UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 18-CA-18134

LEIFERMAN ENTERPRISES, LLC d/b/a HARMON AUTO GLASS; and its successor AUTO GLASS REPAIR and WINDSHIELD REPLACEMENT SERVICE, INC.

AND

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES-DISTRICT COUNCIL 82

AUTO GLASS REPAIR AND WINDSHIELD REPLACEMENT SERVICE, INC'S PRINCIPAL BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Auto Glass Repair and Windshield Replacement Service, Inc. submits its principal brief in support of its exceptions to the Administrative Law Judge Robert A. Giannasi decision regarding a dispute over successor liability with the International Union of Painters and Allied Trades-District Council 82. The brief is submitted under N.L.R.B. Rule § 102.46.

INTRODUCTION

Leiferman Enterprises, LLC was forced into an involuntary liquidation through a Minnesota state court proceeding for defaulting on secured loans of Harmon AutoGlass Intellectual Property ("HAIP"). During to the receivership proceeding, the International Union of Painters and Allied Trades-District Council 82, had commenced a parallel proceeding with the NLRB regarding unfair labor practices.

Meanwhile, Leiferman assets were purchased by WRS. As part of the condition of all bids, including WRS, HAIP was required to indemnify potential purchasers from any pending claims against Leiferman from the NLRB. The court approved the sale of Leiferman's assets "free and clear of any liens and encumbrances." Later, the court rendered a judgment against Leiferman awarding HAIP monetary damages of over $3.6 million. A deficiency of over $3 million remains unpaid. As a secured creditor, Leiferman asset proceeds from the sale went from WRS to HAIP but the huge deficiency remains.

Well after the Leiferman sale, the ALJ issued a decision finding WRS a successor to Leferman, liable for the backpay of Leiferman's previous unfair labor practices. But, the record does not substantiate the ALJ's decision.

First, WRS is not a successor of LE.

Second, the NLRB cannot summarily position an unsecured claim regarding unfair labor relation practices of a predecessor before that of a secured creditor. The record reflects no facts showing malfeasance on the part of HAIP as a secured creditor, to support an "equitable subordination" of the first position secured creditor's claim to that of the unsecured claims of the NLRB.

Third, Leiferman employees, including 5 of 15 union employees that were retained by WRS, received different terms of employment, different benefits, and increased job responsibilities. There are no facts in the record to suggest former Leiferman employees, if employed by WRS, would receive the same employment terms as the predecessor employer. Facts reflect that WRS employment did result in different employment terms and conditions, including the remaining union employees since the union contract itself had expired six months prior to Leiferman's asset sale. The record is devoid of any facts showing WRS either negotiated with, agreed to, or assumed its predecessor's union collective bargaining agreement. The record is also devoid of facts that Leiferman's employees could have obtained any relief from WRS's predecessor by virtue of its insolvency.

Fourth, the NLRB's action prays for successor liability to attach to a court ordered Article Nine asset sale by a first-position-secured

creditor (when there is no similarity between the ownership of buyer and seller) when applicable law provides that all subordinate claims, including state and federal tax liens, inferior security interests, encumbrances and judgments were all extinguished by the sale. This position requires the rewriting of Article Nine, and the law of secured transactions under the UCC, and the law of successor liability.

In short, if Leiferman would have continued to operate and this case would have proceeded to judgment, the NLRB's represented parties would have received *nothing* because his judgment would have been inferior to and subordinate to the security interest of HAIP. Should the ALJ's decision be upheld, the resulting inequity would require putting NLRB's claim in a superior position to HAIP's first position secured claim and shifting this claim from a business that had no hope of any sort of payment or other relief to the NLRB, to a new formed, capitalized, and solvent business.

Likewise, the ALJ"s decision will result in financial prejudice to the first position secured creditor who took no part in the acts for which the NLRB seeks relief and shifting that burden to a successor business who also took no part of its predecessor's acts. This would directly contradict the public policy and interest in market growth. It becomes detrimental to the ability of a new business to arrange its business with

the flexibility required depending upon existing economic conditions. Furthermore, it discourages the acquisition of unionized companies.

Regardless, the ALJ's decision under the facts of this case should be reversed.

