

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21**

**2 SISTERS FOOD GROUP, INC., and  
FRESH & EASY NEIGHBORHOOD  
MARKET, INC.**

**and**

**UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 1167**

**Case No. 21-CA-038915  
21-CA-038932**

**MOTION TO DISMISS COMPLIANCE SPECIFICATION  
AND NOTICE OF HEARING**

Pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board (“NLRB”), Respondent Fresh & Easy Neighborhood Market, Inc. (“Fresh & Easy”) moves to dismiss the Compliance Specification and Notice of Hearing (“Compliance Specification”) issued by the Regional Director of Region 21 of the NLRB (“Region”) in its entirety with respect to Fresh & Easy.

As demonstrated below, the Compliance Specification should be dismissed as to Fresh & Easy because it is untimely. The Compliance Specification, which was the first document to name Fresh & Easy, was issued on May 1, 2012, far more than six months after Fresh & Easy allegedly became a successor to 2 Sisters Food Group, Inc. (“2 Sisters”) and failed to employ alleged discriminatee Xonia Trespalacios.

Dismissal also is appropriate because the Region has failed to even allege sufficient facts to demonstrate that Trespalacios is entitled to employment with Fresh & Easy, much less backpay. The Region has never alleged that Trespalacios sought and was denied employment with Fresh & Easy. Even if she had, the Region has failed to allege any facts that Trespalacios

would have been eligible for employment with Fresh & Easy. Absent these indispensable factual allegations, the proceedings against Fresh & Easy must be dismissed.

Finally, the imposition of successor liability on Fresh & Easy on the facts of this case would deprive Fresh & Easy of its constitutional right to due process of law. The Region was aware no later than July 26, 2010 that Fresh & Easy had acquired the assets of the 2 Sisters operation and extended offers of employment to former employees of 2 Sisters. Yet not only did the Region neglect to amend the pleadings so that Fresh & Easy could receive notice and defend its interests, the Region also denied Fresh & Easy's Motion to Intervene. Due process prohibits the NLRB from imposing successor liability on Fresh & Easy in such circumstances.

#### **I. BACKGROUND SURROUNDING CONSOLIDATED HEARING AND ISSUANCE OF COMPLIANCE SPECIFICATION**

On July 15 and July 29, 2009, the Charging Party United Food and Commercial Workers International Union Local 1167 ("Union") filed unfair labor practice ("ULP") charges against 2 Sisters with NLRB Region 21 in Case Nos. 21-CA-38915 and 21-CA-38932, respectively. It is Fresh & Easy's understanding<sup>1</sup> that the charges alleged that 2 Sisters interfered with employees' Section 7 rights in violation of Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") by promulgating and maintaining overbroad work rules, and that 2 Sisters discharged employee Xonia Trespalacios for engaging in union activities in violation of Sections 8(a)(3) and (1) of the Act.

On December 14, 2009, the Region issued a complaint and notice of hearing in the above-captioned cases ("Complaint"). The Complaint consolidated the above-captioned cases with a separate representation proceeding in Case No. 21-RC-21137, in which the Union challenged the results of an election conducted at 2 Sisters on July 17, 2009. The consolidated

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<sup>1</sup> Because Fresh & Easy was not named as a party during the underlying proceedings in the above-referenced cases, it did not receive a copy of the charges.

case was tried in Riverside, California on March 1-13 and 17-19, 2010 and in Los Angeles, California on March 29, 2010. On June 10, 2010, an Administrative Law Judge (“ALJ”) for the NLRB issued a decision in the consolidated case. The ALJ found that 2 Sisters violated the Act by promulgating and maintaining overbroad work rules and terminating Trespalacios for engaging in Union activities. The ALJ also found that 2 Sisters engaged in objectionable conduct that impacted the outcome of the election and ordered that the election be set aside and a rerun election conducted. The General Counsel, the Union, and 2 Sisters all filed exceptions to the ALJ’s decision.

On June 28, 2010, shortly after the ALJ’s decision was issued, Fresh & Easy purchased all of 2 Sisters’ assets. On or around June 28, 2010, Fresh & Easy established initial terms and conditions of employment and offered employment to former employees of 2 Sisters. A majority accepted employment with the Company.

On July 26, 2010, Fresh & Easy filed a Motion to Intervene and Supplement the Record (“Motion to Intervene”) in the above-captioned cases in which it sought to intervene for the purpose of objecting to any direction of a rerun election on the basis that such an election would be predicated upon a stipulated election agreement to which Fresh & Easy was not a party.

