of any of the above-described collective-bargaining agreements for any of the four trade unions (Tr.

³⁸ The GC orally amended each of the Complaints at the hearing, deleting the name of Tony Wood from each of the complaint's paragraphs pertaining to supervisory status and adding the name of Ronald Cusic to the same paragraph (Tr. 592). The GC's amendment was unopposed (Id.).

³⁹ Packianathan maintained a listing on the website, www.linkedin.com, in which he identified himself as a Project Manager for ECI of Washington, in the construction industry; Packianathan represented that he had been working for ECI of Washington since June 2006—a time when ECI of Washington was still more than three years from forming and almost four years from having paid any wages (GC Exh. 70). Yet Packianathan used an Engineering Contractors, Inc. e-mail address to correspond with Engineering Contractors, Inc.'s supplier for its various jobs well after May 7 (GC Exh. 111). Packianathan testified at the hearing that he worked for Engineering Contractors, Inc. from May 2006 until November 2010, when he began working for ECI of Washington, joining Ronald Cusic as project managers on the Washington metrorail project that both Engineering Contractors, Inc. and ECI of Washington were involved with (Tr. 340-344). In May 2010, Cusic and Packianathan were the only two project managers at ECI of Washington, and they managed the same projects that they had managed when they were each employed as a project manager at Engineering Contractors, Inc. in early May 2010 (Tr. 410).

⁴⁰ Respondents admitted to the supervisory and agency status of Griffith, Paul and Brian Parker, Greg and Jason Absher, and Packianathan, as to both Engineering Contractors, Inc. and ECI of Washington (Tr. 12). Respondents denied the supervisory and agency status of Densua and Clinton Parker (Id.).

⁴¹ Just as ECI of Washington employed individuals to perform the same type of work that employees of Engineering Contractors, Inc. had performed, ECI of Washington and Engineering Contractors, Inc. maintained nearly identical employment policies. Compare, e.g., GC Exhs. 134 and 135, and GC Exhs. 66 and 135.

419-421, 492-493). ECI of Washington did not have any income in 2009 (GC Exhs. 124 and 125), nor did it generate payroll *before* May 10, 2010, when it began performing plumbing, pipefitting, sheet metal, and insulation work (Tr. 403, 435, 504; GC Exh. 117).⁴² In comparison, Engineering Contractors, Inc. did not generate any payroll *after* May 2010 (GC Exh. 116).⁴³

Despite the absence of payroll, Engineering Contractors, Inc. issued 30 checks to ECI of Washington from late April 2010 until mid-December 2010, totaling \$693,825.52 (CP P/S Exh. 6).⁴⁴ As recently as July 22, ECI of Washington's website was still under construction, although it clearly displayed Engineering Contractors, Inc.'s logo (GC Exh. 119). ECI of Washington presently advertises itself as a certified minority business enterprise specializing in plumbing and HVAC work in the Washington metropolitan area (GC Exhs. 120 and 121).

Engineering Contractors, Inc. continued to exist and conduct business after May 7.⁴⁵ For one, Engineering Contractors, Inc. continued to order mechanical contracting goods and materials (e.g., piping; insulation; sheet metal, and ductwork) from its suppliers through the remainder of 2010 and into January 2011 (GC Exh. 149). Likewise, Engineering Contractors, Inc. continues to maintain its account—and several telephone lines—with Verizon Wireless (GC

⁴² As late as April 30, 2010, ECI of Washington had only \$3,375.41 in its corporate checking account (CP P/S Exh. 4, p. 6). In the following month of May 2010, ECI of Washington deposited over \$32,000 into its corporate checking account, and wrote checks totaling over \$9,000 (CP P/S Exh. 4, p. 7).

⁴³ Griffith testified that Engineering Contractors, Inc. has ceased operations and is no longer an ongoing viable entity, but he admitted that he did not believe Engineering Contractors, Inc. had filed any paperwork with any government entity to that effect, dissolved itself, or paid any taxes (Tr. 390-392). Parker confirmed that Engineering Contractors, Inc. is still in business, but that its charter had been revoked by the State of Maryland, which he had just learned of immediately before the hearing (Tr. 544-545).

⁴⁴ ECI of Washington submitted three invoices to Engineering Contractors, Inc., each for labor, material, expenses, overhead, and profit for ECI of Washington to complete Engineering Contractors, Inc.'s contracts (CP P/S Exh. 7). These three invoices add up to \$569,233.

⁴⁵ On May 14, Opare Densua ordered 250 business checks for Engineering Contractors, Inc. (GC 132). She had the authority to purchase office supplies (Tr. 406). Engineering Contractors, Inc. has continued to issue checks after May 7 (CP P/S Exhs. 8 and 9). See also GC Exh. 149 (Engineering Contractors, Inc.'s purchase orders from May 2010 through January 2011).

Exh. 150). Engineering Contractors, Inc. continues to maintain insurance (GC Exhs. 151-153).⁴⁶ Finally, Engineering Contractors, Inc. has continued to make purchases (including from its suppliers in the mechanical contracting industry) and pay for services, as well as make deposits (Tr. 579-582; CP P/S Exhs. 8 and 9).

