

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

Case No. 22-CA-181515

In the Matter of:

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

Respondents,

and

NEW JERSEY BUILDING LABORERS
DISTRICT COUNCIL,

Charging Party.

**RESPONDENTS' BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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STATEMENT OF THE CASE

Pursuant to the National Labor Relation Board's Rules and Regulations, including Section 102.46 thereof, Respondents Collective Concrete Corporation, improperly plead as Collective Concrete & Masonry, LLC ("Collective"), and Remco Concrete, LLC ("Remco") (collectively, "Respondents") submit this Brief in Support of Their Exceptions to the Decision of the Administrative Law Judge ("ALJ") dated November 3, 2017 ("Decision").¹

On August 4, 2016, New Jersey Building Laborers District Council ("NJBLDC" or the "Union") filed a National Labor Relations Board ("NLRB") unfair labor practice charge against Collective, RDM Concrete & Masonry ("RDM")² and Remco pursuant to National Labor Relations Act (the "Act") Section 8(b). Collective and RDM are signatories to a collective bargaining agreement ("CBA") with the Union, while Remco is not.

On February 28, 2017, the Regional Director for Region 22, acting for and on behalf of the General Counsel for the NLRB, issued a Complaint and Notice of Hearing alleging that Remco is an alter ego of Collective and RDM and was therefore required to (1) recognize and bargain with NJBLDC, with which Collective and RDM had collective bargaining agreements ("CBA"); and (2) apply terms and conditions of the CBA governing Collective and RDM to Remco's bargaining unit employees. The Complaint further alleged that, by failing and refusing to do either, Remco violated Section 8(a)(5) of the Act. In essence, the Complaint sought to treat Collective, RDM and Remco as the same employer.

¹ References to the ALJ's Decision will be referred to as "Dec. ___." References to the transcript of the hearing will be referred to as "Tr. ___."

² RDM is represented by separate counsel.

Pursuant to a Notice of Hearing, a hearing in the instant case was held before Administrative Law Judge Jeffrey Gardner on May 17, June 15 and June 19, 2017 in Newark, New Jersey. The ALJ issued an Order and Decision on November 3, 2017.

Respondents seek review of the ALJ's decision that Remco is an alter ego of Collective and RDM and that Remco therefore violated Section 8(a)(5) of the Act by failing and refusing to apply the terms and conditions of the CBA binding Collective and RDM and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the laborer employees of the applicable bargaining unit. In so finding, the ALJ erred by mechanistically applied the criteria of the alter ego doctrine, while failing to consider whether, irrespective of whether the alter ego factors are present, application of the doctrine would nevertheless be inequitable under the facts of the case.

The ALJ's holding in this respect runs contrary to a line of cases existing for well over a decade which rejects formalistic application of the alter ego doctrine in favor of a more flexible approach, in which the alter ego doctrine may be disregarded where there is no equitable basis for its application. In determining whether the alter ego should not be applied with respect to an entity that otherwise meets the criteria, courts consider whether (1) there is any indication that the relationship between the companies has caused the union to receive less than that for which it bargained under a collective bargaining agreement and (2) there is any evidence that the union was deceived about the relationship between the companies.

The facts of this case unmistakably present an instance where the alter ego doctrine should be disregarded as a matter of equity. First, the Union was no worse off by the formation of Remco. The business activities of both Collective and RDM were completely stifled by excessive debt and other financial liabilities facing both companies. Ryan Ciullo, owner of

Collective and Remco, and Mark Ciullo, owner of RDM, both testified that Collective and RDM simply did not have the funds to continue taking on work and paying their workers, and that most of their customers started to hire non-union companies to work on projects. Moreover, any employees from RDM that went to work for Remco had either left RDM before Remco was formed, or simply did not wish to participate in the Union, or both. In other words, Remco did not poach Collective's or RDM's Union workers into performing non-union work. As such, even absent the formation of Remco, the Union would not be receiving much in the way of contributions by Collective or RDM.

