Island Architectural Woodwork, Inc. and Verde Demountable Partitions, Inc., Alter Egos *and* Northeast Regional Council of Carpenters. Case 29–CA–124027

August 12, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On May 8, 2015, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party Northeast Regional Council of Carpenters ("the Union") each filed exceptions and a supporting brief. Respondents Island Architectural Woodwork, Inc. ("Island") and Verde Demountable Partitions, Inc. ("Verde") each filed an answering brief.

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,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.

This case centers on the relationship between Respondents Island and Verde. The General Counsel and Charging Party except to the judge's finding that Island and Verde are not alter egos and the resultant findings that Verde did not violate Section 8(a)(5) and (1) of the Act by failing to apply the terms of the collective-bargaining agreement covering Island's bargaining unit to employees performing bargaining-unit work at Verde, and that Island did not violate Section 8(a)(5) and (1) when it insisted in successor contract negotiations that the Union agree to exclude Verde's employees from the unit. For the reasons discussed below, we reverse the judge and find that the Respondents are alter egos and that they violated the Act, as alleged.

[1] We deny the General Counsel's exception that the judge erred by failing to rule on the General Counsel's motion to correct the record; that motion was granted.

[2] The Union has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. FACTUAL BACKGROUND

A. The Creation of Island and its Operations

Island produces custom wood cabinetry and other millwork for financial institutions. Edward Rufrano and Roger Stevens co-founded Island in 1993. Since 1995, the Union has represented Island's production employees and installers. At the time of the February 2015 hearing in this case, Island was owned by Rufrano, Stevens' sons, and Angelo DeMarco. Rufrano served as president and CEO, and DeMarco was his second-in-command. Rufrano, DeMarco, Stevens, and Stevens' sons jointly owned the three buildings where Island historically operated: the "main," "back," and "side" buildings, all of which adjoined a parking lot.

In 2007, Island started producing custom wood office partitions. Island obtained about 65 percent of its work through a large architectural firm ("the Firm").[3] The Firm typically designed products for a customer, and would then hire Island to manufacture the product. The Firm asked Island to mass-produce a particular version of its custom wood partitions, known as the "Island Verde Green Demountable System." The idea was not feasible, however, due to Island's high production costs. Nonetheless, to accommodate the Firm, Island continued to produce the desired partitions on a custom basis. When the Firm continued to press Island to mass-produce the demountable partitions, Rufrano contacted three companies about selling the demountable partition line in order to accommodate the Firm and to recoup Island's investment in designing and manufacturing the product. Ultimately, however, he was unsuccessful in finding a suitable purchaser.

B. The Creation of Verde and its Operations

For some time, Jeffrey Brite, a former Firm employee, had discussed with Rufrano ways in which Brite could become personally involved with the demountable partition business. The idea to create Verde arose from these conversations, but Rufrano did not want an ownership stake in the new venture. At some point, Rufrano's daughter, Tracy D'Agata, became involved.[4] Although D'Agata worked as a project manager for Island, she was not particularly knowledgeable about the partition line's production processes. Accordingly, Rufrano, DeMarco, and an Island foreman informally agreed to assist with Verde's operations, an understanding that the Respondents later codified in written agreements. Brite then pur-

[3] The parties stipulated that the name of the Firm would remain confidential.

[4] Rufrano testified that D'Agata had worked with the Firm for years in her capacity as an Island project manager and that it was thought that she would be a "very good face of Verde."

sued other investors to join him and D'Agata, leading to Verde's commencement of operations in October 2013. At the time of the hearing, D'Agata and her sister Jessica Ondrush, a long time bookkeeper at Island, each owned 32 percent of Verde; the Firm, Brite, and Rufrano's friend Allan Schatten owned the remaining 36 percent. D'Agata, Ondrush, Brite, and Schatten were directors, with D'Agata serving as president and Ondrush as secretary and treasurer.

Prior to the formation of Verde, Island began investigating ways to maximize its manufacturing efficiency. As a result of these efforts, the bulk of the work that had been taking place in the back building was moved to the main building. By October 2013, only a handful of Island's bargaining-unit employees were still working in the back building. At some point in October, Island transferred the remaining bargaining-unit employees to the main building. Later that month, Verde began operations out of the back building with two employees who had performed bargaining-unit work for Island, as well as several of Island's non-unit personnel, including D'Agata, Ondrush, a foreman, and an engineer who had helped design the demountable partitions. Verde also hired several production employees who had never worked for Island.

C. The Relationship Between Verde and Island

Although Verde began operations in October 2013, the agreements formalizing Verde's relationship with Island were not signed until much later, in most cases as long as 1 year afterward. It was agreed that Verde would acquire the demountable partition business with the intent to mass-produce those partitions. For its part, Island continued custom-producing other types of wood partitions and other millwork, as well as providing assistance and expertise to Verde, as further described below. On October 28, 2014, the Respondents produced, pursuant to the General Counsel's investigatory subpoena, the documents structuring the spin-off. All of these documents were signed by Rufrano and D'Agata. All but one are dated the day before the Respondents produced them, and all but one contain backdating provisions.[5] The record establishes that the agreements were drafted some time prior to October 2014, but were not signed until October 27. Island asserts that the delay in drafting and signing the agreements was a result of its attempts to make the partitions at a profit before ultimately deciding to sell that part of its business.

Pursuant to these agreements, Verde purchased the intangible wood partition assets and leased the back building and equipment therein from Island.[6] As a condition of the asset transfer, the Respondents agreed to provide each other with various services and supplies through December 31, 2015. In particular, Island agreed to assist Verde with management, operations, estimating, back office functions, drafting, engineering, and purchasing. Island also agreed to provide Verde with sales training, trucking, production management functions, equipment repairs and maintenance, and warehousing. Island further agreed, among other things, to manufacture veneer panels; prime, face, press, and sand doors; and manufacture moldings for Verde.[7] Verde, in turn, agreed to provide Island with various manufacturing and related services, including partition, door, hardwood, and molding production and warehousing materials.[8]

D'Agata, Ondrush, Brite, and the Firm contributed an unspecified amount of financial assistance to help start Verde. Although Rufrano did not directly provide his daughters with start-up funds, the lengthy grace periods in the asset agreement and equipment lease with Island amounted to hundreds of thousands of dollars in deferrals to Verde. Also, Verde was able to operate in the back building, which Rufrano partially owns, rent-free for some 8 months.

From its inception, Verde has worked jointly with Island to produce wood partitions.[9] Because of lower-than-expected demand, Verde has not yet begun to mass-produce the partitions as desired by the Firm, so the pro-

[5] The asset purchase agreement, equipment lease, transitional services agreement, mutual supply agreement, promissory note, and officer's certificate are all dated October 27, 2014, and are either expressly backdated to October 1, 2013, or expressly reference another agreement that is backdated. The assignment and assumption agreement is dated October 27, 2014, and backdated to July 30, 2013. The lease of the back building is dated June 1, 2014, and does not include a backdating provision.

[6] Verde agreed to pay Island $750,000 for the intangible partition assets, which consist of expertise, trademarks, trade names, goodwill, as well as partition-design consulting services with the Firm. Verde agreed to pay $200,000 at the closing, with payments on the remaining balance to commence 6 months thereafter, in $16,116 monthly installments over 3 years at 3.5 percent interest. For the equipment lease, no payments were due the first year, but Verde agreed to pay $20,833 per month for the remaining 3 years. The lease provided Verde the option to purchase the equipment for $1 at the end of that time. Verde leased the back building for 2 years, at $211,992 per year.

The lease of the back building was for fair market value. The record does not indicate whether any of the other agreements were.

[7] Island agreed to provide these services to Verde as part of the asset purchase price, except for manufacturing, production management, and maintenance services, which it agreed to provide at cost plus 20 percent.

