

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

**DEER CREEK ELECTRIC, INC. and
BLACK HILLS ELECTRIC, INC., alter
egos**

and

19-CA-097260

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 76,
AFL-CIO, CLC**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Ann Marie Skov
Counsel for the General Counsel
National Labor Relations Board, Region 19
915 2nd Ave, Suite 2948
Seattle, WA 98174
Telephone (206) 220-6301
Fax: (206) 220-6305
Email: Ann-Marie.Skov@nrlrb.gov

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Counsel for the General Counsel (“General Counsel”), pursuant to Section 102.46(a), respectfully submits this Brief in Support of Exceptions to the Decision (the “Decision” or “ALJD”) of Administrative Law Judge Mary Miller Cracraft (the “ALJ”). The Decision in the above captioned case issued on May 1, 2014, dismissing the complaint in its entirety. As set forth in the accompanying Exceptions, the ALJ erred in not finding Deer Creek Electric, Inc. (“Respondent DCE”), and Black Hills Electric, Inc. (“Respondent BHE”) (collectively, “Respondents”), to be alter egos whose failure to continue in effect the terms and conditions of employment set forth in the collective bargaining agreement between Respondent DCE and IBEW Local 76 (“Union”) violated the Act. This Brief in support details her erroneous legal and factual determinations and proposes a revised amended Order, with an attached Notice to Employees, requiring Respondents to, *inter alia*, cease and desist from committing these unfair labor practices in violation of the National Labor Relations Act (the “Act”), as amended, 29 U.S.C. § 151 *et seq.*, and a make whole remedy for the bargaining unit employees.

I. OVERVIEW

The Board will find that two employers are alter egos of each other when both have “substantially identical” ownership, management, business purpose, nature of operations, equipment, customers, and supervision. *Crawford Door Sales*, 226 NLRB 1144 (1976). It is not necessary that all of the enumerated factors be met. *Diverse Steel, Inc.*, 349 NLRB 946 (2007). Respondent DCE, a unionized electrical contractor, and its non-union disguised continuance, Respondent BHE, are just such alter egos.

In her Decision, the ALJ dismissed the complaint in its entirety due to her determination that Respondents were not alter egos. Although she found that there was evidence supporting a finding of substantially identical general business purpose and operations, she determined that there was an absence of evidence sufficient to find substantially identical ownership, purpose to evade responsibilities under the Act, substantially identical management and supervision, substantially identical customers in common, and substantially identical equipment. The ALJ is wrong, however, as she overlooked the fact that only after the instant unfair labor practice charge was filed, did Respondent BHE attempt to reengineer the facts to avoid appearing as a disguised continuance.

Respondent BHE is the undisguised continuing alter ego of Respondent DCE. First, Respondent DCE and BHE have “substantially identical” ownership, as Respondent DCE owners, Rick and Sandra Moloney, are closely related to Respondent BHE owner Cheri Jackson. Second, Respondents are supervised and managed almost entirely by Rick Moloney. Third, as the ALJ correctly found, both Respondents have the same nature of operations and business purpose operating as licensed general

electrical contractors performing mostly commercial work, including a substantial number of public jobs at the prevailing wage rate. Fourth, Respondents have many common customers. Finally, Respondents have almost identical equipment and vehicles that Respondent BHE “purchased” from Respondent DCE via an ostensibly delayed payment schedule that appeared to begin only after the instant unfair labor practice charge was filed. Moreover, the record evidence establishes that Respondent BHE was created to avoid Respondent DCE’s union obligations shortly after the Union informed Respondent DCE that it was bound to its successor agreement.

In sum, as discussed herein, the record establishes that Respondent BHE is the disguised continuance of Respondent DCE and the two are alter egos. Accordingly, the ALJD must be overruled and the Board should order that the terms and conditions of the Union’s collective bargaining agreement be applied and the employees made whole for their lost wages and benefits.

II. FACTS LEADING TO THE ALTER EGO FORMATION¹

A. History of Respondent DCE

Respondent DCE operated as an electrical contractor located at 2920 20th Avenue SW, Tumwater, Washington. (ALJD 3:35-36). Rick Moloney owned 51% and his wife Sandra Moloney owned 49% of Respondent DCE. (ALJD 3:22-23) (18:25; 19:1-10, 17-22; 20:2; 118:11-19). Rick Moloney (“Moloney”)² was the President and Treasurer of Respondent DCE. (ALJD 3:38-39) (21:5-8). Moloney earned \$103,400

¹ References to the Decision appear as (ALJD __:__). References to the transcript appear as (--:--). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh. --). References to Respondent Exhibits appear as (R Exh. --).

² Moloney will reference Rick Moloney while references to Sandra Moloney will be Sandra Moloney.

from January 2011 through December 2012. (ALJD 5:20) (123:15-25) (GC Exhs. 30, 47, 59).

Respondent DCE was certified as a service-disabled-veteran-owned company. (ALJD 3:27-28). Respondent DCE primarily performed public works jobs bid both through both regular bidding and through disabled veteran set-aside bidding and also performed some privately funded commercial jobs. (ALJD 3:27-30) (29:24-25; 30:1-4; 31:1-4, 9-15; 189:8-25; 190:1-14; 191:7-11) (R Exh. 6). Respondent DCE operated from 2004 until it ceased operations in September 2012, and permanently closed in December 2012.³ (ALJD: 3:24-25) (187:24-25; 188:1-2) (GC Exh. 15).

Moloney testified that he decided to close Respondent DCE because of difficulty making ends meet, and that he wanted to find a job with another contractor. (194:23; 196:1-8). When Moloney discussed this issue with his wife's sister, Cheri Jackson, from June to August, Jackson stated that she wanted to open a business because she did not like her job working with the State of Washington Gambling Commission. (ALJD 5:10-11) (123:4-8; 199:9-20). Thus, according to Moloney's testimony, Moloney and Jackson decided, "if...she opened a company...I'd help her run it and teach her." (ALJD 5:12-13).

B. Formation of Respondent BHE

Respondent BHE is an electrical contracting business located at 9428 Blue Mountain Lane, Tumwater, Washington, and performs residential and commercial electrical work, including prevailing wage work, data networking, and design build work. (ALJD 5:9, 35) (201:6-8; 207:19-23) (R Exh. 5). Respondent BHE commenced operations on the heels of Respondent DCE's closure, on about October 1, and is

³ All dates are 2012, unless otherwise stated.

owned solely by Jackson. (ALJD 5: 9, 20-21) (123:4-8; 124:7-9; 200:16-19, 23-25; 294:14-15). Jackson hired Moloney as she created Respondent BHE conditioned on Moloney's promise to help Jackson run the business and to teach her the nature of running an electrical contractor business. (ALJD 5:10-13) (199:12-24; 200:9-12).

