

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: May 11, 2017

TO: Karen P. Fernbach, Regional Director  
Region 2

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Rogan Brothers Sanitation, Inc.  
Case 02-CA-040028

177-1667-0100-0000  
601-5050-1500-0000  
601-7515  
625-4412  
625-4417-2500-0000  
625-4417-2800-0000  
750-2533  
750-2550  
750-2567  
750-5025  
762-8000  
787-6000

This case was submitted for advice as to whether the Region should pursue proceedings to hold R&S Waste Services, LLC (“R&S”) liable as a *Golden State*<sup>1</sup> successor for the unfair labor practices committed by Rogan Brothers Sanitation, Inc. (“Rogan Brothers”). We conclude that R&S is a *Golden State* successor because it was on notice of the unfair labor practice charge against Rogan Brothers before it foreclosed on its security interest in Rogan Brothers or, in the alternative, before it entered into an enforceable security agreement. We further find that R&S can be held responsible for its predecessor’s violations notwithstanding that it was never named as a respondent in the unfair labor practice proceeding and an administrative law judge has already determined that it was not a *Burns*<sup>2</sup> successor.

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<sup>1</sup> *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

<sup>2</sup> *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

## FACTS

Rogan Brothers was engaged in the collection and disposal of residential and commercial waste in Westchester County, New York and in New York City. As of early 2011, Teamsters Local 813 (“Union”) represented a bargaining unit of about 25 to 30 truck drivers and helpers. At that time, the parties’ collective-bargaining agreement was an unenforceable members-only contract and only eight unit employees who were Union members were paid in accordance with the contract.

### First Unfair Labor Practice Proceeding Against Rogan Brothers (*Rogan Bros. I*)

In January 2011, Rogan Brothers entered into an informal settlement agreement to resolve a charge alleging that it discriminatorily discharged three employees in July 2010 and made various unlawful threats and statements. Although Rogan Brothers reinstated one discriminatee, it subsequently requested that the settlement agreement be withdrawn and indicated that it would not comply with its backpay obligations. The Region revoked its approval of the settlement agreement and issued complaint pursuant to the default provisions of that agreement. The Board granted summary judgment in favor of the then-Acting General Counsel and rejected the Employer’s various defenses, including its request that the matter be deferred to the grievance-arbitration procedures.<sup>3</sup> Despite subsequent enforcement of that Board order by the Second Circuit Court of Appeals, the Region has been unable to recover any backpay for the discriminatees and has exhausted efforts to locate assets to satisfy the liability.

### R&S’s Takeover of Rogan Brothers’ Operations<sup>4</sup>

By early 2011,<sup>5</sup> Rogan Brothers was experiencing significant financial difficulties and sought assistance from Joseph Spiezio, a so-called “vulture capitalist” who acquires failing companies by making high interest loans with terms providing for acquisition of the business and its assets if the borrower defaults.<sup>6</sup> Spiezio owns

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<sup>3</sup> *Rogan Bros. Sanitation, Inc. (Rogan Bros. I)*, 357 NLRB 1655, 1656-57 (2011), *enforced mem.*, No. 12-236 (2d Cir. Mar. 22, 2012).

<sup>4</sup> The facts in this section are largely drawn from the Board’s decision in *Rogan Bros. Sanitation, Inc. (Rogan Bros. II)*, 362 NLRB No. 61 (Apr. 8, 2015), *enforced*, 651 F. App’x 34 (2d Cir. 2016).

<sup>5</sup> All dates hereinafter are in 2011, unless otherwise noted.

<sup>6</sup> *Rogan Bros. II*, 362 NLRB No. 61, slip op. at 30-31.

Spiezio Organization, a management firm that operates several of Spiezio's businesses, including Pinnacle Equity Group ("Pinnacle"), a business financing services company. Spiezio agreed to extend Rogan Brothers an \$850,000 loan, financed through Pinnacle, and Rogan Brothers entered into an agreement whereby Spiezio would serve as its consultant, including for the purpose of retaining counsel for labor related matters and negotiating with the Union.