STATEMENT OF THE FACTS

Leiferman Enterprises d/b/a Harmon Auto Glass (Leiferman) was engaged in the sale and installation of automotive glass at various facilities in the Minneapolis area. Stip. ¶4. The International Union of Painters and Allied Trades-District Council 82 (Union) represented some 15 of its employees. *Id.* The Union and Leiferman were parties to a collective bargaining agreement effective from July 1, 2003 through June 30, 2006. *Id.*

Leiferman financed the purchase of its business through various agreements with a secured creditor known as Harmon AutoGlass Intellectual Property (HAIP), the most recent of which was entered into in September 2005. Stip. ¶ 5. Shortly thereafter, Leiferman defaulted on its payment obligations to HAIP. *Id.* Leiferman and HAIP entered into Forbearance Agreement on April 30, 2006 in which Leiferman, inter alia, agreed to make certain payments to HAIP and to complete the sale of Leiferman to a third party before September 15, 2006. *Id.*

HAIP's security interest was perfected by filing a UCC-1 with the Secretary of State in advance of the conduct complained of by Leiferman Enterprises. *Id.* Leiferman thereafter defaulted on the payment terms in the Forbearance Agreement. *Id.* HAIP demanded that Leiferman return possession of and grant access to Leiferman's collateral to HAIP. *Id.* Leiferman refused to do so. *Id.*

Because Leiferman failed to grant possession of and access to the collateral and because of evidence that Leiferman was engaging in erratic economic behavior in the operation of its business, HAIP filed a Complaint for the Appointment of Receiver or for Claim and Delivery in the Minnesota state district court. HAIP sought the appointment of a receiver to manage Leiferman. Stip. ¶ 6. On September 20, 2006 the State District Court issued a Stipulated Order Establishing Receivership and Appointing Receiver, a copy of which is attached to the original fact stipulation as Exhibit 2. *Id.* The court appointed Lighthouse Management Group (Receiver) as the Receiver. *Id.*

The Court's Order authorized the Receiver to operate the business in a manner designed to preserve and maximize the value of the business and its assets, and also authorized the Receiver to pursue the sale of Respondent Leiferman or its assets. *Id.*

After seizing control of Leiferman, in order to keep Leiferman going as a going concern, HAIP was forced to invest over $300,000 to continue the operations and continue paying its employees, including those who had been represented by the Union. Id. At the time, Leiferman had ceased operations and had no financial ability to satisfy its financial obligations to the employees, including the union employees — negatively cash flowing at the rate of $100,000 per month. *Id.* (Emphasis added).

During this same period of time, Leiferman was engaged in negotiations with the Union for the terms of a new collective bargaining agreement to cover its employees. Stip. ¶ 7 On August 13, 2006, after about two months of negotiations, Leiferman implemented its final offer and unilaterally changed the terms and conditions of employment of its employees. *Id.*

The Union filed unfair labor practice charges with the National Labor Relations Board (Board) claiming that this conduct violated Section 8(a)(1) and (5) of the National Labor Relations Act. *Id.* The Board issued a Complaint and Notice of Hearing. The complaint alleged that Leiferman had declared an impasse and unilaterally implemented changes in certain rates of pay and other terms and

conditions of employment without having reached a bona fide impasse in negotiations. *Id.*

In October, 2006. the Receiver sent Bid Instruction Letters to nine potential buyers of Leiferman's assets, together with due diligence data. Stip. ¶ 8. This data included notice of the potential liability arising from the Board's Complaint and Notice of Hearing. *Id.*

Leiferman's assets were subsequently purchased by Auto Glass Repair and Windshield Replacement Services, Inc. (WRS). *Id.* WRS acknowledges that prior to purchasing Leiferman's assets, it was put on notice of Leiferman's potential back pay liability in Board proceeding. *Id.* All prospective purchasers of Leiferman, as a condition to their bids, *required HAIP indemnify them* from any pending claims against Leiferman from the NLRB and the EEOC. Id.

On January 31, 2007, the Minnesota District Court in its receivership proceeding ordered the sale of Leiferman's assets to WRS. Stip. ¶ 9, Ex. 4. The Order stated that WRS' purchase of Leiferman was *"free and clear of any liens and encumbrances." Id.* At no time did any representative of the Board, or the Board itself, file a claim with the District Court for the State of Minnesota, County of Hennepin, or otherwise submit to the jurisdiction of the Court. *Id.*

On August 20, 2007, the state district court entered judgment against Leiferman Enterprises, LLC and Scott Leiferman awarding HAIP monetary damages in the amount of $3,626,095.00, plus attorneys' fees and costs totaling $97,000.50 for a total judgment of $3,723,095.50. Stip. ¶ 10. *A deficiency of over $3million remains unpaid. Id.*

Since purchasing the assets of Leiferman on about January 31, 2007, WRS has continued Leiferman's business of selling and installing automotive glass to retail customers without interruption. Stip. ¶ 11. All additional locations where WRS assumed leases had been locations that were leased by Leiferman. *Id.* WRS employed five of the fifteen glass installers who had worked for Leiferman; two new glass installers; the nine store managers who worked for Leiferman (who had installed glass while working for Leiferman and who install glass now with WRS); four of the five customer service representatives who had worked for Leiferman; and the salesperson who had worked for Leiferman. *Id.* This employee compliment is reflected on Exhibit 5 to the original fact stipulation. *Id.* WRS licensed the same trade name that Leiferman had licensed from HAIP. *Id.* Leiferman had leased the same trade name from HAIP, but HAIP had cancelled the lease. *Id.*

WRS, however, operated with different corporate management and a different headquarters. *Id.* WRS paid glass installers who had worked for Leiferman different benefits and terms of employment, had increased job responsibilities and used different methods (equipment) to install auto glass. *Id.* Despite the substantial reductions in overhead, and the fact that its principal worked more than 60 hours per week at a salary of $15,000, WRS operated at a loss in 2007 and 2008. *Id.*

On February 21, 2008, the Board issued a Decision and Order directing that Leiferman make employees whole for any loss of earnings or benefits suffered because of Leiferman's unfair labor practices, including the unilateral changes in terms and conditions of employment that it implemented without reaching a good faith impasse during bargaining with the Union. Stip. ¶ 12.

