

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington D.C.

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

and

Cases 21-CA-038915  
21-CA-038932

UNITED FOOD AND COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
LOCAL 1167

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO  
FRESH & EASY NEIGHBORHOOD MARKET, INC.'S  
MOTION TO DISMISS COMPLIANCE SPECIFICATION  
AND NOTICE OF HEARING

Under Board Rule 102.24(b), Counsel for the Acting General Counsel, herein General Counsel, files this opposition to the Motion to Dismiss Compliance Specification and Notice of Hearing ("motion to dismiss"), filed by Respondent Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy"). Fresh & Easy contends that the Compliance Specification is time-barred by Section 10(b) of the Act, that it fails to state a claim for relief, and that it violates its due process rights. All of these arguments lack merit. Section 10(b) is inapplicable in compliance proceedings. Furthermore, the Board permits the litigation of derivative liability in supplemental proceedings. The Compliance Specification alleges that Fresh & Easy, as a successor to 2 Sisters Food Group, Inc., ("2 Sisters"), is liable to remedy the unfair labor practices of 2 Sisters. This constitutes a proper claim for relief. Lastly, Fresh & Easy has not been denied its

due process rights. On the contrary, it has a full opportunity to participate in this proceeding and to litigate the issue concerning its liability.

The motion to dismiss should be denied because the Compliance Specification is timely and pleads proper claims for relief. Moreover, Fresh & Easy is fully capable of exercising its due process rights by presenting evidence and defending itself in the compliance proceeding.

## **I. Factual background**

1. On October 28, 2009, the Regional Director of Region 21 (“Regional Director”) issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Complaint”) against 2 Sisters in Cases 21-CA-038915 and 21-CA-038932. On December 14, 2009, these cases were consolidated with a representation case involving 2 Sisters, 21-RC-21137, in a Report on Challenged Ballots and Objections and Order Consolidating Cases and Notice of Hearing issued by the Regional Director. An unfair-labor-practice hearing was held before Administrative Law Judge Lana H. Parke (“ALJ”) for several days in March 2010. The hearing before the ALJ concluded and the record in this matter closed on March 29, 2010.

2. On June 10, 2010, the ALJ issued her decision in these cases, finding, *inter alia*, that 2 Sisters violated Section 8(a)(1) and (3) of the Act by terminating employee Xonia Trespalacios (“Trespalacios”). The ALJ also concluded that the union election at issue in the representation case should be set aside, and ordered a rerun election. 2 Sisters Food Group, Inc., JD(SF)-24-10.

3. On July 23, 2010, 2 Sisters filed exceptions to the ALJ’s decision, and a brief in support. On July 26, 2010, the General Counsel filed limited exceptions to the ALJ’s decision and a supporting brief.

4. On July 26, 2010, Fresh & Easy filed a Motion to Intervene and Supplement the Record (“motion to intervene”), which included a declaration from its chief human resources officer stating that on June 28, 2010, Fresh & Easy purchased the assets of 2 Sisters and hired the majority of its employees. Fresh & Easy moved to intervene to “avoid Fresh & Easy being impermissibly forced into a representation election pursuant to a stipulated election agreement to which it is not a party . . . .” (See page 7 of the motion to intervene attached as Exhibit A). Nowhere in its motion to intervene does Fresh & Easy state that it wishes to intervene to defend on the unfair labor practice issues. In that same motion, Fresh & Easy also assumes that it is a successor employer with liability to remedy the conduct of 2 Sisters under Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

5. On December 29, 2011, the Board issued its Decision, Order, and Direction of Second Election in these cases, directing 2 Sisters, its officers, agents, successors, and assigns, to *inter alia*, make whole Trespacios for her losses caused by the unlawful discrimination against her by 2 Sisters. 2 Sisters Food Group, Inc., 357 NLRB No. 168, slip op. at 8-9 (2011). The Board also affirmed the ALJ’s ruling ordering a rerun election. *Id.*, slip op. at 9-10.