After May 7, Engineering Contractors, Inc. continued work under a pre-existing contract with Manna Construction for the plumbing and HVAC renovations of the Willowbrook condominiums in Washington, D.C. (GC Exhs. 156-158).⁴⁷ Engineering Contractors, Inc. did not complete its work until June 2010, and Engineering Contractors, Inc. did not receive final payment until August (Id.). Likewise, Engineering Contractors, Inc. continued working on pre-existing jobsites at the University of Maryland's College Park campus (Tr. 326-330, 355), as well as various other jobsites, including the University of the District of Columbia and Ferebee-Hope Elementary School in Washington, D.C. (Tr. 60, 75-76). Also, Engineering Contractors, Inc. continued to perform work in Washington, D.C. public schools, as it had previously (Tr. 60, 75-76, 286-287, 307, 354; GC Exh. 76). Likewise, Engineering Contractors, Inc. continued to work for Creative Finishes Inc. Construction Corp. on the Governor Harry W. Nice Memorial Bridge jobsites (GC Exhs. 159-162).⁴⁸ Finally, Engineering Contractors, Inc. continued to bid on mechanical contracting work months after May 7 (GC Exh. 154).

⁴⁶ ECI of Washington is listed as an additional insured party on these three policies.

⁴⁷ The Willowbrook Condominiums are located at 1029 Perry Street, NE, in Washington, D.C. GC Exh. 158 are certified payroll registers submitted by Engineering Contractors, Inc. to Manna, indicating that Engineering Contractors, Inc. performed work on the construction project during the weeks ending May 30 and June 13 (note the variance between the certified payrolls for those two weeks and the week ending May 3). GC Exh. 157 is a few e-mails exchanged between representatives of Manna and Engineering Contractors, further indicating that Engineering Contractors, Inc. was still working on the construction project after May 7. Also, Engineering Contractors, Inc. continued to seek mechanical contracting work from Manna after May 7 (Id. at p. 5).

⁴⁸ GC Exh. 159, which Parker signed on behalf of Engineering Contractors, Inc. on November 2, is a participation affidavit for Engineering Contractors, Inc. as a certified minority business enterprise with the Maryland Department of Transportation. GC Exh. 160 is a request for a change to Engineering Contractors, Inc.'s contract with Creative Finishes Inc. Construction Corp., dated in late October 2010. GC Exh. 162 is a partial release and lien waiver executed by Griffith on January 5, 2011 for work that Engineering Contractors, Inc. was due a sum of money for work it has performed on the project up to November 30. GC Exh. 161 is a certified payroll register, signed by

Engineering Contractors, Inc. and ECI of Washington shared—and continued to share—customers,⁴⁹ and the two nominally-distinct entities shared employees in order to service those customers.⁵⁰ Engineering Contractors, Inc. performed plumbing and HVAC services in the Washington, D.C. metropolitan area for Quality Solutions, Inc. (“QSI”), a facilities maintenance and management company; Engineering Contractors, Inc. worked for QSI at national retailers such as Borders, and H&R Block (GC Exh. 163). After May 7, QSI continued to submit work requests to Engineering Contractors, Inc. at its Upper Marlboro facility (Id.). In one particular instance, QSI requested that Engineering Contractors, Inc. perform HVAC work at an H&R Block location in Washington, D.C. on May 11 (Id. at p. 4). Engineering Contractors, Inc. reviewed the HVAC problem, and submitted an invoice to QSI, dated May 13 for its services (Id. at p. 5). Although QSI continued to submit its work requests to Engineering Contractors, Inc., QSI began receiving invoices from ECI of Washington for the work it had requested from Engineering Contractors, Inc. (Id. at pp. 6-15; see also Tr. 450).⁵¹ On February 22, 2011, Opare Densua signed a vendor agreement with QSI on behalf of ECI of Washington, so that QSI could issue work requests to ECI of Washington (GC Exh. 164). Similarly, one of Engineering Contractors, Inc.’s clients, USM,⁵² continued to subcontract its facilities maintenance and management work, including plumbing and HVAC work, in the greater Washington, D.C.

Parker, for work on the Nice Bridge for the week ending February 27, 2011. Notably, the certified payroll register lists ECI of Washington as the contractor, but Parker certified that he “supervise[d] the payment of persons employed by the ENGINEERING CONTRACTORS INC. on the MTA Harry Nice Bridge. (Id., capitalized in original).

⁴⁹ Compare GC Exh. 147 (customer master list for Engineering Contractors, Inc.) and 148 (customer master list for ECI of Washington).

⁵⁰ See GC Exh. 55 for a list of the projects ECI of Washington had in May 2010.

⁵¹ For the work QSI requested of Engineering Contractors, Inc. in this timeframe, corresponding HVAC and plumbing service order tickets were completed on Engineering Contractors, Inc.’s forms (GC Exh. 163, pp.6-15).

⁵² USM provides facilities maintenance and management to large national retailers, such as Borders and Michael’s Crafts, via local and regional subcontractors (Tr. 449). USM and Engineering Contractors, Inc. entered into a subcontract on November 17, 2008 (Exh. 71).

metropolitan area, and ECI of Washington performed the plumbing and HVAC work for USM (Tr. 449-450).