Further, the facts demonstrate that neither company intends to avoid its Union responsibilities altogether. Neither Collective nor RDM has closed its doors, and Mark Ciullo testified that once the financial picture of RDM improves, he hopes to submit bids on behalf of RDM to perform union work. Ryan Ciullo testified that despite the insurmountable financial hardship facing Collective, he chose not to shut it down because he wishes to pay off all debts, liens and other financial obligations. Notably, Collective is not delinquent in any contributions owed to the Union. These actions do not comport with the notion that these entities are seeking to evade their Union obligations and bilk the Union out of receiving the full benefit of the CBA. Instead, it is clear that Remco was formed not as a sham to avoid Union obligations, but because Collective and RDM simply did not have the financial wherewithal to continue actively operating.

There is also no evidence to demonstrate that Remco deceived or attempted to deceive the Union in any way regarding its relationship with Collective and RDM and its non-union activities. To the contrary, as demonstrated by his undisputed testimony, Ryan Ciullo spoke

candidly to a representative of the Union shortly after Remco was formed regarding his connections with Collective and RDM and the non-union operations of Remco.

The Union was neither harmed nor deceived by the formation of Remco. As such, there is no equitable basis for applying the alter ego doctrine to bind non-signatory Remco to the CBA governing Collective and RDM. Indeed, to do so would be inequitable, as Collective and RDM still exist and are ready and willing to perform Union work once the market allows for it.

QUESTIONS PRESENTED

- (1) Whether the ALJ erred by mechanistically applying the alter ego doctrine to Remco without considering whether the Union was worse off as a result of Remco's formation or was deceived about the relationship among Remco, Collective and RDM.
- (2) Whether application of the alter ego doctrine to Remco under the facts and circumstances of this case lacks an equitable basis and must therefore be rejected.

STATEMENT OF FACTS

A. Ryan Ciullo Forms Collective in 1998

Ryan Ciullo ("Ryan") has been involved in the masonry construction business for his entire working life. See Tr. 295:3-25. Beginning at a young age, Ryan would spend summers working with his father doing masonry work. See Tr. at 295:5-9. About four or five years after working for his father Mark Ciullo's ("Mark") masonry construction business after graduating high school, Ryan decided to form his own company. In 1998, when he was 22 years old, Ryan formed Collective Concrete Corporation, a commercial concrete and masonry business, because he wished to "make [his] own decisions and make [his] own money." Tr. at 296: 21-22.

Since its inception, Ryan has been the sole owner of Collective. Around the time Ryan formed Collective, his father's company, D&M, which performed concrete and masonry in the residential housing sector, was floundering due to the competitive nature of the housing market. See Tr. at 297:20-25. As such, D&M faded away, and Ryan hired his father Mark as

Collective's office administrator. See Tr. at 36:17-21. In that role, Mark was responsible for billing, banking, payroll, and accounts payable and receivable. See Tr. at 36:19. Additionally, Mark visited jobsites in connection with making job bids and meeting with superintendents. See Tr. at 33-36; 134-136. While Mark's role was mostly in the office, Ryan worked primarily in the field supervising jobs. See Tr. 134-138.

Mark never loaned money to his son to form Collective. See Tr. 343:10. Mark was also not listed on the establishment papers or incorporation pages of Collective. See Tr. at 211:9. Mark was simply a paid W-2 employee of Collective. See Tr. at 343:18.

In addition to hiring his father, Ryan also hired his sister, Desiree Ciullo ("Desiree"), as office manager of Collective, where she performed secretarial and clerical tasks. See Tr. at 27:11. In accordance with their roles at Collective, Ryan, Mark, and Desiree were all authorized to engage in the banking transactions with Sovereign Bank of Collective. See GC 8.³

Sometime in 2001, while Mark was at one of Collective's jobsites speaking with a superintendent, he was approached by agents of the Union about Collective becoming a signatory to their contracts. See Tr. at 141 – 142. Mark, after speaking with Ryan, agreed to sign a short form agreement with the Union, which was thereafter sent to the office and signed by Ryan on April 3, 2001. See Tr. at 321. Subsequently, Collective agreed to three additional and successive short form agreements with the Union. See Tr. at 38, 141-145, 217-224, 321.

