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**COUNSEL FOR THE GENERAL COUNSEL’S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Andrew T. Miragliotta, Counsel for the General Counsel in the above case, submits this post-hearing brief to the Honorable Geoffrey Carter, Administrative Law Judge.

**STATEMENT OF THE CASE**

**A. Proceedings Before the Hearing**

Local 100 United Labor Unions (the Union) filed a charge with Region 15 of the National Labor Relations Board (Board) on February 24, 2015, alleging Empire Janitorial Sales & Service, LLC, (Respondent) engaged in unfair labor practices in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act), in Case No. 15-CA-146938, by refusing to recognize and bargain with the Union as a successor employer. GC-1(a).<sup>1</sup> The Union later amended the charge on April 9, 2015 (GC-1(c)), April 29, 2015 (GC-1(e)), and May 11, 2015 (GC-1(g)). All charges were served on Respondent. GC-1(b), (d), (f), (h). A Complaint and Notice of Hearing (CNOH) issued on February 8, 2016, with a hearing scheduled for March 7, 2016. GC-1(i). The Board later rescheduled the hearing for March 16, 2016. GC-1(j). Respondent filed its Answer to the CNOH on February 16, 2016. GC-1(m).

Administrative Law Judge Geoffrey Carter presided over the hearing on March 16, 2016, in New Orleans, Louisiana.

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<sup>1</sup>References to the Exhibits of the General Counsel, Respondent, and Joint Exhibits will be designated as “GC- #”, “R- #,” and “J- #” respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as “Tr. at.” An Arabic numeral(s) after “Tr. at” is a reference to a specific page of the transcript, and Arabic numerals following page citations reference specific lines of the page cited.

## **B. Overview of the Facts**

### **i. Background of the Entities at Issue**

Respondent is a Louisiana limited liability corporation which has performed janitorial, maintenance, and engineering services for locations in Southeast Louisiana since June 2000. Tr. at 15, 22-25. Respondent self-identifies as a provider of “janitorial, day porter, physical plant maintenance, minor maintenance, landscape, and contract labor” services. J-2, at 26. In October 2014, Respondent participated in a public bidding process for a contract to perform janitorial and maintenance services for the Orleans Parish School Board (OPSB). Tr. at 16, 22-24. OPSB awarded Respondent the contract to perform these services on or about December 16, 2014. J-13.

The Union is not affiliated with any other labor organizations and represents low wage workers in Louisiana, Arkansas, and Texas. Tr. at 42-43. Members of the Union participate in the organization by attending meetings and voting in internal union elections. Tr. at 43, 2-7. The Union deals with and engages in collective bargaining with various employers concerning employees’ conditions of work, grievances, and wages. *Id.* at 8-17. On June 18, 2012, pursuant to an Election conducted under the Board’s Rules and Regulations, the Board certified the Union as the exclusive collective bargaining representative for a group of custodial, maintenance, and landscaping employees employed by GCA Services Group, Inc. (GCA) within the New Orleans metropolitan area. GC-3. The Union also represented, and still represents, GCA employees at other locations in the New Orleans metropolitan area. Tr. at 50, 16-17.

GCA is a Delaware corporation and provides janitorial, maintenance, and grounds management services to numerous facilities nationwide, including schools within the New Orleans metropolitan area. Tr. at 46, 18-21. GCA entered into a contract with OPSB to perform janitorial services beginning on January 1, 2010. GC-2(b), at 4. GCA entered into a separate

contract with OPSB to perform maintenance services for OPSB beginning in August 2011. GC-2(f) at 4. After the election discussed above, the Union and GCA bargained and signed a Bargaining Agreement effective from October 5, 2012, through October 4, 2015. GC-4.

OPSB is a political subdivision of the State of Louisiana. *LSA-R.S. 17:51*. OPSB is part of the public school system and administers schools in the New Orleans metropolitan area. Tr. at 49, 13-15. OPSB publicly issues Requests for Proposals (RFP) for all contracted professional services, procures the services through a public, competitive bidding process, and awards contracts to the lowest responsive and responsible bidder. *LSA-R.S. 38:2212*.

**ii. Work Performed by GCA Services prior to February 2, 2015**

GCA started performing janitorial services for OPSB in early 2009, pursuant to an emergency contract. GC-2(e), 2. In December 2009, GCA submitted a bid for a full contract to perform janitorial services in response to OPSB's RFP #10-0015. *Id.* OPSB awarded GCA the bid on about December 15, 2009, and the parties contracted for GCA to perform the janitorial services beginning January 1, 2010. GC-2(b), at 4. The term of the agreement was for three years, with the option for OPSB to extend the agreement for two one-year extensions. *Id.* at 6.

The custodial specifications listed in the RFP required GCA to implement a comprehensive "custodial management program" to provide service to "all current OPSB buildings." GC-2(c) at 21. The custodial management program, among other things, required the successful bidder to provide all personnel for cleaning duties, train the personnel, and to provide supplies, equipment, and adequate staff to clean for evening and day activities in all buildings. *Id.* Calenthia Bartholomew, a cleaning attendant and lead custodian who worked for GCA,

testified her daily duties at GCA included dusting, mopping, sweeping, vacuuming, and cleaning bathrooms. Tr. at 100, 10-13.