Jackson had no experience running or working for an electrical contractor as she was never employed by Respondent DCE. (123:12-14). Indeed, Jackson still works full time for the State of Washington Gambling Commission and earned only \$5,995 in compensation from Respondent BHE while Moloney earned \$77,625.26 in one year working for Respondent BHE. (ALJD 5:20) (123:15-25). Moloney does not appear to share in the profits of Respondent BHE beyond his salary though Respondent BHE's does not appear to have any profits.⁴

C. IBEW Local 76 Represented Respondent DCE Employees

IBEW Local 76 ("Union") represented a bargaining unit of employees comprised of journeymen, apprentices, and helper electricians working for Respondent DCE. (ALJD 2) (31:16-18; 119:23-25; 160:17-22; 175:9-11) (GC Exh. 37). Their bargaining relationship began in about 2004, when Respondent DCE signed a recognition agreement with the Union. Respondent DCE authorized the SW Washington Chapter of National Electrical Contractors Association ("NECA") to serve as its bargaining representative. (ALJD 2) (GC Exhs. 8, 38).

The ALJ expressly found that Respondent DCE was a party to the Union's Area Agreement, the Union had a collective bargaining relationship, and that the Union was the exclusive collective-bargaining representative of the unit employees. (ALJD 2: 3:15-18). The Union's Area Agreement, to which the ALJ found Respondent DCE was

⁴ Respondent BHE's profit and loss ledger show a loss of \$41,890.91. (GC Exh. 50)

signatory, applies to all employers and their employees performing electrical work under its terms and conditions, including commercial and residential work, within the jurisdiction of the Union. (ALJD 3:1-18) (161:4-10) (GC Exhs. 52-53). The Union's jurisdiction includes Grays Harbor, Lewis, Mason, Pacific, Pierce and Thurston Counties. (159:20-22).

D. Respondent DCE's Attempt to Withdraw from the Union

On March 26, 2009, Respondent DCE, through Attorney Chester Baldwin, informed the Union that Respondent DCE intended on withdrawing its recognition of the Union due to economic conditions. (ALJD 4: 11-13) (38:16-25; 39:1-2) (GC Exh. 4). On July 10, 2009, IBEW Pacific Coast Pension Fund Manager M. Cristina Noyes sent Moloney a letter confirming that Moloney had informed her that Respondent DCE would be withdrawing from the Union and continue to operate as a non-Union electrical contractor. (39:17-25; 40:1-2) (GC Exh. 5).

On December 1, 2009, IBEW Pacific Coast Pension Fund Manager Noyes informed Moloney that, based on Respondent DCE's failure to sign a renewal of a collective bargaining agreement, the Pension Fund determined that Respondent DCE had also withdrawn from participation in a multiemployer pension plan, triggering a withdrawal liability of \$331,069. (ALJD 4:45-46) (40:11-17) (GC Exh. 6). Three days later on December 4, 2009, IBEW Pacific Coast Pension Fund Manager Noyes sent Moloney a letter stating that, after sending the December 1, 2009 letter, she discovered that Respondent DCE had signed a letter of assent on September 1, 2009. (ALJD 4:47-47) (GC Exhs. 7-8). Specifically, by signing the September 1, 2009, Letter of Assent and the September 1, 2009, Letter of Agreement, Respondent DCE agreed to be bound

by all current and subsequent collective bargaining agreements absent written notice of termination prior to the expiration of the Letter of Agreement. (ALJD 4:14-15) (GC Exhs. 8-9).

The Letter of Agreement requires that employers submit their intent to withdraw from the Agreement more than 30 days prior to the termination of the Agreement. (ALJD 3:11-13) (GC Exh. 11).

E. The Continued Union Relationship after 2009

The ALJ found that the record clearly established that Respondent DCE has, year after year, signed Letters of Agreement to remain signatory to the Union's Area Agreement. (ALJD 3:1-3) (GC Exhs. 9-11). Most recently, Moloney, on behalf of Respondent DCE, signed a Letter of Agreement in August 2011, again renewing its commitment to be bound by the Union's Area Agreement until its expiration on August 31. (ALJD 3:10-13) (43:21-25; 44:1-9) (GC Exh. 11).

Moloney neither entered into another Letter of Agreement nor withdrew from the assent letter to the collective bargaining agreement during the specified window for withdrawal in August. (ALJD 3:13-15) (GC Exh. 14). Thus, the automatic roll over provision bound Respondent DCE to the July 1, 2012-August 31, 2015 Agreement and to continued representation by the Union. (ALJD 3:13-18) (163:9-15) (GC Exhs. 11, 14, 53).

F. Union Notification to Respondent DCE of Continuing Relationship

On August 30, Respondent DCE sent a notice to the Union that it was terminating the employment of its Inside Wireman Jesse Birdsall because it was closing the company. (ALJD 4: 38-40) (45:3-18) (GC Exh. 12). On August 31, Respondent

DCE sent a notice to the Union that it was terminating the employment of its Inside Wireman Pete Buck because it was closing the company. (ALJD 4: 38-41) (46:1-11) (GC Exh. 13). Respondent DCE only employed Birdsall and Buck at the time it closed. (ALJD 4:41)

On September 7, the Union sent a letter to Respondent DCE stating that it did not send a timely notice terminating its participation in either the Letter of Agreement or the Assent Letter. (ALJD 4:42; 5:1) (46: 18-25; 163:9-15) (GC Exh. 14). Accordingly, the Union informed Respondent DCE that it was now bound to the successor agreement and that it must abide by all contractual terms and conditions therein. (ALJD 5:1) (46: 18-25) (GC Exh. 14). Since the ALJ properly determined that there was no evidence of timely notice of intent to withdraw from the successor Area Agreement, she was also correct in concluding that Respondent DCE was bound to the July 1, 2013 to August 31, 2015 Area Agreement. (ALJD 3:13-15).

G. Respondent DCE Gives Notice of Pending Closure

The Union received a letter on September 27 from Respondent DCE stating that it would no longer perform electrical work as of October 1, and would close on December 31. (ALJD 5:2-3) (47: 13-25; 48:3-15) (GC Exh. 15). Respondent DCE sent the letter announcing its closure several weeks after the Union notified Respondent DCE that it was bound to the 2012-2015 Area Agreement. (ALJD 5:1-3) (GC Exhs. 14-15).

The Union learned about the existence of Respondent BHE in about October when it discovered that Moloney's administrator's license for Respondent DCE had been reassigned to Respondent BHE and that Birdsall, one of two employees who had

worked for Respondent DCE, was now working for Respondent BHE. (ALJD 8:8-10) (175:15-24).

H. Moloney's History of Dissatisfaction with the Union

Dennis Callies, Business Manager for the Union, spoke to Moloney over the phone every two to five months during at least the year prior to Respondent DCE going out of business. (ALJD 4:32-35) (163:16-25; 164:1-11). During these conversations with Callies, Moloney discussed his dissatisfaction with the Union and the quality of the employees referred by the Union and expressed his view that the Union was not a good fit with Respondent DCE. (ALJD 32-36) (163:16-25; 164:1-11).

III. ADDITIONAL FACTS SHOWING ALTER EGO RELATIONSHIP

A. Respondents are Commonly Owned as Demonstrated by Lack of Arm's Length Transacting in the Passing of Assets

On October 10, Moloney signed a document stating that Respondent DCE was giving Respondent BHE a 2005 Ford F-150 truck, a 2006 Ford E-150 van, a 1972 T-weld,⁵ a 1984 International truck, and a 1994 Dodge Ram van with no money exchanging hands. (ALJD 6:39-41) (GC Exh. 16). Also on October 10, Moloney, on behalf of Respondent BHE, completed a vehicle title application and registration certificate with the State of Washington Department of Licensing for the 2005 Ford F-150 truck previously owned by Respondent DCE and licensed as A32413X. (ALJD 6:39-41) (51:10-19) (GC Exhs. 16-17). The application form reveals that the use tax was waived because the 2005 Ford F-150 was titled as a gift. (ALJD 6:40-43) (51:18-19; 52:6-8) (GC Exh. 17). The application lists Respondent BHE as the registered owner and Moloney signed as the registered owner on behalf of Respondent BHE.