[8] Verde agreed to provide these services to Island at cost plus 20 percent, except for the warehousing, which it agreed to provide at $3500 per month.

[9] There is some indication in the record that the Respondents have also jointly produced the millwork incidental to the wood partitions. But the record does not specify the extent of this cooperation.

duction process has been essentially unchanged from the time Island produced the partitions. Materials are sent between the main and back building, where each company works on a certain aspect of the process. Rufrano periodically holds meetings in his office with Verde personnel, many of whom had worked for Island, to discuss "[p]roject coordination, materials, labor, scheduling, and profitability." At the time of the hearing, a web page and video marketing the wood partitions were still posted on Island's website. In the video, D'Agata is listed as the point of contact and Ondrush's husband, an Island employee, is featured promoting the product.[10]

Given the present low demand for wood partitions, Verde has also produced cheaper metal partitions, a product with which Island is not involved. On average since Verde was formed, about 30 percent of its partitions are wood and 70 percent are metal. Rufrano testified that, as of the hearing, Verde was making few wood partitions but that the potential for the wood partitions nevertheless remained "tremendous," particularly because the Firm is marketing them.

D. The Scope of the Collective-Bargaining Unit and the Applicability of the Collective-Bargaining Agreement

From the commencement of Verde's operations, Island management took the position that Verde's production employees and installers were not part of the pre-existing Island bargaining unit. An Island foreman told the Island employees that "no union members were allowed to enter the [back] building again," once Verde started operating there. And as discussed in detail below, Island repeatedly insisted that the Union agree that Verde employees would be excluded from the bargaining unit. For its part, Verde did not recognize the Union's right to represent any of its employees as part of the Island bargaining unit and, therefore, refused to apply the terms of Island's collective-bargaining agreement to them.

The Island shop steward who had been working in the back building informed the Union that non-union employees were performing bargaining unit work there. Union Representative Jeffrey Murray testified that, shortly thereafter, at a meeting in November 2013, a Union official met with Rufrano and DeMarco. Rufrano explained that Verde was D'Agata's business, and that he sold her the building and equipment. Over the next few months, as discussed below, Rufrano's explanations continued to evolve.

Meanwhile, on September 30, 2013, an extension to the 2009–2013 collective-bargaining agreement between Island and the Union expired, at which time the parties began negotiations for a successor contract. In about December 2013, the Union's president met with Rufrano to discuss Island's failure to recognize the back building employees as part of the bargaining unit. Rufrano explained that Verde was a separate business that would benefit Island and the Union because Verde could build wood partitions more cheaply and Island would perform the incidental millwork. They did not resolve the unit issue at that time.

In January 2014, the Union attended a collective-bargaining session with Rufrano and DeMarco. The Union and DeMarco tentatively agreed on all issues except seniority. At that point, Rufrano told the Union that it needed to waive any claim to Verde's work before he could agree to a new collective-bargaining agreement. The Union objected, and DeMarco continued to discuss the seniority issue with the Union.

On February 26, 2014, Rufrano again met with the Union's president and told him that in addition to seniority, subcontracting and pension benefits also had to be addressed. Rufrano stated that his role had changed and that he would be involved in Verde, although he did not provide details. He stated that the Union needed to sign a memorandum of agreement (MOA) waiving its right to represent Verde employees. He then described Island's "plight" as a union contractor, namely, that the price of Island's partitions was higher than the competition. If the Union agreed to waive the right to represent the Verde unit, Rufrano explained, Verde would sign "exclusive agreements" providing Island all of the partition-veneering work, opportunities that "wouldn't exist if there were no VERDE," as well as the millwork to match the partitions. He predicted a great benefit to Island, as "millions" were made in the past.[11]

The next day, Rufrano emailed the proposed MOA to the Union, which in relevant part states that to resolve the Verde unit issue and "finalize" a new collective-bargaining agreement:

> 1. The parties agree that the employees of Verde do not fall within the bargaining unit definition as set forth in either the expired or successor agreement regardless of Verde's ownership.
>
> 2. The parties agree that any ownership interest in or management of Verde by any principal of the Employer, including, but not limited to, Edward Rufrano and Angelo DeMarco, shall not create a joint employment or alter ego relationship or otherwise constitute an ac-

[10] Rufrano testified that Island intended to remove the wood partition information from its website, but that it had been unable to do so.

[11] Consistent with this statement to the Union, Rufrano testified that Verde would not be burdened by the costs of Island's union relationship, and that Island, "one of the last Union shops," could not compete with nonunion entities.

> cretion under the expired collective bargaining agreement. The parties agree and understand that Verde and the Employer are distinct, unrelated entities.
>
> 3. By executing this Agreement, the parties waive all existing and future grievances and claims involving the work performed by Verde, including, but not limited to, the subcontracting or joint venture provisions of the Agreement.[12]

In mid-March 2014, the Union informed Rufrano it would not sign the MOA and requested additional bargaining meetings. Rufrano refused to meet.[13]

II. ANALYSIS

A. Island and Verde are Alter Egos

To determine whether two employers are alter egos, the Board considers several factors, including whether they have substantially identical ownership, business purpose, operations, management, supervision, premises, equipment, and customers. See *Cofab, Inc.*, 322 NLRB 162, 163 (1996), enfd. sub. nom. *NLRB v. DA Clothing Co.*, 159 F.3d 1352 (3d Cir. 1998) (unpublished table decision). No single factor is determinative, and not all are necessary to establish alter ego status. *Fugazy Continental Corp.*, 265 NLRB 1301, 1301–1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984). Unlawful motivation is not a necessary element of an alter-ego finding, but the Board does consider whether the purpose behind the creation of the suspected alter ego was to evade another employer's responsibilities under the Act. See id. at 1302. The burden to establish an alter ego relationship rests with the General Counsel. See *A.D. Conner, Inc.*, 357 NLRB 1770, 1785 (2011).

The judge recognized that the General Counsel established the existence of several factors that would support an alter ego relationship. Specifically, he found that the Respondents share common premises, equipment, and business purpose, that Island performs "significant services" for Verde, and that two of Verde's owners are the daughters of the principal owner and chief executive of Island.[14] On the other hand, the judge found that the Respondents lack common ownership, management, supervision, and employees. The judge further found that the creation of Verde "had virtually no adverse effect on Island's bargaining unit employees" and that the General Counsel failed to establish that Verde had been created to evade Island's responsibilities under the Act.[15] After weighing these competing factors, the judge concluded that the Respondents are not alter egos.

As further discussed below, we agree with the judge that the Respondents have substantially identical business purpose, operations, premises, and equipment, and that these factors support finding an alter ego relationship. Contrary to the judge, we further find that the factors of substantial financial control and an improper motivation to avoid Island's bargaining obligations to the Union also support finding alter ego status. Accordingly, we find that the record as a whole establishes that the Respondents are alter egos.

1. Substantially identical business purposes and operations

We agree with the judge that the Respondents operate in the same sphere of business and work closely together. Verde was created for the purpose of manufacturing a specific line of demountable partitions that Island had been producing; this production was transferred to Verde immediately upon its creation. This seamless transition is indicative of an alter ego relationship. See, e.g., *A.D. Conner, Inc.*, 357 NLRB at 1787 fn. 44 (finding the lack of any hiatus in operations between employers supports an alter ego finding) (citing *MIS, Inc.*, 289 NLRB 491 (1988)).

Moreover, it appears that little of the wood partition work has changed with the advent of Verde. Verde hired a number of Island employees—both bargaining unit and non-bargaining unit—to design and produce its partitions. The production employees of both Respondents perform the same work on the same equipment that Island employees performed before Verde was founded, save for metal partition work. Island continued to press

[12] The collective-bargaining agreement's subcontracting provision permits Island to subcontract, transfer, lease, or assign bargaining unit work to another facility, person, or non-bargaining unit employee only with the Union's consent. The joint venture provision applies the agreement to any work performed by Island as a single or joint employer with another entity.

