

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

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

Respondents.

and

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

Charging Party.

Case 19-CA-097260

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

Dated July 3, 2014

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I. INTRODUCTION

Deer Creek Electric, Inc. (“Deer Creek”) and Black Hills Electric, Inc. (“Black Hills”), (collectively referred to as “Respondents”), respectfully submit this *Brief in Opposition to the Counsel for General Counsel’s (“G.C.”) Brief in Support of Exceptions to the Administrative Law Judge’s (“ALJ”) Decision*. Respondents respectfully request that the Board affirm those portions of the ALJ’s Decision excepted to by the G.C. and affirm dismissal the charge.¹

The only issue in this case is whether Black Hills Electric is an alter ego of Deer Creek Electric. The determination of alter ego status is a question of fact based on all attendant circumstances. *U.S. Reinforcing, Inc.*, 350 NLRB 404, 404 (2007). General Counsel bears the burden of establishing that status. *Id.* Here, the ALJ has done a thorough job in laying out the facts of the case. Respondents refer the Board to the ALJ’s decision for a summary of the facts. ALJD p.2-8.² Additional details with references to the evidence will be provided within the specific argument sections where relevant.

The Board has long held that the test for finding alter ego status is that the two entities must have “substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.” *Cadillac Asphalt Paving*, 349 NLRB 6, 8 (2007)(emphasis added). Having some aspects in common is not sufficient. *Id.*; *T.E. Elevator*, 268 NLRB 1461, 1461 (1984) (“[D]espite the fact that there are many similarities between these business enterprises, we conclude that [the one company] is not the alter ego of [the other] because it does not have ‘substantially identical’ ownership, business purpose, management,

¹ Respondents have also filed *Limited Cross-Exceptions* and supporting *Brief*. Respondents also respectfully request that the Board correct the limited portion cross-exceptioned to by Respondents and consider that correction in affirming the ALJ’s decision.

² References to the ALJ’s Decision are indicated as “ALJD ____.”References to the hearing transcript are cited as “Tr. ”, indicating page and line numbers. References to Exhibits are cited as “GC Ex. ” or “Resp. Ex. ”, indicating General Counsel or Respondent.

customers, and equipment.”). In the present case, Administrative Law Judge Mary Miller Cracraft correctly found that Deer Creek and Black Hills did NOT have substantially identical management, equipment, customers, supervision or ownership.³ ALJD 9: 13-40, 10:1-9, 11:1-23, 12:8-29, 12:31-37. Therefore, she correctly concluded that the two companies are not alter egos. ALJD 12:40-44, 13:1-2.

The Counsel for General Counsel’s Exceptions to the decision are essentially an appeal of Judge Cracraft’s credibility findings, a province long reserved to Administrative Law Judges. Not only are the G.C.’s “facts” unsupported by the record and contrary to the Judge’s findings, the G.C.’s legal analysis is premised upon “facts” which are contrary to Judge Cracraft’s credibility determinations. Judge Cracraft specifically discredited any evidence which conflicted with her factual findings. ALJD 1:note 3. It is well-established Board policy that an administrative law judge’s credibility resolutions will not be overruled absent a clear preponderance of all the relevant evidence. *Paragon Paint & Varnish*, 317 NLRB 747,747 (1995); *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). This is particularly true where the credibility assessment relates to demeanor because “[c]redibility is a function not only of what a witness says but of how a witness says it.” *Medeco Security Locks*, 322 NLRB 664, 664 (1996).

³ She did find substantially identical business purpose and operations. As more fully explained in Respondents’ *Limited Cross Exceptions* and *Supporting Brief*, this conclusion was incorrect as the two entities do not share substantially identical business purposes and operations. Deer Creek’s business purpose was commercial electrical work, primarily public works projects. It was certified as a service disabled veteran-owned company which allowed it to perform work projects set aside for disabled veterans. ALJD 3: 27-33. Black Hills, on the other hand, cannot perform disabled veteran set aside work. ALJD 6:9-11. Moreover, its business purpose focused on design build, data networking and residential electrical work. ALJD 5:24-26. This work is distinctly different from Deer Creek’s.