Turner Construction was another common customer. In early 2010, Turner Construction subcontracted with ECI of Washington for the major expansion of the Bread for the City facility in Washington, D.C. (GC Exh. 82). Although Turner Construction's subcontract was with ECI of Washington, employees of Engineering Contractors, Inc. worked on this project until their May 7 lay-off.⁵³ Later in May, employees of ECI of Washington continued working on the Bread for the City jobsite, performing plumbing, pipefitting, sheet metal, and insulation work at the full construction site (Tr. 301-303, 356-357).⁵⁴ Also, ECI of Washington performed work for Turner Construction in Washington, D.C. public schools (Tr. 562), just as Engineering Contractors, Inc. had previously performed work (Id.). Similarly, Engineering Contractors, Inc. and ECI of Washington both performed work for the same general contractor—Baltimore Contractors—at the University of Maryland, at separate jobsites involving a women's locker room and a building named Harford Hall (GC Exhs. 55 and 84; Tr. 587-588).⁵⁵

Finally, Engineering Contractors, Inc. and ECI of Washington shared a common customer in Mass Electric Construction Company ("MEC"). MEC originally subcontracted two significant rehabilitation projects (largely involving HVAC work) on the Washington metrorail system to ECI (GC Exhs. 87-88). Engineering Contractors, Inc. and MEC entered into these two

⁵³ Engineering Contractors, Inc. identified the Bread for the City subcontract as one which ECI of Washington assumed from Engineering Contractors, Inc. (GC Exh. 55). Engineering Contractors, Inc. estimated that, as of May 1, it had completed 30% of the subcontract (Id.).

⁵⁴ Employee Elry McKnight, a member of Local 5, testified that he was not paid according to the wage scale in Local 5's collective-bargaining agreement, nor did he receive the benefits spelled out in that contract when he worked for ECI of Washington.

⁵⁵ Engineering Contractors, Inc. identifies this subcontract with BC—for a construction project at Harford Hall on the University of Maryland's College Park campus—as a contract that Engineering Contractors, Inc. signed *after* June 1, 2010, only to be subsequently assumed by ECI of Washington (GC Exh. 55). However, ECI of Washington is the company listed on BC's subcontract for mechanical contracting work (HVAC work, including piping and ductwork) at Harford Hall (GC Exh. 84, pp. 1 and 13).

contracts—for which Engineering Contractors, Inc. would receive over \$ 8,200,000 from MEC—on December 9, 2009.⁵⁶ However, on July 15, Parker sent a letter to MEC, requesting that MEC substitute or change its subcontractor from Engineering Contractors, Inc. to ECI of Washington (GC Exh. 52).⁵⁷ On August 9, Engineering Contractors, Inc. (by Griffith) assigned its rights, title, and interest in the two MEC subcontracts to ECI of Washington (by Parker), with MEC’s consent (GC Exh. 89).⁵⁸ Under the terms of this assignment agreement, ECI of Washington agreed to perform the terms of the two MEC subcontracts as if it were the original party. The assignment agreement does not indicate that any money changed hands between Engineering Contractors, Inc. and ECI of Washington as consideration for the assignment of the MEC subcontracts.

In fact, ECI of Washington assumed a significant portion of Engineering Contractors, Inc.’s open signed contracts in May 2010. Most notably, ECI of Washington assumed *all* of two

⁵⁶ Shortly thereafter, Engineering Contractors, Inc. entered into four subcontracts for its two Washington metrorail contracts, all on January 6, 2010. Two were entered into with Commercial Rigging, for transportation, rigging, and removal of certain equipment (GC Exhs. 143 and 144). Two were entered into with ADJ Sheet Metal, a unionized contractor, largely for the furnishing and installation of sheet metal (GC Exhs. 145 and 146).

⁵⁷ In this letter, Parker explained the genesis of ECI of Washington as a means of maintaining certifications as a local, small disadvantaged business enterprise, a minority business enterprise, and a disadvantaged business enterprise. According to Parker’s letter, Engineering Contractors, Inc. lost its certification in the District of Columbia as a certified business enterprise in October 2009; subsequently, “we formed [ECI of Washington]...” In the process of obtaining various certifications for ECI of Washington, Parker and Griffith voluntarily forfeited Engineering Contractors, Inc.’s certifications so that ECI of Washington could obtain the same certifications. Finally, Parker stated that “we felt it was in our best interest to proceed with this process so that we could continue to perform work in the District of Columbia where we have formed some good working relationships with General Contractors who perform a lot of work with DCPS, and in our continuing efforts to build a long term relationship with [MEC] and WMATA on this and future Metro projects” (GC Exh. 52).

⁵⁸ Although ECI of Washington was assigned these subcontracts in July, ECI of Washington’s post-July correspondence with MEC concerning the Washington metrorail work utilized Engineering Contractors, Inc.’s logo (GC Exhs. 138 and 139). The same project manager, Ronald Cusic, corresponded with MEC, regardless of whether the contractor was Engineering Contractors, Inc. or ECI of Washington (*Id.*). Furthermore, Engineering Contractors, Inc. was applying to MEC for payment for work performed on the Washington metrorail system in August and September 2010; ECI of Washington did not apply for such payment until later in 2010 (GC Exhs. 140 and 141). Engineering Contractors, Inc. continued to receive payments from MEC until October 2010, when ECI of Washington began receiving payments from MEC (GC Exh. 142). However, Engineering Contractors, Inc. endorsed some of the checks issued to ECI of Washington (*Id.* at pp. 17-18).