The Board issued a Decision, Order and Direction of Second Election, 357 N.L.R.B. No. 168 (2011), (“Board’s Order”) in the above-captioned matter on December 29, 2011. The Board’s Order denied Fresh & Easy’s Motion to Intervene without prejudice. The Board also adopted the ALJ’s findings that 2 Sisters violated the Act by promulgating and maintaining overbroad work rules<sup>2</sup> and by terminating Trespalacios for engaging in union activities, and

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<sup>2</sup> The Board adopted all of the ALJ’s findings with respect to the alleged ULPs except that, contrary to the ALJ, the Board found that 2 Sister’s rules prohibiting leaving the plant or taking breaks without permission were lawful.

adopted the ALJ's decision to set aside the election and order a rerun election. Importantly, the Board's Order did not contain any finding that Fresh & Easy violated the Act or was derivatively liable as a successor for any ULPs committed by 2 Sisters.

Subsequently, on January 27, 2012, the Region sent a letter to Fresh & Easy's former counsel, Stuart Newman of Seyfarth Shaw LLP, inquiring as to whether Fresh & Easy intended to intervene in the related representation case. (Tab 1.) Fresh & Easy replied via letter on February 3, 2012 that it did not wish to intervene because the matter involved a dispute to which Fresh & Easy was not a party. (Tab 2.)

On May 1, 2012, the Region filed the Compliance Specification in the above-captioned matter, almost three years after the ULP charges were filed, and almost two years after Fresh & Easy purchased the assets of 2 Sisters. The Compliance Specification is the first pleading to name Fresh & Easy and alleges, for the first time, that Fresh & Easy is a successor to 2 Sisters and is therefore liable for remedying the ULPs, including rescinding the work rules the Board found to be unlawful and offering to reinstate Trespalacios, with backpay. *See* Compliance Specification at ¶ 3.

The Compliance Specification also contains a conclusory allegation that "Discriminatee Trespalacios would have continued to be employed . . . by Respondent Fresh & Easy and paid a wage rate of \$10.00 per hour from June 28, 2010, the date that Respondent Fresh & Easy formally took over the business operations of Respondent 2 Sisters at the Riverside facility." *See id.* at ¶ 8. Not a single fact is alleged that would support this bare allegation.

Fresh & Easy was never afforded the opportunity to defend against the underlying ULP allegations nor litigate the issue of its status as an alleged successor to 2 Sisters or its failure to hire Trespalacios, despite the fact that the Region has been on notice for nearly two years that

Fresh & Easy purchased 2 Sisters' assets, including the meat production operations at the Riverside facility.

## II. ARGUMENT

### A. The Compliance Specification Should be Dismissed as to Fresh & Easy Because It Is Untimely

The Compliance Specification should be dismissed as to Fresh & Easy because the allegation that Fresh & Easy is a successor to 2 Sisters is untimely. Section 10(b) of the Act provides that “no complaint shall be issued based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.” 29 U.S.C. 160(b). The 10(b) period begins to run when the charging party receives clear and unequivocal notice of the violation. *Dedicated Services, Inc.*, 352 N.L.R.B. 753, 759 (2008) (citing *Broadway Volkswagen*, 342 N.L.R.B. 1244, 1246 (2004)).

In the instant matter, the Compliance Specification alleges that Fresh & Easy failed to employ Trespacios when it purchased the assets of 2 Sisters and assumed the operation of the Riverside meat production facility on June 28, 2010. As the Compliance Specification makes clear that the Region had notice of these facts through Fresh & Easy's Motion to Intervene, filed on July 26, 2010, it was statutorily obligated to raise its claim no later than six months from that date. The Region, without explanation, neglected to amend the Complaint to include an allegation that Fresh & Easy is a *Golden State* successor to 2 Sisters. Rather, the Compliance Specification, which was the first document to name Fresh & Easy, was not issued until May 1, 2012, nearly two years after Fresh & Easy allegedly became a successor to 2 Sisters.

Further, as a separate employer, Fresh & Easy was free to hire or not hire any person, including Trespacios. The Region's position that Fresh & Easy owes Trespacios back pay from the date it acquired the assets of the 2 Sisters' operation necessarily means that the Region

contends that Trespalacios would have been hired by Fresh & Easy but for her protected activity. On the face of the Compliance Specification, the employment decision at issue was made well-over six months ago. The time to make such an allegation has long past.

Any allegation that in a *Golden State* successorship case, the issue is merely “compliance” or that any allegation against the successor relates back to the original complaint, even if arguable, could not apply in the circumstances of this case. For example, in *Rose Knitting Mills, Inc.*, 237 N.L.R.B. 1382, 1382 (1978), the Board held that the General Counsel could not seek to hold an alleged joint employer liable for the ULPs of the named respondent where the General Counsel was aware of the relationship between the two entities at the time of the original complaint, yet failed to name the entity as a respondent until the compliance phase of the proceedings.