Here Judge Cracraft clearly based her credibility assessment on the demeanor of the witnesses. As she explained at the beginning of her decision:

Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. **Witness demeanor and inherent probability of the testimony have been utilized to assess credibility.** Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

ALJD 1:note 3 (emphasis added). The “facts” outlined by the G.C. in its brief fly in the face of Judge Cracraft’s credibility assessment and were clearly discredited by her. Accordingly, as is Board policy, Judge Cracraft’s credibility assessments--and all that stem from them--should be affirmed. Her well-reasoned decision is based on her credibility determinations and supported by the record. Judge Cracraft correctly applied the law to the facts and concluded that Deer Creek and Black Hills were not alter egos. Respondents ask the Board to affirm the Administrative Law Judge’s dismissal of the unfair labor practice charge.

II. ARGUMENT

A. The ALJ correctly concluded that Deer Creek Electric and Black Hills Electric lack substantially identical ownership.

The ALJ correctly concluded that Deer Creek and Black Hills lack substantially identical ownership. As the facts show, the ownership of the two companies is completely different. Deer Creek was owned by Rick and Sandra Moloney. Tr. 192:24-25; 193:1. Black Hills is owned by Cheri Jackson. Tr. 124:7-9. Although Jackson and Sandra Moloney are sisters, Jackson neither owned nor worked at Deer Creek. Tr. 123:7-14. Sandra Moloney neither owns nor works at Black Hills and did not play an active role in Deer Creek. Tr. 193:2-4.

The G.C. would have us believe that Rick Moloney’s in-law status with Jackson is sufficient to overcome this complete lack of ownership connection. It is not. Except under

narrow circumstances, “the lack of substantially identical common ownership precludes a finding’ of alter ego status.” *U.S. Reinforcing, Inc.*, 350 NLRB 404, 405 (2007). Although close familial ownership is one of the narrow exceptions, the Board “will only find common ownership in the ‘close familial relationship’ context when ‘the owners of one company exercise considerable financial control over the alter ego.’” *Id.* at 406 (citing *Adanac Cole*, 293 NLRB 290 (1989)). In *Adanac*, the Board found no alter ego where the sole owner of one company only owned 10% of a brother's company. Here, the relationship is more remote and neither Jackson nor Moloney owned any part of the other’s company. Moreover, the Judge correctly found Rick Moloney does not have any financial control over Black Hills. ALJD 10:6-9.

The evidence supports the Judge’s finding. Cheri Jackson testified (and the ALJ credited her testimony) that Rick Moloney has no ownership interest in Black Hills. Tr. 296:18-19. He is a salaried managerial employee. Tr. 295:3-5, 296:15-16. He shares management responsibility with Hillman and Jackson. Jackson testified (and the ALJ credited her testimony) that she has final authority on all decisions, including hiring, firing and financial decisions. Tr. 296:20-25, 297:1-2.

The evidence does not support the G.C.’s contentions. Contrary to the G.C., the record does NOT reveal “that day to day operations are controlled by Moloney because Jackson is still employed full time with the State of Washington.” *G.C.’s Brief*, p. 22. The mere fact that a person maintains another job does not equate to an inability to be wholly in charge of her own company. Jackson testified (and the ALJ credited her testimony) that she works approximately 15-20 hours per week on the Black Hill Electric business. Tr. 315:13-15; ALJD 11:6-7.

The G.C.’s challenge to the ALJ’s finding that Moloney does not share in the profits of Black Hills is speculative at best. The G.C. offers no evidence to support her contention.

Essentially, she claims that because Jackson pays Moloney a salary for his work (something which she is legally required to do), while taking no salary herself (something which is legally allowed), Rick Moloney is somehow sharing in the profits of Black Hills. By the G.C.'s argument, anyone receiving any payments from Black Hills Electric—the other employees, the suppliers of goods, the landlord of the office space, etc.—is suspect as sharing in the profits. Such an argument is patently absurd. Moreover, Jackson did receive salary payments from BHE. She was paid \$10,000 in salary in 2013. GC Ex. 51.

Likewise, contrary to the G.C.'s argument, the use of the same electrical license by both Deer Creek and Black Hills does not create substantially identical ownership or show considerable financial control. As Moloney explained (and the ALJ credited his testimony) the electrical administrator license is assigned to the person, not a particular company. Tr. 114:17-25, 115:1-6; ALJD 1, note 3; ALJD 5, note 8. The Board has previously declined to find alter ego status simply because two companies used the same state operating license, issued to an individual who had been a partner in one company but was only an employee in the other. *T.E. Elevator*, 268 NLRB 1461, note 4 (1984) (affirming lack of alter ego status) *supplemented by* 291 NLRB 1184, note 10 (1988).