GCA simultaneously performed maintenance services for OSPB. In June 2011, in response to RFP #11-0028, GCA “re-bid” for the contract to perform maintenance services at OPSB schools. GC-2(k), at 2. OPSB awarded GCA the bid on about August 16, 2011, and the parties entered into an agreement for GCA to perform the maintenance services in August 2011. GC-2(f) at 4. The term of the agreement was for three years, with the option for OPSB to extend the agreement for an additional two year term. *Id.* at 7.

The maintenance specifications listed in the RFP required GCA to provide for the “timely and efficient removal, repair, replacement, and/or installation of Routine Maintenance items, inspections, and preventative maintenance in the existing OPSB School Sites.” GC-2(i), at 25. The specification included “24-hour on call repair service including the labor, equipment, supervision, and... the materials necessary and reasonably incidental to the routine maintenance repairs at OPSB school sites.” *Id.* Stafford Brignac,<sup>2</sup> former General Manager for GCA, explained at hearing that GCA provided a full array of maintenance services including lot repairs, inspections, air conditioning and electrical work, plumbing, and painting. Tr. at 92, 2-4. Brignac further testified GCA performed basic carpentry (such as replacing damaged flooring), electrical work (such as replacing light bulbs), maintenance on the heating, ventilation, and air conditioning (HVAC) system, plumbing (such as repairing toilets), painting (of things like drywall), and services on the exterior of buildings (such as checking drainage). Tr. at 92-93.

GCA employed custodians, maintenance technicians, porters, working leads, and janitors to perform the work required by RFPs #10-0015 and #11-0028. GC-7. The RFPs and agreements

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<sup>2</sup> The transcript erroneously repeatedly spells Mr. Brignac’s last name as “Brigmac.”

required GCA to perform work at “all current OPSB buildings” and the “OPSB school sites.” GC-2(c) at 21; GC-2(k), at 2. Testimony and documentary evidence show GCA performed work at McMinn Magnet School, Benjamin Franklin Elementary School and its satellite extension, Mahalia Jackson Elementary School, McDonogh 35 High School, Bethune School, a medical center on General Meyer Boulevard, vacant sites like the Moton Charter School and Priestley Elementary, and the OPSB’s headquarters known as the Timbers Buildings. Tr. at 48-49; 91; 123; J-10. A roster of GCA employees from January 2015 further confirms GCA staffed custodians and maintenance employees at these locations. GC-5.

**iii. Respondent Replaces GCA Services Group, Inc., as the Provider of Janitorial and Maintenance Services to the Orleans Parish School Board**

OPSB issued a new Request for Proposals (RFP #15-0016) on or about September 19, 2014, J-13 (¶7), in an effort to consolidate the janitorial and maintenance services into one contract. Tr. at 98-98. While GCA had performed janitorial and maintenance services for OPSB pursuant to two separate contracts (GC-2(b), GC-2(f)), RFP #15-0016 included janitorial and maintenance services in the same bid request. J-2. Both GCA and Respondent submitted bids in response to RFP #15-0016. J-13. Ultimately, on about December 16, 2014, OPSB selected Respondent to perform the janitorial and maintenance work specified in the RFP. *Id.* at ¶12.

In advance of the transition from GCA to Respondent, during January 2015, Respondent’s Operations Manager Dayle Hernandez visited each of the six functioning schools, which were still serviced by GCA to offer jobs to the current GCA employees. Tr. at 123, 9-19. He left employment applications and criminal background check forms for employees at each of the sites, and met with the GCA custodians to discuss the changeover from GCA to Respondent.

*Id.* at 17-25. Calenthia Bartholomew, then employed by GCA, testified Hernandez told all the custodians in a group meeting at the Mahalia Jackson School they would “all have positions” with Respondent. Tr. at 102-03.

OPSB and Respondent entered into an agreement on about January 31, 2015, to begin work immediately on the next business day. J-7. GCA ceased operations on January 31, 2015, and Respondent commenced operations on February 2, 2015, (J-13 (¶2)) in the middle of the OPSB academic school year. J-11. Respondent’s Operations Manager Hernandez confirmed there was “no break” between when GCA stopped services for the OPSB schools and when Respondent commenced services at the schools. Tr. at 122-23. Ultimately, Respondent did not even notify Calenthia Bartholomew she had been hired. Tr. at 103, 12-14. Bartholomew first realized she worked for Respondent, rather than GCA, when Respondent distributed new shirts to the custodians. *Id.* at 15-19.

#### **iv. Work Performed by Respondent after February 2, 2015**

By February 2, 2015, Respondent had hired enough custodians and maintenance technicians, including former GCA employees, to take over servicing OPSB without any interruption. Tr. at 125, 18-20. The majority of Respondent’s debut workforce was comprised of former GCA employees. J-10. Respondent employed thirty custodians, leads, and maintenance technicians, by February 2, 2015. J-10. Twenty-one of Respondent’s thirty employees had worked for GCA immediately prior to the transition on February 2, 2015 from GCA to Respondent. *Id.*

By February 5, 2015, Respondent employed thirty-five non-managerial employees to perform the custodial and maintenance services for the OPSB contract. J-10; J-13 (¶22). Twenty-

three of those employees previously worked for GCA. J-10. A week and a half after Respondent began servicing OPSB, on February 11, 2015, Respondent employed thirty-eight non-managerial employees to work at OPSB buildings. J-10; J-13 (¶ 24). At that time, twenty-three out of thirty-eight of Respondent's employees were working for GCA at the time of the transition between companies.<sup>3</sup> J-10.