In *Southeastern Envelope Co., Inc.*, 246 N.L.R.B. 423 (1979), the Board imposed liability on a new employer through a compliance proceeding, but only after finding that the alter ego was created for the purpose of avoiding the Board’s decision and that there was “no substantial change in its ownership or management.” *Id.* at 427. Limiting its holding, the Board expressly stated that, “since the interests of *alter egos* are by definition identical, the *alter ego* finding in the compliance proceeding conclusively established that [the newly added company] did receive adequate notice, was present at the hearing, and did defend itself through the representation of [its alter ego] in the earlier unfair labor practice proceeding.” *Id.* at 423; *see also Coast Delivery Service, Inc.*, 198 N.L.R.B. 1026 (1972) (derivative liability may be imposed upon alter ego where companies were commonly owned, and newly added company was established to circumvent regulations). Nothing even remotely similar exists in the successorship situation, where the entities are by definition separate and independent.

**B. The Allegation that Trespalacios is Entitled to Backpay for the Period Commencing When Fresh & Easy Purchased 2 Sisters' Assets Should Be Dismissed for Failure to State a Claim for Relief.**

The Region makes a sweeping and unsupported assertion that “Trespalacios would have continued to be employed as a Poultry Processing employee by Respondent Fresh & Easy . . . from . . . the date that Respondent Fresh & Easy formally took over the business operations of Respondent 2 Sisters at the Riverside facility.” Compliance Specification at ¶ 8. Therefore, the Region asserts that Fresh & Easy is required to make Trespalacios whole for this time period. However, this allegation should be dismissed because the Region fails to allege sufficient facts to satisfy the NLRB’s pleading requirements.

The NLRB’s own rules require that “(t)he complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices . . . .” NLRB Rules and Regulations § 102.15. Further, as the NLRB Case Handling Manual instructs, “[t]he allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met.” NLRB Case Handling Manual § 10264.2. Where the allegations set forth in a complaint, if true, do not set forth a violation of the Act, the complaint should be dismissed. *See Patane v. Clark*, 508 F.3d 106, 112 & n. 3 (2d Cir. 2007); *Children’s Receiving Home of Sacramento*, 248 N.L.R.B. 308, 308 (1980).

In the instant matter, even assuming that Fresh & Easy is a *Golden State* successor to 2 Sisters, Fresh & Easy did not have an affirmative obligation under the NLRA to hire any of 2 Sisters’ employees after the purchase, including Trespalacios. The NLRB is not a judge of whether an employer made or would have made a wise hiring decision. Rather, it’s sole charge

is limited to determining whether the decision was motivated by unlawful anti-union animus. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980).<sup>3</sup>

Under *Wright Line*, Fresh & Easy may only be found to have violated the Act if the Region can demonstrate that Fresh & Easy's failure to hire Trespalacios itself was motivated by antiunion animus. See *Mammoth Coal Co.*, 354 N.L.R.B. No. 83 at \*25 (2009) (successor employer not obligated to hire any of the predecessor's employees provided that it does not refuse employment because employees' protected activity). The NLRB applies the framework from *Wright Line*, to determine whether a successor employer has violated the Act by refusing to hire employees of its predecessor. *Planned Building Services*, 347 N.L.R.B. 670, 672 (2006).

The Compliance Specification fails even to so much as allege a prima facie case under *Wright Line*. The Compliance Specification does not even allege that Trespalacios sought employment with Fresh & Easy or that Fresh & Easy failed to offer employment to Trespalacios due to anti-union animus. Accordingly, the facts as alleged in the Compliance Specification cannot establish that Trespalacios would have been hired by Fresh & Easy, and therefore, must be dismissed as to Fresh & Easy.

**C. The Compliance Specification Should be Dismissed as to Fresh & Easy because Fresh & Easy has been Denied Due Process of Law**

Dismissal of the Compliance Specification also is appropriate because imposing liability on Fresh & Easy in the circumstances here would violate the Constitutional right of due process. "Due process prohibits enforcement of the Board's decision if it is based on a violation neither charged in the complaint nor litigated at the hearing." *NLRB v. I.W.G., Inc.*, 144 F.3d 685, 689 (19th Cir. 1998). Employers who are subject to Board proceedings have a critical interest in

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<sup>3</sup> For example, Trespalacios video-taped misconduct may have been an insufficient basis for discharge given the taint of 2 Sisters anti-union animus. However, the same cannot be true of any alleged refusal to hire by Fresh & Easy, which has not been found to have any such animus.

receiving “notice and opportunity to be heard on the claims against them.” *Sam’s Club, Division of Wal-Mart Stores v. NLRB*, 173 F.3d 233, 246 fn. 14 (4th Cir. 1999). Such notice must be adequate and reasonably calculated to inform the parties of administrative proceedings which may directly and adversely affect their legally protected interests, the claims of opposing parties, and the issues in controversy. *See, e.g., Huntley v. North Carolina State Bd. Of Ed.*, 493 F.2d 1016 (4th Cir. 1974); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971). “Such are the hallmarks of due process.” *Sam’s Club*, 173 F.3d at 246 fn. 14.