The backpay period included August 11, 2006, when Leiferman unilaterally changed terms and conditions of employment of employees covered by the collective bargaining agreement in effect from July 1, 2003, to June 30, 2006 by ceasing to make 401(k) payments on behalf of said employees and by increasing the monthly contribution of health insurance premiums paid by said employees from 25 to 50 percent of the total monthly cost of said premiums. Stip. ¶ 13. The backpay

period ended on February 2, 2007, after which date WRS began operating the business. *Id.*[1]

QUESTIONS PRESENTED

1. NLRB unfair labor practice orders providing backpay remedies are unsecured debts. Prior to a NLRB decision, the assets of a company in a state court involuntary liquidation action are sold. Does a NLRB unsecured debt for a backpay claim have priority over a perfected secured creditor whose interest was perfected prior to the illegal conduct such that the secured creditor can be forced to pay for liabilities for which it's payment priority is superior?

2. If the terms of employment, benefits, and job responsibilities change, does the company become a successor of the previous company and liable for backpay amounts for unfair labor practices of that predecessor?

3. Prior to an NLRB decision regarding alleged unfair labor practices, a state district court orders the asset sale of an involuntary liquidated company "free and clear of any liens and encumbrances." Does any unsecured liability, an NLRB backpay decision, become extinguished as a result of the

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[1] WRS had also agreed that if it was found to be liable for contributions to employee 401(k) accounts and to make employees whole for the additional 25 percent cost of health insurance premiums, the computations and amounts set forth in paragraphs 9 – 13 (the Compliance Stipulation inadvertently omitted a no.12) of the attached Compliance Specification attached to the original fact stipulation (Exh. 1(b)) are accurate. Stip. ¶ 14.

state court's order if there was no inequitable conduct on behalf of the secured creditor or purchaser justifying liability?

ARGUMENT

I. THE ALJ ERRONEOUSLY CONCLUDED THAT WRS IS A SUCCESSOR TO THE LIQUATED LEIFERMAN AND IN SO DOING UNDERMINED EQUITABLE POLICIES GOVERNING CREDITOR LIQUIDATIONS, PUBLIC POLICIES CONCERNING MARKET GROWTH, AND PROTECTIONS OF UNIONS.

Existing successor liability law does not allow the NLRB to improve its parties' collection position unless the original defendant is able to adequately compensate the aggrieved parties, or there is similarity in ownership between the seller and the purchaser. Existing successor liability law fails to reflect instances that allow a successor liability claim to reduce the first-position secured creditor's recovery unless the facts reveal conduct justifying an equitable subordination of the secured creditor's debt. The ALJ's decision is not sustainable under existing under the law or the facts asserted.

The underlying NLRB's underlying complaint against Leiferman for unfair labor practices omitted three vitally important facts necessary to allege a claim for successor liability in a court ordered Article Nine sale. (ALJD p. 3, lines 15-16). First, the Complaint failed

to allege any fact relative to the ability of Lieferman to provide any of the relief the NLRB demanded if it had stayed in business. *Id.*

Second, the Complaint failed to allege any malfeasance on the part of the secured creditor or other facts supporting the "equitable subordination" of the first position secured creditor's claim to the unsecured claim of the NLRB. *Id.*

Third, the Complaint failed to allege any fact that would support voiding the State District Court order of the Honorable Patricia Karasov, which provided that the sale of Leiferman's assets to WRS be "free and clear of liens and encumbrances" and that all sale proceeds would be paid to LE's first position secured creditor. (ALJD p. 3, lines 6-9).

A. THE INVOLUNTARY LIQUIDATION OF A COMPANY BRINGS TO THE FOREFRONT ARGUMENTS OF EUQITY NOT NECESSARILY FOUND IN OTHER *GOLDEN STATE* SUCCESSOR LIABILITY CASES.

Neither HAIP nor, WRS dispute the important role that unions play in the employment place. Yet, in situations that involve the involuntary liquidation of a company, and suffocating debt that can, and in this case did, freeze operations and endangered the status of the businesses workforce, public policy necessitates a balancing between the conflicting interests of protecting employee rights and market

growth. Market growth includes the salvation of a corporate enterprise through the flexibility of arranging the business dependent upon the then present economic conditions.