In a letter dated January 1, Spiezio stated that, due to Rogan Brothers' financial troubles, he would require a security agreement for the loan that would cover "all of the commercial sanitation customers, contracts and containers, compactors, accounts receivable and vehicles." Spiezio also indicated that he intended to form his own waste company to assume the Westchester operations in the event Rogan Brothers defaulted on the loan. The security agreement, executed on January 3, granted Pinnacle a security interest in the collateral set forth in "Exhibit A," however no such document has ever been produced by Rogan Brothers or R&S.<sup>7</sup> Rather, as discussed more fully below, there exists a document entitled "Schedule A," which is a Uniform Commercial Code ("UCC") financing statement that lists the loan's collateral and is dated several months after the security agreement was signed. Events that would trigger default under the security agreement included, among other things, nonpayment of any principal or interest due, as well as false statements, representations, and warranties. Among the debtor representations and warranties contained in the security agreement, Rogan Brothers declared that it was not in default on any other instrument and that it was the owner of the collateral free and clear of any liens or other encumbrances.

In a letter dated February 1, Spiezio stated that it had "not been easy" to understand how Pinnacle would secure the loan and also informed Rogan Brothers that the loan would be capped at \$800,000. He indicated that Rogan Brothers would need to execute UCC documentation, which would itemize the trucks, customer lists, containers, and account receivables. Spiezio indicated that the UCC filing "will list it all out clearly."

Pursuant to Spiezio's consultant role, he was copied on Rogan Brothers' February 28 request to withdraw the above-mentioned unfair labor practice charge that had been informally settled in January. That same day, Spiezio forwarded the withdrawal request to the Union's business agent via email.<sup>8</sup> Over the course of the

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<sup>7</sup> In addition to the security agreement, Pinnacle and Rogan Brothers also executed a promissory note and a demand note on January 3. Neither of these documents describes the collateral for the loan.

<sup>8</sup> See GC Exhibit 93 in *Rogan Bros. II*.

next few months, Spiezio repeatedly implored the Union to withdraw the charge and resolve it through the grievance-arbitration process to no avail.

By letter dated March 2, Spiezio informed Rogan Brothers that “some serious discoveries have been made that would truly force me to take a position for security and disposition thereof.” He also indicated that he would apply for a waste hauling license with the Westchester County Solid Waste Commission, which he did around this time.

On May 25, Pinnacle filed a UCC financing statement listing the collateral for the loan. According to this filing, the collateral included: all commercial routes, all customer lists, 450 roll off dumpsters, 35 compactors, 800 garbage containers, computers, office furniture, and 19 vehicles listed by VIN numbers. At some point, someone handwrote “Schedule A” at the top of this UCC financing statement.

By letter dated June 1, Spiezio informed Rogan Brothers of his discovery of certain outstanding debts and liens, which constituted a breach of Rogan Brothers’ representation and warranty obligations under the security agreement. Spiezio asserted that such breach triggered default on the Pinnacle loan. He also informed Rogan Brothers that he had filed the UCC form in May and would assign the debt over to R&S by July 31, 2011. On June 30, R&S received its waste hauling license, and the next day Spiezio declared Pinnacle’s loan to Rogan Brothers in default. That same day, Spiezio contracted with Rogan Brothers to perform waste removal services on behalf of R&S.

In late July, R&S made final preparations to implement its takeover of the Westchester operations. Spiezio and Rogan Brothers discussed how to divide up the assets and assigned customer accounts between the two entities. On July 26, R&S sent a letter to Rogan Brothers’ customers indicating that R&S would service their accounts, effective immediately. On July 31, Pinnacle, R&S, and Rogan Brothers executed a Surrender of Collateral in Satisfaction of Debt, which stated that Pinnacle agreed to accept the collateral “as listed on Schedule A of the Security agreement dated January 3, 2011 and the UCC filed May 25, 2011.” Around this time, Rogan Brothers laid off most of its workforce, save a few drivers who performed work under the subcontracting arrangement with R&S and continued to service their same routes with the same trucks.