The Board denied Fresh & Easy’s motion to intervene. *Id.*, slip op. at 8. In its motion to dismiss, Fresh & Easy incorrectly claims that the Region denied its motion to intervene, but it was the Board that denied the motion. *Id.* The motion was denied with respect to the request to intervene for the purpose of objecting to any direction of a second election. The Board found that the declaration of the chief human resources officer was not relevant to its decision to set aside the union election or to the disposition of the complaint allegations. The Board further noted that Fresh & Easy has the right to renew its motion to intervene before the Regional Director with respect to subsequent proceedings in this case. *Id.*

6. By letter dated January 27, 2012, Region 21 solicited a position from Fresh & Easy on whether it wished to intervene in the representation case, 21-RC-21137. Fresh & Easy declined to do so.<sup>1</sup>

7. On May 1, 2012, the Regional Director issued the Compliance Specification and Notice of Hearing in these cases, which sets forth the amount of backpay due, as calculated by the General Counsel. It further alleges that Fresh & Easy is a successor to 2 Sisters, and that both are jointly and severally liable in remedying the unfair labor practices found by the Board. On May 30, 2012, the Regional Director was served with a copy of the motion to dismiss, but it had not yet been properly filed with the Board.

## **II. The Compliance Specification is timely.**

Fresh & Easy alleges that the Compliance Specification is time-barred by Section 10(b) of the Act. However, Section 10(b) of the Act applies to complaints. It states, in relevant part, that “[N]o complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.” A timely complaint was issued against 2 Sisters in this case. Fresh & Easy was not part of the original complaint because Fresh & Easy did not purchase 2 Sisters until after the record in unfair-labor-practice hearing had closed and after the ALJ had issued her decision.

The 10(b) argument propounded by Fresh & Easy also lacks merit because the Board has long held that Section 10(b) of the Act is not applicable in compliance proceedings. Eldorado Development Corp., 305 NLRB 751, 752 (1991), citing Sanford Home for Adults, 280 NLRB 1287, 1289 (1986); Dahl Fish Co., 299 NLRB 413, 416 (1990). Thus, the Regional Director is

---

<sup>1</sup> A copy of the January 27, 2012 letter is attached as Exhibit B, and a copy of Fresh & Easy’s response to this letter is attached as Exhibit C.

not precluded from instituting compliance proceedings against Fresh & Easy at this time to resolve the issue of liability.

The Board and the Courts allow “litigation of joint and several liability or previous unnamed parties in supplementary proceedings.” See Dahl Fish Co., 299 NLRB at 416, and cases cited therein. It is well settled that backpay and reinstatement liability “may be imposed upon a party to a supplemental proceeding, even though [it] had not been a party to the proceeding in which the unfair labor practices were found, if [it] was sufficiently closely related to the party found to have committed the unfair labor practices. . . .” Coastal Delivery Services, Inc., 198 NLRB 1026, 1027 (1992). A predecessor/successor relationship is sufficient to impose derivative liability upon a previously unnamed respondent. *Id.* Accordingly, the Compliance Specification is proper and timely.

a. The cases cited by Fresh & Easy are not applicable.

The case relied upon by Fresh & Easy, Rose Knitting Mills, Inc., 237 NLRB 1382 (1978), fails to support its 10(b) argument. In that case, the Board found that an alleged joint employer was not derivatively liable for the unfair labor practices of the original respondent because the alleged joint-employer relationship existed at the time of the original complaint and, therefore, could have been alleged in the original proceeding. *Id.* Here, the alleged predecessor/successor relationship did not exist when the unfair-labor-practice hearing took place. The record in this matter closed on March 29, 2010, and the ALJ issued her decision on June 10, 2010. Thereafter on June 28, 2010, Fresh & Easy purchased 2 Sisters. The purchase took place not only after the record in these cases had closed, but after the ALJ had issued her decision. Thus, Fresh & Easy could not have been named in the original complaint.

In addition, Rose Knitting was overruled by the Board in Southeastern Envelope Co., Inc., 246 NLRB 423, 423-424 (1979), where the Board concluded that allowing the litigation of

derivative liability in compliance proceedings is appropriate to effectuate the remedial purposes and policies of the Act, even if those issues could have been alleged in the original complaint. *Id.* This includes the litigation of an alleged predecessor/successor relationship. AC Electric, 333 NLRB 987, 987-988 (2001). Accordingly, the motion to dismiss should be denied.

