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RDM Concrete & Masonry, LLC, Collective Concrete, Inc.,¹ and Remco Concrete, LLC, Alter Egos and a Single Employer and New Jersey Building Laborers District Council. Case 22–CA–181515

March 13, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE
AND MCFERRAN

On November 3, 2017, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The Respondents Collective Concrete, Inc. and Remco Concrete, LLC filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, conclusions, and remedy,² and to adopt the judge’s recommended Order as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondents RDM Concrete & Masonry, LLC, and Collective Concrete, Inc., alter egos and a single employer,

¹ We amend the caption to correct the name of the Respondent Collective Concrete, Inc.

² In affirming the judge’s remedy, we clarify that the Respondents shall make whole unit employees by, inter alia, making all delinquent contributions to the Union’s benefit funds set forth in the collective-bargaining agreement, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondents shall also reimburse unit employees for any expenses ensuing from the failure to make the required benefit fund contributions, as set forth in *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891, 891 fn. 2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in the manner set forth in *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer’s delinquent contributions during the period of delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

³ We have modified the judge’s recommended Order to conform to his unfair labor practice findings and to the Board’s standard remedial language, and we have substituted a new notice to conform to the Order as modified.

and their alter ego Remco Concrete, LLC, Toms River and Jackson, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain collectively with the New Jersey Building Laborers District Council (the Union) as the exclusive bargaining representative of their employees in an appropriate unit of Laborers, by refusing to apply the terms and conditions of their collective-bargaining agreement, including wage rates and benefit fund contributions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Honor and abide by the terms and conditions of their collective-bargaining agreement with the Union and make whole their employees in the bargaining unit for any loss of pay and other benefits suffered as a result of the Respondents’ refusal to apply the collective-bargaining agreement to all unit employees, in the manner set forth in the remedy section of the judge’s decision.

(b) Make whole their employees for any expenses ensuing from the Respondents’ failure to make required contributions to the Union’s benefit funds and make whole the Union’s benefit funds for losses suffered, in the manner set forth in the remedy section of the judge’s decision as clarified in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their Toms River and Jackson, New Jersey facilities copies of the attached notice marked “Appendix.”⁴ Copies

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judge-

of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 30, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. March 13, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the New Jersey Building Laborers District Council (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit by refusing to apply the terms and conditions of our collective-bargaining agreement, including wage rates and benefit fund contributions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union, and WE WILL make whole our employees in the bargaining unit for any loss of pay and other benefits suffered as a result of our refusal to apply the collective-bargaining agreement to all unit employees, plus interest.

WE WILL make all delinquent payments to the Union's benefit funds and WE WILL make you whole for any expenses ensuing from our failure to make such payments, including any additional amounts due to the funds on your behalf, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay awards to the appropriate calendar years for each employee.

RDM CONCRETE & MASONRY, LLC,
COLLECTIVE CONCRETE, INC., AND REMCO
CONCRETE, LLC, ALTER EGOS

The Board's decision can be found at www.nlrb.gov/case/22-CA-181515 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Sharon Chau, Esq., for the General Counsel.

Ronald L. Tobia, Esq., for Collective Concrete and Remco Concrete.

Christopher Errante, Esq., for RDM Concrete.

Raymond G. Heineman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. This case was tried in Newark, New Jersey, on May 17, June 15 and 19, 2017. The consolidated complaint alleges that the three named Respondents (hereinafter separately identified as RDM, Collective, and Remco) are alter egos of each other, and, together, a single employer. It also alleges that those entities (sometimes collectively referred to in the singular as Respondent) violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Charging Party Union (hereafter the Union), on and after February 15, 2016, as the bargaining representative of its employees engaged in laborer's work; and repudiating and refusing to apply the applicable collective-bargaining agreement to the Remco bargaining unit employees. Respondent denied the essential allegations in the complaint. After the trial, the parties filed briefs, which I have read and considered.¹

Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent and each of its individual entities are engaged in operating concrete and masonry businesses with locations in the State of New Jersey. They admit and stipulate to the Board's jurisdiction, including that they are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is also admitted and stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act. (See Tr. 20–21 and GC Exh. 1.)²

¹ Tobia filed a brief on behalf of Collective and Remco. Errante did not file a separate brief on behalf of RDM, but joined in the submission of the brief on behalf of Collective and Remco and submitted what he described as a position statement on the issues.

² Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "CP Exh." for the Charging Party's exhibits, and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only

II. ALLEGED UNFAIR LABOR PRACTICES

THE FACTS

The three entities in this case, Collective, RDM, and Remco, are populated by members of the Ciullo family: Mark Ciullo, his wife Deborah,³ his son Ryan, daughter Desiree, and Ryan's wife, Jennifer. To avoid confusion, their first names will be used hereafter.