On August 1, R&S commenced operations servicing most of Rogan Brothers’ customers and using a work force consisting mainly of former employees of Rogan Brothers who were not Union members. R&S paid its drivers and helpers the same wages they earned at Rogan Brothers, and they reported to work at the same truck yard as they always had. Spiezio relied on Rogan Brother’s former general manager to help him run R&S’s day-to-day operations, which included assigning work to Rogan

Brothers' employees and then discharging them at Spiezio's direction, and rehiring at least one driver as an R&S employee.

At the end of September, the Union requested that R&S meet and bargain, but R&S refused.<sup>9</sup> The Union also demanded that Rogan Brothers cease undermining the collective-bargaining agreement by transferring work to R&S. As a result, Rogan Brothers decided to stop performing subcontracted work for R&S as of October 4. Around this time, three drivers who had been performing R&S work while on Rogan Brothers' payroll were pressured to resign their Union membership in order to retain employment or secure jobs with R&S, and they were discharged or laid off from Rogan Brothers. One of these drivers was hired by R&S only after agreeing to withdraw from the Union. Another decided not to apply because he did not wish to resign his Union membership.<sup>10</sup>

After the split with R&S, the owner of Rogan Brothers continued to be involved in the waste business, either through Rogan Brothers or another entity, but on a reduced scale.

Second Unfair Labor Practice Proceeding Against Rogan Brothers with R&S as Co-Respondent (*Rogan Bros. II*)

The Union filed unfair labor practice charges against Rogan Brothers and R&S challenging, among other things, the October discharges and the imposition of discriminatory conditions of employment, as well as R&S's refusal to recognize the Union. Based on its finding of common ownership and financial control, interrelation of operations, common control of labor relations, and common management, the Board determined that Rogan Brothers and R&S operated as a single employer from about March 1 to October 4, 2011.<sup>11</sup> As such, they were jointly liable for the October discriminatory discharges and refusal to hire. The administrative law judge also ruled that R&S was not a *Burns*<sup>12</sup> successor because there was no continuity of

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<sup>9</sup> Shortly thereafter, R&S recognized a different union as the representative of its drivers.

<sup>10</sup> The third employee chose not to apply for work with R&S based on his dissatisfactory experience working for Rogan Brothers.

<sup>11</sup> *Rogan Bros. II*, 362 NLRB No. 61, slip op. at 3.

<sup>12</sup> *Burns*, 406 U.S. at 280-81 (holding that a successor employer is obligated to recognize and bargain with the union representing the predecessor's bargaining unit

representation.<sup>13</sup> Although a majority of R&S's drivers and helpers were former Rogan Brothers employees, only a small minority were actually represented by the Union and paid wages set forth in the members-only collective-bargaining agreement. The then-Acting General Counsel did not except to this ruling. The Board adopted the dismissal of the Section 8(a)(5) allegations on the basis that the collective-bargaining agreement was unenforceable and did not comment on the judge's finding that R&S was not a *Burns* successor.

### ACTION

We conclude that the Region should pursue proceedings to hold R&S jointly and severally responsible as a *Golden State* successor for the unremedied liabilities in *Rogan Bros. I* because R&S was on notice of the allegations before it foreclosed on its security interest in Rogan Brothers or, in the alternative, before it entered into an enforceable security agreement. We further find that neither the failure to name R&S in the original unfair labor practice proceeding, nor the conclusion that R&S was not a *Burns* successor, do not absolve R&S of responsibility for remedying the violations found in *Rogan Bros. I*.

In *Golden State*, the Supreme Court approved the Board's *Perma Vinyl Corp.*<sup>14</sup> holding that an employer that acquires a business in "basically unchanged form"<sup>15</sup> with knowledge of the predecessor's unfair labor practices can be held liable for the predecessor's remedial obligations.<sup>16</sup> The Court agreed with *Perma Vinyl's* rationale that a purchaser-successor who is on notice is in the best position to redress the violations without being unduly burdened because it can adjust the purchase price to reflect its potential liability or arrange other indemnification by the offending seller.<sup>17</sup>

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employees where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by the union).