Prospective purchasers would necessarily become discouraged from the acquisition of unionized companies should their post-sale financial obligations increase. In other words, purchasers would aspire to avoid unknown or unforeseen liabilities by refusing to hire the employees of the predecessor, thus destroying the very continuity of the business, or refuse to purchase the company outright. Both WRS and HAIP faced such a proposition with the purchase and sale of Leiferman's assets, and both parties relied on the state court order providing the sale "free and clear from all liens and encumbrances." The court order accurately reflected the Article Nine priority that existed, namely HAIP as a secured creditor, with a judgment for damages in excess of $3.6 million was entitled to all of the proceeds of the sale of Leiferman's assets.

Here, the NLRB is unable to point to any case where a secured creditor is forced to pay for a successor liability judgment for conduct in which it did not participate, and did not have an opportunity to "contract out" of the liability. The NLRB cannot point to such a case

because it would contravene the equitable purpose of the judicially created doctrine.

Courts that have considered the successorship question in a labor context have found a multiplicity of factors to be relevant. These include: 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product. *Howard Johnson Co., Inc, v. Detroit Local Executive Bd.*, 417 U.S. 249, 256-258 (1974); *Golden State Bottling Co., Inc.* v. *N.L.R.B.*, 414 U.S. 168, 170-171, 184 (1973); *N.L.R.B. v. Burns Intern. Sec. Services, Inc.*, 406 U.S. 272, 274, 280-281 (1972); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 551 (1964); *N.L.R.B. v. Interstate 65 Corp.*, 453 F.2d 269, 272-274 (6th Cir. 1971); *N.L.R.B. v. Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970); *Overnite Transportation v. N.L.R.B.,* 372 F.2d 765, 768 (4th Cir.), *cert. denied,* 389 U.S. 838 (1967). Courts have emphasized that the liability of a

successor is not automatic, but must be determined on a case by case basis. See *Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086, 1091 (C.A. Ohio 1974).

Courts, in addition to these factors, have determined that a negative effect on the rights of third parties is a factor meriting consideration in this inquiry. See *Bates v. Pacific Maritime Association,* 744 F.2d 705, 711 (C.A. Cal. 1984). The purpose behind successor liability is to 'restor(e) the economic status quo that would have obtained but for the company's wrongful refusal to reinstate . . ..' *Golden State Bottling Company, Inc v. National Labor Relations Board,* 414 U.S. 168, 188 (1973).

But, an involuntary liquidation of the offending party adds many considerations to the equitable analysis not present in a traditional case. An example of an application contained in a state court receivership/liquidation sale context is present in *Peters v. National Labor Relations Board v. Western Paper Products,* 153 F.3d 289, 301 (6th Cir. 1998). The ALJ decision, however, incorrectly gives little weight to the factual and legal applications of this analysis. (ALJD p. 6, lines 37-46).

In Peters, a receiver was appointed for an insolvent company and the aggrieved union members along with the NLRB moved for

successor liability. Reversing the Boards' determination of successor liability, the *Peters* Court found:

> The equitable balance that existed in *Golden State* does not exist in the circumstances of this case. New Specialty bought Western's assets through a receivership-a transaction which, unlike a purely private transaction, did not allow it to negotiate an indemnity clause or bargain for a price that would capture the risk associated with any unfair labor practices.
>
> Also militating against *Golden State* liability in this case is the policy interest against saddling an existing collective bargaining agreement on "[a] potential employer [who] may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." *Burns*, 406 U.S. at 287-88, 92 S.Ct. 1571. Forcing this new employer to remedy its predecessor's labor violations might require it to comply with the terms of an old bargaining agreement, or might impede it from instituting the desired changes to other terms and conditions of employment. Finally, the argument in favor of forcing the successor to provide the former employees of a moribund corporation with relief is not as compelling when there is a slim chance that the predecessor would have been able to provide a remedy. *Cf. Musikiwamba v. ESSI, Inc.,* 760 F.2d 740, 750 (7th Cir.1985) ("In our view, it is also relevant whether the predecessor could have provided any or all relief to the plaintiff prior to the transfer of assets."). Without the successor's efforts in this case, the employees might very well have been out of a job. Here, the equities are best balanced by not imposing *Golden State* liability on New Specialty.
>
> Although the issue we decide is one of first impression, our conclusion is supported by other cases in which courts have been reluctant to impose successor liability when it might inhibit the reorganization of failing businesses. *See Burns,* 406 U.S. at 287-88, 92 S.Ct. 1571; *Steinbach v. Hubbard,* 51 F.3d 843 (9th Cir.1995) (finding that company which leased equipment and employees of financially distressed business was not a bona fide

> successor under the Fair Labor Standards Act); *Musikiwamba*, 760 F.2d at 751 ("A company on the verge of bankruptcy may find itself deluged with meretricious claims for employment discrimination as employees see the prospect of a deep-pocket to provide relief.").
>
> Because the facts of this case did not support the Board's conclusion that New Specialty was liable under *Golden State* to remedy Western's violations of the Act, those portions of the Board's order requiring New Specialty to restore the medical, insurance, and pension benefits that Western terminated are vacated.