[13] Island argues that the record supports a finding that, after March 2014, DeMarco attempted to bargain with the Union about the seniority issue. We find it unnecessary to pass on this assertion because, as discussed further below, even assuming arguendo that Island made an effort to bargain over seniority, that would not affect our determination whether Island could lawfully insist that the Union sign the MOA as a condition of signing a successor contract.

[14] The Respondents did not except to the judge's findings as to these factors, but they implicitly contest them in their answering briefs to the exceptions filed by the General Counsel and Union on the alter ego issue.

[15] Citing *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743 (2d Cir. 1996), the judge stated that the United States Court of Appeals for the Second Circuit finds improper motive necessary to show alter ego status. Contrary to this statement, both the Board and the Second Circuit have observed that that court does *not* require such a finding. See *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 118 (2d Cir. 2001); *Fallon-Williams, Inc.*, 336 NLRB 602, 602 fn. 7 (2001). In any event, as discussed below, we find that the General Counsel has established that the Respondents acted with an improper motive here.

the veneer, which Rufrano testified is an "integral part of the [wood] partition system." Even after Verde's creation, Island continues to advertise the partitions on its website; for example, the website included a video marketing the partitions. Such interrelated operations support an alter ego finding. See, e.g., *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435, 439 (2004) (finding, in support of alter ego conclusion, that for several months during the transition period before the old employer went out of business, it and the new employer performed work for each other), enfd. 408 F.3d 450 (8th Cir. 2005).

To properly run its operations, Verde depended on the expertise of Island personnel. Rufrano, DeMarco, and an Island foreman assisted Verde because D'Agata lacked the manufacturing and design knowledge; together these individuals helped coordinate Verde's operations and labor. Their influence over the operations of both Island and Verde additionally supports an alter ego finding. Cf. *BMD Sportswear Corp.*, 283 NLRB 142, 155 (1987) (finding alter ego based, in part, on fact that owner of the original employer supplied management expertise to owners of new employer), enfd. mem. 847 F.2d 835 (2d Cir. 1988); *Rogers Cleaning Contractors*, 277 NLRB 482, 488 fn. 38 (1985) (same), enfd. 813 F.2d 795 (6th Cir. 1987) (per curiam).

The Respondents' common business purposes are also reflected in their collaboration on a broad range of other activities, including management, purchasing, and office functions. Island asserts that these arrangements merely represent a minimal level of cooperation, not unlike a usual vendor relationship. To the contrary, we find that they manifest Island's plan, which was communicated to the Union, to have Island jointly produce wood products with Verde without adhering to the collective-bargaining agreement. The partitions were critical to Island's marketing of wood products, and Island expected customers to buy more of its products with Verde partitions. Indeed, the MOA in clear terms contemplates robust ties between the Respondents, including Island's future ownership interest of Verde and the subcontracting of bargaining unit work to Verde—all to the express exclusion of representation by the Union. These ties are only strengthened by the fact that the Firm continues to provide both Island and Verde with business and customers. See *Crossroads Electric, Inc.*, 343 NLRB 1502, 1506 (2004), enfd. 178 F.App'x 528 (6th Cir. 2006) (finding that even though the old and new employers lacked a total identity of customers, they both performed electrical installation work and served the same market area).

Although the Respondents are correct that Verde produces a sizable number of metal partitions, a product that Island has never produced, this deviation from Verde's original business purpose appears to be the result of a temporary lag in market demand for wood partitions. At the time of the hearing, the Firm, which is a part owner of Verde, continued to promote the concept of mass-producing wood partitions, and Rufrano continued to believe that such partitions have "tremendous" potential. Verde was created to support Island's wood products, and Island expects to derive a considerable profit from the sale of its products in connection with the wood partitions. We likewise reject the Respondents' argument that Verde has a different business purpose because it was formed to mass-produce partitions. Even assuming that Verde did eventually mass-produce wood partitions, we would view that change as only an insubstantial deviation in the production process that it inherited from Island, a change that could only be implemented, according to Rufrano, after he rid Verde of the "plight" of unionization.

2. Substantial financial control

Typically, the factor of common ownership is given significant weight in the alter ego analysis. However, "identical ownership is not a prerequisite for finding an alter ego relationship." *Cofab, Inc.*, 322 NLRB at 163. "The Board has found an alter ego relationship in the absence of common ownership where both companies were either wholly owned by members of the same family or nearly entirely owned by the same individual, *or* where the older company maintained substantial control over the new company." *El Vocero de Puerto Rico, Inc.*, 357 NLRB 1585, 1585 fn. 3 (2011) (emphasis added). In determining whether the original employer maintained substantial control, the Board focuses on the financial relationship between the employers. *First Class Maintenance Service, Inc.*, 289 NLRB 484, 485 (1988). For example, the Board has found the requisite substantial control in cases where the financial dealings demonstrate "a significant lack of an arms-length relationship." *SRC Painting, LLC*, 346 NLRB 707, 721 (2006); see also, e.g., *Vallery Electric, Inc.*, 336 NLRB 1272, 1275 (2001), enfd. 337 F.3d 446 (5th Cir. 2003); *Fugazy Continental Corp*., 265 NLRB at 1302.

We find that Island exerted substantial financial control over Verde demonstrating that there was a significant lack of an arms-length relationship. At the outset, Island, through Rufrano, enabled Verde to begin its operations in October 2013 without formal documentation and with significantly lowered start-up costs. Indeed, it does not appear that Verde could have existed without this support. Island sold the partition business to Verde for $750,000, but only asked for $200,000 up front and did not execute the promissory note until 1 year later. The

asset agreement and equipment lease were not signed until October 2014 and, even then, the asset agreement deferred payments for 6 months and the equipment lease deferred payments for 1 year, allowing Verde to defer about $97,000 in asset payments and about $250,000 in equipment payments. Additionally, the lease for the back building was not signed until June 2014 and had no backdating provisions, allowing Verde free occupancy for 8 months, which resulted in savings of about $140,000. In total, as a result of these concessions by Island, Verde was able to defer and save nearly half a million dollars, circumstances that support an alter ego finding. See, e.g., *Crossroads Electric, Inc.*, 343 NLRB at 1505–1507 (finding, in support of alter ego conclusion, that for 4 months the new employer occupied the old employer's facility, used its phone number, and operated with the vehicles and equipment formerly owned by the old employer which it did not pay to use). The backdating of these agreements, from which Verde derived these significant benefits, further supports our finding. *McDonald's Ready-Mix Concrete*, 246 NLRB 152, 153–154 (1979) (finding that delay of approximately a year in creating written documentation for a sale supports a finding that the new entity was a disguised continuance).

Moreover, Island derived, and expected to derive, financial gain from Verde. Rufrano anticipated a large profit from the increased volume of wood products that Island would sell in conjunction with Verde's partitions. He also anticipated large profits as a result of Verde's nonunion cost structure and the collaboration between the Respondents. Indeed, he told the Union that if it agreed to waive inclusion of Verde employees in the existing bargaining unit, Verde would sign exclusive agreements providing veneer and other work to Island, opportunities that "wouldn't exist if there were no VERDE." Rufrano would have been unable to make such a guarantee if he did not exert substantial de facto control over Verde's marketing decisions, notwithstanding that his daughters were the nominal majority owners of that company.