<sup>13</sup> *Rogan Bros. II*, 362 NLRB No. 61, slip op. at 31-32.

<sup>14</sup> 164 NLRB 968 (1967), *enforced sub nom. U.S. Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

<sup>15</sup> *Id.* at 969.

<sup>16</sup> *Golden State*, 414 U.S. at 171-72 & n.2, 184-85.

<sup>17</sup> *Id.* at 171 n.2, 185.

To be a *Golden State* successor, the new employer must first maintain substantial continuity of the employing enterprise after the transfer of business.<sup>18</sup> In determining whether “substantial continuity” exists, the Board considers factors such as continuity in business operations, location, work force, jobs and working conditions, supervisors, equipment and methods of production, product or service, and customers.<sup>19</sup> Second, as stated above, *Golden State* liability requires evidence that the successor took over the predecessor’s business with knowledge of the potential liability. The burden is on the successor to demonstrate that it lacked actual or constructive knowledge.<sup>20</sup> The Board will draw reasonable inferences from the record as a whole to support finding notice.<sup>21</sup> Knowledge is established if the successor was aware of the conduct underlying the unfair labor practice; the successor need not be aware of particular unfair labor practice charges or complaints.<sup>22</sup>

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<sup>18</sup> See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) (focus of successorship analysis is “on whether the new company has ‘acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations,’” i.e., “whether there is ‘substantial continuity’ between the enterprises”) (quoting *Golden State*, 414 U.S. at 184, and *Aircraft Magnesium*, 265 NLRB 1344, 1345 (1982), *enforced mem.*, 730 F.2d 767 (9th Cir. 1984)); *Commercial Forgings Co.*, 315 NLRB 162, 166 (1994) (finding continuity of operations for purpose of *Golden State* successorship based on conclusion that continuity in employing enterprise existed under *Burns*), *enforced per curiam sub nom. Forgings Forever, Inc. v. NLRB*, 77 F.3d 482 (6th Cir. 1996).

<sup>19</sup> *Fall River Dyeing*, 482 U.S. at 43 (citing *Aircraft Magnesium*, 265 NLRB at 1345); *Hot Bagels & Donuts*, 244 NLRB 129, 130 (1979), *enforced*, 622 F.2d 1113 (2d Cir. 1980).

<sup>20</sup> *S. Bent & Bros.*, 336 NLRB 788, 790-91 (2001) (“concept of constructive knowledge incorporates the notion of ‘due diligence’”); *Robert G. Andrew, Inc.*, 300 NLRB 444, 444 (1990).

<sup>21</sup> *Robert G. Andrew*, 300 NLRB at 444. See also *Wyandanch Engine Rebuilders, Inc.*, 328 NLRB 866, 874 (1999) (presumption of knowledge where predecessor’s president became manager of successor and personally participated in unfair labor practices); *Golden State*, 414 U.S. at 173 (evidence supported inference that manager of predecessor informed his prospective employer of the unfair labor practice litigation prior to the sale).

<sup>22</sup> *S. Bent & Bros.*, 336 NLRB at 790; *Robert G. Andrew*, 300 NLRB at 444; *Signal Communications*, 284 NLRB 423, 429 (1987) (company that took over predecessor’s business operation before NLRB charge was filed against predecessor, but with knowledge of predecessor’s unlawful conduct, was *Golden State* successor).