⁵ A T-Weld is a job shack trailer. (49:18-21).

(ALJD 6:41-43) (51:10-17) (GC Exhs. 17, 18). By his signature, Moloney was certifying that the information contained in the application was accurate and complete. (GC Exh. 17).

Despite the existence of the October 10 statement signed by Moloney stating that Respondent DCE was giving Respondent BHE several vehicles with no money exchanging hands, there is also an October 1 sales agreement. (GC Exhs. 16 and 40). The October 1 sales agreement shows that Respondent BHE purchased the Ford E-150 van, a Ford F-150 truck, and a 1994 Dodge Ram van for a combined total of \$6,500. (ALJD 7:5-7) (GC Exh. 40). That same October 1 sales agreement reveals that Respondent BHE also purchased from Respondent DCE power equipment, including ladders, drills, hole hogs, hand tools and saws totaled \$1455.

The ALJ failed to point out that this October 1 bill of sale predated the October 10 statement in which Respondent DCE gave Respondent BHE a 2005 Ford F-150 truck, a 2006 Ford E-150 van, a 1972 T-weld, a 1984 International truck, and a 1994 Dodge Ram van with no money exchanging hands.

Moreover, on about December 10, the Union sent a request for information to Respondent DCE. (ALJD 8:18) (135: 2-9) (GC Exhs. 20, 22). The information requests consisted of a questionnaire containing 84 questions, all relating to alter ego factors for both Respondent DCE and Respondent BHE (ownership, customers, lines of credit, supervisors, projects, office locations, equipment, etc.). (GC Exhs. 20, 22).

Respondent DCE, by Moloney, replied back to the Union's request for information by undated letter, but presumably it responded after closing on December

31 based on some of its responses.⁶ (GC Exh. 21). Moloney wrote in response to request for information item number 21, that the only transfer of funds between Respondent DCE and Respondent BHE related to the purchase of equipment and vehicles for fair market value but that the first payment was not yet due. (56: 12-22) (GC Exh. 21). Moloney's letter was sent around the time that Respondent BHE had already been in existence for at least 3 months. (GC Exh. 21). Item numbers 34 and 35 of Moloney's written response stated that Respondent DCE agreed to sell to Respondent BHE ladders, drills, hole hogs, hand tools, and porta band saws for \$1,455 and a 2006 Ford E-150 for \$3,500; a 2005 Ford F-150 for \$2,500; and a 1994 Dodge Ram van for \$500. (GC Exh. 21).

The ALJ completely ignored Respondent DCE's admission in its written response to the Union's request for information at the end of December or beginning of January 2013 that the first payment had not yet been paid. Moreover, the ALJ failed to mention that Respondent BHE contends the first payment (check 8000) was in October, yet record evidence reveals that Moloney did not debit the October check until February 7, 2013. (267: 17-21) (GC Exhs. 47, 58). Thus, the ALJ ignores Respondent BHE's contention that the first payment was in October.

February 7, 2013, was several weeks after the unfair labor practice charge was filed, and is the same day that Respondent BHE re-registered the Ford E-150 van and Ford F-150 truck, on advice of attorney as written on the application, to clean up the titles to show that the vehicles were purchased and were not gifts. (125:17-25; 126:1-12; 127:2-4; 129:9-11; 130:10-17, 24-25; 131) (GC Exhs. 40 and 41).

⁶ Moloney wrote that Respondent DCE had "closed its doors on December 31st." (GC Exh. 21). Thus, it appears that Respondent DCE had already closed at the time Moloney sent the letter. (GC Exh. 21).

It defies common sense that Moloney would wait months to cash out the initial October check (almost 4 months) after testifying that he was significantly in debt which is why he was forced to close Respondent DCE. The ALJ fails to address the suspect timing of the debiting of the first payment that coincided with the exact date the vehicle titles were re-registered to show that they were purchased and not gifted.

Moloney testified that Respondent DCE filed its 2012 tax return in August 2013. (114:2-4). Respondent DCE indicated in its 2012 tax return, on form 4797 covering sales of business property, that it sold the 2006 Ford E-150 van on January 23 for \$3,500 and that it sold the 2005 Ford F-150 truck on December 31 for \$2,500. (79:12-23; 80:11-13) (GC Exh. 31). Respondent Moloney testified that these vehicles were sold to Respondent BHE. (79:20-24).

B. Respondents are Commonly Owned as Demonstrated by Moloney Providing Financial Guarantees on Behalf of Respondent BHE

While not being named as an owner of Respondent BHE, Moloney made several financial guarantees on behalf of Respondent BHE around the time it began operations. (GC Exh. 24). One guarantee made by Moloney involved an account Respondent BHE had with electrical supplier Consolidated Electrical Distributors (“CED”) in which CED agreed to extend credit to Respondent BHE for payment of items by the 15th of the month following the date of the purchases. (62:5-7, 15-25; 63:1-5; 232:2-3) (GC Exh. 24). On behalf of Respondent BHE, Moloney signed a personal guarantee promising to pay any and all financial obligations. (62:15-25; 63:1-5; 232:2-3) (GC Exh. 24). Moloney signed an identical personal guarantee on behalf of Respondent DCE when it had an account with CED for credit sales. (61:8-23) (GC Exh. 23).

The second guarantee Moloney made on behalf of Respondent BHE involved signing with Sandra Moloney and Cheri Jackson, a payment and performance personal guarantee warranting: (1) the payment of all individuals supplying labor, material, or equipment on the project; and (2) the full performance of all terms, covenants, and conditions of the agreement. (GC Exh. 36). In order for Respondent BHE to finish a project started by Respondent DCE, the project's General Contractor, Centennial, required a payment and performance personal guarantee. (GC Exh. 36). Interestingly, Moloney and Jackson were jointly signing this guarantee with Centennial Contractors, as early as mid-September before Respondent DCE had ceased operations. (GC Exh. 36).

C. Respondents Have Common Management/Supervision

Moloney was the owner, manager, and the supervisor of Respondent DCE. (ALJD 3:38-42) (21:9-12; 193:5-6). Sandra Moloney did not play an active role in Respondent DCE despite her co-owner status. (ALJD 3:23-24) (193:2-4). Moloney also estimated the cost of Respondent DCE's projects. (ALJD 3:41-42) (21:13-14; 193: 7-9). In order to estimate the cost of a project for which Respondent DCE was preparing a bid, Moloney would review the plans and determine the cost of performing the job. (ALJD 3:41) (21:22-25; 22:1). Moloney would enter into contracts with customers. (ALJD 3:42) (22:5-8).