### **III. The Compliance Specification pleads proper claims for relief.**

Fresh & Easy objects to the portion of the Compliance Specification alleging that Fresh & Easy is required to make Trespalacios whole for the entire backpay period. It further contends that even if it is a Golden State successor, it has no obligation to hire Trespalacios.

However, Fresh & Easy's arguments lack merit because Golden State successors share full joint and several liability for the unfair labor practices of the predecessor. *Id.* at 186-187. In AC Electric, 333 NLRB at 988, the Board stated that the imposition of joint and several liability for the entire backpay period on both predecessor and successor is appropriate, irrespective of their own actual periods of operation. As a Golden State successor, Fresh & Easy would be liable for the full backpay period and obligated to offer reinstatement to Trespalacios. Thus, alleging that Fresh & Easy is a successor of 2 Sisters, and therefore jointly and severally liable for the reinstatement and backpay payment due to Trespalacios, is appropriate.

Fresh & Easy also misstates the issue by arguing that the General Counsel must show that Fresh & Easy's failure to hire Trespalacios was unlawfully motivated. However, the General Counsel is not contending that Fresh & Easy committed independent violations of the Act; rather, that it is a successor liable to remedy the unfair labor practices of the predecessor per the Supreme Court decision in Golden State, 414 U.S. at 168. Moreover, the purpose of the compliance hearing is not to litigate a new unfair-labor-practice action or to relitigate the previous unfair labor practice, but rather to resolve the issue of liability. Therefore, the analysis

in Wright Line, 251 NLRB 1083 (1980) and Fresh & Easy's references to Board Rule 102.15 concerning complaint drafting are wholly inapplicable to this compliance proceeding.

The Compliance Specification contains allegations which are sufficient to warrant a compliance hearing that includes Fresh & Easy. Accordingly, the motion to dismiss on this basis should be denied.

#### **IV. Fresh & Easy is being afforded adequate due process.**

Fresh & Easy claims that its inclusion in the compliance proceeding and any imposition of liability on Fresh & Easy violates its due process rights. However, the Board rejected that same argument in Dahl Fish Co., 299 NLRB at 416. Fresh & Easy has received notice of the Compliance Specification, and has filed an answer to it. It will have ample opportunity to defend itself and to present evidence at the hearing on the issue of its liability. Fresh & Easy inaccurately claims that the Region declined to allow it to intervene to defend the unfair labor practice allegations. But the Region had no authority to grant or deny a motion to intervene. Rather, the Board considered and denied that motion. Further, Fresh & Easy never requested to intervene with respect to these issues. In its motion to intervene, Fresh & Easy explicitly states that its purpose was to intervene to object to any direction of a rerun election.

The cases cited by Fresh & Easy to support its due process argument are distinguishable. Viking Industrial Security, Inc. v. NLRB, 225 F.3d 131 (2nd Cir. 2000) involved a claim that two corporations were a single employer. The evidence showed that although the two entities were a single employer at the time of the employee's termination, their affiliation ended *before* the initial hearing in that case took place. *Id.* at 134. The Court declined to impose derivative liability upon the second corporation because the single-employer relationship ended prior to the start of the unfair-labor-practice proceedings. Unlike the situation in these cases, in Viking Industrial there was no claim of a predecessor/successor relationship between the two

corporations. *Id.* at 134-135. Here, there is no contention that the predecessor/successor relationship has ceased. Therefore, Viking Industrial is not applicable to the circumstances in these cases.