The ownership of Deer Creek and Black Hills are not substantially identical. Their lack of *any* common ownership cannot be overcome by the distant familial relationship between Rick Moloney and Cheri Jackson. There is no evidence of any significant financial control by Moloney over BHE. The ALJ's finding of a lack of substantially identical ownership should be affirmed.

B. The ALJ correctly found that the sale of assets between Deer Creek Electric and Black Hills Electric was at arm's length.

The ALJ correctly found that Black Hills Electric paid fair market value for the three vehicles and assorted tools which it purchased from Deer Creek. ALJD 7:8-11, 12:24-26; Tr. 219:5-220:21. Moloney testified (and the ALJ credited his testimony) that he set the sale prices after reviewing auction sites selling construction tools and vehicles, and consulting with his accountant. Tr. 219:5-16, 220:11-16. The vehicles and tools were old and had been fully depreciated. Tr. 220:1-4. The prices for used construction vehicles and tools were depressed due to the recession in the construction industry. As Moloney put it, "it was a buyer's market." Tr. 219:11-23. The General Counsel presented no evidence to establish that the prices set were not fair market value.

G.C. cites no legal basis for the argument that the sale of vehicles were not at arm's length. She focuses on the timeframe of when the record of sale was corrected with the State and sales tax paid. Initially, the transaction had been reported to the State of Washington as a gift, based upon the advice of the Company's accountant, who told Rick Moloney that doing so could save money on sales tax. Tr. 234:1-12. When Jackson realized what had happened, she corrected the information, reported the sale, and paid the sales tax. Tr. 234:14-25; 235:1-2. Exhibits in the record confirm that it was a sale and that Black Hills had paid for the vehicles and equipment. GC Exs. 16, 40, 41, 43, 44, 47 and 58. Moloney and Jackson testified (and the ALJ credited their testimony) that the trucks were sold, not given. Tr. 129:18-25, 130:1-5. ALJD 6:45-48, 7:1-3, 12:24-26, 28-29. The original bill of sale is dated well before any ULP was filed. Resp. Ex. 4. Likewise Jackson and Moloney testified (and the ALJ credited their testimony) that the sale occurred in October 2012, although payments occurred over a period of time. Tr. 129:18-25, 130:1, 220:17-21, 221:1-19, 234:25, 235:1-10; GC Ex. 47. Moloney gave a

reasonable explanation for the original gifting declaration—i.e. that it was based on advice from his accountant—and that Jackson corrected the certificate and paid the sales tax when she learned of it. Tr. 234:10-24. Again the ALJ credited their testimony and the exhibits which supported it. ALJD 1:note3.

It is not the province of the Board to question an ALJ's credibility determination. *Standard Dry Wall Products, supra*. Black Hills' purchase of some vehicles and tools from Deer Creek at fair market value does not alter the ALJ's findings in her alter ego analysis. *Reigel Electric*, 341 NLRB 198 (2004)(transfer of equipment at fair market value does not create alter ego); *First Class Maintenance*, 289 NLRB 484 (1988)(gift of used equipment between family members insufficient to establish financial control); *Pinter Bros*, 263 NLRB 723 (1982)(purchase of equipment at fair market value shows lack of alter ego status).

C. The ALJ correctly found that limited co-guarantees were insufficient to support substantially identical ownership.

The ALJ specifically rejected the G.C's argument that Rick Moloney's co-signing of a guarantee note indicates identical ownership. ALJD 10, note 17. Moloney explained (and the ALJ credited his explanation) that he co-signed the guarantee as the manager of Black Hills because Jackson was new in the industry. Tr. 231:19-25, 232:1-10.