The Administrative Procedure Act recognizes that “[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.” 5 U.S.C. § 554(b)(3). A NLRB complaint, “much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing.” *NLRB v. H.P. Townsend Mfg. Co.*, 101 F.3d 292, 295 (2d Cir. 1996) (quoting *Douds v. Int’l Longshoremen’s Ass’n*, 241 F.2d 278, 283 (2d Cir. 1957)). The “[f]ailure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law.” *I.W.G., Inc.*, 144 F.3d at 688-89 (quoting *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967)). Importantly, a denial of due process is “not remedied by observing that the outcome would perhaps or even likely have been the same. Rather, it is the *opportunity* to present argument under the new theory of violation, which must be supplied.” *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1257 (D.C. Cir. 1968) (emphasis in original).

In the instant matter, it would violate fundamental principles of due process to permit the Region to include at this late stage the allegation that Fresh & Easy is a successor to 2 Sisters and

liable for remedying 2 Sisters' ULPs. While it is true that an employer may be held derivatively liable for ULPs committed by other entities upon a showing of alter ego, successor, or single employer status, such liability cannot be imposed with complete disregard for an independent employer's rights. Rather, both the Board and federal courts recognize that allegations of this nature implicate important due process interests and must be raised in a manner that provides the entity with notice and meaningful opportunity to defend against them.

Indeed, in *Viking Industrial Security, Inc. v. NLRB*, 225 F.3d 131 (2d Cir. 2000), the court found a violation of due process precisely where a corporation was named as a single employer for the first time in a back pay specification. The court stated that, "[w]here there is nothing in the record to demonstrate that [the corporation's] absence at the original hearing came about through some fault of its own," its late addition at the compliance phase violated due process. *Id.* at 136.

In *Green Construction of Indiana, Inc.*, 271 N.L.R.B. 1503 (1984), the Board refused to permit the General Counsel to amend the complaint more than seven months after the close of the hearing for the purpose of introducing new evidence regarding the "single employer" status of an individual not originally named in the complaint. Noting that the General Counsel was "repeatedly apprised of the problem of the proper identity of the Respondent but did nothing for more than 7 months[.]" the Board held that it would be unjust to permit amendment and would result in undue prejudice to the individual. *Id.* at 1503.

In the instant matter, as discussed above, Fresh & Easy purchased all of 2 Sisters' assets and assumed operations of the Riverside meat processing plant in June 2010, nearly two years prior to the Region's issuance of the Compliance Specification naming Fresh & Easy as a successor to 2 Sisters. Nonetheless, the Region, without explanation, neglected to amend the

Complaint to name Fresh & Easy as a respondent or allege that Fresh & Easy is a successor to Two Sisters. This problem is compounded by the fact Fresh & Easy notified the Region of the purchase and filed the Motion to Intervene in order to ensure that its interests were properly represented. The NLRB, however, affirmatively refused to permit Fresh & Easy to participate in the underlying proceedings when it denied the Motion to Intervene. The Region's attempts to hold Fresh & Easy derivatively liable for the conduct of 2 Sisters without notice and opportunity to defend its interests during the prior proceedings is untimely and constitutes a denial of due process.

This failure to amend the Complaint or permit Fresh & Easy to participate in the proceedings is particularly egregious because 2 Sisters was ceasing all operations in the United States. As a result, 2 Sisters had little incentive to mount a defense. Whatever the outcome of the matter, it could have no future effect on any operations of 2 Sisters. It is precisely such circumstances that have led the courts to find that the imposition of derivative liability at the compliance phase violated the constitutional right to due process. *See Viking Industrial Security*, 225 F.3d at 135-36 (imposition of derivative liability at compliance phase violated due process because named respondent was "headed for insolvency" and therefore "arguably lacked incentive to mount a strenuous or expensive defense to the unfair labor practice charge."); *see also Northern Montana Health Care Ctr.*, 178 F.3d 1089, 1098 (9th Cir. 1999) (due process violated when affiliated company had no notice that its interests would be adjudicated and that it would be bound by order).

### **III. CONCLUSION**

For the foregoing reasons, the Complaint should be dismissed in its entirety as to Fresh & Easy.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 6<sup>th</sup> day of June 2012, a copy of the foregoing Motion to Dismiss Compliance Specification and Notice of Hearing was filed electronically.

Nicholas H. Handberg  
An Employee of DLA Piper LLP (US)

Date: June 6, 2012