Respondent, in its first several weeks of operations, employed custodians, day leads, night leads, and maintenance technicians. J-10. Towards the end of February 2015, Respondent hired a few "floaters." *Id.* Floaters are not assigned to a specific location and only work when Respondent is short-handed. Tr. at 32, 1-9.

Respondent admits that after February 2, 2015, Respondent's employees performed the same custodial/janitorial work formerly performed by GCA employees. J-13 (¶ 19). Calenthia Bartholomew, who worked for both GCA and Respondent, testified she used brooms, mops, and dusters to perform the same type of duties for both employers. Tr. at 100-01; 103-04. When Bartholomew began working for Respondent, Respondent did not train or re-train Bartholomew how to sweep, give her any special training, or tell her to do anything different than she had been doing. Tr. at 104-05. Operations Manager Hernandez admitted there is nothing special or unique about the equipment Respondent gives to its custodians. Tr. at 127, 6-10. Hernandez also admitted some procedures, like the method for mopping restrooms, are dictated by the Request for Proposal to which Respondent must adhere. Tr. at 128, 2-19. The overall custodial

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<sup>3</sup> Exhibit J-10 does not show whether employee "Dewitt T. Perkins" was a "GCA or non-GCA" employee because the parties disagreed about his status. Exhibit GC-7 shows Perkins had been employed by GCA for almost five years at the time of the transition. Perkins worked at the Moton Charter School, which is one of the schools serviced by both GCA and Respondent. Accordingly, Perkins undoubtedly counts as a previously-GCA employee.

specifications in RFP #15-0016 applicable to Respondent and RFP #10-0015, applicable to GCA, are virtually identical. GC-2(c); J-2; J-13 (¶ 19).

After February 2, 2015, the maintenance work performed by Respondent's for OPSB employees was also the same as the maintenance work previously performed by GCA. The agreement between OPSB and Respondent for maintenance services states the scope of work to be performed is described in RFP #15-0016. J-7, at 7. RFP #15-0016 lists the maintenance specifications as including "preventative maintenance", "corrective maintenance," and more specifically, basic carpentry, electrical work, maintenance on the HVAC system, plumbing, painting, and services on the exterior of the buildings. J-2 at 45-49. GCA was similarly responsible for both corrective and preventative maintenance, GC-2(f) at 6, and also performed basic carpentry, electrical work, maintenance on the HVAC system, plumbing, painting, and services on the exterior of the buildings. Tr. at 92-93.

Respondent's employees not only performed the same janitorial/custodial and maintenance services as its predecessor GCA's employees, they also performed the same services at the same facilities. RFP #15-0016 listed the serviceable school sites, office buildings, and vacant sites which required janitorial or maintenance work. J-2. Testimonial and documentary evidence shows GCA performed work at the same facilities listed in RFP #15-0016. Tr. at 48-49; 91; 123 at 9-23; J-10; GC-5. Purchase Orders billed to OPSB from GCA show GCA performed services at the same six schools and the same three office building sites currently serviced by Respondent. GC-2(m); GC-2(n).

Respondent's employees still perform the same services as GCA's employees, at the same facilities. Currently, Respondent employs twenty-five non-managerial employees to

perform the services required under Respondent's contract with OPSB. J-13 (¶26). Respondent's Operations Manager Hernandez testified that even with only twenty-five employees, Respondent is able to complete the services required by the OPSB contract, and there has been no reduction in the workload or number of facilities to service. Tr. at 134, at 10-19.

**v. Refusal to Bargain**

As previously noted, the Board certified the Union as the exclusive collective bargaining representative for a group of custodial, maintenance, and landscaping employees employed by GCA on June 18, 2012. GC-3. The Union later collectively bargained with GCA and secured a Bargaining Agreement effective from October 5, 2012, through October 4, 2015. GC-4. Based on these dates, the Union still represented GCA's bargaining unit employees and had a collective bargaining agreement in place when OPSB transitioned its janitorial and maintenance service provider from GCA to Respondent.

The Union's State Director Rosa Hines learned in January 2015 that Respondent would be the new employer of the Union's represented employees working at OPSB facilities. Tr. at 51, 3-8. Hines contacted each of the bargaining unit employees to determine how many of GCA's employees Respondent intended to hire, tr. at 51-52, using a list obtained from an information request sent to GCA. GC-5. She verified a majority of GCA's former employees were working for Respondent, and that a majority of Respondent's workforce was comprised of former GCA employees. Tr. at 52-53. Accordingly, on February 5, 2015, Hines wrote Respondent's President and Owner Charlie Lusco a letter which stated the Union represented its predecessor GCA's employees, Respondent was a legal successor to GCA, and therefore, the Union was requesting to begin collective bargaining to ensure stability of labor relations. J-8. The letter also proposed

several bargaining dates convenient for the Union. Hines testified she sent the letter and Lusco later admitted he received the letter. Tr. at 19-20.

Respondent’s President Lusco responded by letter to Hines dated February 11, 2015. J-9. Lusco denied Respondent’s workforce was mostly comprised of former GCA employees, and stated he was not interested in negotiating a collective bargaining agreement with the Union. *Id.* Hines stated she received the letter around February 13, 2015. Tr. at 55, 14-16. After that rebuff, Hines called Respondent President Lusco and left a message in March or April 2015. Tr. at 55, 19-20. Respondent did not return her call and the parties have had no contact whatsoever since then. *Id.* at 17-24.

