

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

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ART, LLC; GLEN LAKE’S MARKET, LLC;  
THOMAS B. WARTMAN; THOMAS W. WARTMAN;  
VICTORIA’S MARKET, LLC

Respondents,

Case Nos.	18-CA-168725
	18-CA-168726
	18-CA-168727
	18-CA-168728
	18-CA-168729

and

UNITED FOOD AND COMMERCIAL WORKERS,  
LOCAL 653

Charging Party.

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**CHARGING PARTY’S REPLY BRIEF TO RESPONDENTS’ ANSWERING BRIEF**

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Pursuant to Section 102.46(e) of the NLRB Rules and Regulations, Charging Party United Food and Commercial Workers, Local 653 (“Union” or “Local 653”), hereby submits its Reply Brief to Respondents’ Answering Brief as filed with the Board on August 28, 2017.

This Reply Brief will respond to Respondents’ arguments in the order that they appear in Respondents’ Answering Brief.

**I. RESPONDENTS HAVE NOT IDENTIFIED ANY PERSON WITH WHOM THEY WERE FORCED TO “CEASE DOING BUSINESS” IN VIOLATION OF SECTION 8(b)(4)(ii)(B); THUS, RESPONDENTS’ SECTION 303 LAWSUIT IS OBJECTIVELY BASELESS.**

As thoroughly argued in the Charging Party’s primary brief, to deem picketing unlawful pursuant to Section 8(b)(4)(ii)(B) of the National Labor Relations Act (“NLRA”), the U.S. Supreme Court has expressly ruled that “an object must be to force or require their employer or another person to cease doing business with a *third* person. Thus, much that might

argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited.” *United Brotherhood of Carpenters and Joiners of America v. NLRB (Sand Door)*, 357 U.S. 93, 98 (1958) (emphasis added).<sup>1</sup>

It is critical to understand that not all secondary activity is prohibited by the NLRA. Instead, Section 8(b)(4)(ii)(B) narrowly “describes and condemns specific union conduct directed to specific objectives.” *Laborers Dist. Council of Minn. v. NLRB*, 688 F.3d 374, 377 (8th Cir. 2012). It is a unanimously recognized principle that coercive conduct by a union against a secondary or neutral employer is unlawful *only if* undertaken with a prohibited objective. *Soft Drink Workers Union Local 812 v. NLRB*, 657 F.2d 1252, 1261 (D.C. Cir. 1980); *Carpenters Local 1506 (Eliason & Knuth of AZ, Inc.)*, 355 NLRB No. 159, at 3 (2010).

While Respondents are correct that the conduct prong of the 8(b)(4) analysis is not in dispute here, it remains the case that Respondents have not—and cannot—establish that the Union’s picketing and other activity was carried out with requisite “cease doing business” objective prohibited by Section 8(b)(4)(ii)(B). Respondents’ federal Section 303 complaint simply does not allege that it was coerced to cease doing business with anyone as a result of the Union’s picketing and other activity. Nor does Respondents’ Answering brief identify any such entity with whom it was forced to cease doing business. The lack of a prohibited object is fundamentally fatal to Respondents’ baseless Section 303 claim against the Union.

Rather than identify any person or business with whom it was forced to cease doing business as the statute requires, Respondents continue to argue for an interpretation of Section 8(b)(4) that would improperly render *all* secondary activity unlawful.

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<sup>1</sup> Like the ALJ, Respondents’ wholly failed to address the U.S. Supreme Court’s authoritative interpretation of Section 8(b)(4) as set forth in *Sand Door*.

First, Respondents claim that secondary picketing is unlawful if the neutral employer feels compelled to “put pressure upon” the primary employer, regardless of whether the Union has sought to exploit or disrupt any business relationship. *Resp.s’ Answering Br. at 20–22*. It is impossible to imagine how such a standard could *not* obviously be applied to any and all secondary activity. In literally any case of secondary picketing, the picketed secondary employer would feel compelled to “put pressure on” the primary employer to bring about the end of the picketing. Clearly 8(b)(4) does not have such a broad and general sweep. *See Sand Door*, 357 U.S. at 98 (“[A]n object must be to force or require their employer or another person to ***cease doing business with a third person***. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited.”).