Shortly after Collective signed the first short form agreement, the Union filed grievances alleging that Collective had violated the contract. See Tr. at 145. On August 28, 2002, Mark 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

³ References to the General Counsel's exhibits will be referred to as "GC Ex ____."

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 for the District of New Jersey granted the Unions petition. See GC Exs. 7 and 24, Tr. at 145-150.

Beginning around 2007, the financial health of Collective began deteriorating. See Tr. at 37:4-18; 96:8-23; 186:7-10; 189:12-22; 328:3-17, 20; 330:1-12. By 2013, Collective's debt accumulated to \$163,000. See Tr. at 224:5. As explained by Ryan, Collective began as a non-union company, and "[t]o jump into Union work requires a lot of capital." Tr. at 80:13-14. Accordingly, Ryan incurred massive debt in order to keep operating as a union company. Tr. at 80:15-16. Moreover, Collective had trouble obtaining Union jobs, which tend to be "high profile" and "very competitive." Tr. at 80:10-12. For these reasons, the financial health of Collective became so bad that Collective could no longer afford to pay Mark. See Tr. at 151:18-24. As such, Mark went on to form his own company, RDM, in 2007, which is discussed in more detail below. Id.

Despite Collective's grave financial difficulties, Ryan chose not to shut the company down so that he could pay off its debts and other financial obligations, such as workers' compensation benefits, IRS liens, and contributions to the Union. See Tr. at 97:4-8; 97:22-25; 307:23 – 309:4. Notably, Collective paid all contributions to the Union, even when it went dormant. See Tr. at 308:15-21. Collective is not currently delinquent in any of its obligations to the Union. See Tr. at 98:5-17; 307:23 – 308:3.

Collective performed its last job in 2014, which involved supplying only finishers from the mason's union to Kewit Construction at the Perth Amboy bridge project. See Tr. at 79:18 –

80:2; 309:5 – 310:10. Because Kewit self-performed some of its work, it provided all laborers. See Tr. at 79:18 – 80:2. Collective also performed some finishing work for RDM in 2014. See Tr. at 86-91; 372-377. Subsequently, Collective was unable to perform any additional work and became a dormant company which Ryan kept open so that he could pay off its debts. See Tr. at 89:6-7; 97:1-12; 97:22-25; 189:8-23. Ryan also kept Collective open in hopes that one day he could resume performing union work once the marketplace and Collective's financial situation allowed for it. See Tr. at 329:16-20.

In order to generate income to pay off Collective's debt, Ryan performed various jobs. For example, Ryan worked as a foreman for RDM until the company began encountering financial difficulties similar to Collective's and Ryan was laid off from RDM. See Tr. at 181:21 – 182:14; 214:2-4; 312:19-21. Ryan then did some consulting work in 2015 for another company, Green Horizons, which was owned by Mark, Ryan, and Don Yonkers. See Tr. at 82:7-15; 98:16-17.⁴ Payment for that consulting work was by checks made out to Collective and deposited in Collective's bank account in the total amount of \$73,000. See Tr. at 83:18 – 85:3. 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 a salary. See Tr. at 91:22 – 92:22.

B. Mark Ciullo Forms RDM in 2007

Having been let go from Collective when the company no longer had funds to pay him, Mark started his own concrete and masonry company, RDM, in April 2007. See Tr. at 37:4-18; 150-151; 202:13-17. RDM is owned by both Mark and his wife, Deborah Ciullo ("Deborah"). See Tr. at 152:5-7. Desiree also worked for RDM as an office manager and was authorized to

⁴ Green Horizons was a general contractor in the business of erecting steel buildings. See Tr. at 313:6.

sign for the RDM account at Santander Bank. See Tr. at 162. Deborah was also an authorized bank signer. See Tr. at 160-162. RDM operated out of the office leased and used by Collective, located at 460 Faraday Avenue, Suite 3, in Jackson, New Jersey. See Tr. at 153-160; GC Ex. 25, 27, 28, 30, 31, 34, 39. When Collective could no longer afford to pay its lease in 2013, RDM took over the lease and continued operating out of that office. See Tr. at 47:6-21; 157:1-4.