3. Island's motive in creating Verde

We find that the preponderance of evidence shows that Verde was created to evade Island's bargaining obligation under the Act. Verde's relationship with Island remained a mystery to the Union for some time. The Union learned from the shop steward, not Island, that nonunion employees were performing bargaining unit work in the back building. Thereafter, when the Union approached Rufrano about Verde, he misleadingly told the Union that he had sold the back building and the equipment to his daughters. In fact, the Respondents, represented by Rufrano and his daughter D'Agata, did not sign the agreements structuring the spin-off until a year after Verde was formed. In addition, they failed to sign several documents, including the asset agreement and Verde's officer's certificate, until the day before they were produced pursuant to the General Counsel's subpoena. These attempts to conceal Island's relationship to Verde, including through these less than arm's length transactions, are certainly indicative of Island's intent to evade its responsibilities under the Act. Accord *McDonald's Ready-Mix Concrete*, 246 NLRB at 153–154.

Island also repeatedly communicated its intention that the Verde employees not be unionized, suggesting that the creation of Verde was a way for Island to avoid the Union's labor costs—costs that Rufrano described as the "plight" of "every union contractor." In October 2013, an Island foreman told unit employees that no union members were allowed to enter the back building where Verde had begun operating. Rufrano attempted to dissuade the Union from seeking to represent the Verde employees by emphasizing the benefits that would accrue to Island and its unit members if Verde were able to operate without the substantial costs of a unionized workforce, describing the "millions" in additional business that Island would do in conjunction with Verde's partitions. And by conditioning a new contract on the MOA, Rufrano attempted to pressure the Union to codify this desired outcome. By its sweeping, forward-looking terms, the MOA (1) excises Verde employees from the bargaining unit definition set forth in both the expired and successor collective-bargaining agreement; (2) imposes this condition regardless of Island's ownership in, or management of, Verde that would otherwise create a joint employer, alter ego, or similar relationship; and (3) bars existing and future grievances involving the work performed by Verde, including subcontracting bargaining unit work to Verde. The MOA, in short, sought to preclude Verde employees of their right to representation by the Union, even if Island became more formally involved with Verde at a later date.

In concluding that Island harbored an improper motive in creating Verde, we reject the judge's finding that the creation of Verde "has not resulted in any harm to the existing complement of Island's bargaining unit employees." As a result of Island's actions, the two former Island employees who continued to perform bargaining-unit work at Verde were excluded from the unit and, consequently, the benefits of the collective-bargaining agreement. Furthermore, the bargaining-unit employees who remained at Island saw their bargaining power diminished. Cf. *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 3 (2014) (finding that employer violated its duty to bargain by unilaterally subcontracting bargaining

unit work—despite the absence of job loss or other significant negative effects—because an employer would otherwise be free to "dilute the Union's bargaining strength").

Based on the foregoing assessment of the alter ego factors, we conclude that Verde and Island are alter egos, and that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to honor the collective-bargaining agreement as to the Verde unit employees.[16]

B. Island's Proposal that the Union Exclude Verde Employees from the Unit

The judge concluded that, because the Respondents were not alter egos, Island's insistence that the Union sign the MOA amounted to nothing more than a request to maintain the status quo, pursuant to which Verde's employees were not included in the bargaining unit. The judge further stated, however, that assuming Verde was found to be an alter ego of Island, the insistence on this proposal violated the Act as an attempt to alter the recognized bargaining unit.[17] In addition to our finding that the Respondents were alter egos, we further find that they violated the Act when Island insisted on a permissive subject of bargaining as a condition of reaching a successor collective-bargaining agreement.[18]

A proposal to alter the scope of an existing bargaining unit is a permissive subject of bargaining. *Aggregate Industries*, 361 NLRB No. 80 (2014), reaffirming and incorporating by reference 359 NLRB No. 156, slip op. at 3 (2013), enf. denied __ F.3d __, 2016 WL 3213001 (D.C. Cir. June 10, 2016); *Grosvenor Resort,* 336 NLRB 613, 617 (2001); *United Technologies Corp*., 292 NLRB 248, 249 & fn. 8 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989). It is well established that "conditioning agreement regarding mandatory subjects on acceptance of a nonmandatory proposal is not good-faith bargaining. In short, a party precludes good-faith impasse when it insists on such a proposal as the price of an agreement." *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1735–1736 (2011), enfd. sub. nom. *Rock-Tenn Services v. NLRB*, 594 F.App'x 897 (9th Cir. 2014) (citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958)); see also *Jewish Center for the Aged*, 220 NLRB 98, 102 (1975) (finding that the employer unlawfully insisted to impasse on proposals to limit recognition of the union following the employer's plant relocation). In *Borg-Warner*, the employer made a proposal containing permissive subjects as a condition precedent to accepting a collective-bargaining agreement—yet continued bargaining over mandatory subjects. 356 U.S. at 346–347. The Court held that

> The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

Id. at 349. The same analysis applies to Island's conduct here.

We reject Island's argument that it did not strictly condition a successor agreement on the MOA. It is true that on the occasions Island President and CEO Rufrano proposed the unit waiver, other issues were outstanding, and Island remained willing to bargain. However, Rufrano repeatedly insisted on the MOA and indicated that he would not sign a successor agreement unless the Union agreed to the MOA. The terms of the MOA confirm Island's unyielding demand that Verde employees remain outside the unit. Island's assertion that it attempted to bargain after the Union declined the unit waiver, even if true,[19] is no more a valid defense than that of the employer in *Borg-Warner*, which actually continued bargaining. We therefore find that Island's insistence on the MOA constitutes an additional violation of Section 8(a)(5) and (1).[20]

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[16] We note that in *Deer Creek Electric*, 362 NLRB No. 171 (2015), the Board held that the two employers were not alter egos. Chairman Pearce and Member McFerran did not participate in that decision and express no views as to its correctness; Member Hirozawa dissented. The merits of the decision aside, we find it distinguishable. In that case, the two companies were owned by members of the same family. The Board found that the owner of the second company had never worked for the first and that there was no evidence of financial control or improper motive. Although the first employer gifted equipment to the second employer, that gift was converted into a sale 5 months later, as the parties had originally intended. Here, conversely, Rufrano's daughters had worked for Island for years before starting Verde. Moreover, as discussed above, the Respondents entered into several backdated agreements in which Verde was able to save and defer hundreds of thousands of dollars. This was done against a backdrop of Rufrano's clear attempt to avoid Island's obligations under its collective-bargaining agreement.

[17] The Respondents did not except to this statement, but Respondent Island contests it in its answering brief to exceptions filed by the General Counsel and Union.

[18] We make this finding regardless of whether the bargaining unit here is defined in terms of job classification or, as the General Counsel believes, the nature of the work performed. Under either method of definition, the MOA clearly attempts to alter the scope of the unit. See *Antelope Valley Press*, 311 NLRB 459, 461 (1993).

[19] Island claims that it asked the Union via email to continue bargaining but there is no evidence that the Union received his offer.

[20] Even assuming arguendo the Respondents are not alter egos, we would still find a violation. Island argues, without citation to legal support, that it is a separate entity from Verde and, to the extent that

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Northeast Regional Council of Carpenters, Local 252 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Verde Demountable Partitions, Inc. is an alter ego of Respondent Island Architectural Woodwork, Inc.

4. By failing and refusing to recognize the Union as the collective-bargaining representative of its employees in covered classifications at Verde, and by repudiating and failing to apply to the unit employees, the collective-bargaining agreement between Respondent Island Architectural Woodwork, Inc. and the Union, the Respondents have failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

5. By insisting, as a condition of reaching a successor collective-bargaining agreement, that the Union agree to alter the scope of the bargaining unit, the Respondents have failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall require the Respondents to give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement effective from July 1, 2009, to June 30, 2013, and any successor agreement, between the Union and Island for all bargaining unit employees, including Verde employees in covered classifications, that is, employees performing production work and installation. We further order the Respondents to bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit, without insisting that the Union consent to a nonmandatory bargaining proposal as a condition of reaching an overall agreement.