Moloney was the electrical administrator and maintained a license in his capacity as electrical administrator for Respondent DCE. (ALJD 3:43-44) (23:18-24). Moloney's electrical administrator license number while operating Respondent DCE was MOLONRR974K8. (23:24-25; 24:1-3). As the electrical administrator of Respondent

DCE, Moloney ensured that operations were safe. (ALJD 3:43-44) (24:4-6). When an electrical contractor receives a citation from a state or city entity, for a violation such as working without an electrical permit, working without a license, failing to have an adequate number of journeymen working alongside apprentices, or failing to get an inspection upon completion of a job, both the contractor and the administrator are cited. (24:8-10; 25:9, 13-15; 26:3-10).

Moloney filed affidavits with the Washington State Labor and Industry's Division of Prevailing Wages attesting that Respondent DCE paid employees the proper wage rate on prevailing wage jobs. (ALJD 4:2-3) (29: 1-12). Moloney also obtained electrical permits on behalf of Respondent DCE. (258:11-20). Moloney earned \$103,400 during the time period of January 2011 through December 2012. (GC Exh. 30).

Moloney testified that he was the general manager, estimator, and project manager for Respondent BHE. (ALJD 39-40) (114:11-12; 198:4-6, 11-16). More specifically, on behalf of Respondent BHE, Moloney: finds jobs to bid on, estimates the cost of jobs, puts together jobs bids, meets with customers, ensures that material is purchased at the correct price, inspects field work, and performs electrical work. (ALJD 5: 39-42) (198:11-16). Moloney testified that Jackson never changed or disagreed with a bid that he put together. (288:20-25; 289:1-4).

Moloney is also registered as Respondent BHE's electrical administrator under the same administrator license number as Respondent DCE. (ALJD 5: 39, 45-47) (114:15-24; 115:1-12). As the electrical administrator of Respondent BHE, if BHE received an electrical citation, Moloney would also receive a citation. (115:13-17). Moloney filed affidavits with the Washington State Labor and Industry's Division of

Prevailing Wages attesting that Respondent BHE paid employees the proper wage rate on prevailing wage jobs. (ALJD 5: 40-41) (115: 21-25) (GC Exh. 57). Moloney obtains electrical permits on behalf of Respondent BHE. (ALJD 5: 40-41) (258:11-20). Moloney earned \$77,625.26 during the time period of January 2013 through December 2013. (GC Exhs. 47, 59).

Besides Moloney, Respondent BHE has two other supervisors/managers, Wes Hillman and Jackson. (ALJD 5: 28-32; 6: 13-15) (216:5-8). Hillman handles the low voltage side/data networking side of Respondent BHE by finding jobs, bidding on jobs, managing projects, and working directly on these projects.⁷ (ALJD 6:13-15) (216: 9-13). Hillman's timesheets reveal, however, that he worked 5 hours during the week of February 4, 2013, worked 6 hours the week of March 11, 2013, worked 10 hours the week of May 13, 2013, and then began regularly submitting timesheets the week of July 29, 2013, often showing less than 30 hours of work a week. (GC Exh. 60). The ALJ incorrectly claims that Hillman worked about 15-20 hours per week starting in February 2013 when in reality, the record evidence shows that he worked a total of 21 hours from February 2013 through July 29, 2013. (ALJD 6: 16-17) (GC Exh. 60).

⁷ Respondent DCE subcontracted out work totaling \$59,512.98 in 2011 and \$21,340.00 in 2012. (GC Exhs. 25-26). Respondent DCE subcontracted data networking work to Communication Technologies, Inc. ("CTI"), a company owned by BHE supervisory/manager Wes Hillman. (81:12-21) (GC Exh. 32). Rather than subcontract out data networking work to Wes Hillman's company, CTI, Hillman now works in-house for Respondent BHE. (GC Exhs. 32, 48, 65). Moloney testified that Hillman bids on the work himself and he and another employee perform the work. (216:9-13; 319:3-11) Respondent BHE does, however, occasionally subcontract out data networking jobs as evidenced by the fairly large job it subcontracted out to a company called CTS. (GC Exh. 56). Of note is the fact that Moloney signed the subcontract with CTS and not Hillman, the purported Manager of the data networking side of Respondent BHE. (GC Exh. 56).

Jackson handles accounts receivable, accounts payable, and has final financial decision-making authority.⁸ (ALJD 5: 28-30) (216:14-18). Jackson, however, still works full time for the State of Washington and earned only \$5,995 in compensation from Respondent BHE. (123:15-25) (GC Exh. 59). According to Moloney's own testimony, he promised Jackson, "If...she opened a company...I'd help her run it and teach her." (ALJD 5: 12-13) (199:12-17).

D. Respondents Share Common Employees

At the time Respondent DCE closed its business in 2012, Journeymen Jesse Birdsall and Peter Buck worked for DCE. (ALJD 4:27, 38-41) (31:19-25) (GC Exhs. 12-13). The first non-management employee that Respondent BHE hired within days of opening on October 1, was Jesse Birdsall. (GC Exhs. 48, 65). Payroll records indicate that he worked 50 hours the pay period ending October 15. (GC Exhs. 48, 65). At the time Respondent BHE's operations began, and for several months thereafter, only Birdsall, Moloney, and Jackson worked for Respondent BHE. (GC Exhs. 47, 48, 59, 65). Employee Derrick Lancaster appears to have worked 8 hours during the pay period ending December 15 and then did not work again for Respondent BHE until the pay period ending January 19, 2013. (GC Exhs. 48, 65). Employee Brian Connelly started working for Respondent BHE during the pay period ending December 23. (GC Exhs. 48, 65). Employee Joshua Duncan started working for Respondent BHE during the pay period ending May 26, 2013. (GC Exhs. 48, 65). Employee Jordan Beers worked from pay period ending April 28, 2013 through the pay period ending July 27, 2013. (GC Exhs. 48, 65).

⁸ Jackson testified that she hired Rick Moloney, Wes Hillman, Jesse Birdsall, and Paul Roulet. (295:4-7). Roulet worked for Respondent BHE for 18 hours total. (GC Exh. 59).

By February 2014, Respondent BHE contends that Moloney, Hillman, and Jackson are managerial employees and that it has four non-managerial employees. (225:5-23). Only Moloney and Journeyman electrician Jesse Birdsall worked for both Respondents. (225:23-25; 226:1-13). Moloney and Birdsall were the only two, besides Jackson, to work for Respondent BHE until about the last pay period in December when Connelly started working for Respondent BHE. (GC Exhs. 47, 48, 59, 65).

E. Respondents Have Common Customers

Respondent DCE contends that during the time period of January 1, 2011 through the closing of the business, it had 57 customers and performed 118 total jobs. (R Exh. 3, 6). Out of its 57 customers, 19 became future customers of Respondent BHE. (GC Exhs. 64, 66) (R. Exhs. 3, 5, 6). It is important to note that these 19 common customers were responsible for providing Respondent DCE with 85 jobs out of a total of 118 jobs. (GC Exh. 64) (R. Exhs. 3, 5, 6). In other words, the majority of jobs performed by Respondent DCE were with customers that went on to be customers of Respondent BHE. (GC Exhs. 64, 66) (R. Exhs. 5, 6).