Beginning in 2013, RDM began providing financial assistance to Collective, which, at that point, was experiencing overwhelming financial difficulty. RDM gave Collective loans, which Ryan intended to pay back. Collective paid back the loans from RDM, in part, by transferring some of Collective's equipment to RDM, since Collective did not have any cash flow. RDM also purchased some of Collective's equipment in order to provide funds to Collective. See Tr. at 47:6-21; 202:18-20.

RDM also assisted Collective in about 2012 or 2013, when Collective's bank threatened to call in its line of credit because Collective was not performing any work. See Tr. 72:4 – 75:1-4; 328:3-17. Because RDM was doing work and "had assets," RDM cosigned with Collective's bank so that Collective could make a payment plan to repay the line of credit. See Tr. at 73:1-23.

Initially, RDM was a non-union company, until the Union organized its workers and obtained authorization cards signed by a majority of RDM employees. See Tr. at 250-251. Accordingly, the Union filed a representation petition with the Board on May 7, 2014. Id. Shortly thereafter, Mark met with three representatives of the Union, including Union Coordinator Gurvis Miner. See Tr. at 270-71. At that meeting, Mark initially expressed his reluctance to sign with the Union in light of the fate suffered by Collective after signing with the Union. See Tr. at 184:2 – 185:20; 273:22- 274:10. Eventually, however, Mark agreed to sign with the Union on June 20, 2014. See Tr. 187:1-8; 279-280.

Not long after RDM signed with the Union, the Union filed a grievance against RDM. The matter went to arbitration and the parties agreed to a consent arbitration award on November 17, 2015, which was confirmed by the United State District Court on April 13, 2016. See Tr. at 187; GC Ex. 33. RDM was required to borrow money from its line of credit in order to pay the monies owed to the Union under the arbitration award. See Tr. at 187.

After signing with the Union, RDM met the same fate as Collective. That is, RDM began experiencing substantial, crippling debt caused at least in part by having to use union workers on jobs that were bid non-union. See Tr. at 89:3-14; 174:6-23; 186:21-25; 226:7-14; 239:1-18. For example, RDM owes the IRS over \$600,000, and owes Santander Bank around \$667,000. According to Mark, as of June 15, 2017, RDM owes approximately \$1.5 million total in various debts. See Tr. at 239:14-18. As a result of its grim financial outlook, RDM was forced to lay off its employees, including Ryan. See Tr. at Tr. 151:18-21; 316:13-16. Nevertheless, Mark has not ceased RDM's operations, and has persisted in trying to obtain bids for more union work. See Tr. at 239:1-7.

C. Ryan Ciullo Forms Remco in 2015

In late 2015, while still working for DY, Ryan formed Remco, a non-union concrete and masonry company. See Tr. at 92:23 – 93:23. Remco is owned 99% by Ryan, and 1% by his wife, Jennifer Ciullo (“Jennifer”). See Tr. at 93:4-7. Remco operates out of an office located at 1889 Route 9 in Toms River, New Jersey. See Tr. at 94:17-22. Jennifer is responsible for various office tasks for Remco, including payroll, billing, and drafting proposals. See Tr. at 94:23 - 95:5. Mark neither owns any part of, nor performs any work for, Remco. See Tr. at 336:8-12. Remco employed many RDM employees who, prior to the formation of Remco, either chose not to join the Union or were laid off by RDM. Tr. 99:24 – 100:1-2; Tr. at 213:18-25; Tr. at 213:22-25; 362:1-2; 336:21 – 337:4.

Ryan testified that he formed Remco because he “couldn’t support [himself] as a Union contractor,” as is apparent by the financial ruin of Collective. See Tr. at 96:21-22. Ryan intended to benefit from the non-union marketplace with Remco, while continuing his union company, Collective, in hopes that the marketplace will sustain union work at some point in the future. See Tr. at 326:12-17; 329:16-20. In other words, Remco and Collective together constitute a “double-breasted” operation which allows Ryan to compete for both union and non-union work.