Collective is Formed

Collective was formed in 1998 as a concrete and masonry business. Ryan Ciullo is its sole owner. He was 22 years old at the time and still living with his parents. (Tr. 23, 32, 48.) He described himself as Collective's "project manager" (Tr. 22); and he was "in charge of the jobsites." (Tr. 33.) Prior to forming Collective and since graduating from high school, Ryan had been working for his father Mark's masonry and concrete business, known as D&M Construction. (Tr. 295–296.) At that time, D&M was "folding" and Mark was "on [the] downswing of his career," according to Ryan. (Tr. 297.) From the inception of Collective, Mark worked for Collective, mostly in the office. Mark also visited jobsites, in connection with making job bids and meeting with project superintendents. (Tr. 33–36, 134–136.) According to Ryan, Mark "would coordinate everything" and "confirm major decisions with me." (Tr. 298.)

Ryan's sister, Desiree, was the office manager for Collective and his wife, Jennifer, helped out in the office or with paperwork. (Tr. 27–32, GC Exh. 5.) Ryan, Mark, and Desiree were all authorized to engage in bank transactions with Sovereign Bank on behalf of Collective. (GC Exh. 8.)

In its certificate of incorporation, Collective listed its address as 55 Bay Breeze Drive, Toms River, New Jersey, the residence of Ryan's parents and the home owned by Mark. (Tr. 25, 32, 47–48, GC Exh. 4.) That same year, 1998, in a corporate resolution submitted to open a bank account, Collective listed its address as 460 Faraday Avenue, Jackson, New Jersey. (GC Exh. 8.)

Sometime in 2001, while Mark was at one of Collective's jobsites, he spoke with a representative of the Union and agreed, on behalf of Collective, to sign a short form agreement with the Union. Shortly thereafter, a short form agreement was sent to Collective's office and signed, on April 3, 2001, by Ryan. (GC Exh. 6, CP Exh. 1, Tr. 321.) Subsequently, Collective agreed to three additional and successive short form agreements with the Union. (CP Exh. 1, Tr. 38, 141–145, 217–224, 321.) The short form agreement contains a provision stating that, by signing, Collective agreed to be bound by the terms of the master agreement between the Union and various construction employers in the area of the Union's jurisdiction, which are "incorporated herein as if set forth in full." Subse-

where appropriate to aid review, and are not necessarily exclusive or exhaustive.

³ Deborah's name is erroneously spelled as Debra in the transcript; documentary evidence showing her signature confirms the correct spelling. I also correct the following at p. 66 of the transcript. At L. 3, "Judge Gardner" should be substituted for "Witness;" and, at L. 5, "Witness" should be substituted for "Judge Gardner."

quent short form agreements signed by Collective contained the same provision. (GC Exh. 6 and CP Exh. 1.)

The master agreement incorporated in the original short form agreement states that “[t]he Employer recognizes that [the Union] represent[s] a majority of the employees of the Employer doing laborer’s work and shall be the sole bargaining representative with the Employer for all employees employed by the Employer engaged in all work” set forth in the unit description in another clause of the agreement. (Exh. A of GC Exh. 7.) The master agreement also specifies wages and fringe benefits that are to be paid to and for the covered employees. It further provides that the agreement applies to the work of related companies.

Another part of the master agreement provides that in order for the agreement to be terminated after the stated termination date, written notice must be given by the Employer “at least 30 days prior to April 30th of each succeeding year and, if said thirty (30) days is given, the Agreement shall terminate on April 30th of the year following the giving of such notice.” *Ibid.* This so-called “evergreen provision” appears in subsequent master agreements, as do the other provisions mentioned above. (GC Exhs. 37 and 38.)

Shortly after Collective signed its first short form agreement, the Union filed grievances alleging that Collective had violated the contract. On August 28, 2002, Mark and not Ryan appeared on behalf of Collective at an arbitration hearing on those grievances. On June 23, 2004, the arbitrator issued his decision finding a violation and directing Collective to submit to an audit. A second arbitration decision was issued on July 28, 2006, directing Collective to pay the Union \$10,384.72 for its violations. On September 20, 2006, the Union filed a petition to confirm the 2006 arbitration award. Collective filed an opposition, which included an affidavit signed by Mark. On January 8, 2007, the United States District Court, District of New Jersey, granted the Union’s petition. (GC Exhs. 7 and 24, Tr. 145–150.)

