

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

MIDLAND ELECTRICAL CONTRACTING  
CORP.

and

Case Nos. 29-CA-144562  
29-CA-144584

UNITED ELECTRICAL WORKERS OF AMERICA,  
IUJAT, LOCAL 363

**MAC FHIONNGHAILE & SONS ELECTRICAL CONTRACTING INC.’S  
REPLY IN SUPPORT OF ITS PETITION TO REVOKE SUBPOENA**

**Introduction**

After receiving Counsel’s Opposition to the Petition to Revoke Subpoena (“Opposition”), MAC was apprised by the Region that it was asserting that the basis for their serving a subpoena on MAC was their belief that MAC is the alter ego of Midland. Through this Reply, MAC strenuously denies any allegation that it is Midland’s alter ego and posits that Counsel has put forth no evidence whatsoever to substantiate this theory. In turn, MAC further requests that the Board recognize that Counsel’s subpoena request is both overly broad and unduly burdensome upon MAC, an independent and uninvolved third-party entity with no ownership connection to Midland or the underlying proceedings before the National Labor Relations Board (“NLRB”).

**I. No Evidence Substantiates Counsel’s Claim of Alter Ego Status**

Counsel’s allegation that MAC is the alter ego of Midland is based upon purely speculative statements and no actual evidence.

“To be alter egos, the predecessor and successor must be essentially the same company, separated by only a sham transaction that cloaks the successor’s true identity.” *Boland v. Thermal Specialties, Inc.*, 950 F. Supp. 2d 146, 152 (D.D.C. 2013). Such a relationship can manifest itself in two ways: (1) “when the new entity begins operations but is ‘merely a

disguised continuance of the old employer,” or (2) “a ‘double-breasted operation,’ where ‘two or more coexisting employers performing the same work are in fact one business, separated only in form.’” *Tr. of Detroit Carpenters Fringe Benefit Funds v. Indus. Contracting, LLC*, 581 F.3d 313, 318 (6th Cir. 2009) (quoting *N.L.R.B. v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331, 336 (6th Cir. 1990)). “The Board typically determines alter ego status by examining whether the entities in question have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.” *Subject: Reliant Bolt Reliant Fastener*, No. Case 13-CA-40595-1, 2003 WL 1832117, at \*2 (Feb. 26, 2003).

In her Opposition, Counsel asserts that it is inappropriate to base an argument in support of your position upon “conclusory, unsupported assertions but then utilizes a series of conclusory, unsupported assertions to support her subpoena request. Nowhere in her Opposition does Counsel establish, by any evidence whatsoever, that the owners of Midland have any common ownership or controlling interest, nor does she establish that they have any involvement at all. Counsel also fails to establish that MAC and Midland share any common elements – she does not establish common address, nor common use of equipment. Her assertion that the owners of MAC are the daughter-in-law and son of one of the owners of Midland fails to establish any common factor relevant to justify a finding of alter ego, just that relatives own two different companies. Her assertion that the son at one time worked for the father also does not establish any element that establishes alter ego. Noteworthy she fails to produce any evidence that during the alleged period when the son worked for Midland that he held any ownership or controlling interest in Midland. She goes on to assert that they have adduced that MAC and Midland appear to operate out of the same space in Sea Bright, NJ, but fails to set forth any evidence to support this assertion. Counsel asserts that the Union in her case had “evidence” that

the owner of Midland was operating his business through his children. Noteworthy, despite this significant statement, Counsel fails to set forth one iota of evidence to support this assertion. Counsel further asserted that they uncovered evidence that Midland was operating out of other locations including Keyport, New Jersey where Midland posted notices, yet again failed to produce any evidence that MAC was also operating in any way out of any of those locations.

Counsel does assert that Midland had subcontracted or assigned work to Midland in 2016. Nothing unusual about a company subcontracting work to another company, and entering into a subcontract or assigning work in and of itself does not establish an “alter ego”. In fact, MAC has made it clear that it is more than willing to share the requested information that directly relates to this “work”. Noteworthy, this same work is the issue of a lawsuit between MAC and Midland, because Midland has never paid MAC for the services it rendered related to this work. There is legal activity between the two companies because they are not alter egos and share no common ownership or interests. Nowhere does Counsel set forth anything more than unsupported speculation that MAC is the successor to Midland’s business, only cryptically claiming that Midland “funneled” work to MAC.