And while it is true that the U.S. Supreme Court in *Tree Fruits* articulated that 8(b)(4) prohibits a union from picketing a secondary employer “in order to force him to cease dealing with, or to put pressure upon, the primary employer” (an easily misleading piece of dictum when read out of context, as Respondents do), it is equally clear that the Court was referring to *economic* pressure derived from the targeting of a business relationship. *See NLRB v. Fruit & Vegetable Packers (Tree Fruits)*, 377 U.S. 58, 62–71 (1964). The primary and secondary employers in *Tree Fruits* had a direct business relationship, and the Court in *Tree Fruits* reiterates several times (as noted on pages 9–10 of the Union’s primary brief) that Congress drafted Section 8(b)(4) narrowly to specifically target only the “isolated evil” of secondary “cease doing business” boycotts. *See, e.g., Tree Fruits*, 377 U.S. at 68. In any event, *Tree Fruits* simply does not articulate the broad and general rule that Respondents proffer in their brief, and Respondents’ citation to *Tree Fruits* provides nothing more than a single, cherry-picked piece of dictum erroneously propped up by Respondents as *the* legal rule governing Section 8(b)(4). It

may be true that Congress intended to protect neutral employers from becoming enmeshed in another employer's labor dispute as a general public policy concern, but that is not the legal standard. Picketing is only unlawful under Section 8(b)(4) where an object of the picketing is to coerce the picketed employer to "*cease doing business*" with a third party. If the picketing does not target any of the neutral employer's business relationships, the picketing cannot be unlawful under Section 8(b)(4)(ii)(B).

This limitation on Section 8(b)(4)(ii)(B)'s reach was specifically explained by NLRB Chairman Hurtgen in *Visiting Nurse Health Systems, Inc.*, where he described how unions *may* lawfully picket neutral employers—*i.e.* enmesh them in the primary employer's labor dispute—so long as the picketing does not have a "cease doing business" object. *UFCW Local 1996 (Visiting Nurse Health Sys., Inc.)*, 336 NLRB 421, 434 (2001). In his discussion of the scope of Section 8(b)(4), Chairman Hurtgen even posed the following illustrative hypothetical: "A union could picket a neutral to force the neutral to exercise whatever influence it could bring to bear, short of a cessation of business, to persuade the primary to honor a certification. For example, it would not be unusual for an official of a picketed neutral employer to strenuously urge an official of the primary to honor the certification, ***but not go so far as to threaten a cessation of business.***" *Id.* (emphasis added); *see also id.* at n.34 ("As set forth above, there is every indication that Congress intended to outlaw all secondary picketing ***having a "cease doing business" object***, even if that is only one of the objects of the picketing.") (emphasis added).

Chairman Hurtgen's hypothetical precisely tracks the manner in which Respondents describe the object of the Union's picketing in the instant case. On page 23 of their Answering Brief, Respondents explain that "[i]t is clear the Union engaged in its efforts in order to force the new stores to put pressure on Fresh Seasons Markets." But that is not a "cease doing business"

object. Whatever pressure Respondents felt as a result of the Union's picketing, it was not a pressure to "cease doing business" with Fresh Seasons Markets or anyone else.

None of the other cases cited by Respondents establish the universal prohibition on secondary activity that Respondents urge, either, and each can be easily distinguished. To begin with, most of the cases cited by Respondents involve picketing of neutral employers that had direct business relationships with one or more of the primary employers; facts that Respondents critically lack in the instant case. In *International Longshoremen's Association v. Allied Int'l*, the Supreme Court explicitly found the ILA strike unlawful because it "plainly" had a "cease doing business" objective:

[B]y inducing members of the union to refuse to handle Russian cargoes, the ILA boycott was designed to force Allied, Waterman, and Clark "to cease doing business" with one another and "to cease using, selling, handling, transporting, or otherwise dealing in" Russian products.

456 U.S. 212, 219 (1982). Moreover, the Court reaffirmed in *Allied International* that "the elements of a § 8(b)(4) violation are threefold: Employees must be induced; they must be induced to engage in a strike or concerted refusal; ***an object must be to force or require their employer or another person to cease doing business with a third person.***" *Id.* at n.18 (citation omitted) (emphasis added). Knowing they cannot satisfy the third element, Respondents urge the Board to adopt a new rule that effectively eliminates it.

Similarly, in *NLRB v. Operating Engineers (Burns & Roe)*, the union threatened to strike unless the neutral employer (Burns & Roe) severed its business relationship with the primary subcontractor (White Construction). 400 U.S. 297, 305 (1971) ("The clear implication of the demands was that Burns would be required either to force a change in White's policy ***or to terminate White's contract.*** The strikes shut down the whole project.") (emphasis added); *see also Ruzicka Elec. & Sons, Inc. v. IBEW Local 1*, 427 F.3d 511, 521 (8th Cir. 2005) (finding that

where plaintiff alleged union picketing of neutral construction contractors at reserved gates on a common situs, “[a] reasonable jury could decide the purpose for this activity was to force neutral employers off the job site in support of Local 1's primary dispute with Ruzicka Electric.”); *Local Union No. 25, A/W Int'l Bhd. of Teamsters v. NLRB*, 831 F.2d 1149 (1st Cir. 1987) (primary employer, Sears, had a direct and ongoing business relationship with the neutral employer, Boston Deliveries); *Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980) (primary employer, Duro, had a direct and ongoing business relationship with the neutral employer, Kroger).