RDM is Formed

Just 3 months later, in April of 2007, Mark formed RDM as a nonunion concrete and masonry business. (Tr. 150–151.) He and his wife, Deborah, are the owners of RDM and they are both authorized signers of RDM’s bank accounts with Santander Bank (formerly Sovereign Bank). (Tr. 152, 160–162, GC Exh. 26.) Mark’s daughter, Desiree, also worked for RDM as office manager and was authorized to sign for the RDM account at the Santander Bank. (Tr. 162, GC Exh. 27.) At that point, Mark stopped working for Collective. (Tr. 37–38.)

Mark and Ryan both admitted that RDM does the same type of work as Collective and uses the same type of equipment as Collective uses. (Tr. 45–46, 150–151.) Indeed, Collective transferred some of its equipment to RDM. (Tr. 235–236.) Ryan does not have an ownership interest in RDM, but has been employed by RDM to run jobs in the field, the same responsibilities he had at Collective. (Tr. 46, 79, 181–182.) Tellingly, in explaining why RDM was formed, Ryan testified that his father, Mark, “realized that a lot of our customers were nonunion and that was important to our business, that’s what the marketplace sustained so he formed RDM and he started to

do work so he could support himself and that’s the direction we went.” (Tr. 37.)

It is undisputed that Mark, Deborah and Desiree were employed by RDM and Collective at the same time. (Tr. 164.) Documentary evidence confirms that this association with Collective continued well after the formation of RDM, as reflected in relevant bank authorizations. It also confirms that Mark was more than simply an office employee at Collective. In a series of documents in connection with an application and authorization for a Collective bank account with Sunshine Bank (later Sovereign bank), Mark was authorized to be signatory to that account by a Collective corporate resolution that identified him as “vice-president.” The date of that corporate resolution was October 10, 2008. (GC Exh. 8, Tr. 50–52, 121.) In another document submitted to Sovereign Bank on behalf of RDM, dated January 21, 2011, and titled “On Site Business New Account Opening Application,” Mark, Deborah and Desiree signed the document that identified themselves as employees of Collective. (GC Exh. 27, Tr. 162–164.)

RDM and Collective also shared an office and phone and fax lines. Shortly after its formation and in the early years of Collective’s existence, as indicated above, it rented an office at 460 Faraday Avenue, Suite 3, Jackson, New Jersey. When Mark formed RDM, he listed the Faraday Avenue address on a number of tax and bank documents. (GC Exhs. 8 and 25.) RDM’s bank documents with Sovereign/Santander Bank from 2011 through 2013 also list the Faraday Avenue address. Those documents also list, as RDM’s telephone number, the telephone number for Collective. (GC Exh. 27, 28, 30, 31, Tr. 34, 39, 48.) RDM admittedly did not pay rent for the Faraday Avenue location when both entities used it. Sometime in 2013, Collective gave up the Faraday Avenue location and RDM took over Collective’s lease. The rent paid by RDM was initially the same as the amount Collective was paying at the time. (Tr. 47–48, 155–160, 349–353, 362.)

Even after Collective gave up its Faraday Avenue offices, it continued operations, listing that address for banking purposes for 3 more years until finally closing its bank account in 2016. (Tr. 69, GC Exhs. 9 and 13.) Nevertheless, despite the bank account closure, Collective remains in existence. (Tr. 82, 86–91, 272.) Ryan testified that Collective is basically dormant today, but he continues its corporate shell out of his home to pay debts. (Tr. 97.) The remaining balance in the Collective bank account of \$1,003, as of June 7, 2016, was transferred to RDM. (Tr. 69–70.)

The record further shows that RDM has assisted Collective in significant ways and that both Mark and Ryan treated these companies as conduits. Ryan testified that “we helped each other like a father and son would.” (Tr. 379.) Mark testified that RDM lent money to Collective because Collective was his son’s business, and “I got him into this mess.” (Tr. 242.) Ryan further testified that, during the good years, with Collective, he and Mark each received salaries of “upwards of a couple hundred thousand.” (Tr. 381.) But, in the bad years, they might forego a salary. They did the same with RDM. (Tr. 378–382.)

RDM also assisted Collective in about 2012 or 2013, when Collective’s bank threatened to call in its line of credit, requiring payment of an outstanding loan balance. At that time, ap-

parently, RDM, or Mark personally, jointly assumed the outstanding debt with Collective. And payments are still being made on this debt. But, according to Ryan, neither he nor Collective ever repaid Mark or RDM for this assistance. (Tr. 70–77, 380.) Significantly, Collective’s bank statements show that RDM transferred money totaling \$1,644,658.17 to Collective in 37 separate transactions from July 2013 through February 2015. (GC Exh. 9.)⁴

RDM remained nonunion until May 2014, when the Union organized its workers and obtained authorization cards signed by a majority of the RDM employees. The Union filed a representation petition with the Board on May 7, 2014. (Tr. 181, 250, 270–271, GC Exh. 40.) Shortly after the petition was filed, Mark met with three representatives of the Union, including Union Coordinator Gurvis Miner at a diner in Toms River, New Jersey.