We shall also require Respondents to make whole unit employees by, inter alia, making all delinquent contributions to the fringe benefit funds set forth in the collective-bargaining agreement that have not been made since October 1, 2013, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[21] The Respondents also shall be required to reimburse the unit employees for any expenses ensuing from the failure to make the required benefit fund contributions, as set forth in *Kraft Plumbing & Heating*, 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*, 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).[22] We shall also order the Respondents to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, 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 years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondents, Island Architectural Woodwork, Inc. and its alter ego Verde Demountable Partitions, Inc., Ronkonkoma, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Northeast Regional Counsel of Carpenters (the Union) as the exclusive collective-bargaining representative of employees at both the Island and Verde facilities in the following appropriate unit by refusing to apply the 2009–2013 collective-bargaining agreement and any

Island asked the Union to waive representation of the Verde employees, in the MOA, it merely sought to clarify the status quo—i.e., the Verde employees are not in the Island unit. The MOA, however, goes considerably further. It expressly states that the Verde employees will not be included in the bargaining unit definition even if the Board would, at some point in the future, find that the Respondents are alter egos or joint employers or that one of the units is an accretion of the other. Thus, the Union's ability to represent the Verde unit is fundamentally constrained. See *Jewish Center for the Aged*, 220 NLRB at 102 (explaining that the employer's proposals limiting the union's recognition deprived employees of, among other things, continued representation by their statutory bargaining representative). Accordingly, given the MOA's breadth, we find that even absent an alter ego relationship, Island unlawfully insisted on limiting the unit's scope.

[21] We leave to the compliance stage the question whether the Respondents must pay any additional amounts into the benefit funds in order to satisfy our make-whole remedy. *Merryweather Optical Co.*, supra.

[22] 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 the 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.

successor agreement in effect between the Union and Island to employees at the Verde location. The unit is:

> All full-time and part-time production employees and installers employed by the Employer, excluding all shipping (including wrappers and packers), sanders, maintenance and clerical employees, salesman, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Respondents' employees in the bargaining unit, by insisting as a condition of reaching a successor collective-bargaining agreement, that the Union consent to a nonmandatory bargaining proposal.

(c) 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) Give full force and effect to the terms and conditions of employment provided in the 2009–2013 collective-bargaining agreement and any successor agreement between the Union and Island, and apply them to the employees in the unit described above at both the Island and Verde locations.

(b) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit, without insisting that the Union consent to a nonmandatory bargaining proposal as a condition of reaching an overall agreement.

(c) Make whole unit employees, with interest, for any loss of earnings and other contractual benefits resulting from the Respondents' failure to apply and continue in effect, the terms of the 2009–2013 collective-bargaining agreement and any successor agreement, in the manner set forth in the remedy section of this decision.

(d) Compensate unit employees for the adverse tax consequences, if any, of receiving lump-sum make-whole awards, and file with the Regional Director for Region 29, 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 years for each employee.

(e) 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.

(f) Within 14 days after service by the Region, post at their Ronkonkoma, New York facilities copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 October 1, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 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. August 12, 2016

_____
Mark Gaston Pearce, Chairman

_____
Kent Y. Hirozawa, Member

_____
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[23] 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."

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 recognize and bargain with the Northeast Regional Counsel of Carpenters (the Union) as the exclusive collective-bargaining representative of employees at both the Island and Verde facilities in the following appropriate unit by refusing to apply the 2009–2013 collective-bargaining agreement and any successor agreement in effect between the Union and Island to our unit employees at the Verde location. The unit is:

> All full-time and part-time production employees and installers employed by the Employer, excluding all shipping (including wrappers and packers), sanders, maintenance and clerical employees, salesman, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit, by insisting as a condition of reaching a successor collective-bargaining agreement, that the Union consent to a nonmandatory bargaining proposal.

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 give full force and effect to the terms and conditions of our 2009–2013 collective-bargaining agreement and any successor agreement between the Union and Island and apply them to our employees in the unit described above at both the Island and Verde facilities.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit with respect to a successor agreement, without insisting that the Union consent to a nonmandatory bargaining proposal as a condition of reaching an overall agreement.

WE WILL make our unit employees whole, with interest, for any loss of earnings and other contractual benefits suffered as a result of our failure to apply and continue in effect the terms of the 2009–2013 collective-bargaining agreement and any successor agreement.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum make-whole awards, and WE WILL file with the Regional Director for Region 29, 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 years for each employee.

ISLAND ARCHITECTURAL WOODWORK, INC., AND VERDE DEMOUNTABLE PARTITIONS, INC., ALTER EGOS

The Board's decision can be found at https://www.nlrb.gov/case/29-CA-124027 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.

Marcia E. Adams Esq., for the General Counsel.
Harry Liolis Esq. counsel for Verde Demountable Partitions, Inc., *Jeff A. Meyer Esq.,* and *David A. Tauster Esq.,* counsel for Island Architectural Woodwork Inc., *Curtis T. Jameson, Esq.,* counsel for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on February 25 and 26, 2015, in Brooklyn, New York. The charge and the amended charge were filed on March 10 and April 17, 2014. The Complaint that was issued on December 22, 2014, alleged as follows:

1. That the Union has been recognized by Island Architectural Woodwork Inc., pursuant to Section 9(a) of the Act and has maintained a contract effective from July 1, 2009, to June 30, 2013.

2. That in or about October 2013, the owners and managers of Island set up Verde Demountable Partitions Inc., for the

purpose of evading the contractual obligations that Island had with the Union.

3. That in or about October 2013, Verde has performed work previously performed by the employees of Island.

4. That since October 2013, Verde has not applied the terms of the collective bargaining agreement to its employees.

5. That after January 13, 2014, Island has insisted as a condition of reaching a new agreement, that the Union permit Verde to perform work normally performed by Island.

6. That in February 2014, Island demanded that the Union agree that Verde's employees were not in the bargaining unit and that the Union waive any claims over such work performed by Verde.

7. That Island and Verde are alter egos.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondents are employers engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Island Architectural is a corporation that is engaged in the manufacture of high end custom made wood products used in offices and commercial buildings. Most of its customers, many of which are large banks and financial institutions, are located in the New York metropolitan area. Island was formed in or about 2005 by Edward Rufrano and two other people who were the shareholders at the time. Thereafter, Rufrano bought out the shares of Roger Stevens who was one of the founders. At this time, the shareholders of Island are Rufrano, Angelo DeMarco, and the two sons of Stevens. As far as Island's management, the evidence shows that Rufrano is the president and chief executive officer while DeMarco is the second in command. I also note that Rufrano has two daughters, Tracey D'Agata and Jessica Ondrush, both of whom, although having no ownership interest in the company, have worked for Island for many years.

Island and the Union have maintained a collective-bargaining relationship for a number of years and the last collective bargaining agreement ran from July 1, 2009, to June 30, 2013. The bargaining unit consists of:

> All full-time and part-time production employees and installers employed by the Employer, excluding all shipping (including wrappers and packers), sanders, maintenance and clerical employees, salesman, professional employees, guards and supervisors as defined in the Act.

After the contract's expiration, the parties, with some delay, entered into contract negotiations. In this regard, the parties executed two consecutive interim agreements which extended the terms of the expired contract until a new agreement was reached or until either side gave notice of termination. At the present time, the company and the Union have not terminated the interim agreements and the company has continued to pay the wages and benefits in accordance with the terms of the expired contract. The evidence also shows that at least in some respects, the parties were fairly close to reaching a new agreement.

A great deal of Island's business is derived from a long standing relationship that it has with the largest architectural firm in the world. Much of its production is done for major banks and other large financial institutions.

Before the great recession, one of Island's main customers was Lehman Brothers. And when that company imploded in 2008, Island lost a substantial amount of business not only from that customer but also from other bank customers who were affected by the financial crisis. Thus, in or about 2006, Island employed about 59 or 60 bargaining unit production employees, whereas by October 2013, that number had declined to about 30.