Aside from these cases that involved direct business relationships between the primary and neutral employers, Respondents rehash their patently meritless “boycott-with-the-object-of-causing-a-boycott” argument by once again citing *Knight Newspaper, Inc.*, 138 NLRB 1346 (1962) and *Teamsters Local 732 (Servair Maintenance)*, 229 NLRB 392 (1977) and claiming that the “cease doing business” object is demonstrated where the union’s picketing caused customers to refuse to shop in their stores. Those cases were fully discussed in the Union’s primary brief at pages 15–16, and that discussion need not be repeated here.

As a final point, it should be considered that all this raises a couple of obvious questions that bear discussion. First, why would a union ever picket a neutral employer that had no business relationship with the primary employer? And second, how could a purportedly secondary boycott *not* have a “cease doing business” object? The facts of this case present a clear answer to both questions: when the purportedly neutral employer is simply a ***disguised continuance and alter-ego*** of the primary employer. Unlike a “single employer” situation where both employers exist simultaneously and typically have an actual business relationship, alter-ego employers do not exist simultaneously or do business with each other—one is created to *replace*

the other in order to avoid legal obligations. *See Howard Johnson Co. v. Hotel Emp. Union*, 417 U.S. 249, 259 n. 5 (1974). Thus, an alter-ego fact pattern inherently allows for a defense based on the lack of a “cease doing business” object (in addition to an ally doctrine defense, as discussed below) because, *by definition*, the closed primary employer never does business with the new, purportedly neutral alter-ego employer.

Applied here, Respondents and the ALJ are unable to articulate a “cease doing business” object because Fresh Seasons Markets stores and Victoria’s Market/Glen Lake’s Market stores never did business with each other. The Union picketed the “new” stores because they were a continuation of the closed Fresh Seasons Stores that, to this day, owe thousands of dollars in unpaid benefits to their employees. The picketing of Respondents’ new stores did not violate Section 8(b)(4)(ii)(B) because there was no “cease doing business” object, and the ALJ erred in ruling otherwise.

**II. AT THE TIME RESPONDENTS FILED THEIR LAWSUIT, THEY HAD NO REASONABLE BASIS TO BELIEVE THAT THEY WERE NEUTRAL IN THE UNION’S DISPUTE WITH FRESH SEASONS MARKETS.**

Respondents are correct when they state that the General Counsel must prove that “the Respondent[s], when [they] filed [their] complaint...did not have and could not reasonably have believed [they] could acquire through discovery or other means evidence needed to prove essential elements of its causes of action.” *Resp.’s Answering Br. at 26, citing Milum Textile Servs. Co.*, 357 NLRB 2047, 2053 (2011). Here, because Respondents’ complaint alleges unlawful secondary activity in violation of Section 8(b)(4), one way that the General Counsel can satisfy its burden is to demonstrate that Respondents could not have reasonably believed that they were neutral employers entitled to the protection of Section 8(b)(4).

Citing numerous cases, the General Counsel satisfied its burden by demonstrating the substantial “mutual interest” between the old and new stores. Every fact need not be repeating

here,<sup>2</sup> but it remains *undisputed*<sup>3</sup> in this case that shortly after Wartman Sr. closed his Fresh Seasons stores, he (1) solicited his three sons to create a new corporate entity to reopen grocery stores in the old Fresh Seasons locations, (2) solicited investors to help *him* “reopen” his stores, (3) provided all the funding for the “new” stores, (4) worked on a daily or near-daily basis at the “new” stores both before and after they officially opened (while his sons had other full-time jobs), (5) referred to the stores publicly and *in the presence of union officers* as “my store” prior to the picketing, and (6) signed checks on behalf of the “new” stores. Again, all of this is undisputed. Respondents are simply not “wholly unconcerned” neutrals in the Union’s dispute with Fresh Seasons Markets, full stop.