By letter to Ryan dated December 2, 2016, the Union requested that Remco recognize the Union as the collective bargaining representative of the laborers in its employ and that Remco apply the CBA to the laborers. See GC Ex. 42. In a response dated December 12, 2016, Remco refused the Union’s request. See GC Ex. 43.

Ryan was quite candid about his desire to keep Remco non-union based on both Collective and RDM’s difficulty succeeding in the union marketplace. At some point in 2017, Union agent Sammy Espinoza arrived at one of Remco’s jobsites in 2017 and introduced himself to Ryan as a representative of the Union. During that meeting, Ryan openly expressed his preference to maintain Remco as a non-union operation in light of the serious misfortune both he and his father encountered attempting to operate Collective and RDM in the union marketplace. See Tr. at 253:5-17. Ryan readily acknowledged his relationship to Collective and RDM and was in no way deceptive about his desire to operate Remco as an open shop.

LEGAL ARGUMENT

THE ALJ ERRED BY IMPROPERLY APPLYING THE ALTER EGO DOCTRINE TO REMCO UNDER THE FACTS AND CIRCUMSTANCES OF THIS MATTER.

The ALJ erred by formalistically applying the factors of the alter ego test, without regard to whether application of the doctrine would be inequitable under the particular facts and circumstances facing Remco, Collective and RDM. The ALJ's decision in this respect offends well-established case law which mandates consideration of the equities before application of the alter ego doctrine, in light of the inherently equitable nature of the doctrine.

A. The Alter Ego Doctrine May Be Applied To Double-Breasted Operations To Determine Whether Two Or More Entities Performing the Same Work Are In Fact One Business.

The law clearly permits a construction firm to create two separate and distinct entities: one that is a party to a collective bargaining agreement with a union, and one that is not. See C.E.K. Indus. Mechanical Contractors, Inc. v. N.L.R.B., 921 F.2d 350, 352 at n.3 (1st Cir. 1990); Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1275 (9th Cir. 1984). This economically advantageous business arrangement, commonly known as a "double breasted operation" or a "dual shop," allows an enterprise to compete for and bid on both union and non-union work, so that both companies can "bid more competitively in their respective markets." C.E.K., 921 F.2d at 352 at n.3; Carpenters' Local, 743 F.2d at 1275. In other words, a double-breasted operation enables a business to have the "best of both worlds."

When a double-breasted operation is properly used in furtherance of this legitimate business purpose, the law respects the distinctness of each entity and therefore will not bind the separate non-union entity to the CBA governing its union counterpart. See Slack v. Int'l Union of Operating Engineers, at *18 (N.D. Cal. Aug. 19, 2014) (internal citation omitted). On the other hand, where formation of a separate non-union entity is merely a sham transaction or a

technical change in operation that was in truth designed to escape the unionized company's collective bargaining obligations, courts will employ the "alter ego" doctrine and treat the two separate companies as one employer for purposes of collective bargaining obligations. See Southern California Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co., Inc., 558 F.3d 1028, 1031-32 (9th Cir. 2009); Flynn v. Interior Finishes, Inc., 425 F.Supp.2d 38, 51 (D.D.C. 2006). As such, under the right circumstances, the alter ego doctrine may provide an "analytical hook" to bind an entity to the terms and conditions of a collective bargaining agreement of which it is not a signatory. See Local Union No. 38, Sheet Metal Workers Intern. Ass'n, AFL-CIO v. A & M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc. 314 F. Supp. 2d 332, 347 (S.D.N.Y. 2004).

There is no bright line test used to determine whether two nominally separate but related companies—one union and one non-union—are in truth one entity, such that the non-union company must abide by the terms and conditions of the CBA governing its union counterpart. Instead, the alter ego doctrine requires that the court weigh a number of non-exclusive factors which are geared toward "one key inquiry: Is the second company really the first, disguised by a sham transaction?" See Boland v. Thermal Specialties, Inc., 950 F.Supp.2d 146, 153 (D.D.C. 2013). Those factors include: "whether the two entities have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership, and whether the decision to change companies was motivated by anti-union sentiment." Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. A & M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc., 314 F. Supp. 2d 332, 347 (S.D.N.Y. 2004) (internal quotations and citations omitted). No one factor is dispositive to the analysis. Id.