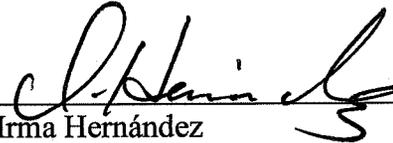
Fresh & Easy also relies upon Green Construction of Indiana, Inc., 271 NLRB 1503 (1984) to support its due process argument. However, that case dealt with an allegation of single-employer relationship, not with a predecessor/successor relationship, as alleged here. *Id.* Furthermore, in Green Construction, the Board noted that the General Counsel was on notice of the problem regarding the identity of the respondent at the unfair-labor-practice hearing, but failed to amend the complaint before the hearing closed. *Id.* There were no similar issues during the unfair-labor-practice hearing in these cases because the successor relationship had not been established when the unfair-labor-practice hearing closed. Further, as noted above, Fresh & Easy never sought to intervene before the Board on the issue of its liability for various unfair labor practices; only on the issue of participating in a rerun election. Therefore, Green Construction also fails to support Fresh & Easy's due process argument.

The predecessor/successor relationship between 2 Sisters and Fresh & Easy has not been litigated. The Board properly denied the motion to intervene, noting that the matter could be dealt with in subsequent proceedings. After the Board's order issued, Fresh & Easy was offered the opportunity to intervene in the representation case, but declined. The compliance proceeding will permit all parties to fully litigate the issue of Fresh & Easy's liability. Thus, the motion to dismiss should be denied because Fresh & Easy is being afforded adequate due process.

**V. Conclusion**

Based on the aforementioned, the General Counsel respectfully submits that Fresh & Easy's motion to dismiss should be denied in its entirety.

Respectfully submitted,



---

Irma Hernández  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 21  
888 South Figueroa Street, Ninth Floor  
Los Angeles, CA 90017

Dated at Los Angeles, California, this 15th day of June, 2012.

## STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the Acting General Counsel's Opposition to Fresh & Easy Neighborhood Market, Inc.'s Motion to Dismiss Compliance Specification and Notice of Hearing** in Cases 21-CA-38915 and 21-CA-38932 was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board, on June 15, 2012. The following parties were served with a copy of the same documents by electronic mail.

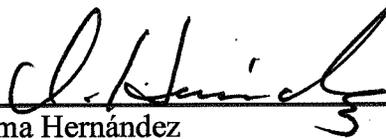
Stuart Newman, Attorney at Law  
Seyfarth Shaw LLP  
[snewman@seyfarth.com](mailto:snewman@seyfarth.com)

Joseph A. Turzi, Attorney at Law  
DLA Piper LLP (US)  
[joe.turzi@dlapiper.com](mailto:joe.turzi@dlapiper.com)

Nicholas R. Hankey, Attorney at Law  
DLA Piper LLP (US)  
[nicholas.hankey@dlapiper.com](mailto:nicholas.hankey@dlapiper.com)

David Rosenfeld, Attorney at Law  
Weinberg Roger & Rosenfeld  
[drosenfeld@unioncounsel.net](mailto:drosenfeld@unioncounsel.net)

Ana Gallegos, Attorney at Law  
Weinberg Roger & Rosenfeld  
[agallegos@unioncounsel.net](mailto:agallegos@unioncounsel.net)



Irma Hernández  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 21

Dated at Los Angeles, California, this 15th day of June, 2012.

# **Exhibit A**

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

**2 SISTERS FOOD GROUP, INC.**

\*

and

\*

Case Nos.: 21-CA-38915  
21-CA-38932

\*

\*

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

\*

\*

\*

\*

Case No. 21-RC-21137

\*

and

\*

\*

**FRESH & EASY NEIGHBORHOOD  
MARKET, INC.,**

\*

\*

\*

**Petitioning Party In Interest**

\*

---

**MOTION TO INTERVENE AND SUPPLEMENT THE RECORD**

Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy" or the "Company"), as a party in interest and for the reasons set forth below, moves to intervene and to reopen the record in the above captioned matter. In support of its Motion, Fresh & Easy states as follows:

**I. FACTUAL BACKGROUND**

Fresh & Easy operates retail grocery stores in California, Arizona and Nevada. It commenced operations in 2006 and opened its first retail stores in November 2007. Between November 2007 and June 2010, the Company purchased its meat products from an outside vendor, 2 Sisters Food Group, Inc. ("2SFG").