At that meeting, Miner asked Mark whether he was aware that a majority of RDM employees were interested in representation by the Union and Mark answered in the affirmative. Mark was also told that the Union believed that Collective and RDM were alter egos and bound by the union agreements that Collective had signed. Mark refused to recognize the Union, complaining about his bad experience with the Union at Collective, including the result of the arbitrator’s decision that cost Collective a lot of money. According to Miner, Mark admitted that he was “highly upset” by the arbitrator’s decision. (Tr. 274.) He also admitted that he had opened RDM so he could be more competitive and signing an agreement with the Union would not help in that respect. The Union then raised the possibility of giving Mark some relief in order to help him be more competitive by working with him on his pending projects. Mark agreed to provide the Union with a list of RDM’s pending projects. (Tr. 273–274.)

At a subsequent meeting on May 28, 2014, Mark agreed to sign an agreement with the Union that would include some kind of amnesty for certain pending projects, but he still had not provided the Union a list of his pending projects. (Tr. 275–276.) The parties agreed to still another meeting, but that did

⁴ Ryan gave a convoluted and unconvincing explanation for these transfers, which I discredit. He testified that these transfers were loans, but no loan or other documents were provided to support that testimony. The record contains a document (GC Exh. 23) that purports to be a sale of equipment from Collective to RDM, but the amount of that transaction is nowhere near the amount of the transfers listed above. And it is not clear that even that transaction was an arm’s length transaction because Ryan himself apparently set the value of the equipment. Moreover, the equipment sale agreement was executed in June of 2013, a month before the beginning date of the transactions listed above in GC Exh. 9. Nor is there any evidence, aside from Ryan’s conclusory testimony, uncorroborated by documentary evidence, that these alleged loans were ever repaid. Indeed, as already noted, it appears that RDM had to come to the rescue of Collective with a loan that has not yet been repaid in order to prevent Collective’s bank from calling in its line of credit. That is the more likely explanation for any loans by RDM to Collective, especially in view of testimony by Mark about these events. See Tr. 202–203. Thus, the reason for the more than a million and a half dollars of transfers from RDM to Collective during a roughly 2-year period from 2013 to 2015 remains a mystery. What is clear, however, is that the transfers were made.

not occur. After a breakdown in communications, the Union filed an unfair labor practice charge against RDM with the Board (GC Exh. 41) and set up a picket line at two of RDM’s jobsites. (Tr. 277–278.) Later, Mark agreed to sign an agreement with the Union and the Union removed its picket line and withdrew the charges. The parties thereafter worked out an amnesty agreement, and, on June 20, 2014, Mark signed a short form agreement with the Union on behalf of RDM. (GC Exh. 39, Tr. 278–280.)⁵

Shortly thereafter, the Union filed a grievance against RDM over its failure to abide by the agreement. The matter went to arbitration and, on January 29, 2015, an Award and Order issued against RDM. On November 17, 2015, RDM and Collective, jointly, and the Union agreed to a consent arbitration award setting forth a settlement amount and a payment schedule for monies owed. The Union filed a petition to confirm the arbitration award and, on April 13, 2016, a United States District Court entered a judgment confirming the award. (GC Exh. 33, Tr. 187.)

Collective’s work started slowing down as RDM’s was picking up. From its inception and throughout most of 2014, Ryan was working for RDM. (Tr. 79–80.) His last work project as Collective was in 2014, on the so-called Keiwet job. (Tr. 26–27, 79–82, 86, 272, GC Exh. 15.) That year, Collective also did some finishing work for RDM, for which Collective was not always paid back. (Tr. 86–91, 372–377, GC Exh. 15.) In addition, Ryan did some consulting work for another company, New Horizons, which was owned by Don Yonkers, his father, Mark, and Ryan himself. (Tr. 91.) That consulting work was performed in 2015; he was paid by New Horizons for that work a total of about \$73,000, in 4 separate checks made out to Collective and deposited in Collective’s bank account. The last check was dated December 21, 2015. (Tr. 83–85, 91–93, 313, GC Exh. 14.) During that same period and until mid-2016, Ryan also worked as a foreman for DY Concrete, a nonunion company owned by Don Yonkers for which he was paid an annual salary of \$100,000. (Tr. 92.)

Like Collective, RDM’s work started slowing down, as shown by the fact that Ryan was no longer working for RDM in November of 2014. (Tr. 358.) He began working as a salaried employee for DY Concrete at the end of 2014 or the beginning of 2015. (Tr. 92–93, 358–359.) Although, like Collective, RDM still exists as a corporate entity, Mark testified that, as of the time of the hearing in this case, RDM was “pretty much dormant right now.” (Tr. 160.) Several of RDM’s employees joined Ryan at DY Concrete. (Tr. 358–360, CP Exh. 4.)