**vi. Summary of Respondent’s Workforce After Commencing Operations**

<b>Date (2015)</b>	<b>Significance of Date</b>	<b>Former GCA Employees Employed by Respondent</b>	<b>Total Non-managerial Employees Employed by Respondent</b>	<b>Percentage of Respondent’s Non-managerial Workforce who worked for GCA</b>
February 2	Respondent begins operations	21	30	70%
February 5	Union makes demand for bargaining	23	35	66%
February 11	Respondent refuses to bargain with Union	23	38	61%

**ARGUMENT**

**I. The Union is a Labor Organization Within the Meaning of Section 2(5) of the Act**

Respondent, in its Answer (GC-1(m)) to the Complaint (GC-1(i)) denied the Union’s status as a labor organization “for lack of sufficient information.” The record evidence shows the Union is a labor organization within the meaning of Section 2(5) of the Act.

Section 2(5) of the Act defines a “labor organization” very broadly, as “any organization of any kind... in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152 (5).

The Board certified the Union as the exclusive collective bargaining representative for a group of custodial, maintenance, and landscaping employees employed by GCA on June 18, 2012. GC-3. The Union’s State Director Rosa Hines testified members of the Union participate in the organization by attending meetings and voting in internal union elections. Tr. at 43, 2-7. The Union successfully bargained with GCA for a collective bargaining agreement concerning wages, rates of pay, hours, and conditions of work. GC-4. The Union filed the Unfair Labor Practice Charge here in its role “dealing with employers concerning... labor disputes.” GC-1(a). Accordingly, for all these reasons, the Union satisfies the definition of a “labor organization” within the meaning of Section 2(5) of the Act. *See Butler Mfg. Co.*, 167 NLRB 308, 308 n. 2 (1967) (holding that an organization qualified as a labor organization because it bargained with an employer concerning wages, hours, and other working conditions).

## **II. Respondent is a Successor under Board law**

Respondent is a legal successor with an obligation to bargain with the Union – the representative of its predecessor’s bargaining unit employees. The Board, as determined by the United States Supreme Court, employs two main tests to determine whether a new employer constitutes a “successor” bound by the duty to bargain with its predecessor’s employees’ bargaining unit representative. “An employer... succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a ‘substantial and representative

complement,’ in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a ‘substantial continuity between the enterprises.’” *Hydrolines, Inc.*, 305 NLRB 416, 421 (1991) (citing *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41-43 (1987), citing, *inter alia*, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972)). Respondent satisfies the criteria of both tests, and therefore, is a legal successor to GCA.

**a. Respondent is a Successor under the *Burns* “Majority” Test**

The first test, from *NLRB v. Burns International Security Services*, is mathematical and considers whether a majority of the new employer’s employees are represented by a union. 406 U.S. at 281 (1972). In *Burns*, the Supreme Court upheld the Board’s finding that where “a majority of the [new employer’s] employees are represented by a recently certified bargaining agent,” the new employer is a successor and is bound by a duty to recognize and bargain with its predecessor’s union under Section 8(d) of the Act. *Id.* at 281. After *Burns*, the Board has consistently held the applicable “majority of employees” should be gauged by the percentage of the *successor’s* employees who were formerly bargaining unit employees of the predecessor. *Fall River*, 482 U.S. at 46 n. 12 (1987).

The Board and the Supreme Court have further held the appropriate time for measuring whether a majority of the successor’s employees were formerly bargaining unit employees of the predecessor is when the successor has hired a “substantial and representative complement” of employees. *Id.* at 47-48. In deciding when a “substantial and representative complement” exists, the Board considers whether the job classifications required for operation “were filled or substantially filled,” whether the operation “was in normal or substantially normal production,”

and whether there is an expected substantial expansion. *Id.* at 49; *Hayes Coal Co.*, 197 NLRB 1162, 1163 (1972); *St. John of God Hospital Inc.*, 260 NLRB 905 (1982). The Supreme Court approved the Board's rule and criteria for the determination in noting "the employer generally will know with tolerable certainty when all its job classifications have been filled or substantially filled, when it has hired a majority of the employees it intends to hire, and when it has begun normal production." *Fall River*, 482 U.S. at 50.

Here, Respondent had hired a "substantial and representative complement" of employees within its first week of operations. By February 2, 2015, Respondent "filled or substantially filled" the job classifications required for operations. For its first day, Respondent employed individuals in the classifications of day lead, night lead, custodian, day custodian, and maintenance/repair. J-10. Tr. at 125-26. Respondent only has one other job classification: floater. *Id.* Floaters are not assigned to a specific location and only work when Respondent is short-handed. Tr. at 32, 1-9. Respondent, during the spring of 2015, never employed more than three floaters at one time, and they therefore represent a minor percentage of Respondent's workforce. J-10. Therefore, because Respondent had filled vacancies in five of its six classifications, with the sixth classification being a small part of its workforce, within its first week of operations, Respondent had filled or substantially filled the job classifications required for operations.

Respondent was also in normal or substantially normal production in its first week of operations. There was "no break" between when GCA stopped servicing OPSB schools and when Respondent began servicing the schools. Tr. at 122-23. Respondent commenced operations on February 2, 2015, in the middle of the OPSB academic school year. J-11. Respondent hired GCA employees to ensure there was sufficient staff to complete its janitorial and maintenance

services on day one of operations. Tr. at 123, 6-8. Respondent started with thirty employees on February 2, 2015, and within its first week of operations, on February 5, 2015, staffed thirty-five non-managerial employees at OPSB sites. J-10; J-13 (¶22). About a week later, on February 11, 2015, Respondent employed thirty-eight non-managerial employees to perform work for OPSB. J-10; J-13 (¶24).