In or around 2007, Island began making a product which was a wood based demountable partition designed by the architectural firm. These were sold to and installed at Lehman Brothers. To explain, these were custom made floor to ceiling wood veneered/glass partitions that could be moved around to create different office spaces within a building. They were not the type of movable partitions that are typically used to create cubicle offices and they are not the same as other demountable floor to ceiling partitions that are made of metal, glass and cloth. The latter are much less expensive to make. This product was licensed to Island by the architectural firm and was given the name of "Island Verde Green Demountable System." This was marketed by the Respondent and was included in its product brochures and video sales material. The name "Verde" refers to the idea that the product would be produced with "green" materials and therefore would be an added inducement for potential customers.

At the time that Island was making these custom made demountable partitions for Lehman Brothers, Jeffrey Brite who was employed at the architectural firm, thought that they were great and wanted Island to expand this product so that it could be made on a larger scale and not simply on a custom limited edition basis. The problem was that as a premium product, the cost of producing these types of wood veneer partitions was a lot more expensive than producing the metal, glass, and cloth partitions. And given the recession and cutbacks by potential customers, this idea was not feasible at that time. That is, the production of this type of product did not attract many customers and was expensive to produce for those limited orders that were received.

In or around 2008, Island hired an efficiency expert with the goal of increasing its competitiveness in the industry. The result was that new automated machinery was purchased and through "lean engineering" the entire manufacturing process was made more efficient. One result of this process was that by 2013, one of the three buildings that Island had previously

[1] The General Counsel's unopposed Motion to Correct the Record is granted.

used, became seriously underutilized and the bulk of the work was moved to the main building. (The second building was basically used as a warehouse).

The underutilized building was located at 20 Haynes Street and was called the back building. By September 2013, there were only five bargaining unit production employees working at the back building. By October 2013, there were only three, inasmuch as two were transferred back to the main building in September. The back building also contained a number of machines including two numerically controlled machines that although perfectly good, were not being used. Thus, for all practical purposes, by October 2013, there were about 25 plus production employees working at the main building and only 2 to 3 unit employees working at the back building.

During the period after the Lehman Brothers collapse and 2013, the Respondent apparently made a small number of sales of the Verde demountable partitions. But it does not seem that this generated much business on any regular basis. Nevertheless, people at the architectural firm still liked the product and were interested in producing these partitions in greater numbers on a more standardized basis. Rufrano, although thinking that this product might have a future, did not want at his age, to undertake the expansion of his business that this might entail; preferring instead to run a customized wood shop. As a result, Rufrano tried without success to sell its license to other companies.

The evidence shows that sometime in 2012 or 2013, Jeffrey Brite who worked at the architectural firm came up with the idea of creating a new enterprise to market the Verde demountable partitions. In essence, he rounded up some independent investors and in conjunction with Rufrano's daughters, they formed a new company called Verde Demountable Partitions, Inc.

The new company is owned as follows: Rufrano's daughters, Tracey D'Agata and Jessica Ondrush each have 32 percent of the shares. Jeffrey Brite, Allan Schatten, (a friend of Rufrano), and the architectural firm own the remaining 36 percentof the shares. Neither Rufrano, DeMarco nor the two Steven's sons have any ownership interest in the new company. There is no evidence that Rufrano advanced any money to his daughters in relation to the start up of Verde Demountable Partitions, Inc. There is also no evidence that any of the owners of Island have derived or expect to receive any financial gain from Verde Demountable Partitions.

Verde Demountable Partitions paid Island $750,000 for the product license. It also leased, at $11 per square foot, the back building that had previously been used by Island and was largely unused in October 2013. Additionally, Verde has leased from Island, the numerically controlled machines that were languishing in the back building with an option to purchase them at the end of the lease period for $1.

The evidence shows that from its inception, Island has performed certain services for Verde on a cost plus basis. These services included machine repair, wood finishing, and transportation. This originally was an informal arrangement that was incorporated into a written agreement executed a year later in October of 2014.

The parties entered into a stipulation that Island and Verde (a) employ the law firm of McGinity & McGinity for corporate filings; (b) employ the accounting firm of Shalik Morris, LLP; (c) have bank accounts at the same branch of Bank of America; (d) employ Hugo Cruz and Cathy (LNU) to clean their buildings; (e) utilize Jem Security Systems for fire and burglar alarm services; (f) utilize AXE at 6268 Jericho Turnpike in Commack, New York, for computer maintenance, (g) utilize Island employee Mike Menichini to service their production machines; (h) utilize Chris Vorisek and Joe Pecorella for plumbing services; (i) utilize Carr Business Systems to service their copier machines; (j) utilize D&D Electric Motors and Compressors for electrical work; (k) utilize Eniro HVAC Corp. for heat and air conditioning maintenance and (l) utilize Brentwood Door Co., to maintain and repair doors.

Additionally, the parties stipulated that Irek Sionina worked for Island before being hired by Verde.

Verde commenced operations in October 2013 in the back building after the Island employees who had worked there had been moved back to Island's main building. At the start, Verde offered a job to and hired Jose Aguilera who was a long term employee of Island and who was in the bargaining unit. The evidence also shows that Verde hired Christian Questo, another production employee who had been employed by Island for only a very short time before October. Thereafter, all production employees hired by Verde were new people who had not been employed by Island. Thus, with these exceptions, there have been no instances of bargaining unit people leaving Island and going to work for Verde.[2] Further, there has been no interchange of bargaining unit employees between the two companies. Additionally, there is no evidence of any Island people supervising the employees of Verde and no evidence that there is any common control by either enterprise over the labor relations of the other.

The evidence shows that no bargaining unit employees of Island were laid off or discharged as a result of Verde's creation as a separate business enterprise. Nor is there any evidence that this has resulted in bargaining unit employees who have remained at Island, having suffered any diminution of their pay because of fewer hours worked. During this entire period, the Union and Island have been negotiating for a new collective bargaining agreement and the company has agreed to maintain the terms and conditions of the expired contract. As such, the creation of Verde has not resulted in Island's bargaining unit employees losing any of their existing benefits. As such, the creation of Verde as a separate enterprise, has not resulted in any harm to the existing complement of Island's bargaining unit employees. In my opinion, this mitigates against any conclusion that Island had the intent to evade its contractual obligations to its existing complement of employees who were represented by the Union.

The testimony was that as of the time of the hearing, the pro-

[2] Jessie Capiello, a nonunit employee of Island, left that company to join Verde. He was employed as a person who designed products and was familiar with the design and production of the demountable partitions. As noted above, the parties stipulated that Irek Sionina worked for Island before being hired by Verde. But as far as I can tell, that person was not in the Island bargaining unit.

duction and sale of the demountable partitions was not yet profitable. However, hope springs eternal, and when asked why he would burden his daughter with a loss producing business, Rufrano testified that he anticipated that this would eventually turn out to be a very profitable venture given the financial and marketing backing of the architectural firm.

With respect to the negotiations between Island and the Union, the evidence shows that bargaining for a new contract commenced in September 2013. At a meeting in November 2013, Rufrano notified the Union that his daughter was operating a new business in the back building. When asked about this, Rufrano stated that this was a separate business and that he had no financial interest in it.

At a meeting in February 2014, Rufrano met with the Union's president and asked that the Union release any claims to Verde's work or employees. Following this conversation, Island sent to the Union a memorandum of agreement that proposed that the Union agree that Verde's employees would not be part of the bargaining unit; that Verde and Island could not be construed as an alter ego or joint employer; and that the Union waive its right to file any past or future grievances over work performed by Verde's employees. When this was declined, the Union requested additional meeting dates. Based on the credited evidence, Rufrano declined to agree to any more meetings except on condition that the terms of the company's proposal be met. The testimony of the Union's representatives was that Rufrano asserted that the partitions could be manufactured more cheaply if it could be done under nonunion rates.