The G.C. relies on a footnote in a twenty-five year old decision to argue that this guarantee shows identical ownership. Not only is the footnote stale dicta, it was supported by only two Board members. *Goldin-Feldman*, 295 NLRB 359, note 3, (1989). *Goldin-Feldman* is distinguishable from the present case. In *Goldin-Feldman*, a bank refused to provide a \$2.4 million line of credit (in 1980's dollars) until the patriarch of the family (and owner of the previous business) provided a half million dollars-worth of bonds as collateral. Over several years, the line of credit was increased to \$3 million. Each time, however, the father had to

provide bonds worth hundreds of thousands of dollars as collateral to the bank. In the present case, the guarantee was on a much smaller scale and only occurred on a single occasion. It was with a part supplier, not a bank. It did not involve providing collateral, but only a personal guarantee on payment for products. Millions of dollars were not involved. G.C. Ex.24. Moloney only co-signed as manager of Black Hills. Tr. 231:19-25, 232:1-10. Judge Cracraft correctly found Moloney's co-signature on the guarantee to be insufficient to show financial control over Black Hills.

The G.C. also focuses on G.C. Ex. 36. Contrary to her contention, this was not a guarantee of Black Hills' work by Deer Creek. The personal guarantee was made by Rick and Sandra Moloney warranting the work which Deer Creek had already done on a project. Tr. 228:11-25, 229:1-12. Because Black Hills later did some work on the project, Jackson guaranteed Black Hills' portion of the work. Any company who undertook to complete the project would have had to sign the guarantee. Tr. 111:1-3, 12-20. Deer Creek's work on the project had concluded several months earlier. Black Hills' work consisted of completing some "punch list" items at the end of the project, which is nothing more than tying up loose ends. Tr. 227:5-25, 228:1-9. Deer Creek and Black Hills each personally guaranteed the respective work that each company performed on the project. GC Exs. 36, 43; Tr. 137:3-7; 228:10- 230:6; ALJD 7:33-39.

Quite simply, neither document shows Moloney having financial control over Black Hills, and certainly not the level of significance necessary to impute identical ownership. *First Class Maintenance*, 289 NLRB 484 (1988); *Adanac Cole*, 293 NLRB 290 (1989). The ALJ's finding that Moloney lacked financial control over Black Hills should be affirmed. Therefore,

her conclusion that the two companies lacked substantially identical ownership should also be affirmed.

D. The ALJ correctly found insufficient evidence to show substantially identical management and supervision.

The ALJ correctly found that the management and supervision of the two companies was not substantially identical. ALJD 11:1-23. At Deer Creek, Rick Moloney was the sole manager of that operation. ALJD 3:38-44. Tr.193:5-6. He supervised all of Deer Creek's employees. Tr. 21:11-12. At Black Hills, on the other hand, management and supervision duties are shared between three individuals: Cheri Jackson, Wes Hillman and Rick Moloney. Each manages and supervises different aspects of the operation. Wes Hillman manages the data networking portion of the business and supervises individuals involved in data network jobs. Rick Moloney handles the electrical side. Tr. 296:16-17.ALJD 5:39-42, 6: 13-15. At Deer Creek, only Moloney obtained permits. At Black Hills, both Moloney and Hillman get the permits. Tr. 290:17-25. Hillman and Moloney report directly to Jackson, the president and owner of the business. Jackson makes final decisions on all major issues. She oversees the company, finances, expenditures, payroll and personnel. She reviews bids and handles the office administration. Tr. 294:22-25, 296:23-25; 297:1-2; ALJD 5:25-32. At Deer Creek, Moloney alone performed these functions. At Deer Creek, Moloney did not work with tools. Tr. 259:24-25, 260:1; AJLD 3:42. At Black Hills, Moloney works in the field with tools two to three days a week. Tr. 230:16-20, 237:6-10; ALJD 6:6.

Under established Board law, different management structures result in a finding of no alter ego relationship. In *T.E. Elevator*, the Board found that companies were not alter egos where one individual only had a one-third interest in the new company while he and his wife owned all of the former business where he had been the sole manager. The same individual was

responsible for day-to-day running of the new business but the other two owners also participated in major decisions. *T.E. Elevator*, 268 NLRB 1461 (1984), See, also, *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007), where the Board found no alter ego relationship despite some common ownership and substantially identical supervision and operations because of the different management structures at the two companies. In the instant situation, Rick Moloney has no ownership interest in the new company and shares responsibility for managing the new business with two other individuals. Thus, management of the two companies is not substantially identical.