On June 28, 2010, Fresh & Easy purchased all of the assets of 2SFG, which were primarily its meat processing plant located in Riverside, California. At or around June 28, 2010, Fresh & Easy established initial terms and conditions of employment and offered employment to all of 2SFG's former employees. A majority accepted employment with the company. 2SFG,

for all intents and purposes, no longer exists. See the attached Declaration of Mr. Hugh Cousins, of which we request be added to the formal record in this case.

Long before Fresh & Easy purchased the assets of 2SFG, specifically on July 17, 2009, pursuant to a stipulated election agreement entered into by 2SFG and the United Food and Commercial Workers Union Local 11167 ("the Union") and approved by the Regional Director on June 17, 2009, the Region conducted a representation election at 2SFG. The bargaining unit stipulated to by the Union and 2SFG is:

All full-time and regular part-time production employees, maintenance employees, technical/quality assurance employees, sanitation employees, shipping and receiving employees and plant clerical employees employed by the Employer at its [Riverside] facility ...excluding all other employees, temporary employees, office clerical employees, professional employees guards and supervisors as defined in the Act.

The Union lost the election by a vote of 66 in favor of Union representation and 87 against representation. Thereafter, the Union filed dozens of election objections based on alleged conduct by 2SFG. The objections were consolidated for a hearing along with certain unfair labor practice charges filed against 2SFG by the Union. A consolidated hearing was held before Administrative Law Judge Lana H. Parke ("ALJ Parke") who, on June 10, 2010, issued a decision and order finding that 2SFG had engaged in unfair labor practices and also certain objectionable conduct which impacted the election outcome. As a result, ALJ Parke recommended, in addition to remedial actions regarding the unfair labor practices, that the election be set aside and a re-run election be conducted.

As explained more fully below, controlling National Labor Relations Board ("Board") and U.S. Supreme Court precedent do not allow for a re-run election in these circumstances.

## II. ARGUMENT

A re-run election cannot be ordered because such an election would be predicated upon a stipulated election agreement to which Fresh & Easy was not a party. Therefore, this stipulated election agreement is invalid or, even if valid, voidable by Fresh & Easy. Furthermore, even if Fresh & Easy is a *Golden State* successor to 2SFG, there is no basis on which to hold the former liable for the latter's objectionable conduct.

### A. The Stipulated Election Agreement Is No Longer A Valid Contract

A stipulated election agreement is a contract between the signatory parties in which each party waives its statutory right to a hearing in exchange for specifically negotiated terms regarding the bargaining unit description, voter eligibility issues and the election process itself. *See Highlands Hosp. Corp. d/b/a Highlands Reg. Med. Ctr.*, 327 N.L.R.B. 1049, 1050 (1999) (“the Board has long held that election agreements are contracts binding on the parties who executed them . . . .”). Because a stipulated election agreement is a contract, basic contract law principles are applicable in analyzing issues resulting from a stipulated election agreement. *See Tidewater Oil Company v. NLRB*, 358 F.2d 363, 365(2nd Cir. 1966) (the Board’s “function is limited to construing the agreement according to contract principles and its discretion [to alter the contract] is gone”). As a matter of basic contract law, a successor in interest does not assume liability for a predecessor’s contract unless the successor expressly agrees to do so. *Golden State Bottling v. NLRB*, 414 U.S. 168, 182 (“the general rule of corporate liability is that when a corporation sells all of its assets to another, the latter is not responsible for seller’s debts and liabilities”).

The terms of a stipulated election agreement are important contractual agreements between a union and an employer, and are unique to the parties who negotiated them. As such, there can be no assumption that a successor employer under the National Labor Relations Act

("Act") would find the unique election terms negotiated by the predecessor acceptable. *See T & L Leasing*, 318 N.L.R.B. 324, 326(1995) ("it is not unusual for the parties to negotiate long and hard for their respective positions on those issues"). Indeed, there are multiple terms beyond the mere agreement to have an election that the Board and the courts have found "material," such that the failure of a party or the Board to abide by them constitutes a breach of contract. *See Wells Fargo Alarm Services*, 289 N.L.R.B. 562 (1988) (unit description); *Windham Comm. Mem. Hosp.*, 312 N.L.R.B. 54 (1993) (eligibility of certain employees); *Summa Corp v. NLRB*, 625 F.2d 293 (9<sup>th</sup> Cir. 1980) (method and time of election).