contracts from Engineering Contractors, Inc. for work on the Washington metrorail system, the dollar value of which far exceeded the value of Engineering Contractors, Inc.'s other contracts (GC Exh. 55). Also, ECI of Washington assumed contracts which Engineering Contractors, Inc. signed *after* May 7 (GC Exh. 55).⁵⁹ For example, ECI of Washington assumed *all* of a subcontract Engineering Contractors, Inc. entered into for a project at a United States Postal Service facility in Bethesda, Maryland (GC Exh. 55).⁶⁰

Just as they shared customers,⁶¹ Engineering Contractors, Inc. and ECI of Washington shared equipment, tools, safety gear (much of which was labeled for Engineering Contractors, Inc.),⁶² as well as vehicles, suppliers,⁶³ and service providers. Engineering Contractors, Inc.'s work equipment (bobcat; mini-excavator; equipment trailer)⁶⁴ and office equipment (furniture; computers; e-mail addresses; printers; telephones; and telephone numbers),⁶⁵ safety gear, and tools continue to be stored at its Upper Marlboro facility, where they are used by ECI of Washington (Tr. 308-309, Tr. 480-481).⁶⁶ Regarding vehicles, Engineering Contractors, Inc. returned some of its vehicles to a leasing company, but ECI of Washington also "assumed" several vehicles from Engineering Contractors, Inc. for its use, with ECI of Washington paying

⁵⁹ Griffith testified about various ECI of Washington jobs (several of which had originally been bid by Engineering Contractors, Inc.), what types of work each job entailed, and what types of work ECI of Washington subcontracted (Tr. 438-450). In sum, ECI of Washington has self-performed plumbing, pipefitting, insulation, and sheet metal work, with some subcontracting of sheet metal and insulation work.

⁶⁰ ECI of Washington also assumed contracts from Engineering Contractors, Inc. covering projects on the Intercounty Connector and a methadone clinic, as well as projects at Fort Belvoir in Virginia and the University of the District of Columbia's Child Development Center (Id.).

⁶¹ Engineering Contractors, Inc. and ECI of Washington have nearly-identical templates for subcontracts, purchase orders, and change orders (GC Exh. 136).

⁶² Tr. 62-64, 149-150, 261-264, 303, 463.

⁶³ See, e.g., Tr. 457-461; GC Exhs. 129 and 130.

⁶⁴ Tr. 468-471.

⁶⁵ See, e.g., Tr. 352-358 (same telephones, fax machines, and mobile phones), 484 (same computers, phones, and fax machines), and 489 (same furniture); see also GC Exh. 133.

⁶⁶ Engineering Contractors, Inc. and ECI of Washington share the same software, Computer Ease, for all of their payroll, invoicing, and office functions (Tr. 396, 402-403). ECI of Washington's representatives continue to use their e-mail addresses from Engineering Contractors, Inc., ending with the suffix "eci-dc.com" (Tr. 282-283, 462).

Engineering Contractors, Inc.'s leasing company (Tr. 465-467).⁶⁷ Engineering Contractors, Inc. and ECI of Washington utilize the same suppliers,⁶⁸ utilize substantially-similar vendor lists,⁶⁹ and share invoices.⁷⁰ Finally, regarding service providers, Engineering Contractors, Inc. and ECI of Washington share the same banks (Old Line Bank and Wachovia),⁷¹ the same surety company (First Sealord Surety),⁷² the same insurance providers (Guard Insurance Group; Cincinnati Insurance Co.; Care First),⁷³ and the same legal representatives (James Nowak and Offitt Kurman).⁷⁴ Finally, Engineering Contractors, Inc. and ECI of Washington share physical facilities (see *supra* for discussion of the two facilities; see, e.g., GC Exh. 38 (identifying Engineering Contractors, Inc.'s locations)).⁷⁵

⁶⁷ See GC Exhs. 91-92, photographs taken after Engineering Contractors, Inc. "went non-union" (Tr. 44-47). GC Exh. 91 is a photograph of a van at the Upper Marlboro facility, on which there is a Local 602 sticker. GC Exh. 92 is a photograph of the license plate of another truck. As of January 13, 2011, Engineering Contractors, Inc. still owned both vehicles (GC Exhs. 93-94). See also GC Exh. 95 (listing certain vehicles and work equipment transferred from Engineering Contractors, Inc. to ECI of Washington) and Tr. 148-149, 464-467.

⁶⁸ GC Exh. 110 are a series of e-mails between Jeff Barriere at Thomas Somerville Co. and Clinton Parker, ECI of Washington's estimator. In his role as estimator, Parker evaluates ECI of Washington's needs for parts and material on its construction projects, and then communicates on behalf of ECI of Washington with suppliers to obtain pricing for that parts and material (Tr. 274-276; GC Exh. 110). In doing so, Clinton Parker evaluates the pricing and quality of material, such as HVAC equipment (e.g., Trane vs. Luxaire) (Tr. 276-277, 289-290; GC Exh. 110, pp. 15-17). Clinton Parker's brother, Kyle Parker, is the purchasing agent for ECI of Washington (Tr. 279, 310-311). Clinton Parker also worked for Engineering Contractors, Inc. as an assistant project manager (GC Exh. 114). While with Engineering Contractors, Inc., Clinton Parker worked in the field for 3-4 years, before moving in to do office work (Tr. 293-294). He testified that he has been doing estimating work for two years, going back to the some point in 2009 (Tr. 277-278, 294). He estimated that he works four days a week from the Upper Marlboro facility, and one day a week from the D.C. office (Tr. 278).