Although *Golden State* and *Perma Vinyl* involved sales of businesses, the Board has imposed remedial liability on employers where no purchase of a business or its assets took place.<sup>23</sup> The Board has merely required that there be “some pecuniary or security interest, or other ‘clearly identifiable and connecting interest’ between the predecessor and the successor.”<sup>24</sup> Where there is such a connection, the Board examines the nature of that relationship to determine if the successor could have effectively insulated itself from liability for the predecessor’s unfair labor practices.<sup>25</sup> Generally, if the successor lacked the opportunity to shield itself, the Board will not find *Golden State* successorship.<sup>26</sup>

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<sup>23</sup> See *Hot Bagels & Donuts*, 244 NLRB at 131 (successor was former predecessor who returned as lessee after bank foreclosure); *Ponn Distributing, Inc.*, 232 NLRB 312, 313-15 (1977) (successor cancelled its security interest and retook distributorship), *enforcement denied on other grounds sub nom. NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978); *Martin J. Barry Co.*, 278 NLRB 393, 394 n.4 (1986) (reduced management fee effectively constituted payment for business); *Evans Plumbing Co.*, 278 NLRB 67, 67-68 (1986) (successor formed using capital obtained from creditor’s foreclosure on security interest in predecessor’s assets is *Golden State* successor if not alter ego), *enforced in relevant part sub nom. Evans Servs., Inc. v. NLRB*, 810 F.2d 1089 (11th Cir. 1987).

<sup>24</sup> *S. Bent & Bros.*, 336 NLRB at 792 (quoting *Glebe Electric*, 307 NLRB 883, 885-86 & n.27 (1992) (subcontractor who completed final phase of electrical project for general contractor after prior subcontractor decided to go out of business not a *Golden State* successor because there was “total absence of any business relationship” between the two subcontractors)).

<sup>25</sup> *Id.* (*Golden State* successorship found notwithstanding that banks arranging sale were purportedly unwilling to negotiate where buyer never requested a lower price and, in fact, purchased the assets at a discount in excess of the predecessor’s liabilities). See also *Lebanite Corp.*, 346 NLRB 748, 749-50 (2006) (no *Golden State* successorship where lease of operations was terminable on 30 days’ notice and indemnification clause impractical because predecessor was financially precarious); *Hill Industries*, 320 NLRB 1116, 1116-17 (1996) (no *Golden State* successorship where purchase of materials was small compared to potential unfair labor practice liabilities).

<sup>26</sup> *S. Bent & Bros.*, 336 NLRB at 792. But see *Eldorado, Inc.*, 335 NLRB 952, 952 n.1 (2001) (unnecessary to find successor had opportunity to indemnify itself or negotiate a price reduction where successor’s president was on both sides of transactions between the two companies; president of successor co-owned predecessor company and retained stock and assets as collateral after sale).

## I. R&S Knew of Charge in *Rogan Bros. I* Prior to Foreclosure

This case turns on whether R&S had the requisite knowledge under *Golden State*, since the Board’s factual findings in *Rogan Bros. II* amply demonstrate that R&S continued Rogan Brothers’ operations in essentially unchanged form.<sup>27</sup> We conclude that R&S had timely notice of the charge in *Rogan Bros. I* such that imposition of *Golden State* liability will not produce an unfair hardship.

In *Ponn Distributing*,<sup>28</sup> the successor employer, essentially a franchisor, cancelled its predecessor’s distributorship, foreclosed on its security interest, and continued to operate the business essentially without change. It was undisputed that the successor was aware of the unfair labor practices “at the time of its foreclosure on its security interest.”<sup>29</sup> The Board rejected the defense that the successor had no opportunity to insulate itself from the predecessor’s liabilities since there was no sale of assets.<sup>30</sup> It held that a purchase was not a prerequisite for *Golden State* successorship, and it found the security interest to be sufficiently analogous to a purchase.<sup>31</sup> Moreover, the Board found no undue hardship since the successor, as a franchisor, maintained some control over the predecessor’s manner of operation and it assumed operations in order to safeguard its own investment; thus, it was not a “totally disinterested party” when it foreclosed.<sup>32</sup>

Likewise, in *Evans Plumbing*,<sup>33</sup> the Board found *Golden State* successorship following foreclosure on a security interest. There, an official of the predecessor company made a loan to the company that was secured by a recorded security

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<sup>27</sup> In this regard, there was no hiatus in operations and R&S’s work force consisted mostly of former Rogan Brothers employees. Its drivers and helpers earned the same pay, performed the same work, reported to the same yard, used the same trucks, worked under the same manager, and serviced mainly the same customers.