Remco is Formed

In late 2015, around the time RDM and Collective were jointly agreeing with the Union to a consent arbitration award, and while Ryan was still working for DY, he formed Remco.

⁵ The above is based on the essentially uncontradicted testimony of Miner. Mark, who testified before Miner, actually confirmed most of Miner’s account of their dealings, although he gave it a different slant. (Tr. 183–186.) Mark testified that, as a result of his experience with Collective and the Union, “I lost a lot.” (Tr. 185.) Ryan confirmed that Mark agreed to the union contract with RDM after union representatives told Mark that RDM was Collective’s alter ego. (Tr. 77–78.)

(Tr. 92–96, 188–190.) He has a 99 percent interest, and his wife, Jennifer, owns 1 percent of the Company. (Tr. 93.) Remco does concrete and masonry work, mostly in New Jersey, just like Collective and RDM, using the same type of equipment. (Tr. 95.) Remco also uses many of the same suppliers used by RDM. (Tr. 111–113, 196–198.) Ryan, of course, owned and managed Collective and still owns it; and he also owns and manages Remco.

Ryan testified that he formed Remco with the intention of taking advantage of the market place after Collective and RDM had signed union agreements and started having problems. He testified that he was not “doing well in union work before then” and he “needed . . . the non-union work to fulfill what I was doing previous to all of this.” (Tr. 326.) He also readily admitted that, with Collective and Remco, he now covers both the union and the nonunion marketplaces. (Tr. 379.)

During the first quarter of 2016, Remco employed 7 people, including Jennifer, Ryan’s wife, and six other employees, half of whom had previously worked for RDM and DY with Ryan. (GC Exh. 16, Tr. 94–95, 98–100, CP Exh. 4.) Later, in the second quarter of 2016, Ryan hired other former RDM employees, including former RDM Foreman Mark Kowalski, who had also worked with Ryan at DY. (Tr. 100–103, 191–196.) Ryan also hired RDM’s former purchasing and pricing employee, Jackie Brantiff, to do the same work for Remco. (Tr. 100–103, GC Exh. 17.) Contrary to Ryan’s testimony that Brantiff was on unemployment when Ryan hired her (Tr. 103), documentary evidence shows she was on RDM’s payroll until June 4, 2016. (GC Exh. 36.)

Ryan has publicly represented that Remco is a continuation of Collective and RDM. In a March 21, 2016 email seeking a certificate of insurance for Remco for a job with the Iorio Construction Company, Ryan told the Creative Coverage Insurance Company that “RDM used to do work for the same company.” (GC Exh. 18, Tr. 104–105.) Creative also provided insurance for RDM. (Tr. 104.) Ryan also used his prior connections with Collective and RDM when applying for new lines of credit for Remco. (GC Exhs. 19 and 20, Tr. 105–106.)

In seeking work on behalf of Remco in a February 16, 2016 email, Ryan introduced Remco as follows: “We are a local concrete subcontractor that has over 20 years of experience with commercial projects like this.” (GC Exh. 21, Tr. 107.) Moreover, it was apparent that at least some outside contractors viewed Remco as a continuation of RDM, as evidenced by a March 21, 2016 email in which PJR Construction contacted Ryan, not Mark, about a final release for a job which had been performed by RDM. (Tr. 108–110, GC Exh. 22.)

By letter, dated December 2, 2016, and addressed to Ryan, the Union requested that Remco recognize the Union as the bargaining representative of the laborers in its employ and that Remco apply the applicable agreements signed by Collective and RDM to the laborers. (GC Exh. 42.) In a response dated December 12, 2016, Remco denied the request. (GC Exh. 43.) It is undisputed that neither Collective nor RDM ever gave the required notice to terminate their agreements with the Union. And, under the evergreen clause in the applicable bargaining agreements with the Union, unless terminated in writing at

appropriate times, those agreements automatically renew themselves. (Tr. 224–225, 265–266.)

Credibility

Many of the above factual findings are based on uncontradicted testimony, authenticated documentary evidence and testimony against interest by Mark and Ryan Ciullo, which amounted to admissions. To the extent that Mark and Ryan gave arguably exculpatory testimony for their actions, I reject their testimony. I found both to be unreliable witnesses. They were often defensive, evasive, contradictory, and unable to recall important details in their testimony.