Here, there is no evidence that Fresh & Easy did or would have agreed to any of the stipulated election agreement terms negotiated and agreed upon by 2SFG and the Union. Moreover, Fresh & Easy did not assume this agreement when it purchased 2SFG's assets. Therefore, the Board has no legal authority to require that Fresh & Easy to accept or abide by the terms of that contract.

**B. Fresh & Easy Can Void The Stipulated Election Agreement**

The Board has held that a change regarding the identity of the entities involved in the representation case proceeding warrants voiding a stipulated election agreement or allowing a party to withdraw from the agreement, due to the potential confusion among the voters in such circumstances. *See Sunnyvale Medical Clinic*, 241 N.L.R.B. 1156, 1157 (1979) ("conditions which created a grave possibility for confusion as to the identities [of the parties to an election] resulted in changed circumstances which were grounds for granting the Employer's request to withdraw from the election agreement. Accordingly, the parties must be afforded the opportunity to enter into a new agreement or to participate in a pre election hearing."); *Andrie, Inc.*, 7-RC-18255 (unpublished Board Order dated May 25, 1989) (vacating stipulated election

agreement, setting aside election and remanding case to Regional Director because of an issue regarding the appropriate parties on the ballot).<sup>1</sup>

In the instant case, a re-run election certainly would be confusing to bargaining unit employees because there would be a different employer involved in the re-run election that is being held only because of actions by agents of the seller. These employees would justifiably wonder why they are voting for union representation to allow collective bargaining with an employer with whom they have not sought collective bargaining. This is not only confusing, but fundamentally unfair to Fresh & Easy and to its' employees.

**C. There Is No Basis For A Rerun Election Even If Fresh & Easy Is A Golden State Successor**

Fresh & Easy was not the employer when the representation petition was filed. It did not commit or have knowledge of the objectionable and/or unlawful conduct giving rise to the proposed second election. It was not the employer when the second election was recommended by the ALJ. Most critically, Fresh & Easy was not a party to the stipulated election agreement. Therefore, assuming (without conceding) that Fresh & Easy is a successor employer for purposes of assuming liability for 2SFG's conduct pursuant to the Supreme Court's decision in *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973), this liability does not extend to any findings of objectionable conduct by 2SFG.

The Board's authority to compel a successor employer to remedy the liabilities of a predecessor is limited in several respects. These limitations foreclose Fresh & Easy being ordered to participate in a re-run election. First, the Court's decision in *Golden State*, which

---

<sup>1</sup> On June 25, 2010 a FOIA request was submitted to the Board requesting a copy of the May 25, 1989 order. By letter dated June 30, 2010 the Executive Secretary advised that the files had been destroyed and therefore a copy could not be provided. It is inexplicable that the Board chose not to publish such a substantive decision and even more inexplicable that it did not maintain a formal copy.

provided that a successor may be found liable for its predecessor's unfair labor practices, was based on the Board's remedial authority under Section 10 of the Act. But, the Board's Section 10 remedial powers are limited to unfair labor practices as defined in Section 8 of the Act, and do not extend to representation cases which, of course, are governed by Section 9 of the Act. In the case at hand, ALJ Parke ordered the rerun election pursuant to Section 102.69 of the Board's Rules and Regulations which regulate Board proceedings under Section 9 of the Act, not Sections 8 and 10. Therefore, ALJ Parke lacks the statutory authority to recommend and the Regional Director lacks the authority to direct a re-run election (pursuant to Section 9 of the Act ) at Fresh & Easy even if it is a *Golden State* successor to 2SFG.