These facts were all elicited from Respondents at the hearing, and they clearly had this information at the time they filed their lawsuit. A determination of neutrality under Section 8(b)(4)(ii)(B) is not confined to the technical concepts of the “struck work” or “single employer” doctrines; rather, “all the strands of mutual interest” connecting the entities must be considered.” *Teamsters Local 560 (Curtin Matheson)*, 248 NLRB 1212, 1214 (1980). In this case, the “strands of mutual interest” run deep, and the Union and General Counsel have cited numerous cases with similar facts to establish that Respondents have no reasonable basis for claiming neutrality. *See, e.g., Teamsters Local 282 (Acme Concrete)*, 137 NLRB 1321 (1962); *Cofab, Inc.*, 322 NLRB 162 (1996); *Mastronardi Mason Materials Co.*, 336 NLRB 1296 (2001); *Fallon-Williams, Inc.*,

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<sup>2</sup> The pertinent record facts noted here are cited and described more fully at pages 19–25 of the Union’s primary brief in support of its exceptions.

<sup>3</sup> Respondents mistakenly argue that a lawsuit cannot be considered objectively baseless if the merits depend on a fact-based inquiry. *See Resp.s’ Answering Br. at 26*. In this case, however, numerous *undisputed facts* demonstrate that Respondents lack neutrality for 8(b)(4) purposes, which was, of course, the whole purpose of the ALJ hearing. Respondents appear to be confusing the concept of “fact-based inquiry” (which is entirely appropriate in the *Bill Johnson’s* setting if the material facts are undisputed) with “determination of disputed facts” (which is not appropriate in the *Bill Johnson’s* setting). The ALJ properly understood this distinction. *See ALJ Decision n.2*.

336 NLRB 602, 602 (2001) (alter-ego finding when companies were owned by husband and wife); *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), *enf'd* 888 F.2d 125 (2d Cir. 1989) (the close familial relationship between parents who owned the original company and children who owned the new company was evidence supporting an alter-ego finding since the children were financially dependent on their parents and there was less than an arm's-length transaction in creating the new company).

For their part, rather than present a logical legal counter-argument demonstrating that Respondents may yet be considered neutral despite the overwhelming evidence of mutual interest, Respondents instead distinguish literally *all* of the ally doctrine cases cited by the Union and General Counsel on the basis that those cases do not also involve retaliatory lawsuits. *See Resp.s' Answering Br. at 29 ([A]ll of the cases cited by General Counsel and the Union are inapplicable [because they] do[] not involve a determination as to whether a secondary picketing claim is objectively baseless.)* (bold in original).

Respondents clearly misunderstand how the body of alter-ego case law cited by the Union and General Counsel applies to this case. In retaliatory lawsuit cases like this, the General Counsel needs to show that Respondents did not have a reasonable basis for filing their secondary activity claims at the time those claims were filed. The alter-ego case law cited by the Union and General Counsel establishes, quite clearly, that employers are alter-egos of each other where factors such as close family ownership and financial support, same business purpose, and same equipment can be demonstrated. Those facts are all undisputed here, and based on the alter-ego case law cited by the Union and General Counsel, Respondents knew or should have known that they could make no legitimate claim to neutrality for purposes of a Section 303 claim. The

fact that these alter-ego cases did not *also* address separate issues of retaliatory lawsuits is completely irrelevant.

In short, Respondents' lawsuit is objectively baseless because they are unquestionably disguised continuance alter-egos of Fresh Seasons Markets with no entitlement to the protection of Section 8(b)(4). All the *undisputed* facts supporting that conclusion were known to Respondents well before they decided to file a baseless and retaliatory<sup>4</sup> Section 303 lawsuit. The General Counsel fully satisfied its burden for proving that Respondents' Section 303 lawsuit is objectively baseless and retaliatory and, therefore, violates Section 8(a)(1) pursuant to *Bill Johnson's* and its progeny. 461 U.S. 731, 744 (1983). The ALJ erred by ruling otherwise.

### CONCLUSION

For the foregoing reasons, the Charging Party respectfully requests that the Board sustain the Exceptions to the ALJ's decision as filed by the Union and the General Counsel on August 14, 2017.

Dated: September 11, 2017

**MILLER O'BRIEN JENSEN, P.A.**

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<sup>4</sup> Respondents did not except to the ALJ's finding that they filed their lawsuit with a retaliatory motive.

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LOCAL 653

Charging Party.

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**CERTIFICATE OF SERVICE OF EXCEPTIONS AND BRIEF IN SUPPORT OF  
EXCEPTIONS**

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I hereby certify that, on September 11, 2017, I caused the following document:

- Charging Party's Reply Brief

to be e-filed with the Board in Washington D.C. through the NLRB's website and served by e-mail to the following parties:

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Dated: September 11, 2017

/s/Timothy J. Louis  
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