Thus, Counsel utterly lacks an argument that MAC is Midland’s alter ego. So far as MAC can discern, Counsel primarily relies upon the familial relationship between MAC and Midland’s owners, which in the absence of any other material evidence, does nothing to establish that MAC is the alter ego of Midland. Indeed, as a broad swath of NLRB precedent provides, that mere fact is insufficient to confer alter ego status, and consequently, defeats any possibility of derivative liability on the part of MAC. *See, e.g., Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Dorn Sprinkler Co.*, 669 F.3d 790, 795 (6th Cir. 2012) (holding that two companies were not alter egos “even though the characters [were] the same and [were] related to

one another”); *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, 349 (S.D.N.Y. Apr. 21, 2004) (recognizing that common ownership may be inferred from a close familial relationship “only when there has been a strong showing of common control”); *In re Armen Digital Graphics, Ltd.*, No. 96 Civ. 5844, 1997 WL 458738, \*7 n.9 (S.D.N.Y. Aug. 8, 1997) (“Were courts to assume alter ego status merely from the closely held ownership of the two companies by members of the immediate family, families would be effectively precluded from organizing their business affairs in any but a single corporate entity.”); *Kenmore Contracting Co.*, 289 NLRB 56, \*3-4 (1988) (finding familial relationship as indicative of alter ego status but only in conjunction with proof of several other factors).

In a recent NLRB decision analyzing alter ego status, the Board determined that a spousal relationship between the owners of two companies was insufficient to prove that one company was the other’s alter ego. *See Glass Fabricators, Inc. & Glass & Metal Sols., Inc., Alter Egos & Int’l Union of Painters & Allied Trades Dist. Council 6*, No. 08-CA-174567, 2018 WL 5249925 (Oct. 19, 2018). In *Glass Fabricators*, the Board recognized that, while the owners of the two companies in question were married, neither of them had any involvement whatsoever with the other’s company. *Id*

Another pertinent case involves the same familial relationship that exists between the owners of Midland and MAC. In *Sabine Area Joint Apprenticeship & Training Fund, Inc. v. Texas Tin Shop, Inc.*, a federal district court in Texas considered whether a company called Texas Air Duct was the alter ego of Texas Tin based upon the fact that Texas Air Duct’s owner, Joey Herrington, was the son of the owners of Texas Tin. *Sabine Area Joint Apprenticeship*, No. 1:05-CV-786-TH, 2009 WL 10707305, at \*6-8 (E.D. Tex. Jan. 15, 2009). After considering the

testimony of several witnesses, the court found insufficient evidence to conclude that Texas Air Duct was Texas Tin's alter ego because no cross-control, operational overlap, or management similarities existed between the two companies. *Id.* at \*8-9. Notably, the only connection between the two companies that the court could identify was the familial relationship, which it noted "does not constitute common ownership." *Id.* at \*8 (citing *Reigel Elec.*, 341 NLRB 198, 202 (2004); *Kenton Transfer Co.*, 298 NLRB 487, 488 (1990); *First Class Maint.*, 289 NLRB 484, 485 (1988); *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292, 1297-98 (1983)).

Here, the Board is presented with a similar scenario. While the owners of MAC and Midland do share a familial relationship, as Sean and Amanda McGinley are Kevin McGinley's son and daughter-in-law, *Glass Fabricators, Sabine*, and the other cited precedents definitively establish that merely sharing the same blood does not, standing alone, suffice to create a business relationship. To hold otherwise would cause courts and administrative tribunals to enter the domain of genetic research rather than factual and legal analysis. Much more is necessary, but Counsel has not met the proper threshold.

## **II. The Subpoena is Overly Broad and Unduly Burdensome**

Additionally, this case exposes a crucial weakness within the Board's subpoena process. MAC, an innocent third-party entity with no relevant ties to Midland, has been hamstrung by a very substantial burden that will be extremely costly and damaging to MAC's business and reputation. Until being served with an overly broad and unduly burdensome subpoena, MAC has had no involvement whatsoever in the proceedings before the Board. Now, Counsel for the Region seeks to engage in a quintessential fishing expedition. MAC was completely blindsided by this subpoena and is puzzled as to why Counsel believes it has any involvement in Midland's

case. Indeed, it seems as though Counsel is acting solely upon the Union's unsubstantiated allegations regarding MAC.