Second, even assuming the re-run election was ordered pursuant to an unfair labor practice, the Board is without authority to compel Fresh & Easy to participate in a re-run election which is predicated upon a contract to which Fresh & Easy is not a party. As the *Golden State* Court noted, a new employer cannot be bound to a contract of its predecessor "inasmuch as Sec. 8(d) of the Act as well as the legislative history of the labor laws, reflected a policy against compelling a party to agree to substantive contractual obligations." *Id.* at 183 (citing *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972)). Yet, this is exactly what Fresh & Easy would improperly be compelled to do, which is why the ordered re-run election cannot proceed.<sup>2</sup>

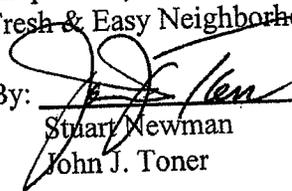
---

<sup>2</sup> Although the Board applied successorship principles to determine whether a successor employer was bound in representation proceedings in *Jen-Weld of Everett, Inc.*, 285 N.L.R.B. 118, 118 n. 1 (1987), the employers in that case never disputed the Regional Director's determination that successorship principles apply in representation proceedings, or that a "successor" employer can be bound by decisions made in such proceedings. Not surprisingly, the Board upheld the Regional Director's analysis in these regards without any reasoning or analysis whatsoever, and focused instead on the principle issue in the case, *i.e.*, whether employees who had been economic strikers for more than one year were eligible to vote in a re-run election. *Id.* at 118, 121-22. Most importantly, however, the original election was not pursuant to a stipulated election agreement (*i.e.*, a contract) but, rather, was the result of a Board-

### III. CONCLUSION

For the foregoing reasons, Fresh & Easy should be allowed to intervene in this matter and the record reopened, to avoid Fresh & Easy being impermissibly forced into a representation election pursuant to a stipulated election agreement to which it is not a party or otherwise bound.

Respectfully submitted,  
Fresh & Easy Neighborhood Market Inc.

By: 

Stuart Newman  
John J. Toner

Seyfarth Shaw LLP  
Attorneys for Petitioning Party In Interest

1075 Peachtree Street, N.E., Suite 2500  
Atlanta, Georgia 30309-3962  
(404) 885-1500  
(404) 892-7056 (facsimile)  
snewman@seyfarth.com

975 F Street, N.W.  
Washington, D.C. 20004  
(202) 463-2400  
(202) 828-5393 (facsimile)  
jtoner@seyfarth.com

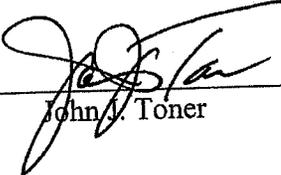
---

directed election. Therefore, unlike the instant matter, the successor employer was not compelled to assume a contract of its predecessor.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of July, 2010, I caused copies of the **MOTION TO INTERVENE AND SUPPLEMENT THE RECORD** to be served on the following parties by facsimile and U.S. Mail.

Irma Hernandez, Esq., Attorney Jean C. Libby, Esq., Field Attorney National Labor Relations Board Region 21 888 South Figueroa Street, 9th Floor Los Angeles CA 90017-5449	David A. Rosenfeld, Esq. Weinberg Roger & Rosenfeld PC 1001 Marina Village Parkway Suite 200 Alameda, CA 94501-1092
Ana M. Gallegos, Esq. Weinberg, Roger & Rosenfeld, PC 3435 Wilshire Boulevard, Suite 620 Los Angeles, CA 90010-1907	Alan R. Berkowitz Of Counsel Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111-4067

  
\_\_\_\_\_  
John A. Toner

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

**2 SISTERS FOOD GROUP, INC.**

and

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

and

**FRESH & EASY NEIGHBORHOOD  
MARKET, INC.,**

**Petitioning Party In Interest**

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case Nos.: 21-CA-38915  
21-CA-38932

Case No. 21-RC-21137

**DECLARATION OF HUGH COUSINS**

I, Hugh Cousins, based on my own personal knowledge, state as follows:

1. I am the Chief Human Resources Officer for Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy"). As such, I am personally knowledgeable regarding the purchase of the assets of 2 Sisters Food Group, Inc. ("2SFG") by Fresh & Easy.

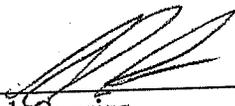
2. On June 28, 2010, Fresh & Easy purchased all of the assets of 2SFG. These assets primarily constituted its Riverside, California, meat processing facility.