From October 1, 2012, to February 1, 2014, Respondent BHE performed 161 jobs. (R. Exh. 2). Approximately 64 jobs involved customers who were previously customers of Respondent BHE. (GC Exh. 66) (R. Exhs. 5, 6). Respondent BHE has approximately 21 customers in common with Respondent DCE. (GC Exhs. 64, 66) (R Exhs. 5, 6). The ALJ incorrectly found that the total sales from common customers was around \$365,000 out of \$1,235,000. This is in error as careful analysis of the records show that Respondent BHE Sales to customers in common was close to \$730,000 out of \$1,235,000. (GC Exhs. 61, 62, 63, 64, 66)(R. Exhs. 5,6) Indeed, Christiansen and

North Thurston School District - Respondent BHE's two biggest customers in terms of sales – are customers in common with Respondent DCE. (ALJD 6:28-30, 34-37) (GC Exh. 62, 66) (R Exh. 5).

Besides sharing many common customers, Respondent DCE started a job that was subsequently finished by Respondent BHE. (GC Exhs. 36, 43). More specifically, Respondent DCE worked on a project at Joint Base Lewis McCord as a sub-contractor to Evergreen Fire and Security. (230:6-15). Centennial Contractor was the general contractor on this project. (230:6-8). Evergreen Fire and Security sub-contracted to Respondent DCE a portion of the work (worth \$36,850) on the project run by Centennial Contractor. (GC Exhs. 36, 43). Respondent DCE was paid \$28,200 for the work it performed before a long lapse in the project and Respondent BHE was paid the remaining \$8,650 to complete the project since Respondent DCE closed during the lapse in the project. (109:1-6; 110:6-19) (GC Exh. 43). Centennial required that Respondent BHE complete paperwork in order to finish the job. (111:1-21) (GC Exh. 36).

On September 14, Moloney, along with Sandra Moloney and Cheri Jackson, signed a payment and performance personal guarantee warranting: (1) the payment of all individuals supplying labor, material, or equipment on the project; and (2) the full performance of all terms, covenants, and conditions of the agreement. (GC Exh. 36). Additionally, Moloney signed the W-9 Request for Taxpayer Identification number and certification form under penalty of perjury that the Employer's identification number listed on the form was his number. (GC Exh. 36).

On October 1, Respondent BHE signed a purchase order with subcontractor Evergreen Fire and Security agreeing to complete and assume all responsibilities for all work and warranting the work performed by Respondent DCE in exchange for completing the job and receiving the final payment of \$8,650. (136:16-25) (GC Exh. 43). Respondent BHE performed the work on the project in about January 2013. (109:7-9). While this job is depicted as punch list work, the \$8,650 earnings from the job appears as a relatively high paying job for Respondent BHE in contrast to many of its other jobs. (GC Exh. 62).

F. Respondents Share Equipment

As set forth above in Section III. A., the evidence disclosed a lack of arms' length transacting between Respondent DCE and Respondent BHE relating to equipment and vehicles. The ALJ found it critical that Respondent BHE purchased two additional vehicles - a Dodge Ram Van in April 2013 and a Chevrolet Van in December 2013 – from third parties. (R Exhs. 8, 9). Respondent BHE also bought tools in June 2013 from a third party as described in an email sent from sent from Moloney to Respondent BHE's attorney. (R Exh. 7). The ALJ failed to address that all of these additional purchases from a third party occurred well after the commencement of the investigation of the instant unfair labor practices.

G. Respondents Use Common Services

Both Respondents use Capital Bookkeeping Solutions to maintain their respective books. (70:9-14; 140:1-13) (GC Exhs. 27, 45). Respondents also use Stapp Financial to perform accounting services such as preparing tax returns. (71:9-21; 72:1-

9; 141:8-13) (GC Exhs. 28, 46). Both Respondents use the law firm of Davis, Grimm, Payne, and Marra for legal services. (GC Exh. 1(e)).

H. Respondent BHE Created to Evade the Act

Respondent DCE's attempt to withdraw from the Union based on poor economic conditions served to teach Moloney that continuing as a non-union contractor was not feasible because by withdrawing from the multiemployer pension plan, he would be fined \$331,069. (ALJD 4:11-13, 45-46) (38: 16-25; 39:1-2, 17-25; 40:1-2, 11-17) (GC Exhs. 4- 6). Moloney also viewed the Union as hindering viability as revealed in his attempt to withdraw from the Union in 2009 for economic reasons. (GC Exh. 4).

Additionally, in the last year of Respondent DCE operations, Moloney had phone conversations with Union Business Manager Callies every three to five months where Moloney discussed his view that the Union was not a good fit with Respondent DCE. (ALJD 32-36) (163:16-25; 164:1-11). Moreover, there was no evidence that Moloney informed the Union of financial problems. (163:16-25; 164:1-11).

IV. THE ALJ ERRED IN NOT FINDING RESPONDENTS TO BE ALTER EGOS

A. The ALJ Erred by Not Finding that Respondents Are Commonly Owned

It defies logic that Respondents are not alter egos of each other based on Moloney's integral role with both entities. Indeed, the Board has found alter ego status where the first entity's sole owner dominated the second entity but held no ownership interest in it. *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 488 (1985). Here, it is hard to imagine how Respondent BHE would even exist without Moloney. Thus the adage, "For purposes of this case, we wholeheartedly embrace the now-infamous 'duck test,' dressed up in appropriate judicial garb: 'WHEREAS it looks like a duck, and

WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck.” *US Reinforcing, Inc.*, 350 NLRB 404, 409 (2007) (Walsh dissenting)(quoting *Dole v. Williams Enterprises, Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989)).

Respondent BHE is unquestionably an alter ego as it started up without a hiatus after Respondent DCE purportedly went out of business and Moloney is the face and known quantity of both companies while Jackson works full-time for the State of Washington. A finding of common ownership may be made when the corporations are solely owned by members of the same family even if the same individuals are not shown to be owners of each corporation. *Crossroads Electric, Inc.*, 343 NLRB 1502, 1506 (2004); *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435 (2004); *Cofab, Inc.*, 322 NLRB 162, 163 (1996); *Kenmore Contracting*, 289 NLRB 336, 337 (1988); *Watt Electric Co.*, 273 NLRB 655, 658 n. 17 (1984); *E.G. Sprinkler Corp*, 268 NLRB 1241, 1244 (1984), *enfd. sub nom., Goodman Piping Products v. NLRB*, 741 F.2d 10 (2d Cir. 1984). Moreover, the Board will find an alter ego relationship where ownership is transferred from one family member to another, especially where as here, there is evidence of a lack of arms’ length transactions and/or continued control over the new company by the owner of the old company. *Walton Mirror Works*, 313 NLRB 1279, 1284 (1994) (alter ego when owners were brothers-in-law); *Kenmore Contracting*, 289 NLRB 336, 337 (1988) (common ownership between close family members where there is evidence of lack of arms’ length transactions).

Although Respondent BHE is technically owned by Jackson instead of Moloney, Jackson is a member of Sandra Moloney’s immediate family and is Rick Moloney’s in-

law. The Board has found that the common ownership factor is met when ownership remains within close familial relations, especially where as here, it appears that the prior owner maintains significant control over the new entity. The record revealed that day to day operations are controlled by Moloney because Jackson is still employed full time with the State of Washington. Moloney continues to exert significant control over Respondent BHE as the yet unchallenged decision maker with regard to bidding of work. While the ALJ noted that there was no evidence that Moloney shares in the profits of Respondent BHE, she failed to mention that there were no profits and that Moloney's salary was \$77,625.26 in contrast to Jackson's \$5,995 in earnings.