Just as in *Peters*, HAIP and WRS are unable to avoid the consequences of Leiferman's allegedly unlawful actions because the seizure and sale of Leiferman's assets was an involuntary act triggered by Leiferman's payment defaults. Despite prospective purchasers requiring indemnity by HAIP, including WRS, Stip. ¶ 8, the fact that there exists a $3 million deficiency to the secured priority claim means that if HAIP is forced to pay its indemnity to WRS (which was a condition of the sale), the payment would result in the elevation of the NLRB's claim to a superior status of HAIP's claim. Thus, imposing successor liability will inhibit the reorganization of a failed business, since WRS will inevitably find itself in the position of paying an unsecured liability over HAIP's outstanding secured liabilities against Leiferman.

Neither party bargained for such a result of imposed economic hardship. Likewise, to provide for HAIP to pay the unsecured successor liability when HAIP's claims are first in priority of payment under state and federal law remain unpaid is a manifestly inequitable result for both parties.

Likewise, there are no facts in this case to support a finding, as did the ALJ, that WRS is obligated — even if a successor employer — to be bound by the substantive provisions of the Union's collective bargaining agreement with Leiferman. For instance, with the involuntary liquidation of Leiferman, employees were well aware of the dire economic situation of the company. Thus, for the 5 of the Leiferman union employees retained by WRS there were no facts to suggest employment with WRS would result in terms of employment the same as those with Leiferman. Furthermore, there are no facts to suggest that WRS lulled or misled the 5 of union employees from seeking other positions with other companies.

While facts show WRS a general willingness to hire former Leiferman employees — as a good business practice — whether union or not, they did receive different terms of employment, different benefits, and greater job responsibilities than at Leiferman. Nor are

there any facts that WRS would retain all Leiferman union employees — and in fact it did not.

WRS's actions are consistent with the National Labor Relations Act that allows the parties to negotiate for any protection either deems appropriate, "but allow the balance of bargaining advantage to be set by economic power realities." *See S&F Market Street Healthcare LLC v. NLRB, at 9 (June 30, 2009)* (Discussing that a "perfectly clear" exception must remain narrow. When an employer makes it perfectly clear that it plans to retain all of the employees in the bargaining unit it requires a successor to bargain with union before making any changes to predecessor's agreed to terms.) *quoting NLRB v. Burns International Security Services,* 406 U.S. 272, 288 (1972). The stipulated record reflects that WRS from the outset intended to set its own employment terms, and whether or not those employees would be retained depended upon *their* willingness to accept those terms. No stipulated facts reflect otherwise.

But more importantly, retaining 5 of Leiferman's union employees reflects the economic realities of Leiferman's involuntary liquidation on WRS's terms of employment. WRS nor HAIP were parties to the Leiferman collective bargaining agreement. Nor were

WRS and HAIP party to the negotiations relating to and arising from the claims of unfair labor practices.

II. THE ALJ'S DECISION SHOULD BE REVERSED SINCE IT FAILED TO PROPERLY ANALYZE AN ESSENTIAL ELEMENT OF SUCCESSOR LIABILITY.

In order to prevail on a claim for successor liability, the facts must substantiate and demonstrate that the initial defendant in the lawsuit— Leiferman — was actually able to provide relief to the injured party. It was not. Leiferman was in receivership and was hopelessly insolvent.

"Unless extraordinary circumstances exist, an injured [party] should not be made worse off by a change in the business. But neither should the employee be made better off." *Musikiwamba v. ESSI, Inc.*, 760 F. 2d 740, 750 (7th Cir. 1985). Furthermore, as a matter of public policy over the free transfer of capital and reorganization of businesses, imposing liability on a successor will inhibit the reconstitution of a failing business:

> The public has an interest in the free transfer of capital and the reorganization of unprofitable businesses. Imposing liability on a successor when a predecessor could have provided no relief whatsoever is likely to severely inhibit the reorganization or transfer of assets of a failing business. A company on a verge of bankruptcy may find itself deluged with meritorious claims for employment

> discrimination as employees see the prospect of a deep-pocket to provide relief. The failing company might have to dissipate substantial but desperately needed assets to defend against these lawsuits. In addition, that company will have difficulty selling its assets or business for a decedent (sic) price because successors will be unwilling to assume a business involved in substantial and time consuming litigation when the assets themselves lack substantial value. Thus, the predecessor's ability to provide some relief prior to the transfer is one factor to be considered in determining if successor liability should be imposed.

Id. At 751.