“The burden to demonstrate undue burden rests with the party resisting compliance. This burden ‘is not easily met.’” *N.L.R.B. v. Midwest Heating and Air Conditioning, Inc.*, 528 F.Supp.2d 1172, 1179 (D. Kan. 2007) (quoting *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)), *cert. denied*, 479 U.S. 815 (1986). There is no doubt that “[s]ome burden on subpoenaed parties is to be expected and is necessary . . . .” *Id.* (quoting *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977)) (emphasis added). “[Thus,] [t]o demonstrate undue burden, the subpoenaed party must show that compliance with the subpoena ‘would seriously disrupt its normal business operations.’” *Id.*

MAC only employs a skeleton staff of three administrative employees, all of whom would be forced to suspend their normal work activities to assist with this subpoena request. Additionally, MAC would likely have to contract with a third-party vendor to manage the production, as the subpoena pertains to every document related to MAC since its incorporation in 2014. The production will be extremely costly and likely involve thousands of documents, requiring MAC's small administrative staff to assist the vendor and provide guidance. *See N.L.R.B. v. Vista Del Sol Health Servs., Inc.*, 40 F.Supp.3d 1238, 1266 (C.D. Cal. 2014) (holding that to establish an unduly burdensome subpoena, a party must “show what the likely costs of [compliance] would be and that paying such costs would seriously disrupt or threaten its business”); *E.E.O.C. v. Bay Shipbuilding Co.*, 668 F.2d 304, 313 (7th Cir. 1981) (a party may demonstrate undue burden in a petition to revoke a subpoena by showing that “compliance would threaten the normal operation of [its] business”). With its entire administrative staff entangled with this subpoena, MAC's business operations will undoubtedly suffer.

### **III. The Board Must Limit Abusive Subpoena Requests**

MAC certainly does not dispute that it is reasonable to require companies to comply with subpoenas under most circumstances. Under these specific circumstances, however, this particular subpoena is based upon rampant speculation, and as is argued above, will cause significant disruption to MAC's business and day-to-day activities. Simply put, the mere speculation of the Union based on familial relationship should not permit the significant burdening of a third party. As noted above, the Counsel for the Region has asserted that the Union has stated it has evidence that MAC is the alter ego of Midland. The Counsel has stated that it believes that the two companies are operating out of the same space in Sea Bright, NJ and that the Region has adduced evidence that they are alter egos. As a threshold before a third party is burdened by a subpoena of the magnitude of the subpoena at issue, the Counsel for the Region should set forth some level of evidence that it is engaged in more than a totally speculative fishing expedition. Balancing the realities of having Counsel meet such a minimal threshold against the burden on MAC in responding to the subpoena, clearly calls for the Region to meet its threshold first. Counsel should be required at minimum to provide some support for its conclusory assertions.

There must be some meaningful threshold met before such blanket requests can proceed, otherwise the entire subpoena process could run amok.<sup>1</sup> Without such a threshold, the NLRB process could be utilized by Unions to harass or abuse Employers who they do not control or whom they have a dispute with. The Board would preclude such tactics by requiring that parties

---

<sup>1</sup> "To enforce an administrative subpoena, an agency must demonstrate that the subpoena meets certain threshold requirements... '(1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry.'" *Chao v. Comm. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007) (quoting *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir. 1980)).

seeking to impose the burden of a subpoena must rely on more than broad, unsupported conclusory statements. This case illustrates that principle, as there is simply no basis for the Board to find that MAC is Midland's alter ego. Counsel should be required to establish that there is some factual evidence to justify its claim that MAC is the alter ego of Midland.

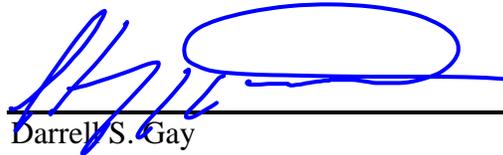
**Conclusion**

Counsel for the Region has not identified any scintilla of sufficient evidence to support her request for a subpoena of this magnitude. Accordingly, for the reasons stated above, MAC hereby requests that the Board grant its Petition to Revoke Subpoena, or in the alternative, limit the subpoena to the information related to the assignment of the work from Midland to MAC..

Dated: December 27 2019

Respectfully Submitted,

ARENT FOX LLP



---

Darrell S. Gay  
Stavros Karageorgiou  
1301 Avenue of the Americas  
42<sup>nd</sup> Floor  
New York, NY 10019  
Phone: 212.484.3900  
*Attorneys for Non-Party Mac Fhionnghaile  
& Sons Electrical Contracting Inc.*

**CERTIFICATE OF SERVICE**

I, Stavros Karageorgiou, hereby certify that a true and correct copy of the foregoing Reply in Support of Petition to Revoke Subpoena was served on this 27<sup>th</sup> day of December, 2019, on the following via NLRB e-filing and via email:

Kathy F. King  
Regional Director  
National Labor Relations Board  
Region 29  
Two Metro Tech Center, Suite 5100  
Brooklyn, NY 11201-3838

Emily Cabrera  
Counsel for General Counsel  
Two Metro Tech Center, Suite 5100  
Brooklyn, NY 11201-3838