III ANALYSIS

It is the General Counsel's contention that Verde is the alter ego of Island and therefore that Verde would be obligated under the Act to recognize and bargain with the Union as a single entity with Island. It also is contended that as an alter ego, Verde is obligated to make whole its employees to the extent that they were not paid the wages or benefits received by Island's employees. I don't agree.

In determining whether one employer is the "alter ego" of another, the Board looks to whether the two enterprises have "substantially identical management, business purpose, operation, equipment, customers and supervision, as well as ownership." *Advance Electric, Inc.,* 268 NLRB 1001 (1984), enfd. as modified, 748 F.2d 1001 (5th Cir. 1984); *Crawford Door Sales Co*., 226 NLRB 1144 (1976). The Board has held that no one factor is a prerequisite to finding an alter ego. *Perma Coating, Inc.,* 293 NLRB 803 (l989).

A finding of alter ego is often applied to situations in which the Board finds that what purports to be two separate employers are, in fact, one employer and where the contract signatory employer is either not honoring its bargaining obligations and/or there is a question of who should pay what is owed by an employer that has committed unfair labor practices. In some cases the issue of alter ego has been raised when one company ostensibly goes out of business to avoid liabilities, but then reopens under a new name. Other cases involve situations where a Respondent does not have the assets to satisfy a backpay liability and the General Counsel is seeking to find a deeper pocket. In still other cases, one company transfers bargaining unit work to another related company in an effort to avoid paying the contractual obligated wages and benefits to its employees. In all of these types of cases, the Board has held that it is relevant to consider whether the alleged alter ego was created for the purpose of evading a company's bargaining obligations.

Some courts, including the Second Circuit, have held that an alter ego can *only* be established, even if all other factors are present, if it has been shown that the new entity was created for the purpose of evading the original enterprise's legal obligations. (This would be similar in concept to a fraudulent conveyance). See *NLRB v. Lihli Fashions,* 80 F3d 745 (2nd Cir, 1996), where the Court affirmed the Board on the issue of single employer but reversed on the alter ego issue. In that case, the Court held that in order to find one employer to be the alter ego of another (for purposes of derivative liability), there had to be evidence showing intent to defraud.

On the other hand, Board decisions have concluded that while a motive to avoid bargaining can help establish alter ego status, it is not a requirement to finding a violation or liability by the new entity because it is important to protect the interests of the employees, regardless of the employer's motive in making the corporate changes. See for e.g., *Allcoast Transfer*, 271 NLRB 1374 (1984), enfd. 780 F.2d 576 (6th Cir. 1986); *Johnstown Corp. and/or Stardyne, Inc.,* 313 NLRB 170 (1993), enfd. in part 41 F.3d 141 (3d Cir. 1994); *CEK Industrial Mechanical Contractors*, 295 NLRB 635 (1989).

It is the Board's current view that a showing of intent to defraud may be a relevant but not a necessary factor. Thus, in *Park Maintenance* et al*.,* 348 NLRB 1373 (2006), a Board majority affirmed the Judge's alter ego finding, albeit then Chairman Battista stated that in his view, the General Counsel must show, among other things, an intent to avoid legal obligations under the Act in order to prove alter ego status.

In many of the cases I have reviewed, the outcome was pretty obvious as the facts were relatively clear cut and either showed that the involved companies were alter egos or not. This issue becomes a problem when the facts, such as those in the present case, are more ambiguous.

The evidence in the present case shows that Verde operates in the same sphere of business as Island; that it is located in a facility and uses machinery that used to be part of Island's operations; that Island performs significant services for Verde; and that at least two of Verde's owners are the daughters of the principal owner and chief executive officer of Island. Moreover, the business being done by Verde, (producing wooden demountable partitions), is work that was, at one time, done by Island.

On the other hand, the evidence shows that the owners of Verde are not the same people who own Island and Verde's ownership includes individuals and businesses that have no familial relationship with Island's owners. In addition, the evidence shows that Island's management does not exercise control over Verde's business operations; that Verde, and not Island, supervises, hires, fires and controls the labor relations of its own employees; that there is no interchange of production employees between the two companies; and that with two exceptions, Verde's production employees were not employed by

Island contemporaneously with when Verde commenced its operations. Finally, the evidence shows that when Verde was created and commenced operations, this transaction had virtually no adverse affect on Island's bargaining unit employees who, despite the expiration of the existing contract, continued to be paid and receive benefits in accordance with the agreement between Island and the Union to continue the collective bargaining agreement. No bargaining Island unit employees were laid off and those who chose to remain employed by Island did not have their pay or existing benefits reduced.

There have been cases where the Board has concluded that two or more businesses which did not have common ownership were nevertheless alter egos.

For example in *Citywide Services Corp*., 317 NLRB 861 (1999), the Board held that two companies were alter egos based on the finding that a newly established corporation was in reality a "disguised continuance" of the older employer and was, in effect, a "sham." In that case, the prior company was called Citywide and the successor company was called Hudson. Citywide had been owned and operated by a person named Richmond and the evidence showed that in order to avoid paying money owed to Local 32B/J, he ostensibly went out of business, but through his wife, funded the start of Hudson, a company ostensibly owned by a man named Giacoia who was the former vice president of Citywide. In addition, there was evidence that Richmond continued to be involved in Hudson's affairs after claiming that he had left the business. The Judge stated:

> It must be reemphasized that Hudson was formed 5 months before Citywide closed, and began operating 2 months before Citywide closed. Hudson was formed with capital from the Richman family, the sole investor. That transaction was not an arm's-length business arrangement which could be expected from two separate entities. The loan of $60,000 was not evidenced by writing, and it was repaid in cash in small amounts delivered to Richman. It may be said that management remained substantially identical. Richman took an active role in the formation of Hudson, participating in ensuring that a friendly union was obtained, and in directing the removal of equipment and supplies from Citywide to Hudson, and in selecting the ''best'' workers for Hudson. Giacoia sought advice from Richman concerning whether Rivas should continue in Hudson's employ.
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> The business purpose and operation of the two companies was identical: they were both involved in the commercial cleaning of offices. Hudson used much of the same equipment and supplies which it initially obtained from Citywide. Hudson's customers were obtained from Citywide in the startup phase, and were solicited by Citywide's sales representatives, who became employed by Hudson. . . . The supervisors, too, transferred from Citywide to Hudson. They supervised employees who also transferred from Citywide and who performed the same work, with the same equipment, for the same customers, when employed at Hudson. . . . Citywide paid Hudson's first payroll, making such wage payments to employees who were transferred from Citywide to another company and then to Hudson's payroll. Citywide also paid for the purchase of a fax machine, air conditioners, and the installation of a computer program. Large amounts of supplies and equipment were moved from Citywide to Hudson without compensation. Supplies left on jobsites by Citywide were, despite industry practice, not retrieved by that company, but were taken by Hudson, also without compensation. Citywide's accounts were permitted to be solicited by its employees for Hudson, while still on Citywide's payroll, and no compensation was made for those accounts, although Citywide had received payment for other accounts assigned to other cleaning companies.
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> It also appears that Hudson was formed so that Citywide could avoid its obligation to Local 32B. Citywide owed enormous sums of money to the Local 32B funds and simply stopped making payments to those funds. It is clear that Richman devised a plan to continue operation through Hudson with a new, more acceptable union, and make it appear that Citywide was closing its operations. This is supported by the testimony of Rivas that, beginning in early April 1991, Giacoia told him to replace the Local 32B members who were working on Citywide's jobs with nonunion workers. The Local 32B employees were either laid off or had their hours reduced. He stated that at the time he left Citywide in October, 90 percent of the jobs were being serviced by nonunion workers.
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> I accordingly find and conclude that Hudson was merely a disguised continuance of Citywide, and that the closing of Citywide and the opening and operation of Hudson was motivated by a desire to avoid dealing with Local 32B and in an effort by Citywide to avoid its obligations to Local 32B. I therefore find that Hudson is an alter ego of Citywide. (Citations omitted).