The G.C. takes issue with the ALJ's findings concerning Jackson's role in the company but provides no evidentiary support to discredit Jackson's direct testimony on the subject—testimony which the ALJ specifically credited. Tr. 294-297; ALJD 11:6. The G.C. also reiterates some of her speculation about Jackson's being able to run the business while holding a second job (*see* section A above, p.4). Again these are unsupported attacks on the ALJ's well-founded credibility determinations, which must be rejected by the Board. *Standard Dry Wall, supra*.

The G.C. contends that she is puzzled over the ALJ's statement that "there is a total lack of evidence that Moloney has any management duties with BHE," ALJD 11:14-15. However, this sentence is perfectly consistent with the ALJ's other findings. Clearly, it should be read as a reference to Sandra Moloney, not Rick Moloney. Elsewhere, the ALJ recognized that Rick Moloney had management duties at the new company and was part of the three member management team. ALJD 5:39-6:13, 6:21, 11:6; Tr. 216:1-24, 296:20-22. On the other hand, there is no absolutely no evidence that Sandra Moloney, who was a 49% owner of Deer Creek

Electric, had any involvement with Black Hills Electric. Tr. 118:11-15. Thus the ALJ's statement is consistent with the record and with her other findings.

Moreover, as already explained, the fact that Rick Moloney performs some managerial and supervisory functions at Black Hills does not make the management and supervision of Deer Creek and Black Hills *substantially identical*. The G.C.'s assertion about aspects in common applies the wrong legal standard. Substantially identical, not some aspects in common, is the standard for determining alter ego status. *Cadillac Asphalt, supra; TE Telephone, supra*.

Recognizing that the three person management structure of Black Hills differs significantly from Deer Creek's, the G.C. also challenges Wes Hillman's managerial role in the company. She focuses on the fact that Hillman did not immediately come on board full-time. The timing is neither suspicious nor determinative. As Hillman and Jackson testified (and the ALJ credited their testimony), Hillman had agreed to become a manager of Black Hills in November or December 2012 (before any ULP charges were filed). Tr. 314: 22-25, 318:2-19; ALJD 6:13-19. Hillman began part-time for Black Hills in January or February 2013, so that he could wind up his own business enterprise and allow Black Hills to develop the data networking business to a level which would support his full-time employment there. Hillman is currently working full time for Black Hills and has had a full time employee working under him since mid-2013. Tr. 315:1-8; 317:15-19; 318:17-25; 319:1-18; ALJD 6:13-19.

The G.C.'s reliance on *Redway Carriers*, 301 NLRB 1113 (1991) for her argument that determination of alter ego status must be viewed at the moment the new company is formed is simply misplaced. As the Board has more recently noted,

...*Redway Carriers* does not establish a general principle for analysis of alter ego determinations. As...correctly point[ed] out, the Board does not hold that 'the fact finder is limited to the very beginning of a new entity....' The applicable precedent in the circumstances of this case is stated in *Blue &*

White Cabs, 291 NLRB 1047, 1048 (1988), where the Board, in finding no alter ego, held that ‘to restrict consideration of the alter ego issue to ... [the time of the alleged alter ego's] formation would distort the picture of ... [its] essential identity and purpose.’

Crossroads Electric, Inc., 343 NLRB 1502, 1506 (2004). The Board in *Blue & White Cabs* declined to focus only on the new company’s formative period in determining whether the alleged alter egos were substantially identical. Recognizing that it takes time for a new company to start up, the Board concluded that temporarily shared common ownership and management during formation did not create alter ego status. The Board dismissed the alter ego charges. Here the G.C. would limit the analysis to the time before the Union made any allegations of alter ego status. To paraphrase *Blue & White Cabs*, however, because that particular period covers only the formative stages of Black Hills’ existence; limiting the focus on this transitional stage would ignore the evidence that, by the time Black Hills had been fully phased in to carry out its intended purpose of design build, data networking and residential work, it was under a different management structure, had different customers, different equipment, different employees and different business purpose from Deer Creek. Thus, to restrict consideration of the alter ego issue to Black Hill’s formation would distort the picture of its essential identity and purpose.” *Blue & White Cabs*, 291 NLRB 1047, 1048 (1988). The ALJ correctly found that the management and supervision of the two companies was not substantially identical. Her finding should be affirmed.