The purpose of successor liability is "not to provide windfalls" for people who were unable to recover from the predecessor, because the predecessor had no means of satisfying the claim. *Steinbach v. Hubbard*, 51 F. 3d 843, 847 (9th Cir. 1995). Here, there is nothing in the ALJ's decision to reflect that Leiferman could provide the damaged parties with the NLRB's award. (ALJD p. 3, lines 6-9). When the underlying complaint was filed, Leiferman owed HAIP in excess of $3 million, and was dramatically negatively cash flowing. Stip. ¶¶ 6 and 10. In addition, besides HAIP, Leiferman owed other subordinate secured and unsecured creditors (including the IRS and the Minnesota Department of Revenue) hundreds of thousands of dollars.

There is no showing that Leiferman with a negative cash flow of approximately $100,000 per month and owing a debt of over $3 million

in secured debt would be able to pay an unsecured judgment. The "windfall" to the employees places an inequitable burden on WRS for its' efforts in obtaining assets of a failed business. Meanwhile, WRS continued to operate at a loss in 2007 and 2008. Stip. ¶ 11 (ALJD p. 6, lines 2-3). Regardless, the ALJ failed to show WRS is subject to successor liability for the alleged backpay of Leiferman's union employees.

III. THE ALJ'S DECISION FAILED TO ADHERE TO RULES OF PRIORITY REGARDING SECURED AND UNSECURED CREDITORS IMPLICATING SUBORDINATION OF A SECURED CREDITOR TO THAT OF THE NLRB'S UNSECURED DEBT.

The ALJ suggests WRS is not in the position to argue HAIP's position. (ALJD p. 6, lines 1-15). Yet, because of the Leiferman's sale, the NLRB obligation it seeks to impose upon WRS is a direct result of HAIP's position at the time of the sale.

If the successor liability claim is upheld, HAIP's proceeds from the sale of Leiferman will be reduced and/or eliminated because HAIP was compelled by the all prospective purchasers including WRS to indemnify them in order to complete the sale of Leiferman's assets. Stip. ¶ 8. If the Union receives any of HAIP's proceeds of the sale of Leiferman's assets, it will violate the state and federal laws relating to

the priority of creditors, because HAIP will not receive the full proceeds of the sale of Leiferman because of HAIP's required indemnity.[2]

The exact same issues of creditor priority relative to successor liability have been addressed by the Bankruptcy Courts. For example, in *In re: Trans World Airlines*, 322 F.3d 283 C.A.3 (Del) 2003, the claimants who had settled a sex discrimination lawsuit with the Airline attempted to impose successor liability on the airline who purchased the assets of the airline out of the bankruptcy sale. In denying the employees claims, the Trans World Court Stated that: "if one claimant of the bankrupt's estate is to be preferred over others, 'the purpose should be clear from the statute' [citing *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 73 (1952)]." *Trans World*, at 291-92. The court reasoned that allowing the claimants to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate would subvert the specific priorities which define

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[2]The vast majority (over $700,000) of the purchase price for LE's assets, and WRS's new license agreement with HAIP remains unpaid because WRS is still negatively cash flowing. Stip. ¶ 11. Why is the NLRB not asserting claims to any of the proceeds of the sale of LE's assets? Presumably the NLRB understands the rules of priority of creditors and that the aggrieved persons which the NLRB represents cannot be paid anything until HAIP's claim is paid in full.

Congressional policy for bankruptcy distribution to creditors. *Id.* at 292; *New England Fish*, 19 B.R. 326, 329 (Bankr. W.D. Wash. 1982).

The *Trans World Court* found that:

> Other courts have also followed the rationale set forth in New England Fish. For instance, in *Forde v. Kee-Lox Mfg. Co., Inc.*, 437 F. Supp. 631 (W.D.N.Y. 1977), the District Court dismissed a suit brought under Title VII by an employee of a bankrupt debtor against the purchaser of its assets on a successor liability theory. *The Court rejected the civil rights claimant's assertion that the Court could not reduce his demand for reinstatement to a fixed amount of money that could be satisfied out of the proceeds for the sale of assets of the debtor's bankruptcy estate. See Id.* at 633. The Court explained: There are two major difficulties with the plaintiff's position. *First, the plaintiff would allow claimants such as himself to assert their claims against purchasers of the bankrupt's assets, while relegating lienholders to the proceeds of the sale. This elevates claims that have not been secured or reduced to judgment to a position superior to those that have.* Yet the Bankruptcy Act is clearly designed to give liens on the bankrupt's property preference over unliquidated claims.
>
> An additional difficulty with the plaintiff's position is that it would seriously impair the trustee's ability to liquidate the bankrupt's estate. If the trustee in a liquidation sale is not able to transfer title to the bankrupt's assets free of all claims, including civil rights claims, prospective purchasers may be unwilling to pay a fair price for the property, leaving less to distribute to the creditors.