B. Even Where The Factors of the Alter Ego Doctrine Are Present, Distinct Companies Should Not Be Treated As The Same Entity For Purposes of a Collective Bargaining Agreement Where the Union Suffers No Harm or Injustice By The Existence of Separate Entities.

The alter ego doctrine is not to be automatically applied merely because the relationship between or among entities is characterized by a sufficient number of the alter ego doctrine's criteria. See Boland, 950 F.Supp.2d at 153 (even where many alter ego factors were present, "that tally alone cannot carry the day."); Interior Finishes, 425 F.Supp. at 53-54. Instead, because it is an equitable doctrine, the alter ego doctrine is to be used only where inequity would occur if the corporate form were to be respected. Boland, 950 F.Supp.2d at 153; Interior Finishes, 425 F.Supp. at 52.

This concept was explored in great detail in Interior Finishes. The defendants in that case Interior Finishes, Inc. and R.H.I., Inc., were both solely owned by Dale R. Stevens and were part of a double-breasted operation. R.H.I. was established first and operated as a general contractor on non-union projects involving the sale and installation of flooring. Id. at 40-41. In response to demand among customers for union labor, Stevens formed a separate corporation, Interior Finishes, to install and supply flooring with an all-union work force, and entered into a number of CBAs with the various unions. Id. at 41-42. All projects performed by Interior Finishes were for a single customer, the May Company. Id. at 54. However, in 2004, the May Company selected other union contractors to perform its projects. Id.

After performing an audit of Interior Finishes' contributions under the CBAs, the Trustees of a multiemployer employee benefit plan brought an action alleging, *inter alia*, that R.H.I. is an alter ego of Interior Finishes and was therefore required to make contributions to the pension fund pursuant to the collective bargaining agreements signed by Interior Finishes, even though R.H.I. was not a party to those contracts. Id. at 43. The defendants countered that R.H.I.

should not be held liable as Interior Finishes' alter ego because application of the doctrine under the facts of the case would be a misuse of the doctrine. See id. at 43, 52.

The court agreed with the defendants that even where the characteristics of an alter ego relationship are present, the alter ego doctrine should not apply unless necessary to prevent some inequity. In reaching this conclusion, the court relied on two cases from the First and Sixth Circuits, both of which held that, irrespective of whether its factors are met, the alter ego doctrine should not be invoked in the absence of inequity. Id. (citing Mass. Carpenters Central Collection Agency v. A.A. Building Erectors, Inc., 343 F.3d 18 (1st Cir. 2003); Trustees of the Resilient Floor Decorators Insurance Fund v. A & M Installations, Inc., 395 F.3d 244 (6th Cir. 2005)). In those cases, the court found that imposition of the alter ego doctrine was not warranted because there was no indication that the union was somehow worse off as a result of the formation of a non-union counterpart or some other change in structure of the unionized company. Id. at 52-54. Moreover, there was no evidence that the owners of the companies deceived the Union about the relationship between the two companies. Id. at 52-54.

Importantly, in adopting the reasoning of the First and Sixth Circuits, the court in Interior Finishes rejected the Trustees' argument that this approach effectively requires a finding of "anti-union animus" in order to invoke the alter ego doctrine, a requirement that the D.C. Circuit, as well as many others, have rejected. Id. at 53. While the court agreed with the Trustees that a finding of anti-union animus or wrongful motive is not required before a court can apply the alter ego doctrine, it held that this approach to the alter ego doctrine did not effectively impose any such requirement. Id. at 54. Indeed, as the court explained, prior to the decisions in A.A. Building and A & M Installations, both the First and Sixth Circuits had definitively held that anti-union animus or wrongful motive is not a prerequisite for imposing the alter ego doctrine,

and neither A.A. Building or A & M Installations overruled those prior decisions. Thus, the equitable approach to the alter ego doctrine is fully compatible with the notion that anti-union animus or wrongful motive is not essential to finding that two entities are alter egos.