⁶⁹ Compare GC Exhs. 129 and 130 (the master vendor reports for Engineering Contractors, Inc. and ECI of Washington).

⁷⁰ See, e.g., Tr. 310.

⁷¹ Tr. 484; GC Exh. 122, p. 8, and CP P/S Exhs. 2-3. On July 29, Old Line Bank agreed to loan \$510,000 to Engineering Contractors, Inc. and ECI of Washington listed in order to restructure and extend the outstanding balance of an existing, matured loan to Engineering Contractors, Inc. (GC Exh. 128; see also Tr. 485).

⁷² On May 13, Engineering Contractors, Inc. signed a cross corporate resolution, which stated that Engineering Contractors, Inc. was "materially interested in matters or transactions in which ECI of Washington LLC has applied or may hereafter apply to First Sealord Surety, Inc for surety bond(s)..." (GC Exh. 137).

⁷³ See GC Exhs. 122, p. 8. Engineering Contractors, Inc. and ECI of Washington have also been insured *under the same policies* (GC Exhs. 151-153). Engineering Contractors, Inc. and ECI of Washington both utilized Care First for health insurance (Tr. 486).

⁷⁴ Tr. 485-486.

⁷⁵ See Exh. 98. These photographs of the Upper Marlboro facility, taken after Engineering Contractors, Inc. "went non-union," show a small paper sign "ECI of Washington LLC," and directing people to enter from door B5, rather than B3. See also Tr. 47-50. The two doors lead into the same office space (Tr. 312).

Griffith interviewed and hired applicants for ECI of Washington from Engineering Contractors, Inc.'s Upper Marlboro facility (Tr. 300). On May 18, Griffith interviewed an individual, Elry McKnight, who had responded to a job opening advertisement on a website. www.craigslist.org (Tr. 298). The advertisement was seeking plumbers with backflow certification (Tr. 299). Griffith contacted McKnight to arrange an interview, and the two men met later that evening at the Upper Marlboro facility (Tr. 299-300). During this interview, Griffith asked McKnight if he was a member of a union, and McKnight responded that he was not (Tr. 300). Griffith said that he had a contract with the D.C. Public Schools that would have work later in the summer, but that McKnight could start working at an ongoing project at Bread for the City (Tr. 301). On or about May 24, McKnight began working at the Bread for the City jobsite, along with other plumbers, pipefitters, sheet metal workers (Tr. 301-302). That employee complement had only been working at the Bread for the City jobsite for approximately a week (Tr. 304). Later in the summer, McKnight did plumbing work for ECI of Washington at various public schools in Washington, D.C. (Tr. 307). In his employment with ECI of Washington, McKnight never went to ECI of Washington's D.C. office for work purposes (Tr. 313).

III. ARGUMENT

Under well-established Board law, the evidence developed at the hearing—almost entirely unchallenged and unrebutted by Respondents—establishes that Respondents committed hornbook violations of Sections 8(a)(1), (3) and (5) of the Act by discharging its unionized workforce and terminating its relationships with the unions by repudiating its contracts and failing and refusing to bargain in good faith, as well as by ignoring Local 100's information request. Furthermore, the record evidence presents a clear-cut case of alter ego/single employer

liability for ECI of Washington, a company which is indistinguishable from Engineering Contractors, Inc. in any meaningful respect. As found by Judge Rosenstein, the GC has overwhelmingly proven these unfair labor practice allegations, and the alter ego/single employer relationship of Respondents.

Respondents' limited exceptions feebly attempt to reverse Judge Rosenstein's findings—each of which was based on clear record evidence and well-established principles in traditional labor law. As discussed below, the Board should summarily dispose of each of Respondents' exceptions, and adopt Judge Rosenstein's decision.

1. Judge Rosenstein properly found that Respondents are an alter ego and a single employer.

There can be no serious dispute that, based on the record evidence, Engineering Contractors, Inc. and ECI of Washington are alter egos and a single employer, such as found by Judge Rosenstein. Under Board law, a corporation the alter ego of a predecessor corporation if there is not “a bona fide discontinuance and a true change of ownership” or if there is “merely a disguised continuance of the old employer.” D.L. Baker, Inc., 351 NLRB 515 (2007)(quoting Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942), 315 U.S. 100, 106 (1942)). In such circumstances, the Board and the courts have held that the successor is actually the same employer as the predecessor and subject to all of the predecessor's legal and contractual obligations. Id. (citing Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249, 259 fn. 5 (1974)).

The Board finds alter ego status “where two enterprises have ‘substantially identical’ management, business purpose, operations, equipment, customers, and supervision, as well as ownership.” Midwest Precision Heating & Cooling, 341 NLRB 435, 439 (2004), *affd.* 408 F.3d 450 (8th Cir. 2005)(quoting Advance Electric, 268 NLRB 1001, 1002 (1984), *enf'd as modified*