Additionally, Moloney holds the electrical administrator license for Respondent BHE, just as he did for Respondent DCE. If either entity is issued an electrical citation, Moloney is also cited as the holder of the electrical administrator license for both Respondents.

**B. The ALJ Erred by Failing to Find a Lack of Arm's Length
Transacting as Evidence that Respondents are Commonly Owned**

The Board pays close attention to lack of arms' length transactions when analyzing whether common ownership exists between close family members in alter ego cases. Here, there is a tortured history revolving around when and, even if, the equipment and vehicles belonging to Respondent DCE were sold instead of gifted to Respondent BHE. At a minimum, the evidence suggests a delayed payment plan triggered only by the filing of the instant unfair labor practice charge; at most, an all-out fallacy.

While there is an October 1 bill of sale from Respondent DCE to Respondent BHE for the vehicles and equipment, there is also an October 10 document signed by

Moloney stating that Respondent DCE gave Respondent BHE the 2006 Ford E-150 van, the 2005 F-150 truck, and the 1994 Dodge Ram van, among all other items. This October 10 document, coming nine after the October 1 bill of sale document, expressly stated that no money exchanged hands for the equipment and vehicles between Respondents. Indeed, this document was presented to the State of Washington Department of Licensing and the vehicles were titled as gifts, thus allowing Respondent BHE to avoid paying sales tax. Moreover, the application to transfer the title to Respondent BHE is signed by Moloney in his capacity as the registered owner of the Respondent BHE vehicles.

At some point after December 10, and probably in January 2013, Respondent DCE informed the Union in a written response to the Union's request for information, that Respondent DCE was selling equipment and vehicles to Respondent BHE, but that the first payment was not yet due. Even Moloney's 2012 tax return does not shed light on the date of the sale of vehicles because the 2006 Ford E-150 van was reported as being sold in January 2012 (almost a year before Respondent DCE closed up shop) and the sale of the 2005 Ford F-150 truck was reported to have occurred in December 2012.

Furthermore, Moloney himself testified that the first payment from Respondent BHE to Respondent DCE for the vehicles (the purported initial October check) was debited on February 7, 2013. February 7, 2013, nearly 9 days after the instant unfair labor practice charge was filed, is the same date that the titles for the 2006 Ford E-150 van and 2005 F-150 were reissued so as to show that they were purchased by Respondent BHE rather than gifted by Respondent DCE.

The ALJ ignored the many conflicting dates surrounding when, and even if, the sale of equipment and vehicles to Respondent BHE occurred. Moloney appears only to have attempted to clean up the status of whether the vehicles were gifts or were purchased after the filing of the charge. The only logical explanation for the conflicting dates of when the vehicles were sold is that Respondents tried to recreate arms' length transactions, after the fact, to better defend against the accusation that Respondents are alter egos. Remarkably, the application to re-register the vehicles clearly states that the titles were being corrected to show that they were not gifts on advice of attorney. This is critical because the sanitation of the titles occurred only after the instant Charge was filed.

By allowing for a very much delayed payment schedule for equipment and vehicles triggered only by the filing of the instant charge (if at all), Respondent BHE was able to have the tools and vehicles necessary to perform jobs from day one of operation.

C. The ALJ Erred by Failing to Give Weight to Moloney's Financial Guarantees on behalf of Respondent BHE as Evidence that Respondents are Commonly Owned

Moloney has also personally guaranteed to electrical supplier CED that he is jointly responsible for the payment of electrical supplies. Moloney signed the same personal guarantee required by CED for both Respondents. Moloney also signed a guarantee with General Contractor Centennial covering payment of employees, payment of material, and warranting full performance of the job thereby ensuring that Respondent BHE would be allowed to complete a project started by Respondent DCE.

The ALJ chalks Moloney's signature below Jackson's as guarantor for

Respondent BHE's purchases from an electrical supplier and his signing a performance bond with Jackson as not indicating ownership in Respondent BHE because Moloney testified that his signatures were required because Jackson was new and unknown in the industry. This is precisely the point.

Jackson was new and unknown in the industry and without Moloney's joint signature, Jackson would have been unable to get off the ground. Jackson was an unknown quantity who worked full-time for the State of Washington while Moloney was a reputable, known quantity in the electrical contracting community. Moreover, Moloney's signature, bound him jointly to Jackson's debt. Even if Moloney was just being a nice guy, he was financially on the hook for unpaid supplies or performance bond issues. Once again, Moloney provided support to Jackson that permitted Respondent BHE to get off the ground. This is a clear example of how Moloney is a dominate presence with Respondent BHE which the Board has found to support common ownership. *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 488 (1988).

In *Goldin-Feldman, Inc.*, 295 NLRB 359, n.3 (1989), the Board found common ownership due in significant part to the fact that the owner of the initial company exercised financial control over the new company by obtaining loans and providing financial guarantees for the new company and by accepting late payments from the new company on outstanding loans. There can be no doubt that, without Moloney's financial assistance and guarantees, Respondent BHE would not have gotten off the ground. Here, Moloney's personal guarantee allowed Respondent BHE to purchase parts and supplies on credit. Finally, Moloney's guarantee to Centennial led to one of Respondent BHE's first jobs and would not have been possible without Moloney's willingness to

cover payment of employees, payment of material, and warranting of full performance of the job.

D. The ALJ Erred by Not Finding Common Management or Common Supervision

Supervision and management of Respondent DCE resided almost entirely with Moloney. Moloney is essentially the sole supervisor and manager of Respondent BHE as well. Jackson may perform some paperwork for Respondent BHE, but all of the decisions about bidding for projects are effectively made by Moloney. Jackson works a full time job and the record does not reveal that Jackson actively manages or supervises the business on a day to day basis beyond administrative functions such as managing accounts payable and receivable and performing payroll duties. While Jackson testified that she hired Moloney, Birdsall, Hillman, and Roulet, they all were previously connected to Respondent DCE, except for Roulet who worked for Respondent BHE for a total of 18 hours.

Moreover, Moloney was the key witness to testify concerning Respondent BHE customers and business records, as pointed out by the ALJ, because he alone has in-depth knowledge of the work performed by Respondent BHE.

Hillman, another alleged manager, appears to have worked a total of 21 hours for Respondent BHE by the time the complaint in this case issued. Hillman began working on a more consistent basis for Respondent BHE nearly 10 months after Respondent BHE opened its doors when timesheets reveal that starting the week of July 29, 2013, Hillman began working on a weekly basis though often part-time hours. Moreover, a very large subcontract for data networking with CTS was entered into by Moloney and

not Hillman, thus revealing the extent of Moloney's involvement with the data networking side of the business.

The record evidence conclusively establishes that Moloney supervises and manages both Respondent DCE and Respondent BHE. Respondent BHE even called Moloney as its key witness for describing the work and operations of Respondent BHE because clearly the institutional knowledge resides with Moloney.

One of the most puzzling conclusions made by the ALJ is that "there is a total lack of evidence that Moloney has any management duties with BHE." This conclusion contradicts the ALJ's own factual description of Respondent BHE in which Moloney was described as, the "general manager, project manager, electrical administrator, and estimator for BHE."