The court ultimately held that imposition of the alter ego doctrine to R.H.I. would be inappropriate and inequitable under the facts of the case. Central to the court's conclusion was the fact that the union did not receive less than it was due when R.H.I. began performing the work formerly performed by Interior Finishes. The court explained that, contrary to the Trustees' assertion, after Interior Finishes lost the May Company as its primary customer in 2004, R.H.I. did not continue to perform those projects on a non-union basis with former employees of Interior Finishes. Id. at 54. Instead, the May Company had selected completely different union contractors to perform its projects. Moreover, any Interior Finishes employees that may have been employed by R.H.I. in 2004 did not work on any of Interior Finishes' former projects. Id. at n.17. As such, the court explained, the Fund continued receiving contributions for the same work previously performed by Interior Finishes, only at that point, the contributions were coming from different subcontractors that received the bids from the May Company. Id. at 54-55.

The court also highlighted the fact that Interior Finishes continued to advertise and submit bids for business after losing its sole customer in 2004. According to the court, this is "uncharacteristic of a business entity that has closed its doors in order to avoid union responsibilities." Id. at 54.

Finally, Interior Finishes never deceived the Union about its structure, ownership, relationship with R.H.I., or the fact that R.H.I. regularly subcontracted with non-unionized

installers. Id. at 56. Because the court found the circumstances of the case to be unsuitable to the alter ego doctrine, the court did not even engage in an analysis of the alter ego factors.

Interior Finishes, and the cases relied upon therein, make clear that unless a double-breasted operation results in some type of injustice to the union, courts should not impose the collective bargaining obligations of the union entity upon the related non-union entity through the alter ego doctrine.

C. There Is No Equitable Basis Upon Which To Apply The Alter Ego Doctrine To Remco.

Here, the ALJ found that many of the facts suggesting alter ego status were present with respect to the relationship between Remco and Collective/RDM. However, in contravention of Interior Finishes and related cases, the ALJ completely failed to consider whether the Union was worse off as a result of the formation of Remco, or whether Ryan Ciullo deceived the Union in any way with respect to Remco's relationship with Collective and RDM and the nature of the work performed by Remco. Had the ALJ considered these factors as required, it would have determined that this case epitomizes that which is unsuitable for application of the alter ego doctrine.

1. The Union Is No Worse Off Than It Otherwise Would Have Been Had Remco Not Been Formed.

The testimony is clear that the formation of Remco did not result in the Union losing contributions or other benefits it would have otherwise received under its CBAs with Collective and RDM.

First, the financial situations of Collective and RDM made it virtually impossible for those companies to operate. As a result of debts, liens, and other financial hardships experienced by both Collective and RDM, neither company had sufficient capital to perform projects because they could not even afford to pay its workers. See Tr. 151:18-21 (Mark Ciullo explaining that

Collective could no longer pay its staff due to its enormous debt); Tr. 184:24 – 186:16 (Mark Ciullo explaining that once it went union, RDM could no longer get work from its regular customers because of the cost burdens of hiring union); Tr. 239:5-12 (Mark Ciullo stating that while he has been trying to get jobs for RDM, it is hard to get bids and perform work “without any money”).

Indeed, the testimony of both Ryan Ciullo and Mark Ciullo demonstrates that had they been financially able to perform union work, they would have. When asked whether he planned to restore Collective’s operations after paying off its massive debts, Ryan Ciullo stated:

I mean I don’t have anything against union work. If I can make money I mean I – that’s the reason that, you know, we made a go of it for 16-17 years. As long as the marketplace would support it, I would – you know, I wouldn’t – I don’t have a problem with it.