E. The ALJ did not err in “not finding common employees”.

The G.C. seeks to find error in the lack of a finding of “common employees,” even though having common employees is not an element of alter ego analysis. The test is “substantially identical management, business purposes, operations, equipment, customers,

supervision, and ownership.” *Cadillac Asphalt Paving, supra*. There is no specific reference to employees or “common employees.”

Nevertheless, having a different work force could be an indication that operations are not substantially identical. Here the ALJ correctly found that Jackson hired Moloney, Hillman, Jesse Birdsall, and Paul Roulet. Tr. 295: 3-5; ALJD 5:29-33. Later, Black Hills hired Derrick Lancaster and Brian Connelly. ALJD 5:29-33; GC Ex. 59. In the spring two other employees, Joshua Duncan and Jordan Beers, were brought on board. Tr. 316:4-8; ALJD 5:29-33. GC Ex. 59. Of these, only one individual beside Moloney previously worked at Deer Creek, specifically Jesse Birdsall. Tr. 225:21-25, 226:1-6; ALJD 4:26-28, 6:22. The fact that some of these individuals were not hired immediately is immaterial. Contrary to the G.C. argument, the Board frequently considers events after the formation of the entity in assessing alter ego status. *Blue & White Cabs, supra*. The ALJ correctly found that Black Hills only employs one of Deer Creek's former employees. If anything, this fact weighs in favor of finding no alter ego status.

F. The ALJ correctly found that Deer Creek Electric and Black Hills Electric lacked substantially identical customers.

The ALJ correctly found the number of customers in common was not substantially identical. ALJD 6:26-37, 7:17-21, 12:31-37. Resp. Exs. 2-3; Tr. 206:19-25, 207:1-13, 209:9-18. The ALJ specifically credited Moloney’s testimony and account documents. ALJD 7:21. She questioned him on how he reached the numbers that he did. Tr. 209-213. He explained. He also explained the difference between customers and job. *Id.*

Moloney testified (and the ALJ credited his testimony) that since operations began on October 1, 2012, Black Hills has performed services for approximately 82 different customers. Resp. Ex. 2; Tr. 206:19-25, 207:1-13. Only twenty-one of those customers were former customers of Deer Creek. Resp. Ex.2; Tr. 209:9-18. Thus, only about 25% of Black Hills

customers also had work performed by Deer Creek. This fact strongly supports a finding of no alter ego status. See, *Pinter Bros.*, 263 NLRB 723 (1982), where the Board found that there was no alter ego relationship when a new company's customer base included only about 37% of customers from the old company. See also *T.E. Elevator*, 268 NLRB 1461 (1984) where the new company solicited all of the old company's 33 customers but only obtained work from 15 of them, or 45%. The new company also contracted with 13 new customers. Thus 53% of the new company's customer base was the same as the old company's. Nevertheless, the Board affirmed that new company did not have substantially identical customers and was not an alter ego. Here, the percentage of shared customers is considerably smaller. The ALJ correctly concluded that Deer Creek and Black Hills do not have substantially identical customers.

The G.C. seeks to confuse the facts by focusing on the number of jobs performed or the amount of money a particular customer brought in which is not the same thing as the number of customers. She provides no legal support for her theory of counting jobs or sales instead of actual customers. She again points to the one instance where Black Hills performed worked on a project that Deer Creek had previously worked on. However, Moloney testified (and the ALJ credited the testimony) that Deer Creek's work on the project had concluded several months earlier, and that Black Hills' work simply consisted of completing some "punch list" items at the end of the project. Tr. 227:5-22, 228:1-9, ALJD 7:23-27, 33-38.

With regard to the G.C.'s disagreement over the dollar figure for the amount of sales by common customers, the G.C. does not even support her own calculations with any specific reference to the record. Instead, she simply refers the Board to seven different exhibits containing pages and pages of dollar amounts. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991). Neither is the

Board like a pig hunting for truffles buried in the record. Furthermore, if the G.C. is including sales of data networking or design build in her calculations, Deer Creek did not do that type of work and it should not be included in the totals. Ultimately, however, whether or not the ALJ miscalculated the amount of customer sales is irrelevant. The percentage of shared customers, not the amount of sales, is sufficient to demonstrate whether the customers are substantially identical. *Pinter Bros., supra; T.E. Elevator, supra.* The ALJ's calculation of the number of customers is clearly based on the credited evidence. The ALJ's conclusion that the two companies do not have substantially identical customers should be affirmed.