3. I also am personally knowledgeable regarding the offer of employment made by Fresh & Easy to the former employees of 2SFG and in the establishment of the initial terms and conditions of employment upon which those offers of employment were based.

4. These initial terms and conditions of employment were significantly different than those provided by 2SFG.

5. A majority of the former employees of 2SFG accepted our offer and are now employees of Fresh & Easy.

I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Hugh Cousins

Dated: July 26, 2010

# **Exhibit B**



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 21  
888 S FIGUEROA STREET, 9<sup>TH</sup> FLOOR  
LOS ANGELES, CA 90017-5449  
Telephone: (213) 894-5244

Agency Website: [www.nlrb.gov](http://www.nlrb.gov)  
Telephone: (213)894-5204  
Fax: (213)894-2778

January 27, 2012

John J. Toner, Attorney at Law  
Seyfarth Shaw LLP  
975 F Street, N.W.  
Washington, DC 20004

Stuart Newman, Attorney at Law  
Seyfarth Shaw LLP  
1075 Peachtree Street, N.E., Suite 2500  
Atlanta, GA 30309-3962

Alan R. Berkowitz, Attorney At Law  
Bingham McCutchen LLP  
3 Embarcadero Center  
San Francisco, CA 94111-4067

Cathy D. Lee, Attorney At Law  
Bingham McCutchen LLP  
355 South Grand Avenue  
Los Angeles, CA 90071-3106

Re: 2 Sisters Food Group, Inc.  
Case 21-RC-21137

Gentlepersons:

On December 29, 2011, the Board issued a *Decision, Order, and Direction of Second Election* in the above-captioned case. As set forth on page 8 of the slip opinion, Fresh & Easy Neighborhood Market, Inc. moved to intervene in the proceedings, noting that it had purchased the Respondent's assets on June 28, 2010. The motion to intervene was for the purpose of "objecting to any direction of a second election in this matter on the basis that such an election would be predicated upon a stipulated election agreement to which Fresh & Easy was not a party."

January 27, 2012

The Board denied the motion to supplement the record as well as the "motion to intervene without prejudice to its right to renew the motion before the Regional Director in connection with subsequent proceedings in this case."

The Regional Director has asked me to inquire as to whether Fresh & Easy Neighborhood Market, Inc. does wish to intervene in the above-captioned matter at this time. While the petition in this matter is currently blocked, it may become unblocked at some time in the future. Making a motion to intervene at this time assures everyone that your motion would in fact be considered by the Regional Director at the appropriate time.

Please advise me in writing of your intention at your earliest convenience. Thank you.

Very truly yours,



John J. Hatem  
Field Examiner

# **Exhibit C**



DLA Piper LLP (US)  
500 Eighth Street, NW  
Washington, DC 20004  
www.dlapiper.com

Joseph A. Turzi  
joe.turzi@dlapiper.com  
T 202.799.4252  
F 202.799.5252

February 3, 2012

VIA FACSIMILE AND MAIL

John J. Hatem  
Field Examiner  
National Labor Relations Board, Region 21  
888 South Figueroa Street, 9th Floor  
Los Angeles, CA 90017-5449

Re: **2 Sisters Food Group, Inc.**  
**Case No. 21-RC-21137**

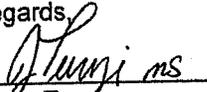
Dear Mr. Hatem:

I represent Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy") with regard to the above-referenced matter.

By letter dated January 27, 2012, you inquired as to whether Fresh & Easy wishes to intervene in the above-referenced matter. As best we can determine, the proceeding involves a representation dispute between 2 Sisters Food Group, Inc., ("2 Sisters") and the United Food and Commercial Workers Union.

It is our understanding that 2 Sisters no longer does business in the United States and, consequently, does not employ any persons in the United States. Based on the foregoing, it is unclear to us as to what would be the purpose or basis for any intervention. In any event, Fresh & Easy does not wish to intervene.

Best regards,

  
\_\_\_\_\_  
Joseph A. Turzi

Cc: Olivia Garcia, Regional Director

David A. Rosenfeld  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501