Tr. at 329:16-20. Ryan further explained that many large project owners had been gravitating toward non-union contractors “since the economic downturn of 2007-2008” and therefore there was simply not much business to be had by union shops like Collective. See Tr. at 330:1-12. Similarly, Mark Ciullo testified that RDM is still in existence, and that he would like to continue bidding work for RDM once its financial situation improves. See Tr. 239:5-12. This testimony provides further support for the conclusion that any negative impact to the Union resulted from the financial hardship of the signatory companies, not the formation of a non-union shop. Put simply, had the entities been able to survive financially, they would have gladly performed work governed by the CBAs.

Finally, the formation of Remco did not cause Collective and RDM’s union workers to begin performing non-union work, because any former Collective or RDM employees that Remco hired had already left RDM well before the formation of Remco. During his testimony, Ryan Ciullo explained that while the Union organized many of RDM’s employees, “some of

them weren't interested in joining the Union and then I guess they worked for other companies and when I formed Remco I reached out to them." Tr. 99:24 – 100:1-2. Mark Ciullo corroborated this testimony by explaining that "a handful" of RDM employees did not want to join the Union, and therefore they were let go. Tr. at 213:18-25. Significantly, this occurred before the formation of Remco, while Ryan Ciullo was still working for RDM. See Tr. at 213:22-25; 362:1-2; 336:21 – 337:4. It is clear that, as in Interior Finishes, Remco did not poach any of RDM's Union employees away from performing union work. Thus, the formation of Remco did not result in Union employees performing non-union work to the detriment of the Union's rights under the CBAs.

2. **The Union Was Never Deceived Regarding The Relationship Between Remco, Collective and RDM and Remco's Non-Union Status**

Sammy Espinoza, a representative of the Union, testified that when he first went to one of Remco's jobsites and met with Ryan Ciullo, Ryan gave a candid account of Remco's ties to Collective and RDM and its desire not to perform union work. According to Mr. Espinoza, Ryan explained that:

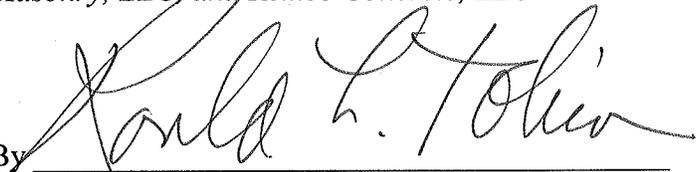
REMCO is his company. How REMCO is not going to sign no agreement to no unions. *How the unions forced his father into signing an agreement. How Collective is gone, because of the unions.* I basically responded by saying the unions didn't force anybody to do anything. And he just kept venting after that. . .

Tr. at 253: 5-17. Not even the Union's own representatives claimed to have been deceived in any way nor kept in the dark about his ownership of Remco, Remco's relationship to Collective and RDM, and his desire to maintain Remco's non-union status. As in Interior Finishes, the Union was fully apprised of Remco's structure, ownership, and relationship with Collective and RDM, and the fact that it performed non-union work. See Interior Finishes, 425 F.Supp.2d at 52, 56. Under such circumstances, imposition of the alter ego doctrine is unwarranted, and Remco should not be bound by the collective bargaining obligations of Collective or RDM.

CONCLUSION

The facts of case readily lend themselves to the rejection of the alter ego doctrine, even assuming *arguendo* that the typical indicia of an alter ego relationship are present. The Union suffered no injustice as a result of the formation of Remco, nor was the Union ever deceived about Remco's non-union status or its relationship to Collective or RDM. As such, Respondents respectfully request that its exceptions be granted and the Complaint in this proceeding be dismissed.

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Masonry, LLC, and Remco Concrete, LLC*

By 
RONALD L. TOBIA

Dated: January 5, 2018

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COLLECTIVE CONCRETE, INC.)	
AND REMCO CONCRETE LLC)	
)	
Petitioners)	Nos.18-1109, 18-1140, 18-1169
)	
v.)	Board Case No.
)	22-CA-181515
NATIONAL LABOR RELATIONS)	
BOARD)	
)	
Respondent)	
)	
and)	
)	
NEW JERSEY BUILDING)	
LABORERS DISTRICT COUNCIL)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its document contains 6,410 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.