G. The ALJ correctly concluded that Deer Creek Electric and Black Hills Electric lacked substantially identical equipment.

The ALJ correctly concluded that there was a lack of substantially identical equipment. ALJD 12:10-29. Although Deer Creek sold three of its vehicles to Black Hills, as well as some tools, Resp. Ex. 4, Black Hills also purchased vehicles, tools and equipment from other sources. These purchases included a van purchased from Rainier Dodge, a truck purchased from Good Guys, and tools and equipment purchased from several sources, including Craigslist, State Surplus, Platt Electric, and Travis Co. Tr. 297:21-25; 298:1-10; Resp. Ex. 7; Tr. 291:19-24; Resp. Ex. 8 and 9; Tr. 298-1-25; 299:1-17. Deer Creek also retained three other vehicles, as well as tools and equipment after the sale. Tr. 200: 8-19. Again, the G.C. raises the question of whether the sale of the vehicles was really at arm's length. This argument has been fully addressed in section B, above.

The G.C. also questions the timing of the purchase of additional equipment. The time of the purchases does not change the ALJ's factual findings. Contrary to the G.C. argument, the Board recognizes that the formation of a new company takes time. It frequently considers events beyond the start-up date of the entity in assessing alter ego status. *Blue & White Cabs, supra.*

The ALJ correctly found that there was a lack of substantially identical equipment. Her finding should be affirmed.

H. The ALJ did not err in “not finding common services”.

The G.C. seeks to find error in the lack of a finding of “common services,” even though using services in common is not an element of alter ego analysis. The test is “substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.” *Cadillac Asphalt Paving, supra*. There is no reference to “common services.” This is simply not a factor in an alter ego analysis.

The G.C. cites *Engineering Contractors, Inc.*, 357 NLRB No. 127, slip op. at 5 (2011) for her argument that retaining the same law firm must be evidence of alter ego status. However, that decision does not support her conclusion. *Engineering Contractors* involved both an alter ego analysis and a single employer analysis. These are two distinct theories and involve different consideration of different factors. One of the elements of single employer analysis is “common control of labor relations.” *Id. at *6*. No such element is part of an alter ego analysis. Thus the fact that the Respondent in *Engineering Contractors* “retained the same attorneys to represent both companies for labor relations matters” was relevant to the single employer analysis. It was not relevant to the alter ego analysis.

The G.C.’s reliance on *Colonial Metal Spinning*, 310 NLRB 21, 23 (1993) is similarly misplaced. There, in listing the similarities between the two entities, the ALJ did mention that they shared the same accountant and the same attorney. However, in concluding that the two were alter egos the ALJ focused on their having identical ownership and having been set up to avoid their Union obligations. Moreover, the Board never ruled on the ALJ’s alter ego analysis because that issue was not appealed. These decisions simply do not establish a principle that alter ego analysis involves the consideration of common legal and accounting services.

In the present case, only an alter ego theory has been alleged. Therefore, whether or not Respondents use the same law firm for legal advice is irrelevant. Judge Cracraft could properly decline to consider that in her alter ego analysis. Moreover, she did note that Deer Creek and Black Hills used the same accounting and bookkeeping firm for the first 9 months of Black Hills' existence. ALJD 7:40-41, 8:1-3, 12:11-12. Thus, G.C. cannot credibly claim that the ALJ failed to consider "common services" in her analysis.

I. The ALJ correctly found that the creation of Black Hills was not an attempt to evade Deer Creek's responsibilities under the NLRA.

The ALJ correctly found that the creation of Black Hills was not an attempt to evade Deer Creek's responsibilities under the Union contract. Although in early 2009 Moloney had initiated a withdrawal from the Union, he changed his mind. Tr. 38: 16-21. Contrary to the G.C.'s "facts," the assessment of unfunded pension liability could not have been the reason he changed his mind. The assessment was not sent to him until *after* he executed new letters of assent and agreement. GC Exs. 6, 8 and 9. On a couple of occasions, Moloney spoke to the Union about the quality of the workers that he was receiving from the Union Hall. Tr. 164:12-25, 165:4-13, 167:13-25. However, as the ALJ found "there is no evidence that Moloney's decision to cease doing business in 2012, three years after his attempt to withdraw, was due to this unhappiness with the Union. Rather, the record reflects economic reasons for Deer Creek's cessation of business." ALJD 10:21-24.