I have already mentioned Ryan’s unconvincing explanation of a series of bank transfers between the Collective and RDM. Here are several other examples of their unreliability: Ryan and Mark contradicted each other on whether RDM had ever purchased a laser screed from Collective. (Tr. 54–55, 238.) Ryan at one point suggested that former RDM employee Jackie Brantiff was hired by Remco because she was unemployed at the time. This I viewed as an attempt to show a hiatus between her employment with RDM and that with Remco. But documentary evidence shows that she was employed by RDM up until the time she was hired by Remco.

Mark’s testimony that he used Collective’s address to store documents for RDM because his home was often flooded was far-fetched at best. (Tr. 153–159.) Indeed, both Mark and Ryan gave unconvincing testimony in an effort to diminish their responsibilities in the companies owned by the other.

For example, Mark initially testified that he simply coordinated the office at Collective, “receiv[ing]” and “open[ing] the mail,” and visited jobsites “to see what was going on.” (Tr. 135.) However, the record clearly shows that Mark’s authority was much more extensive than that to which he testified. And Ryan initially testified, “I have nothing to do with RDM” (Tr. 46), even though he worked for it for at least 7 years and engaged in numerous financial transactions between Collective and RDM. Mark testified that he did not even know about Ryan’s formation of Remco until after it happened and claimed to be “surprised” when he found out. (Tr. 189.)

These transparent efforts at evasion are implausible considering what they each described as a close father-son relationship where one was always seeking to help the other, and in light of the documented assistance they gave each other in their various roles with these entities. Accordingly, I do not credit their testimony where it differs from my otherwise supported factual findings.

Analysis

The Supreme Court has long-recognized that the operation of a prior enterprise under a different name could, in certain circumstances, constitute a disguised continuance” binding the new company to the old company’s obligations under the Act. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In determining whether an enterprise is a “disguised continuance” or alter ego of another business, the Board examines whether the entities share substantially identical management, business purpose, operation, equipment, customers and supervision. Other factors include common ownership or control, lack of arm’s length dealings between the two entities and whether

one entity was formed or used to avoid union obligations under the Act.

No one factor is controlling and not all the indicia need be present to find an alter ego relationship. *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), *enfd.* 888 F.2d 125 (2d Cir. 1989), and cases there cited. See also *U.S. Reinforcing, Inc.*, 350 NLRB 404, 404–405 (2007). Moreover, strict common ownership is not a necessary requirement if there is a family relationship that shows common control. *El Vocero de Puerto Rico, Inc.*, 357 NLRB 1585, 1585, *fn.* 3 (2011).

Single-employer status is similar to but different from alter ego status. *Johnstown Corp.*, 322 NLRB 818 (1997). The following four factors are addressed in determining single-employer status: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Significantly, in the single employer analysis, there is no requirement that one entity was formed in order to avoid responsibilities under the Act.

Here again, however, no one factor is controlling and not all need be present, although the most important is centralized control of labor relations because it tends to demonstrate “operational integration.” Single employer status is also characterized by a lack of an arm’s length relationship. *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995) and cases there cited. See also *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001).

A. Collective and RDM were and are Alter Egos and a Single Employer

As the factual findings above clearly show, RDM was and is an alter ego of Collective. One is owned by Ryan Ciullo and the other by Mark Ciullo and each worked in an important management position for the other’s company. Ryan and Mark provided the essential operational management of both companies, Mark in the office and Ryan on the jobsite. Mark’s daughter, Desiree, was the office manager of both companies and all three did the same work for both companies at the same time. Both entities perform masonry and concrete work in New Jersey and use the same type of equipment. Their operations and business purposes are thus essentially the same.

Mark, Ryan and Desiree were authorized bank signers for Collective; and Mark, Desiree and Mark’s wife, Deborah, were authorized bank signers for RDM. Indeed, Mark was designated a “vice-president” of Collective in a corporate document filed in connection with his bank signature authorization. And when they submitted bank authorization statements for RDM, Mark and Desiree, and even Deborah, identified themselves as employed by Collective. Mark also agreed to a union short form agreement on behalf of Collective and represented Collective in the subsequent arbitration proceeding. He likewise dealt with the Union as the owner of RDM.

There is substantial evidence of a lack of an arm’s length relationship in the many transactions between the two companies. Both entities used the same Faraday Avenue address at the same time and RDM paid no rent to Collective for its joint use. They also used the same fax and telephone number. As late as 2014, Collective did finishing work for RDM, some of which was not paid for by RDM. In addition, there were significant

financial dealings between the two companies. And no documents exist to support that these transactions were loans or otherwise arm’s length business dealings.

Indeed, when Collective’s bank line of credit was threatened, RDM stepped in to rescue it. There is no credible or documented explanation in the record for the \$1.6 million dollars transferred from RDM to Collective from 2013 to 2015. Tellingly, although Collective is still technically in existence, it closed its bank account in June of 2016 and transferred the proceeds to RDM. Moreover, in testifying about the two companies, Ryan used the word “we” to refer to both. (Tr. 37, 73.) Mark made similar references in his testimony. (Tr. 141.)