While Respondent's President took the position that he prefers to look at a thirty day period as enough time to hire permanent positions for a contract, by April 1, 2015, about *two months* after Respondent commenced normal operations, Respondent still only employed thirty-nine employees – only one more employee than it employed *two weeks* after it started operations. J-13 (¶25). While Respondent attempted to show the OPSB schools were understaffed and not in normal production by eliciting testimony that Operations Manager Hernandez was forced to perform janitorial work at the schools, tr. at 130-131, Hernandez later testified that currently, over a year after Respondent commenced operations, he is *still* performing custodial duties at the schools. Tr. at 134, 5-7. The record evidence undermines Respondent's attempt to show it was initially understaffed. Respondent initially operated with between thirty and thirty-eight employees, and now, a year later, Respondent can still complete the normal production required with only twenty-five employees. Tr. at 134, 10-12.

Respondent's President Lusco even admitted that while Respondent prefers thirty days to staff a job, Respondent is fully capable of putting together sufficient staff "overnight." Tr. at 33, 13-16. The evidence shows Respondent, in fact, did put together a sufficient staff to be in normal or substantially normal production within a week of taking over janitorial and maintenance services at the OPSB locations from GCA.

The Board does consider an employer's relative certainty of expansion in determining when a successor has hired a substantial and representative complement of employees. *St. John of God Hosp., Inc.*, 260 NLRB 905, 905-06 (1982). The Board will delay the time of the "substantial and representative complement" beyond when the successor employer commences operations if the successor employer is relatively certain it will expand and announces as much. *Id.* For instance, in *St. John of God Hospital*, the Board prolonged the date of the employer's substantial and representative complement after it started operations because the employer announced it had employed only twenty percent of the employees it reasonably expected to employ within four to five months, and was in the midst of a recruitment campaign. *Id.* at 906. Here, Respondent failed to present any at hearing that it intended to dramatically expand its staff after February 2015. As noted above, after two months of operations, Respondent still employed about the same number of employees it had employed after two weeks. J-10. Respondent currently employs five non-managerial employees fewer than when it commenced operations on February 2, 2015 – to do the same amount of work. Tr. at 134, 10-12. Here, Respondent had no basis for any certainty of expansion, thus there is no reason to delay the substantial and representative complement timeframe beyond when Respondent commenced operations.

Based on the foregoing, the testimonial evidence and documentary evidence show Respondent had "filled or substantially filled" the job classifications required for operations on its first day, was in normal or substantially normal production on the first day or within the first week, and had no reasonable expectation of dramatic expansion. Accordingly, Respondent had hired a substantial and representative complement of employees on its first day, February 2, 2015. Nonetheless, if Respondent's initial increase in staff would delay the date of a substantial

and representative complement of employees from the onset of its operations at OPSB on February 2, 2015, then Respondent still had hired a substantial and representative complement of employees no later than February 11, 2015, when it employed a maximum of thirty-eight employees – a number that would remain consistent for at least two more months, and only decrease from that point forward.

Determining when Respondent hired a substantial and representative complement of employees allows for the measurement of whether a majority of Respondent’s employees were formerly bargaining unit employees of the predecessor. The Summary of Respondent’s Workforce shown above in Section *B.vi* shows that throughout Respondent’s first weeks of normal operations, a majority of Respondent’s employees were represented by the Union. On February 2, 2015, the day Respondent commenced services for OPSB, twenty-one of Respondent’s thirty non-managerial employees were bargaining unit employees working for GCA immediately prior to the transition. J-10. After ten days of normal production, on February 11, 2015, twenty-three of Respondent’s thirty-eight non-managerial employees previously were bargaining unit employees of GCA. *Id.* Accordingly, by February 2, 2015, or February 11, 2015, a majority of Respondent’s employees were represented by the Union. Therefore, Respondent is a successor employer and is “bound by a duty to recognize and bargain” with the Union under Section 8(d) of the Act. *Burns*, 406 U.S. 272, 281 (1972).

**b. Respondent is a Successor under the *Fall River* “Substantial Continuity Between Enterprises” Test**

The second, more expansive test, from *Fall River Dyeing & Finishing Corp. v. NLRB*, considers whether there is “‘substantial continuity’ between the enterprises.” 482 U.S. at 43. This inquiry examines a number of factors including, but not limited to: 1) “whether the business of

both employers is essentially the same;” 2) “whether the employees of the new company are doing the same jobs;” 3) “whether the new entity has the same production process or produces the same products;” and, for 4) “the same body of customers.” *Id.* The Board has also considered other criteria such as whether “the new employer uses the same plant” and whether “the same or substantially the same workforce is employed.” *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 815 (1973). The Supreme Court later elaborated that “in conducting the analysis, the Board keeps in mind the question whether ‘those employees who have been retained will understandably view their job situations as essentially unaltered.’” *Fall River*, 482 U.S. at 43 (citing *Golden State Bottling Co.*, 414 U.S. 168, 184 (1973)). Analysis of these factors reveals substantial continuity between the predecessor GCA and the successor Respondent such that Respondent is obligated to bargain with the Union.

First, “the business of both employers is essentially the same.” *Fall River*, 482 U.S. at 43. GCA performs custodial/janitorial and maintenance services at many locations, including school districts. GC-2(e), at 2. Respondent also performs janitorial, and maintenance, including at school districts. Tr. at 15-16. Therefore, this factor weighs in favor of finding substantial continuity between the enterprises.