<sup>28</sup> 232 NLRB 312.

<sup>29</sup> *Id.* at 314.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 314-15.

<sup>32</sup> *Id.*

<sup>33</sup> 278 NLRB 67.

agreement.<sup>34</sup> After the official foreclosed her security interest, she purchased the company's assets at the foreclosure sale and used them to capitalize a new company.<sup>35</sup> The Board adopted the administrative law judge's conclusion that the newly-formed company was an alter ego or, alternatively, a *Golden State* successor.<sup>36</sup> On appeal, the Eleventh Circuit enforced the successorship determination on the Board's alternative ground.<sup>37</sup> Moreover, it rejected the successor's claim that it lacked notice under *Golden State* because the unfair labor practices occurred well after the secured loan was made to the predecessor company.<sup>38</sup> Instead, the Court determined that notice should be judged at the time the successor company was formed, since that was when the official could choose how to apply her acquired assets or the sale's proceeds.<sup>39</sup> At that point, the official could have decided not to continue the business in basically unchanged form, or she could have taken the cost of the potential unfair labor practice liability into account when buying the assets at the foreclosure sale.<sup>40</sup>

Here, R&S can be held responsible for Rogan Brothers' outstanding unfair labor practice liabilities because R&S was on notice of the NLRB charge well before it foreclosed on the loan and formally took over business operations in July and August. In his capacity as consultant, Spiezio was well aware of the charge in *Rogan Bros. I* during the months leading up to the foreclosure. The earliest proof of his knowledge is from February, when Spiezio forwarded to the Union the letter Rogan Brothers sent to the Region requesting withdrawal from the settlement agreement. Although

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 68.

<sup>36</sup> *Id.*

<sup>37</sup> *Evans Services*, 810 F.2d 1089, 1091 n.2.

<sup>38</sup> *Id.* at 1093-94.

<sup>39</sup> *Id.* at 1093.

<sup>40</sup> *Id.* at 1093 n.5. *See also Darta, Inc.*, 36-CA-5578, Advice Memorandum dated Apr. 21, 1988, at 2-3 & n.8 (concluding that regional office should pursue compliance from successor entity, presuming it had knowledge of predecessor's unfair labor practices at the time it foreclosed on its sales contracts, because it could have avoided *Golden State* liability by either permitting the predecessor to pay off its debt rather than foreclosing on its security interest or liquidating the predecessor's assets after foreclosure).

there was no sales price to adjust or indemnity clause to negotiate at the time of foreclosure, R&S could have avoided *Golden State* liability by liquidating the foreclosed assets rather than continuing the business in basically unchanged form. Moreover, as in *Ponn*, R&S was not a totally disinterested party when it foreclosed, since Spiezio essentially managed Rogan Brothers' operations in the months prior to the foreclosure and R&S assumed those operations in order to protect Spiezio's investment. Thus, imposing liability on R&S does not work an unfair hardship, especially considering that it reaped the benefits of the unfair labor practices by taking over a business with fewer Union members earning contract wages.<sup>41</sup>

## II. **Alternatively, R&S Knew of Charge in *Rogan Bros. I* Prior to Formation of an Enforceable Security Agreement**

Even assuming that notice must be established such that a creditor-successor can adjust its security agreement to account for potential liabilities in the same way a purchaser-successor adjusts a sales contract, R&S should still be treated as a *Golden State* successor. Under New York law, security agreements of the type involved in this case must describe and reasonably identify the collateral in order to be enforceable.<sup>42</sup> Here, Spiezio failed to adequately identify the collateral for the loan until May, when he filed the UCC financing statement, and there is no evidence that Spiezio properly identified the collateral so as to establish an enforceable security interest prior to that time.<sup>43</sup> Indeed, Spiezio effectively acknowledged that the UCC filing would serve as the collateral description in his February 1 letter. Furthermore, the security agreement executed in January granted Pinnacle a security interest in the collateral listed in "Exhibit A," but no such document apparently exists. Rather, "Schedule A" is handwritten on the May UCC filing, and the July Surrender of Collateral in Satisfaction of Debt also referred to "Schedule A" and the May UCC filing in describing the collateral. Thus, the evidence plainly establishes that May is the earliest point at which Spiezio might have held an enforceable security interest in Rogan Brothers' assets.<sup>44</sup>

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<sup>41</sup> See *Golden State*, 414 U.S. at 171 n.2, 184 ("[T]he successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities.").