Finally, there is substantial evidence that RDM was formed as a way to avoid Collective’s agreements with the Union and thus the Act’s bargaining requirements. RDM was formed shortly after the conclusion of litigation with the Union that resulted in a money judgment against Collective. And in conversations with representatives of the Union leading up to RDM’s agreement with the Union, Mark complained that he was wary of the Union because of his experience with the Union when he was with Collective, which had cost him a lot of money—here again identifying himself with Collective. But RDM’s relationship with the Union led to more litigation because of its noncompliance with its bargaining agreement, as did Collective’s relationship with the Union for the same reason. Thus, I find that RDM was formed at least in part to avoid dealing with the Union and to avoid bargaining obligations under the Act.

The above analysis also provides support for the finding, which I make, that Collective and RDM constitute a single employer. There is, of course, common management and, in view of the financial transactions between the two companies, an interrelation of operations. It is also clear that the lack of arm’s length relationship in the financial dealings between the two entities provides support for the single employer finding.

Thus, it is not as significant that there is a technical difference in ownership, although the two companies were owned by father and son. Mark’s dealings with the Union, both while employed by Collective and later as owner of RDM, also support the finding that there was common control of labor relations. It is also clear that Mark and Ryan considered themselves as part of one enterprise.

B. Remco is an Alter Ego of Collective and RDM

The factual findings above also strongly support the finding that Remco is an alter ego of Collective and RDM. Ryan formed Remco in late 2015, while he was still operating Collective. Although he apparently had interim employment in parts of 2014 and 2015, Collective still had jobs under its own name and it performed finishing work for RDM, all in 2014. And in 2015, Collective was paid by another company for Ryan’s consulting work; the last check for this work was issued in December of 2015. Ryan owns 99 percent of Remco and he owned 100 percent of Collective. The business purpose of Remco is the same as the business purpose of Collective/RDM and they use the same type of equipment. They also use many of the same suppliers.

Through Ryan, both also have the same management. Ryan hired many of the former RDM employees, including a former foreman, for his new company. Remco also retained the same insurance company used by Collective/RDM. Indeed, the evidence shows that Ryan represented his new company, Remco, as being a continuation of Collective/RDM when he told entities he dealt with that Remco had extensive experience in the concrete and masonry business.

The evidence also shows that contractors recognized Remco's connection with the Ciullo family's prior companies. In March of 2016, a contractor contacted Ryan, when he was at Remco and no longer with RDM, about a job release for work performed by RDM. In introducing Remco to a possible customer and asking for an opportunity to bid on a particular job, Ryan made reference to 20 years of experience, which included the word "we," clearly encompassing the combined experience of Collective and RDM. (GC Exh. 21. See *Johnstown Corp.*, 313 NLRB 170, 171 (1993), remanded, sub. nom., *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3rd Cir. 1994), and reaffirmed in 322 NLRB 818 (1997).

It is also clear that Remco was formed, at least in part, to avoid the union problems experienced by Collective/RDM. Ryan and Mark had been found to be in noncompliance with previous union agreements in their operation of Collective and RDM. Both were concerned about the burdens of operating under a union contract. Indeed, Ryan formed Remco shortly after RDM's litigation with the Union required it and Collective to comply with the union agreement.

Ryan essentially admitted that, in forming Remco, his purpose was to avoid union work. He testified that he was "not doing well in union work," and needed to do nonunion work "to fulfill what I was doing previous to all of this." (Tr. 236.) Although he may have framed some of his purpose in terms of financial considerations, it is clear that, where, as here, those financial considerations are related to avoiding the costs of operating under a union contract, such evidence is a strong factor supporting an alter ego finding. See *Diverse Steel, Inc.*, 349 NLRB 946 (2007).⁶

C. Remco Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain with the Union and by Failing to Apply the Bargaining Agreement in Existence Between the Union and Collective/RDM

It is undisputed that Remco never recognized the Union as the representative of its laborer employees and never applied the applicable union agreements to the unit employees it employed. It is also clear that neither Collective nor RDM ever timely terminated the agreements they had with the Union, which by their terms renewed themselves unless written notice of termination was given. Thus, those agreements continued. And the Board has held that the collective-bargaining agreement of an employer applies to its alter ego, as of the date of the alter ego's first use of bargaining unit employees. *E. G. Sprinkler Corp.*, 268 NLRB 1241, 1241 fn. 1 (1984).

⁶ Although the complaint alleges that RDM, Collective and Remco are a single integrated enterprise, in its brief, the General Counsel does not contend that Remco is a single employer with Collective/RDM. I therefore consider any such allegation waived.