Second, Respondent’s employees “do the same jobs” as GCA’s employees did under the OPSB contract. *Fall River*, 482 U.S. at 43. GCA employed custodians, working leads, and maintenance technicians to do the janitorial and maintenance work specified in RFP #10-0015 and #11-0028. GC-7. Respondent employs day and night leads, custodians, and maintenance technicians to do the janitorial and maintenance work specified in RFP #15-0016. J-10. Respondent stipulated and the testimonial and documentary evidence shows Respondent’s

employees do the same janitorial jobs formerly done by GCA's bargaining unit employees. J-13 (¶ 19). Respondent did not train or re-train employees or tell them to do anything different than they had been doing when they worked for GCA. Tr. at 104-05. The custodial specifications in RFP #15-0016 applicable to Respondent and RFP #10-0015 applicable to GCA are nearly identical, GC-2(c); J-2; J-13 (¶ 19), which means certain job techniques not only remained the same in practice, but were required to be the same by contract as well.

Respondent's maintenance technicians also do the same jobs formerly performed by GCA's bargaining unit maintenance technicians. Both employers' technicians are or were responsible for performing preventative and corrective maintenance, as well as basic carpentry, electrical work, maintenance on the HVAC system, plumbing, painting, and services on the exterior of the buildings. J-7, at 7; Tr. at 92-93. GCA's former General Manager Stafford Brignac gave specific examples of each area of work performed by GCA's maintenance technicians, and each identified area is still the responsibility of Respondent's maintenance technicians. J-7, at 7; Tr. at 92-93. Therefore, because Respondent's and GCA's employees did and do the same janitorial and maintenance jobs, this factor weighs in favor of finding substantial continuity between the enterprises.

Third, Respondent and GCA's employees use "the same production process" in providing the same services to OPSB. *Fall River*, 482 U.S. at 43. Again, Respondent did not re-train custodians or instruct them to do anything different than they had been doing when they worked as bargaining unit employees for GCA. Tr. at 104-05. Custodians still used brooms to sweep the floors and still used mops to mop the floors. Tr. at 103-04. The custodians' "duties never changed," and they used the same types of commercial equipment to complete those duties. Tr.

at 103-04. Operations Manager Hernandez testified Respondent did not have its own unique process for sweeping and the brooms, mops, and buckets it provided to its custodians were not special or unique. Tr. at 127. Hernandez further testified that some processes, like the method for mopping restrooms, are dictated by the Request for Proposal to which Respondent must adhere. Tr. at 128, 2-19. The documentary evidence shows the custodial specifications in RFP #15-0016 and RFP #10-0015 applicable to Respondent and GCA, respectively, are almost identical, further demonstrating Respondent's and GCA's bargaining unit employees used the same production processes, sometimes as required by contract. GC-2(c); J-2; J-13 (§ 19). Therefore, because Respondent's and GCA's employees used the same production processes to render the same services, this factor weighs heavily in favor of finding substantial continuity between GCA and Respondent's enterprises.

Fourth, in the context of this case, Respondent and GCA have "the same body of customers." *Fall River*, 482 U.S. at 43. Here, the services provided by the bargaining unit employees at issue were performed for GCA and Respondent for only one customer: OPSB. Accordingly, because Respondent and GCA were performing services for same customer, this factor weighs in favor of finding a substantial continuity between the enterprises.

While the above factors are specifically listed in *Fall River* as criteria for determining whether there is substantial continuity between enterprises, the Board has historically considered other criteria as well. In *Border Steel Rolling Mills*, for instance, the Board stated that based on *Burns*, the Board should consider whether "the same or substantially the same work force is employed" to determine whether there is substantial continuity in the employing industry, and opined it was "perhaps the most important" factor. 204 NLRB at 821. Here, as discussed above,

twenty-one of Respondent's thirty non-managerial employees servicing OPSB buildings worked as GCA bargaining unit employees immediately prior to the transition. J-10. Respondent employed nearly the same workforce as GCA when it started operations, which further weighs in favor of finding a substantial continuity between the enterprises.

The Board has also considered "whether the new employer uses the same plant" to determine whether a successor has substantial continuity with its predecessor. *Border Steel*, 204 NLRB at 821. Respondent's employees perform the same jobs previously performed by GCA's former bargaining unit employees in the same facilities. Respondent's employees work in the same six operating schools and three office buildings where GCA's bargaining unit employees worked, as well as several of the same vacant sites. Tr. at 48-49; 91; 123 at 9-23; J-2; GC-2(m); GC-2(n). Accordingly, this factor establishes further continuity between GCA and Respondent.

The Board has regularly gauged whether employees of the successor are working "under the same supervisors," as the predecessor's employees, and here, Counsel for the General Counsel concedes the transition between companies resulted in new supervision. *Fall River*, 482 U.S. at 43. However, the Board has explicitly held "not all of these criteria need to be present to warrant a finding of continuation of the employment industry." *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 815 (1973). Moreover, Respondent's counsel argued at hearing Respondent may not be a successor because it did not acquire any assets of GCA. However, the Board and the courts have routinely found assets need not be acquired to make an employer a legal successor. In *NLRB v. Houston Building Service*, the Fifth Circuit agreed with the Board and found an employer to be a successor even without acquiring any physical assets of its predecessor. 936 F.2d 178 (5th Cir. 1991). The District of Columbia Circuit also agreed and specifically held an

employer need not purchase a predecessor's business or acquire its assets to be deemed a *Burns* successor. *Harter Tomato Products Co. v. NLRB*, 133 F.3d 934 (D.C. Cir. 1998). There, the court applied *Fall River* and determined it would be a mistake to rely upon one single factor, rather than the multi-faceted test used by the Supreme Court. *Id.* at 938. Accordingly, because the Board, as confirmed by appellate courts, has regularly held an employer need not purchase its predecessor's assets to be considered a successor, here, Respondent is still a successor without having purchased any assets from GCA.