<sup>42</sup> N.Y. U.C.C. LAW §§ 9-108(a), 9-203(b)(3)(A) (McKinney, Westlaw through 2017).

<sup>43</sup> Normally, a UCC financing statement merely serves to "perfect" a security interest; it is not necessary to create an enforceable security interest. See N.Y. U.C.C. LAW § 9-310(a).

<sup>44</sup> Whether a security agreement that was executed months before the collateral description was formalized is, in fact, enforceable under New York law is irrelevant

Here there was ample opportunity to adjust the loan terms to account for the unfair labor practice liability stemming from *Rogan Bros. I* since R&S had notice of that liability prior to May, as described above. Thus, Spiezio could have negotiated with Rogan Brothers to increase the collateral necessary for the loan. Even assuming Rogan Brothers had no more assets that could be used as collateral, e.g., because other lenders may have had liens on the assets, Spiezio could have protected R&S by decreasing the amount of the loan while maintaining the same collateral. Indeed, Spiezio was well aware of this possible approach for reducing his liability, given that he capped the loan at \$800,000 in February. Thus, even though an indemnification clause would have probably been futile given Rogan Brothers' precarious financial position,<sup>45</sup> R&S had other ways to effectively insulate itself from the outstanding unfair labor practice liabilities but failed to do so. Accordingly, *Golden State* liability would impose no undue hardship on R&S.

### III. R&S's Defenses Lack Merit

In relevant part, R&S argues that it should not be held liable as a *Golden State* successor based on the doctrines of laches, res judicata, and collateral estoppel. In addition, it argues that *Golden State* is inapplicable because Rogan Brothers continued to operate after the foreclosure and Rogan Brothers has the resources to remedy the backpay order. As explained below, none of these defenses absolve R&S of liability for remedying the unfair labor practices found in *Rogan Bros. I*.

R&S's contention that it should not be held accountable for Rogan Brothers' unfair labor practices because the Region waited six years before prosecuting R&S is without merit. The General Counsel may choose to litigate successor liability at the compliance stage rather than naming the successor as a respondent in the underlying unfair labor practice proceeding.<sup>46</sup> Here, *Rogan Bros. I* was fully briefed to the Board

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for purposes of determining R&S's *Golden State* liability and beyond the scope of this memorandum.

<sup>45</sup> See *Lebanite*, 346 NLRB at 750.

<sup>46</sup> 2 *Sisters Food Group, Inc.*, 361 NLRB No. 152, slip op. at 1 (Dec. 16, 2014) (finding no deprivation of due process rights notwithstanding the region's failure to include the *Golden State* successor in the underlying unfair labor practice proceeding). See also *Golden State*, 414 U.S. at 181 (successor had no due process complaint where it was named in the compliance specification).

prior to R&S's takeover of Rogan Brothers' operations.<sup>47</sup> Unfortunately, the Region's efforts to secure Rogan Brothers' compliance with the resulting Board order have been unsuccessful. Thus, the Region reasonably seeks to hold R&S accountable for the outstanding unfair labor practice liabilities, and the delay in naming R&S does not preclude such prosecution under the doctrine of laches. Laches generally does not apply to the Board as a federal government agency enforcing a public right.<sup>48</sup> And even assuming it did apply, R&S cannot show that it has been prejudiced by the delay.<sup>49</sup> In *Rogan Bros. II*, R&S extensively litigated the circumstances surrounding its takeover of Rogan Brothers. Therefore it has no claim that its *Golden State* defense would suffer from spoliation of evidence or otherwise.