The ALJ's finding is fully supported by the record. In the final years of its operation, Deer Creek dealt with a worsening economy and recession. Public works projects, including those with disabled veteran preferences, dried up. Moloney and his co-owner wife, Sandra, dipped into their savings and incurred personal credit card debt of \$60,000 to try to keep Deer Creek afloat, but it was to no avail. The couple even cashed out the college funds they

maintained for their children. Tr. 194:7-25; 195:1-14. Jackson's decision was also clearly unrelated to any Union considerations. She had been considering opening a business of her own for some time. Tr.199:12-17. She knew nothing about any withdrawal liability. Tr. 125:6-16. Again, the ALJ credited Moloney's and Jackson's testimony. The G.C.'s speculation to the contrary is insufficient to overrule her credibility assessment. *Standard Dry Wall, supra*. The ALJ's finding that the creation of Black Hills was not an attempt to evade any responsibilities under the Act should be affirmed.

J. The ALJ correctly found that Deer Creek Electric and Black Hills Electric are not alter egos and correctly dismissed the complaint.

Having found that there was no substantially identical management, equipment, customers, supervision or ownership and that there was no attempt to evade obligations under the NLRA, Judge Cracraft properly found that there was no alter ego status.

Contrary to the G.C. argument, events which occur after the formation of the entity are frequently included in assessing alter ego status. The filing of a unfair labor practice charge does not limit the assessment to the initial startup period. *Blue & White Cabs*, 291 NLRB 1047, 1048 (1988). In *Blue & White Cabs*, the Board specifically declined to limit the assessment of alter ego status to the time frame during which an unfair labor practice was alleged to have occurred. This was the same time frame during which the second entity was forming its business. To limit the assessment to that initial period would distort the picture. Moreover, the G.C.'s argument is improperly premised on a disagreement with the ALJ's credibility assessment.

In the present case, Jackson was forming a new company. It took time for the business to develop. Therefore, employees were added slowly, customers were developed, equipment was purchased over time. The late payment of sales tax and correction with the State was explained and the ALJ credited the explanation. Tr. 234:10-24. She also credited the testimony

that it was a sale and not a gift. Tr. 129:18-25, 130:1-5; ALJD 6:45-48, 7:1-3, 12:24-26, 28-29. Although Hillman did not become a full-time employee immediately, he agreed to be hired in November or December 2012—well before any unfair labor practice complaint was filed. Tr. 314:22-25; 318:2-19; ALJD 6:13-19. Again, his initial part-time status was explained and credited. Tr. 315:1-8; 317:15-19; 318:17-25; 319:1-18; ALJD 6:13-19. The hiring of other employees and purchasing of equipment reflects a new business forming its essential identity and purpose. The ALJ properly considered all that was undertaken during the entire time that it has taken Black Hills get up and running.

The ALJ properly found no substantial identicalness in ownership. The owners are completely different. The distant family relationship lacks sufficient financial control to overcome this. She correctly found no substantial identicalness in management or supervision. Although Moloney managed all of Deer Creek, he only manages a portion of Black Hills. The management structure is clearly different. The ALJ also correctly found that there was a lack of substantially identical equipment. Black Hills purchased vehicles and tools from several sources. Finally, the ALJ correctly found that there was a lack of substantially identical customers. The ALJ correctly concluded that Deer Creek Electric and Black Hills Electric are not alter egos. The G.C.'s exceptions should be rejected and the ALJ's well-reasoned decision should be affirmed.

III. CONCLUSION

For all of the above-stated reasons, the Counsel for General Counsel's Exceptions must be rejected, the ALJ's decision affirmed and the Unfair Labor Practice charge dismissed.

DATED at Seattle, Washington this 3rd day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2014 I caused to be filed with the Executive Secretary of the National Labor Relations Board via the NLRB E-Filing system the above and foregoing “*Respondents’ Opposition to Counsel for General Counsel’s Brief in Support of Exceptions to the ALJ’s Decision.*”

E-FILE:

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I further certify that on July 3, 2014, true and correct copies of the same were served via electronic mail upon the following individuals at the email address specified for them as shown below:

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