Based on the foregoing, the factors the Board assesses when determining if there is substantial continuity in the enterprises overwhelmingly demonstrate Respondent is a successor to GCA under Board law. Here, the business of both employers is the same and the employees are performing the same jobs, in the same job classifications, using the same methods of production, to provide the same services to the same single customer. At the time of the transition, the workforce remained substantially the same, and the employees still work in the same facilities for Respondent as it had for GCA. As noted above, the Supreme Court stated the question underlying all of this analysis is “whether ‘those employees who have been retained will understandably view their job situations as essentially unaltered.’” *Fall River*, 482 U.S. at 43 (citing *Golden State*, 414 U.S. at 184). Calenthia Bartholomew, a custodian who worked for both enterprises, testified that Respondent informed her and other custodians they would all have jobs with Respondent after the transition, she was not re-trained in any way, was never informed to do anything different than she had been doing, and only became aware her employer had changed because she was given a different shirt to wear. Tr. at 104-05. Given the “totality of the circumstances,” Bartholomew, a retained employee, reasonably viewed her job as “essentially

unaltered.” 482 U.S. at 43. Thus, based on all of the factors discussed above, the “substantial continuity” of operations makes Respondent a “successor” under the *Fall River* test.

### **III. Respondent Failed and Refused to Recognize and Bargain with the Union**

As shown in Section II, above, Respondent is a successor to GCA and therefore, has a duty to recognize and bargain with the Union. *Aircraft Magnesium*, 265 NLRB 1344, 1346 (1982). Respondent’s failure and refusal to recognize and bargain with the Union constitutes a violation of Section 8(a)(5) of the Act. *Id.*

In a letter on February 5, 2015, the Union asserted Respondent was a legal successor to GCA and requested to begin collective bargaining. J-8. Respondent’s President and Owner Lusco admitted to having received the letter. Tr. at 19-20. The letter specifically requests to bargain “for the purposes of affecting a collective bargaining agreement.” J-8. This letter therefore represents a “valid request to bargain” as it “clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit...” *Marysville Travelodge*, 233 NLRB 527, 532 (1977).

Upon a valid request for bargaining, it has long been recognized “the obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring.” *J.H. Rutter-Rex Manufacturing Company, Inc.*, 86 NLRB 470, 506 (1949). Instead, Respondent denied a majority of its workforce was comprised of formerly-GCA bargaining unit employees and refused to bargain with the Union. J-9. Since sending a letter refusing to bargain on February 11, 2015, Respondent has not contacted the Union in any way. Tr. at 55, 17-24. Therefore, because Respondent, as a successor employer, owes the Union, a labor organization under the Act, a duty to recognize and

bargain, and it has failed and refused to meet with or bargain with the Union, Counsel for the General Counsel respectfully urges Your Honor find Respondent has failed in its duty to recognize and bargain with the Union in violation of Section 8(a)(5) of the Act.

#### **IV. Respondent's Defenses**

##### **a. "Overbroad" Bargaining Unit Argument**

In its Answer and at hearing, Respondent argues the bargaining unit described in the Complaint is "overbroad" because only part of GCA's former bargaining unit now works for Respondent. However, in *Simon DeBartelo Group*, the Board explicitly held:

"[i]t is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to ... transfer to a new owner, so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation." 325 NLRB 1154, 1155 (1998) (citing *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981); *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26, 28 (1975), *enfd.* 526 F.2d 74 (1st Cir. 1975)).

Here, successorship is not defeated by the mere fact that only a portion of GCA's operation is now being performed by Respondent. The former GCA bargaining unit employees constitute a separate, appropriate bargaining unit with Respondent. Further, at all relevant times Respondent employed a substantial and representative complement of employees, the former GCA bargaining unit employees "comprised a majority of the unit under the new operation." *Id.* The Board in *Simon DeBartelo* went on to say that once the Board determines a sufficient number of former bargaining unit employees of the predecessor constitute a majority of the successor's employees, the Board "considers such circumstances as whether or not there has been a long hiatus in resuming operations, a change in product line or market, or a change of location or scale of operations. ... However, a change must be extreme before it will alter a finding of

successorship.” *Id.* (citing *Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978)). Here, just as in *Simon DeBartelo*, the change between operations was not “extreme.” *Id.* There was *no* hiatus in resuming operations, no change in the services offered, and no change of location or scale of operations. Accordingly, the evidence shows the criteria are not present to alter a finding of successorship simply because only a portion of GCA’s operation is now being performed by Respondent.