Likewise, the administrative law judge's conclusion in *Rogan Bros. II* that R&S was not a *Burns* successor does not bar litigation of R&S's status as a *Golden State* successor, even assuming the Board adopted that conclusion. *Burns* and *Golden State* successorship are separate legal determinations whose analytical factors are not congruent. They share only one element: continuity of operations.<sup>50</sup> Here, the judge's ruling on R&S's status as a *Burns* successor did not turn on this element. Rather, the judge found no *Burns* successorship solely due to the fact that a minority of R&S's work force consisted of Union-represented employees. Since R&S's status as a *Golden State* successor was not "actually litigated," nor was there an adverse determination concerning the continuity of operations after R&S's takeover, collateral estoppel does not apply here.<sup>51</sup>

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<sup>47</sup> In any event, prosecutorial decisions by regional directors and the General Counsel are not adjudications and have no preclusive effect on future actions. *O'Dovero v. NLRB*, 193 F.3d 532, 536 (D.C. Cir. 1999). Thus, the failure to involve R&S in the unfair labor practice proceeding would not prevent litigation against it at a later time.

<sup>48</sup> See *Roofing, Metal & Heating Associates*, 304 NLRB 155, 160 (1991), *enforced mem. sub nom. NLRB v. Roofers Local 30*, 975 F.2d 1551 (3d Cir. 1992).

<sup>49</sup> See *United Electrical Contractors Assn.*, 347 NLRB 1, 2-3 (2006) (complaint not barred by laches because General Counsel's inordinate delay did not cause spoliation of evidence or otherwise hamper respondent's defense).

<sup>50</sup> See, e.g., *Commercial Forgings*, 315 NLRB at 165-66.

<sup>51</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of collateral estoppel . . . judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.").

Finally, we reject R&S's contention that *Golden State* is inapplicable either because Rogan Brothers may have continued to be in the waste business on a reduced scale after the foreclosure or because Rogan Brothers purportedly has the financial wherewithal to satisfy the outstanding backpay order. As to the first argument, our research has not disclosed any case where *Golden State* successorship turned on the continued existence or nonexistence of a predecessor's operations,<sup>52</sup> nor does R&S cite any case for this proposition. As to the second argument, Rogan Brothers' ability to remedy the unfair labor practices is exceedingly doubtful given the Region's extensive efforts to obtain compliance with the Board order in *Rogan Bros. I*. Moreover, Rogan Brothers' financial status is irrelevant, since *Golden State* successors are jointly and severally liable for their predecessor's unfair labor practices precisely because they are generally in the "best position" to effectively remedy these violations.<sup>53</sup> Thus, R&S's contentions in this regard are unpersuasive and lack merit.

Accordingly, the Region should pursue proceedings to hold R&S liable as a *Golden State* successor for the unfair labor practices committed by Rogan Brothers, absent settlement.

/s/  
B.J.K.

ADV.02-CA-040028.Response.RoganBros. (b) (5), (b) (7)

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<sup>52</sup> See *Lebanite*, 346 NLRB at 749-50 (ruling that new entity was not *Golden State* successor based on inability of successor to insulate itself from liability rather than on continued existence of predecessor, which leased its operations to successor); *Hill Industries*, 320 NLRB at 1116-17 (finding no *Golden State* successorship based on limited transaction between the two entities rather than on continued existence of predecessor, which stored equipment at successor's facility). See also *Eastman Kodak Co.*, 194 NLRB 220, 220, 227 & n.36 (1971) (ALJ found *Golden State* successorship where principal predecessor continued to carry on "extensive operations"), questioned in *Glebe Electric*, 307 NLRB at 886 & n.28 (questioning the precedential value of *Eastman Kodak*, but noting that Board may have adopted ALJ's *Golden State* analysis therein sub silentio).

<sup>53</sup> *Perma Vinyl*, 164 NLRB at 969.