Because Remco was and is the alter ego of Collective and RDM, it is subject not only to the bargaining obligations of Collective and RDM, but also to the continued application of the bargaining agreements binding Collective and RDM. See *E.G. Sprinkler, Corp.*, cited above, 268 NLRB at 1244; *A.D. Connor, Inc.*, 357 NLRB 1770, 1785–1787 (2011); and *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435, 440 (2004), enfd. 408 F.2d 450 (8th Cir. 2005).

Respondent has not successfully countered the findings and legal conclusions set forth above. The main point in its brief (Br. 15–18) is that so-called double breasted operations (where an employer has both a union and nonunion entity) are not "inherently illegal," citing *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275 (9th Cir. 1984). The quoted proposition is accurate as far as it goes. But there is an important caveat, which the Ninth Circuit emphasized, and it is crucial in the distinction between that case and the instant case. In *Carpenters'*, the Court was considering the enforcement of an arbitrator's award applying the bargaining agreement of a union company to the employees of a nonunion company. The Court refused to enforce the award because it noted that the Board had ruled that the two entities involved were not alter egos. Id. at 1275–1278, 1280.

In contrast, here, my findings show that Remco, Collective and RDM were and are alter egos and that the prior bargaining agreements are valid and continue to apply to Remco's bargaining unit employees.

CONCLUSIONS OF LAW

1. Collective and RDM were and are alter egos of each other and together constitute a single employer.
2. Remco is an alter ego of Collective and RDM.
3. By failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of its laborer employees in an appropriate unit, Remco, has violated Section 8(a)(5) and (1) of the Act.
4. By failing and refusing to apply the collective-bargaining agreements that its alter egos, Collective and RDM, have and continue to have with the Union, Remco violated Section 8(a)(5) and (1) of the Act.
5. The above violations constitute unfair labor practices that affect commerce within the meaning of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it and its constituent entities to cease and desist therefrom and to take appropriate affirmative action designed to effectuate the policies of the Act.

Since Respondent (Respondent here means all three named respondents) has unlawfully failed to apply the terms and conditions of employment under the applicable bargaining agreements to its laborer employees, it must make those employees whole for any loss of earnings or benefits, computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, Respondent shall be ordered to make employees whole for any expenses resulting from the failure to make contributions to the benefit funds provided for in the applicable bargaining agreements, plus interest, and to reimburse those benefit funds for those contributions it has failed to make on behalf of bargaining employees employed by it. Such payments shall be computed in the manner described in *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891, fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), and *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7(1979).⁷

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁸

ORDER

The Respondent,⁹ Collective Concrete and Masonry LLC, RDM Concrete and Masonry, and each of them, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to apply the terms of the collective-bargaining agreements that Respondent entered into with the Union and failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the laborer employees in the applicable bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of the unfair labor practices found in this decision, in the manner set forth in the remedy of this decision.

(b) Comply with all terms and conditions of the collective-bargaining agreements that the Respondent entered into with the Union.

(c) Bargain in good faith with the Union for all employees of the bargaining unit.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of monies due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all of its facilities, copies of the attached notice marked "Appen-

⁷ In the event that lumpsum payments are required to be made to employees under this remedy, those payments must be made in accordance with the requirements set forth in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

⁸ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ The term Respondent when used in the singular in this order refers to all three respondents.

dix."¹⁰ Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by other material. If the Respondent has gone out of business, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all employees and former employees employed by Respondent at any time since February 16, 2016.

(f) In the event that lump-sum backpay awards are required to be made to affected employees, the Respondent shall compensate those employees for the adverse tax consequences, if any, of receiving those lump-sum awards. Respondent shall file with the Regional Director, within 21 days of the date such awards are fixed, reports allocating the awards to the appropriate calendar years for each employee.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 3, 2017

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to apply the terms of the applicable collective-bargaining agreement with New Jersey Building Laborers District Council (the Union) or fail and refuse to bargain collectively with the Union as the exclusive collective-bargaining representatives of our laborer employees in the applicable bargaining unit.

WE WILL NOT in any like or related manner interfere with, re-

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

strain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all union bargaining unit employees for any loss of earnings and other benefits suffered as a result of our failure and refusal to apply the terms of the applicable collective-bargaining agreement.

WE WILL bargain collectively with the Union as the exclusive collective-bargaining representative of our laborer employees in the applicable bargaining unit.

WE WILL comply with all terms and conditions of the collective-bargaining agreement that we have entered into with the Union.

RDM CONCRETE & MASONRY, LLC
COLLECTIVE CONCRETE & MASONRY, LLC
REMCO CONCRETE, LLC

The Administrative Law Judge's decision can be found at www.nlr.gov/case/22-CA-181515 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