748 F.2d 1001 (5th Cir. 1984), *cert. denied* 470 U.S. 1085 (1985)). The Board also considers other factors, including: (1) whether the employer’s purpose behind the creation of the alleged alter ego was legitimate, or whether, instead, it intended to evade its responsibilities under the Act; and (2) whether the transfer of business operations resulted in an expected or reasonably foreseeable benefit to the employer. *Id.* (citing Fugazy Continental Corp., 265 NLRB 1301, 1301-02 (1982), and Alkire v. NLRB, 716 F.2d 1014, 1020 (4th Cir. 1983)).⁷⁶ No single factor is determinative, and not all the indicia need be present for the Board to find alter ego status. *Id.* (citing Reigel Electric/Central Electrical Services, 342 NLRB 847, 847 (2004), and Standard Commercial Cartage, Inc., 330 NLRB 11, 13 (1999)). Ultimately, single employer status is characterized by the absence of an “arm's length relationship found among the integrated companies.” Vance v. NLRB, 71 F.3d 486, 490 (4th Cir. 1995).⁷⁷

As laid out in Section II.B above, the GC introduced a plethora of evidence establishing that Engineering Contractors, Inc. and ECI of Washington share common control and a substantial identity of operations. Griffith and Parker have exactly the same roles and responsibilities for the two companies—even the same ownership shares. Examining the management of the two companies below the executive level of Parker and Griffith, Engineering Contractors, Inc.’s and ECI of Washington’s other managers, during the relevant timeframe, were practically indistinguishable. The same people occupied the same roles between the two companies, in what was a seamless transition. The two companies had the same project managers overseeing field operations, the same estimator evaluating the companies’ material

⁷⁶ See also Ledford v. Mining Specialists, 865 F. Supp. 314, 319 (S.D.W.Va. 1993)(citing Alkire)

⁷⁷ See also Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam); Walter N. Yoder & Sons, Inc. v. NLRB, 754 F.2d 531, 535-36 (4th Cir.1985).

needs and corresponding with suppliers, the same purchasing agent obtaining materials and parts, and the same safety director ensuring the safety of employees. Furthermore, regardless of whether she was a supervisor under Section 2(11), the two companies shared a seamless transition in their office administration: Opere Densua handled those responsibilities, along with human resources, accounts payable, and bookkeeping, for both companies.

Turning to the companies' respective businesses, Engineering Contractors, Inc. and ECI of Washington share a common business—both worked as mechanical contractors in the Washington, D.C. metropolitan region, performing plumbing, HVAC/pipefitting, insulation, and sheet metal work. As for day-to-day operations, Engineering Contractors, Inc. and ECI of Washington shared *everything*: customers; jobs; worksites; locations; vendors and suppliers; tools and field equipment; office furniture and equipment; vehicles; insurers; banks; and legal representatives. It is hard to conceive of any way that Engineering Contractors, Inc. and ECI of Washington were different, save in the one critical respect that Engineering Contractors, Inc. was a unionized company, and ECI of Washington did not employ union-represented employees or follow any collective-bargaining agreements. Furthermore, Griffith and Parker clearly wanted Engineering Contractors, Inc. to be rid of the unions, and they wanted to do that by “going non-union” in the form of ECI of Washington. Furthermore, the record reflects a substantial volume of transactions between the two nominally-distinct companies, all tainted by a lack of legitimate arm's-length business dealings. As found by Judge Rosenstein, the GC proved beyond a doubt that ECI of Washington is an alter ego of Engineering Contractors, Inc., that the two nominally-distinct entities are a single employer, and thus that ECI of Washington is liable for the violations of Sections 8(a)(1), (3) and (5).

Against this overwhelming showing, Respondents advance two weak exceptions. First, Respondents contend that Judge Rosenstein erred in finding Respondents to be alter egos because they used the same vendors and suppliers. Yet Respondents' argument to the Board is doomed by its disingenuousness. Based on its argument to the Board, Respondents would have the Board believe that Judge Rosenstein *solely* based his finding of alter ego status on the fact that the two nominally-distinct companies used the same vendors. However, as is clear from his decision, Judge Rosenstein examined *all* of the factual indicia traditionally used by the Board to determine alter ego/single employer status. In doing so, Judge Rosenstein looked to the common vendors and suppliers as but one indicia supporting a finding of alter ego and single employer. Respondents claim that Judge Rosenstein gave improper weight to this evidence, but fail to support their argument on this point. When viewing the record evidence together with Judge Rosenstein's decision, it is self-apparent that Judge Rosenstein gave all of the evidence going to Respondents' alter ego/single employer status is proper weight. Thus, the Board should have little difficulty in disposing of Respondents' exception.

Respondents' other half-hearted attempt to reverse Judge Rosenstein's finding of alter ego/single employer status comes in the form of a self-serving exception that has been rejected at every turn in these proceedings: that Respondents are not alter egos/single employer because of the self-proclaimed business purpose and inception of ECI of Washington. Respondents advanced this argument before Judge Rosenstein, who rejected it without comment. The Board should similarly have no pause before rejecting Respondents' exception. First, Griffith's testimony regarding his desire is obviously self-serving, and not credible: it is flatly contradicted with the paperwork he and Griffith filed with the District of Columbia at ECI of Washington's formation, and it is inconsistent with ECI of Washington's own present-day advertisements.

Implicitly, Judge Rosenstein did not credit Griffith's testimony, and Respondents have advanced no reasoning why this implicit credibility determination was in error. Respondents have not even attempted to come up with the clear preponderance of evidence necessary to disrupt this implicit credibility ruling against them. Standard Dry Wall Products, 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951).