In *Redway Carriers*, the Board paid close attention to the developments which took place at the time the alter ego was formed and not what may have happened at a later date. 301 NLRB 1113, 115 (1991); *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985), *enfd.* 813 F.2d 795 (6th Cir. 1987). *But see Crossroads Electric, Inc.*, 343 NLRB 1502 (2004). It makes no sense if Moloney is not a manager, and essentially the face of Respondent BHE, because Jackson works full-time for Washington State limiting her presence at Respondent BHE and Hillman only worked for Respondent BHE a total of 21 hours by the time the complaint in this case issued, more than six months after Respondent BHE had been formed. Moloney enabled Respondent BHE to get off the ground by meeting with customers, bidding jobs, supervising projects, co-signing guarantees and performance bonds, and helping Jackson run the business as he promised "if...she opened a company...I'd help her run it and teach her."

E. The ALJ Erred by Not Finding Common Employees

At the time Respondent DCE closed its business in 2012, it was down to two employees - Journeymen Jesse Birdsall and Peter Buck – and Moloney. A nascent Respondent BHE began operations with just three employees -- Jackson, Moloney, and Birdsall. Moloney and Birdsall were formerly employed by Respondent DCE and Jackson worked full-time for the State of Washington Gambling Commission.

While there are now 3 other consistent employees working for Respondent BHE, they started months after Respondent BHE was up and operating. Moreover, while Wes Hillman did not work for Respondent DCE, Respondent DCE subcontracted to him the data networking jobs he now performs in-house for Respondent BHE. Again, the ALJ failed to recognize that the shell of what remained of Respondent DCE became the core of Respondent BHE.

F. The ALJ Erred by Not Finding Common Customers

Respondents share at 21 customers in common. Moreover, the record evidence shows that during the relevant time period, 85 out of 118 jobs performed by Respondent DCE involved a future BHE customer. In short, most of the repeat customers of Respondent DCE became BHE customers. Of the 161 jobs performed by Respondent BHE during the relevant time period, 64 jobs involve former Respondent DCE customers. It is undeniable that many of Respondent DCE's customers have now become Respondent BHE's customers. Moreover, two of Respondent BHE's biggest customers in terms of sales are customers in common. Finally, the ALJ claimed, in error, that Respondent BHE sales to customers in common with Respondent DCE was around \$365,000 out of \$1,235,000 in sales when in reality the record evidence shows

that Respondent BHE sales to customers in common was close to \$730,000 out of \$1,235,000.

It is also noteworthy that Respondent BHE finished out a project for Evergreen Fire and Security that was initially a Respondent DCE project and that Moloney signed a personal guarantee warranting payment of employees, material, and cost and covering performance of the job. These facts showing a high percentage of common customers and even a shared job support an alter ego finding.⁹

G. The ALJ Erred by Not Finding Shared Equipment

Respondent DCE sold equipment and three vehicles to Respondent BHE after initially appearing to give these items free of charge to Respondent BHE. Now after reneging on the plan to gift the equipment and vehicles, Respondent BHE has been granted a very lax payment plan, with no record of any interest being charged, whereby after four months from October 1, only a fraction of the total amount owed to Respondent DCE had been paid. It is ironic that Respondent DCE allegedly no longer even exists, and in effect, Jackson, as owner of Respondent BHE, made payments to Moloney who was her subordinate.

While Respondent BHE established that it purchased two additional vehicles, these purchases are suspect because they were purchased after the instant unfair labor practice was already under investigation. Respondent BHE purchased a Dodge Ram Van in April 2013 -- more than 6 months after Respondent BHE began operations and several months into the unfair labor practice investigation. Additionally, Respondent

⁹ Respondents will cite to *Pinter Brothers*, 263 NLRB 723 (1982) where the Board did not find alter ego status when 37% of the customers of one company were customers of the other. Respondents will likely argue that since the number is less than 37% shared customers in this matter, Respondents could not be alter egos. *Id.* Respondents' reliance on *Pinter Brothers* is misplaced because that case lacked evidence of common supervision and common ownership, which are factors present in this matter.

BHE purchased a Chevrolet Van in December 2013 – more than a year after Respondent BHE opened for business and more than 6 months after the instant complaint issued. As for the tools, Respondent BHE purchased them in June 2013 and Moloney went out of his way to notify Respondent BHE’s attorney of the purchases so as to reengineer the evidence so that it appears that not all vehicles and equipment came from Respondent DCE. Little if any weight should be given to the purchase of these two vehicles and tools from vendors because they came well after Respondent BHE knew that new acquisitions would be under review due to the unfair labor practice investigation.

These facts strongly support a finding of alter ego status. In *ELC Electric*, 359 NLRB No. 20, slip op. at 15-16 (2012), the Administrative Law Judge, with Board approval, relied upon the financial assistance of an agent of one company to another in finding that two entities were alter egos of each other. See *D.L. Baker, Inc.*, 351 NLRB 515, 521 (2007) (lack of arms’ length transaction where financial transactions between two companies were vague and undocumented); *SRC Painting*, 346 NLRB 707, 721 (2006).

H. The ALJ Erred by Not Finding Common Services

Both Respondents use Capital Bookkeeping Solutions, Stapp Financial to perform accounting services such as preparing tax returns, and the law firm of Davis, Grimm, Payne, and Marra. In *Engineering Contractors, Inc.*, 357 NLRB No. 127, slip op. at 5 (2011), the Board approved an Administrative Law Judge decision in which retaining the same attorneys was a fact, among others, in finding alter ego status. See *Colonial Metal Spinning*, 310 NLRB 21, 23 (1993) (considering same accountant and

same attorney as facts, among others, in finding alter ego status). The ALJ failed to analyze the facts showing that Respondents used a common bookkeeping company, accounting company, and law firm.

I. The ALJ Erred By Not finding that Respondent BHE was Created to Avoid Respondent DCE's Bargaining Obligation

Unlawful motivation is not a necessary element to proving the existence of an alter ego relationship, but the Board does consider whether or not an alleged alter ego was created for the purpose of avoiding obligations under the Act. *McCarthy Construction*, 355 NLRB No. 10, slip op. at 2 (2010); *Diverse Steel, Inc.*, 349 NLRB 946 (2007). Respondent DCE made an unsuccessful attempt to terminate its collective bargaining relationship with the Union in 2009 to improve its economic viability. When Moloney realized that he would be unable to operate Respondent DCE as a non-Union electrical contractor without incurring withdrawal liability, he simultaneously closed Respondent DCE and became instrumental in the creation and dominant in the operation of Respondent BHE.

Moreover, Moloney had phone conversations with Union Business Manager Callies every three to five months during the year leading up to Respondent DCE going out of business. During these conversations, Moloney would talk about his dissatisfaction with the Union and claim that it was not a good fit for Respondent DCE.

Finally, on September 7, the Union announced that Respondent DCE was bound to the successor 2012-2015 Area Agreement. By September 27, Respondent DCE notified the Union that by October 1, it would no longer perform electrical work and close by December 31. On October 1, Respondent BHE commenced operations on the very date that Respondent DCE would no longer perform electrical work.