#### **b. The Union’s Presumption of Majority Status**

At hearing, Respondent’s counsel argued Respondent can overcome the Union’s rebuttable presumption of majority status, which continues despite the change in employers, to avoid any bargaining obligation. Tr. at 137-38; *see Fall River*, 482 U.S. at 41 (“Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers.”) In *St. Elizabeth Manor, Inc.*, the Board strengthened a union’s presumption into an *irrebuttable* presumption and held once a successor employer’s obligation to recognize an incumbent union has attached, “the union is entitled to a reasonable period of time for bargaining without challenge to its majority status....” 329 NLRB 341, 344 (1999). The Board later overruled *St. Elizabeth Manor* in *MV Transportation* and returned a union’s presumed majority status back to a rebuttable presumption. 337 NLRB 770, 773 (2002). However, finally, in *Lamons Gasket Company*, the Board explicitly overruled *MV Transportation* and returned to *St. Elizabeth Manor*, holding that when a new employer assumes an operation and conditions of successorship are satisfied, the new employer has a duty to bargain with a union that represented its predecessor’s employees, and the Board bars any challenge to the union’s representative status for a reasonable period of time. 357 NLRB No. 72 (2011). The Board went on to define a

“reasonable period of time” to be “no less than 6 months after the parties’ first bargaining session and no more than 1 year.” *Id.* Here, Respondent has refused to bargain with the Union and refused to hold even a single bargaining session, and therefore, Respondent should not be able to challenge the Union’s continuing majority status. *Id.*

Assuming, *arguendo*, however, the irrebuttable presumption imposed by *St. Elizabeth Manor* only applies to proceedings like decertification efforts, employer petitions, or rival petitions, then Respondent still did not offer sufficient evidence to overcome the Union’s rebuttable presumption of continued majority status. The Board determined the successor employer in *Williams Energy Services*<sup>4</sup> overcame the Union’s rebuttable presumption of majority status when the employer received a petition, signed by all unit employees, stating they no longer wanted to be represented by the incumbent union. 340 NLRB 764, 764-65 (2003). The Board reasoned in light of the petition, “*at the time of its withdrawal of recognition*, the [successor employer] had, at a minimum, a good-faith uncertainty that the union had the support of a majority of unit employees.” *Id.* at 765 (emphasis added). Respondent here did not and cannot meet such a burden. At the time Respondent refused to bargain with the Union, Respondent, by its own admission, had only just learned the Union represented GCA employees. Tr. at 28, 2-7. Respondent never received a petition from its employees stating they no longer wanted to be represented by the Union. Respondent failed to introduce any evidence to suggest it had any proof whatsoever it could rely upon to form a “good-faith uncertainty” the Union had the support of a majority of unit employees *at the time it refused to recognize and bargain with the Union*. *Williams*, 340 NLRB at 765. Instead, Respondent unlawfully flatly refused to bargain with the

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<sup>4</sup> *Williams* was explicitly decided after and in light of the fact that *MV Transportation* had overruled *St. Elizabeth Manor*. 340 NLRB at 764

Union because of its misguided reliance upon the fact it is a “private sector employer in a Right to Work State.” J-9. Respondent failed to elicit any concrete testimony, from Union State Director Hines or any past or current employees, about the level of support the Union had during February 2015. The only reference to the level of support is Hines’ testimony that no employees informed her they no longer supported the Union, and to the contrary, that the employees “had faith in the Union” to fix any problems. Tr. at 77, 13-22.

Further, Respondent’s attempt to elicit evidence about the number of dues paying Union members there were among its employees in January and February 2015 cannot be relied upon to justify Respondent’s refusal to bargain. *Virginia Sportswear*, 226 NLRB 1296, 1301 (1976) (“Majority union support, the Board has made clear, is not to be confused with majority union membership, as there is no necessary correlation between the number of employees who join a union and pay dues and the number of employees who favor union representation.”) In *Virginia Sportswear*, the Board rejected the successor employer’s attempt to rebut the Union’s presumption of a majority when the successor employer introduced evidence of the number of dues paying members of the predecessor’s bargaining unit employees prior to the transition between employers. *Id.* The Board held evidence of that kind “is inadequate, without more, to afford an objective basis for a reasonable doubt of majority union support.” *Id.* (citing *Terrell Machine Company*, 173 NLRB 1480, 1481 (1969), *enfd.* 427 F.2d 1088 (C.A. 4, 1970), *cert. denied* 398 U.S. 929; *Harpeth Steel, Inc.*, 208 NLRB 545 (1974); *Wald Transfer & Storage Co. and Westheimer Transfer & Storage Co., Inc.*, 218 NLRB 592 (1975)). This evidence is further undermined, again, because Board law, requires the “good-faith uncertainty” be present **at the time of the refusal to recognize and bargain with the Union.** *Williams*, 340 NLRB at 765. A

timely uncertainty is unlikely since Respondent repeatedly argued it had no knowledge of the Union at the time of the transition between GCA and Respondent, and therefore, Respondent cannot simultaneously credibly claim it had good-faith uncertainty about the level of Union support at the time it refused to recognize and bargain with the Union.

### **CONCLUSION**

The evidence at hearing demonstrated that during the first week of Respondent's operations in February 2015, a majority of Respondent's employees, consisting of a substantial and representative complement in an appropriate bargaining unit, were former bargaining unit employees of GCA, and the similarities between Respondent and GCA manifest a substantial continuity between the enterprises. As the Union is a labor organization within the meaning of the Act and Respondent admits it has refused to recognize and bargain with the Union, the evidence supports and Counsel for the General Counsel respectfully requests a finding that Respondent has violated Sections 8(a)(1) and (5) of the Act.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2016, I electronically filed a copy of the foregoing Counsel for General Counsel's Brief to the Administrative Law Judge with the National Labor Relations Board Division of Judges and forwarded a copy by electronic mail to the following:

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