Not only have Respondents' failed to carry this burden, the record evidence indicates precisely the opposite—that ECI of Washington was formed to evade Engineering Contractors, Inc.'s legal obligations. First, there is no other support for Griffith's statement—although they had ample opportunity to do so, Respondents failed to produce any documentary evidence indicating that ECI of Washington is, in fact, a general contractor, rather than a mechanical contractor. Most significantly, Griffith's self-serving statement is proven false by Griffith's own testimony regarding the work that ECI of Washington has performed. At the hearing, Griffith identified the different types of work involved in several projects, and whether the work was self-performed or subcontracted. The following chart summarizes Griffith's own testimony:

JOB	PLUMBING	HVAC/PIPE	INSULATION	SHEETMETAL
Intercounty Connector		X	X	X
USPS	X		X	X
Ft. Belvoir Playground	X			
Ft. Belvoir, Specker	X	O	X	O
Ft. Belvoir, Bldg. 334		O	X	O
Bread for the City U of Md.	X	X*	X	O*
Harford Hall				
P.R. Harris Rec Center	X	X	X	O
WMATA Red Line Phase 1	X	X	X	O
WMATA Red Line Phase 2, 3, and 4	X	O/X	O	O
FPCS Modular U of Md.	X	X	X	X
Women's Locker Room				
Harry M. Nice Bridge, Admin. Bldg.	X	X	X	X
UDC Child Development Ctr	X	X	X	X
Methadone Clinic	X		X	
Willowbrook Condos	**	**	**	**

X = Self-performed O = Sub-contracted

* - **Engineering Contractors, Inc. employees self-performed**

** - **Griffith not certain**

Plainly, ECI of Washington is *not* operating as a general contractor. Furthermore, even if it was, there is no dispute that ECI of Washington is operating as a general contractor for mechanical contracting. In short, ECI of Washington has performed, either by itself or through a subcontractor, the exact same type of work that Engineering Contractors, Inc. previously performed. Finally, as noted by Judge Rosenstein, Griffith admitted that he never informed *any* of the Charging Party Unions about the formation of ECI of Washington, further suggesting that ECI of Washington was created with an improper motive. Considering this mountain of evidence, Respondents' exception hardly even dents Judge Rosenstein's well-supported finding.

Considering the record evidence against Respondents' exceptions and Judge Rosenstein's findings, the Board should quickly conclude that Respondent's exceptions are meritless.

2. *Judge Rosenstein properly found that Respondents failed to negotiate with the Charging Party Unions.*

Respondents' next exception claims that Judge Rosenstein erred in finding that Respondents failed to negotiate with the unions. Incredibly, Respondents claim that it was the Charging Party Unions—not Respondents—who refused to negotiate, and that Respondents made every effort to negotiate with the Charging Party Unions. Looking at the record evidence in full, it requires a suspension of common sense—or a complete ignorance of traditional labor law—to conclude that Respondents did *not* violate Section 8(a)(5). There is no real dispute that, on or about May 7, 2011, Respondents unilaterally withdrew recognition from each of the four Charging Party Unions, repudiated its collective-bargaining agreements, and generally refused to bargain with the four Charging Party Unions. Respondents advance no argument or exception to the contrary, and, under Rules 102.46(b)(2) and 102.48, Judge Rosenstein's findings on these points should be adopted by the Board.

Respondents' exception appears to be that, after Respondents had discharged their entire union-represented workforce in violation of Section 8(a)(3) and withdrawn recognition, repudiated contracts, and refused to bargain with the four Charging Party Unions, there was a meeting between Respondents' vice president and representatives from each of the four Charging Party Unions, and those representatives refused to agree to permit Respondents to violate Sections 8(a)(3) and (5). In support of its exception, Respondents cite absolutely nothing: not a transcript citation, nor a piece of documentary evidence, or a case in the Board's seventy-five-plus years of existence. Ignoring Respondents' efforts at contorting the record in what can only be charitably described as "exaggeration" Respondents conveniently ignore that Respondents'

supposed efforts at “bargaining” only occurred *after* May 7, at a meeting the unions—not Respondents—requested. Unrebutted and unchallenged record evidence indicates that Parker had not raised Engineering Contractors, Inc.’s financial difficulties with the unions before May 7, or even intimated at what ultimately occurred. The Board should flatly reject Respondents’ incredible exception that it did, in fact, negotiate with the Charging Party Unions.

3. *Judge Rosenstein properly found that Respondents violated Section 8(a)(3).*

Respondents’ next exception seeks to reverse Judge Rosenstein’s well-supported finding that Respondents violated Section 8(a)(3) when they summarily terminated and/or constructively discharged their entire union-represented workforce on or about May 7, 2011. Respondents contend that it satisfied its burden of proving that it would have terminated all of these employees regardless of their union membership because Engineering Contractors, Inc.—according to Respondents—was no longer a viable entity. Respondents’ argument blatantly ignores record evidence—including that which came from its own witness—and it should be disregarded. Respondents’ claim that it did not violate Section 8(a)(3) because it was ceasing operations ignores the obvious: Respondents *were not ceasing operations and had no intention to cease operations*. Rather, Respondents continued working on the same jobsites, with the same equipment from the same vendors, and the same managerial structure and the same facilities. By their own admission, Respondents were more than willing to retain their employees, provided those employees were no longer working under the terms of the collective-bargaining agreements Respondents had with the four Charging Party Unions (Tr. 548-551). In light of this record evidence, Respondents’ exception does not even pass a “sniff test” as a legitimate legal argument for a material error. Equally bizarre is Respondents’ argument that its employees would have been terminated for poor work performance. This argument—that employees were

terminated for poor work performance—has never appeared before. Respondents never informed the employees, or their respective unions, that they were being terminated for work misconduct, nor did Respondent raise this point at the hearing before Judge Rosenstein or the proceedings before Judge Williams. Its exceptions to the Board are the first time that Respondents have asserted this claim of termination for poor work performance. As such, the Board should have little difficulty in disregarding Respondents' specious claim.