Id. at 633-34; *Trans World*, at 292. (emphasis added).

An example of the lack of priority of NLRB claims vis-a-vis claims of other creditors in liquidation proceedings is made clear in *Nathanson v. National Labor Relations Board*, 344 U.S. 25 (1952). In *Nathanson*,

the Supreme Court addressed the issue of whether the wage claims of the employees involved in the claims brought by the NLRB enjoyed the priority of those given to the IRS and other governmental entities. In dismissing this argument, and placing the claims in the same position for payment as other wage claims not brought by the NLRB, the Supreme Court held:

> The beneficiaries here are not wards of the federal government; they are wage claimants who were discriminated against by their employer. The Board has eliminated the discriminated (sic) by the back pay order; and enforcement of the Order has been directed by the Court of Appeals. The full sanction of the National Labor Relations Act has therefore been placed behind the order. The Board argues that the interest of the United States in eliminating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. *The contest now is not between employees and management but between various classes of creditors. The policy of the National Labor Relations Act is fully served by recognizing the claim of back pay as one to be paid from the estate.* The question of whether it should be paid in preference to other creditors is a question to be answered by the Bankruptcy Act.... We can find in the Bankruptcy Act no warrant for giving these back pay awards different treatment than other wage claims enjoy.

Id. at 83. (emphasis added).

Minnesota state law and federal law relating to the priority of creditor relationships is identical for all practical purposes to that in bankruptcy with the exception of the preference power of the

bankruptcy courts (i.e. that all transfers made within 90 days of the petition are voidable to regular creditors, or within one year for insiders See 11 U.S.C. §547). In the present dispute, Leiferman needed to be liquidated in a receivership proceeding versus a bankruptcy because Leiferman chose to abandon his interest in Leiferman versus filing a Chapter 11 or 7 Bankruptcy petition.

In order to file an involuntary bankruptcy proceeding, three creditors owed over $10,000.00 would need to join in the filing. *See* 11 U.S.C. §303(b)(1). Securing the agreement of two of Lieferman's creditors to spend the money and time required for an involuntary bankruptcy filing when the proceeds of the operation or the liquidation were to be paid to HAIP to the exclusion of all creditors (because of the size of HAIP's secured claim in relation to the value of Lieferman), was impossible.

Therefore, HAIP's entitlement to priority in payment over all other creditors cannot be divested by Leiferman's failure to file a bankruptcy petition. If successor liability is found in this case, HAIP will have been compelled to invest $300,000 to keep Leiferman's doors open so that the aggrieved parties could recover when it had no such opportunity had Leiferman stayed in business. Stip. ¶¶ 6 and 10. Such a result would be absurd. Further, HAIP cannot be precluded from

obtaining a fair price for its assets in which it possessed a first priority security interest.

As previously stated, all purchasers of Leiferman's assets were well aware of the impending lawsuits against Leiferman. All of the prospective purchasers required HAIP to indemnify them from these claims before they would consent to a purchase. To allow HAIP's proceeds of its Court Ordered sale to be reduced by its required indemnification would violate the rules of creditor priority in Minnesota.

Section 9-322 of Article Nine of the Minnesota Uniform Commercial Code entitled "Priorities Among Conflicting Security Interests in and Agricultural Liens on the Same Collateral," provides that:

> (a) [General priority rules] Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:
>
> (1) Conflicting security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.
>
> (2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien...

Minn. Stat. §336.9-322(a). The section further provides that the first priority secured interest extends to proceeds of the sale of secured collateral. Minn. Stat. §336.9-322(b).

These priority rules are the exact same priority rules which the Supreme Court ruled in *Nathanson* would preclude the aggrieved parties claims for relief. Whether these priority rules are applied by a State Court receivership or a Federal Bankruptcy Court is irrelevant, the priority analysis remains the same.

HAIP loaned money and perfected its security interest months before the alleged unfair labor practices of Leiferman. If Minnesota state and federal law provides that a first-position-secured creditor is entitled to the collateral and the proceeds of the collateral, how does the NLRB's successor liability action alleging rights to that same collateral, *for which the secured creditor was forced to indemnify the purchaser in order to sell it*, not violate the State and Federal rules of creditor priority in Minnesota?

WRS and HAIP acknowledge that Article Nine sales and bankruptcy sales are not exempt from equitable claims, such as successor liability claims. Minn. Stat. §336.1-103(b) provides that "principals of law and equity, including the law of capacity to contract,

principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating, or invalidating cause supplement its provisions." *Id.* Nonetheless, facts supporting equitable relief must be alleged and proved for a claim of successor liability to be viable under Minnesota State and Federal law.