The totality of the circumstances suggests that Respondent DCE closed and Respondent BHE opened for the purpose of evading Respondent DCE's responsibilities under the collective bargaining agreement. Moloney had previously attempted to withdraw from the Union and planned to continue operating Respondent DCE as a non-Union electrical contractor. Had Moloney operated non-Union he would have faced a staggering amount of withdrawal liability.

While Moloney testified that he closed Respondent DCE because of a failure to make ends meet and the resulting personal debt, he did not deny that he had multiple conversations with Union Business Manager Callies expressing that the Union was not a good fit with his company for reasons other than financial reasons. Moreover, there was no evidence that Moloney informed the Union of financial problems.

Finally, Respondent BHE began operations shortly after the Union advised Respondent DCE that it was now covered by the Area Agreement through 2015 and there was no hiatus between the date Respondent DCE stopped performing electrical work and the date Respondent BHE commenced operations. Based on these facts, it is clear Respondent BHE opened for the purpose of evading Respondent DCE's obligations under the collective bargaining agreement.

J. The ALJ Erred by Failing to Find that Respondents are Alter Egos Thereby Failing to Order the Proper Remedy

The overwhelming evidence as set forth above, shows that Respondents are alter egos as they have "substantially identical" ownership, are supervised and managed almost entirely by Rick Moloney, have the same nature of operations and business purpose operating as licensed general electrical contractors performing mostly commercial work, have many common customers, and have almost identical equipment

and vehicles that Respondent BHE purchased from Respondent DCE via an ostensibly delayed payment schedule triggered only by the filing of the instant unfair labor practice. Moreover, the record evidence reveals that Respondent BHE was created to avoid Respondent DCE's union obligations shortly after the Union informed Respondent DCE that it was bound to its successor agreement.

The ALJ ignored critical pieces of evidence resulting in her failure to find that Respondent BHE is the disguised continuance of Respondent DCE and the two are alter egos. The ALJ overlooked that only after the instant unfair labor practice charge was filed, did Respondent BHE sanitize vehicle titles to reflect that they were purchased rather than gifted, cash a purported first payment for vehicles and equipment (October check), have Hillman work more than a minimal number of hours, and purchase additional equipment and vehicles from third parties. *Redway Carriers*, 301 NLRB 1113, 115 (1991); *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985), *enfd.* 813 F.2d 795 (6th Cir. 1987) (paying close attention to developments that took place at the time the alter ego was formed and not what may have happened at a later date).

Accordingly, the ALJ failed to order the proper remedy including that terms and conditions of the Union's collective bargaining agreement be applied to Respondents' bargaining unit employees, that bargaining unit employees be made whole for lost wages and benefits, that bargaining unit employees receive compensation for the adverse tax consequences of receiving lump-sum backpay payments covering periods longer than one year, that Respondents file a report with the Social Security Administration (SSA) allocating backpay to the appropriate calendar quarters, that

Respondents post an appropriate Notice to Employees, and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act..

V. CONCLUSION

General Counsel respectfully submits that the evidence in the record and relevant case law establish that Respondents violated Sections 8(a)(1) and (5) of the Act as alleged in the complaint.

DATED at Seattle, Washington, this 19th day of June, 2014.



Ann Marie Skov
Counsel for the General Counsel
National Labor Relations Board, Region 19
915 2nd Ave, Suite 2948
Seattle, WA 98174
Telephone (206) 220-6301
Fax: (206) 220-6305
Email: Ann-Marie.Skov@nlrb.gov

APPENDIX

Proposed Order

Deer Creek Electric, Inc. (“Respondent DCE”), and Black Hills Electric, Inc. and (“Respondent BHE”) (collectively, “Respondents”), its officers, agents, successors and assigns, shall

1. Cease and desist from:

a. failing and refusing to recognize and bargain collectively in good faith with IBEW, Local 76 (“Union”), concerning the wages, hours, and other terms and conditions of employment of the employees in the following units:

All journeymen, apprentice and helper electricians employed by the Charged Parties working within the Union’s territorial jurisdiction, excluding office clerical, professional, managerial employees, guards and supervisors as defined by the Act.

b. failing to apply, and/or continue in effect, all the terms and conditions for the bargaining unit that are set forth in our 2012-2015 Area Agreement with the Union.

c. creating an alter ego company and/or transferring unit employees’ bargaining unit work to any alter ego to avoid Respondents’ obligations to the Union, as unit employees’ collective bargaining representative.

d. in any like or related manner interfering with employees’ rights under Section 7 of the Act.

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

a. within 14 days of the Board’s Order, apply the terms of the Agreement to all unit employees working for either Respondents.

b. within 14 days of the Board’s Order, make unit employees whole for any losses suffered as a result of Respondents failure to apply the terms of the Agreement to unit employees; make all required fringe benefit contributions on behalf of unit employees, as required by the Agreement; provide compensation for the adverse tax consequences of receiving lump-sum payments covering periods longer than one year; and file a report with the Social Security Administration (SSA) allocating backpay to the appropriate calendar quarters.

c. within 14 days after service by Region 19, post copies of the Notice in this matter at all locations where Respondents' notices to employees are customarily posted; maintain such notices free from all obstructions or defacements; and grant to agents of the Board reasonable access to Respondent's facilities to monitor compliance with this posting requirement.

d. within 21 days after service by the Region, file with the Regional Director of Region 19 of the Board, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply with the terms of this order, including the exact locations where Respondents posted the required Notice.

NOTICE TO EMPLOYEES

**Posted by Order of an
Administrative Law Judge
of the National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

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

WE WILL NOT fail and refuse to bargain collectively and in good faith with IBEW, Local 76 (Union) as the exclusive bargaining representative of our employees in the following bargaining unit:

All journeymen, apprentice and helper electricians employed by the Charged Parties working within the Union's territorial jurisdiction, excluding office clerical, professional, managerial employees, guards and supervisors as defined by the Act.

WE WILL NOT fail to apply, and/or continue in effect, all the terms and conditions for the bargaining unit that are set forth in our 2012-2015 collective bargaining agreement with the Union.

WE WILL NOT create an alter ego company and/or transfer your bargaining unit work to any alter ego to avoid our obligations to the Union, as your collective bargaining representative.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL apply the terms of the Agreement to all unit employees working for either Deer Creek Electric or Black Hills Electric.

WE WILL make you whole for any losses suffered as a result of our failure to apply the terms of the Agreement to you; and **WE WILL** make all required fringe benefit contributions on your behalf, as required by the Agreement.

**DEER CREEK ELECTRIC, INC., and BLACK
HILLS ELECTRIC, Inc., alter egos**

(Employer)

Dated: _____
(Representative)

By: _____
(Title)

Dated: _____
(Representative)

By: _____
(Title)

CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions to the Administrative Law Judge's Decision were served on the 19th day of June, 2014, on the following parties:

E-file:

Gary Shinnars, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11602
Washington, DC 20570-0001

E-mail:

William T. Grimm, Attorney
Davis Grimm Payne & Marra
701 5th Ave, Ste 4040
Seattle, WA 98104-7097
wtgrimm@davisgrimmpayne.com

Kristina Detwiler, Attorney
Robblee Detwiler & Black PLLP
2101 Fourth Ave, Ste 1000
Seattle, WA 98121-2346
kdetwiler@unionattorneysnw.com



Kristy Kennedy
Office Manager