Rather, the Board should adopt Judge Rosenstein's finding that Respondents violated Section 8(a)(3) when they terminated and/or constructively discharged their entire union-represented workforce on or about May 7. Despite a strong *prime facie* case presented by the GC, Respondents failed to even offer up a meek affirmative defense at the hearing that they would have taken the same employment actions regardless of its employees' union membership. Evidence clearly establishes that Griffith and Parker did not want to operate a union company anymore, and that the employees' membership in the respective unions prevented Griffith and Parker from having Engineering Contractors, Inc. as a non-union company. Engineering Contractors, Inc. was certainly aware of its employees' union membership, and it unquestionably terminated all of those employees. Furthermore, Engineering Contractors, Inc. provided *direct* evidence of its antiunion animus in its statements to employees and union representatives, in its pre-termination e-mail exchange, and in its testimony at the hearing (Tr. 548-551). Engineering Contractors, Inc. terminated its employees on May 7 *because* they were represented by unions. In the absence of any defense that Respondents would have taken the same actions regardless of the discriminatees' union activities, the violation of Section 8(a)(3) is easily found.

Alternatively, Engineering Contractors, Inc. violated Section 8(a)(3) by constructively discharging its employees. An employer violates Section 8(a)(3) when it presents employees

with the “Hobson's choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act.” White-Evans Service Co., 285 NLRB 81 (1987). As employees have the statutory right to union representation, as well as to the contractual benefits negotiated by their representative, they may not be forced to choose between leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully established by their employer. See, e.g., Noel Corp., 315 NLRB 905, 909 (1994); RCR Sportswear, 312 NLRB 513 (1995). Engineering Contractors, Inc. *unquestionably* presented its employees with this Hobson’s choice—Parker admitted as much during the hearing (Tr. 548-551). Accordingly, Judge Rosenstein correctly found that, under this constructive discharge theory, Engineering Contractors, Inc. violated Section 8(a)(3) by conditioning its employees’ continued employment on their relinquishing their union membership and contractual terms and conditions of employment.

4. ***Judge Rosenstein correctly found that Respondents violated Section 8(a)(5) by refusing to provide requested information.***

Respondents final exception alleges that Judge Rosenstein erred in finding that Respondents violated Section 8(a)(5) by failing to provide requested information to Local 100. Respondents’ sole argument on this point is that, by the time of the administrative hearing, Local 100 had received all of the information it had requested from Respondents. Respondents fail to cite any Board case for the proposition that an employer may avoid an unfair labor practice finding by providing requested information after a complaint allegation that the employer has failed to provide requested information. Such a precedent would create an absurd result: an employer could ignore a well-founded information request until a hearing began, at which the parties would litigate whether the employer had violated Section 8(a)(5) by previously refusing

to provide the requested information. The Board should summarily reject Respondents' exception, and adopt Judge Rosenstein's finding that Respondent violated Section 8(a)(5).

Both before and after the administrative hearing, Respondents offered no defense to the allegation that it violated Section 8(a)(5) by failing and refusing to provide Local 100 with information that Local 100 had requested on or about June 15. Under hornbook Board law, an employer must, on request, furnish a union with information that is relevant to the union's carrying-out of its duties to represent employees. NLRB v. Acme Industrial, 385 U.S. 432, 435-436 (1967). However, a union's request for information that goes beyond the bargaining unit it represents is not considered presumptively relevant, and the union bears the burden of establishing the relevance of the requested information. Dodger Theatrical Holdings, Inc., 347 NLRB 953, 967 (2006). A union's request for information relating to an alleged alter ego or single employer relationship is not considered presumptively relevant. Cannelton Industries, 339 NLRB 996, 997 (2003). However, this burden is met if there is an objective factual basis supporting the union's belief there may be an alter ego/single employer relationship, and the union need not provide the employer with its objective basis at the time of the request. Id. at 997. Such a basis may include the use of the same facilities by the allegedly related firms and transfer of work among such firms. C.E.K. Industrial Mechanical Contractors, 295 NLRB 635, 637 (1989), *enf. denied on other grounds*, 921 F.2d 350 (1st Cir. 1990).

In the case at hand, Local 100 had more than a sufficient objective basis on which to base its information request. Local 100 Business Agent had learned from Parker that Engineering Contractors, Inc. was "going non-union," thus clearly insinuating a continuation of the business enterprise. Chaffee himself observed Engineering Contractors, Inc.'s materials and tools being used at the Bread for the City jobsite, where Local 100-represented employees had been working

CERTIFICATE OF SERVICE

I hereby certify that the following document was electronically filed through the NLRB's electronic case-filing system, and that I served the document by e-mail on the 12th day of October, on the parties listed below:

1. The Counsel for the Acting General Counsel's Answering Brief to Respondents' Brief in Support of its Exceptions.

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Dated at Washington, D.C., this 12th day of October 2011.

Respectfully submitted,

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