Simply alleging that an unsecured creditor failed to get paid or received nothing out of a receivership liquidation is not unique or unusual facts. In the absence of other allegations supporting a claim for successor liability in a liquidation context [(e.g. allegations that the purchaser participated in the prohibited conduct *Chicago Truck Drivers v. Tasemkin,* 59 F.3d 48 (2nd Cir. 1995); allegations of similarity of ownership and management between the seller and the purchasing entity *See EEOC v. SWP, Inc.,* 153 F. Supp. 2d 911 (N.D. Ind. 2001)], fail to support a claim of successor liability.

Here, the NLRB failed to allege, and the ALJ did not find any facts to support a claim of inequitable conduct on the part of HAIP, nor inequity in the results of the sale, to support its claims for successor liability. Nor were claims made in the context of Article Nine. Absent such arguments, the ALJ's decision finding successor liability fails.

IV. THE ALJ FAILED TO CONSIDER CASES SHOWING WHERE SUCCESSOR LIABILITY IS IMPOSED IN AN ARTICLE NINE OR BANKRUPTCY SALE CONTEXT INCLUDES FACTS THAT REFLECT INEQUITABLE CONDUCT IN THE SALE AND SUPPORT FINDINGS OF EQUITABLE SUBORDINATION.

The ALJ's decision ignored WRS's arguments relating to successor liability in either a bankruptcy or Article Nine sale context. Under the instant circumstances, inequities to unsecured creditors in the sale process exist. The cases that have found successor liability have determined that such sales were attempts to "wash" the assets clean of their employment liabilities while maintaining essentially the same operation and ownership.

For example, in *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al. v. Tasemkin*, 59 F. 3d 48 (7th Cir. 1995) in finding successor liability determined that, the alleged successor was owned by the daughter in-law of the former owner, the registered agent of the purchaser was the seller's owner's son who was the registered agent of the seller, and the new business operated the same business under largely the same management. *Id.* at 49-50.

Similarly, in *E.E.O.C. v. SWP*, 153 F.Supp.2d 911 (N.D. Ind. 2001), the court found that successor liability was appropriate because

the Court found that the "friendly foreclosure" which occurred was simply an attempt to rid the corporation of the EEOC's sexual harassment judgment. In *SWP*, the Court found that the debtor's principals were considering filing for bankruptcy to solely discharge the EEOC judgment. *SWP,* 153 F.Supp.2d at 915-916. The *SWP* Court also found that the company had actually made a $78,000 profit in the fiscal year 1999, as further evidence that the "friendly foreclosure" in early 2000, was simply an attempt to avoid a valid judgment. *Id.* at 915. The *SWP* Court also found specific instances where *SWP*'s principals attempted to influence the lender into foreclosing.

For example, "Michael Armey, legal counsel for Lake City Bank, testified at his deposition that 'based on discussions that I'd had with them [the bank], they didn't feel that there were at risk on the loans and that they really didn't want to get into this thing unless they have to and there was no alternative to taking the assets and selling them." *Id.*, at 915. The court further found that the principals of *SWP* were the owners of the acquiring corporation until they transferred ownership of the acquiring corporation to their wives and a friendly third party eleven days before the assets were purchased. *Id.* at 916.

Although *SWP* found successor liability under the egregious facts of that case, it noted that: "[The] purpose of successor liability is 'not to

provide windfalls' for people who were unable to recover from the predecessor because the predecessor had no means of satisfying the claim." *SWP*, 153 F.Supp.2d at 922.

There are no facts to suggest any similarities in ownership or management between the WRS and Leiferman. Further, there are no facts or allegations asserted that the foreclosure sale was an attempt to "wash" Leiferman's assets of the potential liabilities to the NLRB's aggrieved parties.

In contrast, Leiferman possessed millions of dollars of additional liabilities that were not satisfied by the proceeds of Leiferman's asset sale.

Successor liability is a claim that lies in equity, not in law. The NLRB cannot now find that the first position secured creditor, who enjoys priority in payment over any unsecured claim, is compelled to pay for the labor/tort liability of the entity to which it loaned money. Likewise, the debt of the unsecured NLRB claim cannot be that of WRS who purchased the assets whose moneys paid the secured creditor who retains a deficiency of over $3 million on that secured liability.

The NLRB cannot be allowed to enjoy priority in payment for a subordinate liability from a secured creditor, and in the absence of any facts showing malfeasance on the part of the secured creditor. It is

simply not fair and that is why the NLRB's claim is not sustainable in equity. HAIP did nothing to the NLRB's aggrieved parties other than loan money to the business at which they chose to work. In fact, HAIP's losses in the transaction exceed the aggrieved parties by a 60-1 ratio Stip. ¶¶ 6 and 10. Allowing this case to proceed to judgment on a successor liability theory, without any facts demonstrating inequitable conduct on behalf of the secured creditor is contrary to existing law of successor liability. The NLRB's prayer for relief must be denied because it requests a result that is not consistent with existing law or equitable jurisprudence.

CONCLUSION

Based upon the foregoing, the ALJ's decision should be reversed.

Dated: July 24, 2009

By _____

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