In *Fugazy International*, 265 NLRB 1301 (1982), the Board found that two companies were alter egos notwithstanding their lack of formal common ownership. The facts of that case are too long to describe here but it is clear from the Board's comprehensive decision that the evidence there, similar to the evidence in Citywide, revealed that the second company was, in effect, a sham enterprise, set up by the original owner for the purpose of evading legal obligations to a union. Indeed, as the owner of the second company was only there to disguise the continued ownership interest of the original owner, it should be concluded that there was common ownership; inasmuch as there really was only one owner. See also *American Pacific Concrete Pipe Co*., 262 NLRB 1223, 1226 (1982), where despite the lack of common ownership the Board found two companies to be alter egos when they had substantially identical business purpose, operations, equipment, and where it was concluded that one exercised almost total control over the other's labor relations.

In some cases the Board has concluded that two or more companies were commonly owned where ownership of each, although held by separate persons, was held within a single family. For example, in *Kenmore Contracting Co.,* 289 NLRB 336 (1988), the Board found that two companies, owned respectively by the parents and their children, were commonly owned. In that case, the Board noted that the two Hanley chil-

dren, who were the owners of nonunion Sloan Erectors, were financially dependent on their parents who were the owners of the unionized Kenmore, and that the children capitalized the company they ostensibly owned through indirect contributions from their parents. See also, *D.I.C. Mfg. Corp.,* 294 NLRB 426 (1989) involving a similar set of facts.

In *Advance Electric, Inc*., 268 NLRB 1001 (1984), the Board concluded that two corporations were alter egos because they were owned by members of the same family, had common management and supervision and because the newer company was created for the purpose of allowing the older company to evade its obligation to honor its collective bargaining with the Union.

In *First Class Maintenance Services*, 289 NLRB 484, 485 (1988), the Board explained its rationale for finding that nominally separate businesses owned by close family members should be considered, in some circumstances, to be commonly owned for alter ego purposes. It stated:

> [A] finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owners of two companies. Rather, each case must be examined in the light of all the surrounding circumstances. In particular, the Board focuses on whether the owners of one company retained financial control over the operations of the other. . . .
>
> Applying this principle, the Board has indicated that it will only find common ownership in the "close familial relationship" context when "the owners of one company exercise considerable financial control over the alter ego." *Adanac Coal Co.*, 293 NLRB 290, 290 (1989) (finding no common ownership despite alleged alter egos being owned by brothers); see also *Midwest Precision Heating & Cooling, Inc.*, 341 NLRB 435 (2004), enfd. 408 F.3d 450 (8th Cir. 2005). Thus, the inquiry at the heart of the "close familial relationship" inference concerns the degree of *financial control* the owner of one company has over the other company.[3]

As indicated by the quotation cited above, the fact that two companies are owned by members of the same family does not mean, a fortiorari, that they should be construed as being alter egos even if they have some of the other indicia relevant to alter ego status.

In *Cadillac Asphalt Paving Co*., 349 NLBB 6, 8 (2007), the Board held that two employers neither constituted a single employer nor were alter egos; albeit it concluded that one was a "successor" to the other. With respect to the issue of common ownership, the Board stated that it has only found alter egos in the absence of common ownership where both companies were "either wholly owned by members of the same family or nearly totally owned by the same individual or where the older company maintained substantial control over the new company." The Board also opined that although it will consider whether a second company was created in order to allow the old employer to "evade responsibility under the Act," unlawful motivation is not a necessary element of an alter ego finding. In reviewing the facts of the case, the Board noted that there was substantially common supervision and operations and that the two companies had substantially identical business purposes, equipment, premises and customers. Nevertheless, the Board refused to find that they were alter egos, stating that this evidence, "does not outweigh the aforementioned evidence showing separate ownership and control and the lack of identical management, as well as the lack of evidence to suggest that LLC was formed for other than legitimate business reasons."

In *L & J Equipment Co*., 274 NLRB 20, 27–28 (1985), the Board affirmed the decision of the Administrative Law Judge who concluded that a new business enterprise, Willow Tree, was *not* an alter ego of L & J, where the owners of Willow Tree were the children of the owners of L & J and where the two companies were engaged in substantially similar businesses. The Judge noted that Willow had received significant financial support from L & J in the form of unsecured loans at below market rates, plus debt forgiveness and forbearance. The Judge additionally noted that; "Willow Tree benefited in its formative period from the use of L & J's office facilities from family land connections; from L & J's co-indemnification agreement to support its land reclamation bond, from the extensive credit arrangements above described; from the generously flexible lease/purchase relationship on heavy equipment and from other operating items furnished gratis; from association with L & J or its satellite companies when Willow Tree applied for its mining license, and in other ways. L & J also was the principal purchaser of Willow Tree's coal."

Despite finding that Willow Tree had basically the same business purpose as L & J, and that it used some of the same equipment through generous lease agreements, the Judge concluded that Willow Tree was maintained as an independent corporation with respect to its operations and control of its own labor relations. The Judge concluded that between L & J and Willow, there were no common officers, directors, shareholders or supervisors and that there was no employee interchange. He concluded that after the summer of 1982, the two companies were physically and administratively apart where James Filiaggi controlled operations, administration, and labor relations for L & J, while Richard Filiaggi did the same for Willow Tree.

After considering the facts in the present case in light of the multi-factor test set forth in the cases described above, it is my conclusion that the balance of the evidence shows that Verde Demountable Partitions Inc., is not the alter ego of Island Architectural Woodwork, Inc. As such, I shall recommend that this allegation of the Complaint be dismissed.

The General Counsel also contends that the Respondent violated Section 8(a)(5) by insisting on a contract wherein the

[3] *First Class Maintenance* supra, was cited in support of the majority opinion in *US Reinforcing Inc*., 350 NLRB 404, 406 (2007). The latter case had an interesting twist inasmuch as the Board rejected the contention that there was common ownership based on the fact that the owner of a newly created company was the unmarried cohabitant of the owner of the old company. Although stating that it was not foreclosing this possibility in the future, the facts of the case did not sufficiently demonstrate that the owner of the old company exercised substantial control over the new company.

Union would agree that Verde's employees would not be part of the bargaining unit; that Verde and Island could not be construed as an alter ego or joint employer; and that the Union would waive its right to file any past or future grievances over work performed by Verde's employees. In this regard, the General Counsel contends that this was a permissive subject of bargaining and under *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958), the Respondent could not legally insist that the Union agree to this proposal.

The proffered Memorandum of Agreement contained a waiver of the Union's right to assert that Verde's employees were in the bargaining unit and to exclude any work performed by Verde's employees from coverage under any negotiated contract between Island and the Union. As stated by the General Counsel; "Clearly, this proposal was an attempt to cement Respondent's primary goal in creating the alter ego; remove the Verde partition work from the burden of the Union contract and ensure that Respondent Verde employees "would never e considered members of the bargaining unit."

Assuming that Verde was found to be an alter ego of Island, the Respondent's insistence on this proposal would be a violation of the Act because it would essentially be an attempt to alter the recognized collective bargaining unit. If Verde was found to be an alter ego of Island then any additional production employees hired by Verde would accrete to the existing bargaining unit. But if it is found that Verde is not an alter ego with Island, then the proposal merely insists on maintaining the status quo which would be that Verde's employees would not be part of the bargaining unit. And since I have concluded that Verde is not an alter ego of Island, then the insistence on this proposal, cannot violate Section 8(a)(5) of the Act.

CONCLUSION

For the reasons stated above, I conclude that the Complaint should be dismissed.

Dated, Washington, D.C. May 8, 2015