

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

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

**and**

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

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

**BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT TO ADMINISTRATIVE  
LAW JUDGE ELEANOR LAW’S DECISION AND REQUEST FOR ORAL  
ARGUMENT**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB”), Respondent Fresh & Easy Neighborhood Market, Inc. (“Fresh & Easy”) submits this Brief in Support of its Exceptions to Administrative Law Judge (“ALJ”) Eleanor Laws’ Decision in the above-captioned matters. In her Decision, ALJ Laws found that Fresh & Easy may be held liable as a successor to 2 Sisters Food Group, Inc. (“2 Sisters”) despite the fact that Region 21 of the NLRB neglected to name Fresh & Easy as a Respondent until the compliance phase of the proceedings, almost two (2) years after the Region received notice that Fresh & Easy had purchased the assets of 2 Sisters. Although the Region’s neglect prevented Fresh & Easy from participating in the appeal of the ALJ’s decision, a critical phase in the proceedings, ALJ Laws nonetheless found that the imposition of successor liability would not violate Fresh & Easy’s Constitutional due process rights. Because ALJ Laws’ Decision is based on an erroneous analysis of the evidence and contradicts well-established Board law, Fresh & Easy respectfully requests that the Board refuse to adopt ALJ Laws’ Decision and instead

dismiss the Compliance Specification as to Fresh & Easy in its entirety. Fresh & Easy requests the opportunity for oral argument before the Board in this matter.

## **I. BACKGROUND**

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 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

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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.

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 Fresh & Easy.

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 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 inquiring as to whether Fresh & Easy intended to intervene in the related representation case. (Exhibit 1.) Fresh & Easy replied via letter on February 3, 2012 that it did not wish to

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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.

intervene because the matter involved a dispute to which Fresh & Easy was not a party. (Exhibit 2.)

It was not until May 1, 2012, that the Region filed the Compliance Specification in the above-captioned matter, almost three years after the ULP charges were filed against 2 Sisters, 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.

On July 30, 2012, the parties executed a Stipulation settling the issues regarding the backpay and reinstatement of Trespalacios (the “Stipulation”). That same day, the parties executed a Stipulation of Facts and Motion to Submit Case on Stipulation, in which the parties stipulated to certain facts regarding Fresh & Easy’s purchase of 2 Sisters’ assets and subsequent operation of the Riverside meat packaging facility (the “Stipulation and Motion to Submit Case”). The parties also stipulated that such facts “are sufficient to establish that Fresh & Easy would be a successor to 2 Sisters” but that Fresh & Easy maintains its arguments that the Region’s delay in asserting the allegations against Fresh & Easy relieve it of liability in this matter. *See* Stipulation and Motion to Submit Case at p. 5. The parties requested that the case be submitted to the ALJ for a decision without a hearing. *See id at* p. 1. ALJ Laws approved the Stipulation on August 1, 2012.

The parties submitted briefs in support of their respective positions on September 5, 2012. On November 21, 2012, ALJ Laws issued her Decision and the case was transferred to the Board on the same date.

## II. STATEMENT OF QUESTIONS PRESENTED

- A. Did ALJ Laws err in concluding that the imposition of successor liability upon Fresh & Easy under the circumstances present in this case did not violate Fresh & Easy's Constitutional due process rights? (Exception Nos. 1-3.)
- B. Did ALJ Laws err in recommending the remedies and order set forth in the Decision? (Exception Nos. 4 and 5.)

## III. ARGUMENT

### A. **ALJ Laws Erred in Concluding that the Imposition of Liability Against Fresh & Easy Did Not Violate Fresh & Easy's Due Process Rights**

ALJ Laws erred in failing to recognize that the imposition of liability on Fresh & Easy under the facts present in this case would violate the Constitutional right of due process. Indeed, as discussed more fully below, ALJ Laws summarily disregarded well-established case law holding that dismissal is warranted where, as here, the Region's inexcusable delay in asserting allegations of derivative liability has prejudiced Fresh & Easy's ability to present a meaningful defense. ALJ Laws' conclusory assertions that Fresh & Easy has been provided due process of law cannot withstand scrutiny.

#### (i) **Standard for Constitutional 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 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 . . . .” *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 . . . 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 . . . which must be supplied.” *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1257 (D.C. Cir. 1968) (emphasis in original).

**(ii) ALJ Laws’ Decision Ignores the Obvious Prejudice to Fresh & Easy Caused by the Region’s Failure to Name Fresh & Easy as a Successor in a Timely Fashion**

ALJ Laws’ Decision relies almost exclusively on *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), in holding that Fresh & Easy, as a successor to 2 Sisters, did not have a due process right to defend itself in the underlying ULP proceedings before the Board. In so holding, ALJ Laws entirely ignores the obvious prejudice to Fresh & Easy that resulted from the Region’s

failure to name Fresh & Easy as a respondent under these particular set of facts. ALJ Laws' failure to consider the harm to Fresh & Easy constitutes clear error and should be reversed by the Board.

Although it is generally true that, under *Golden State Bottling*, an employer may be held derivatively liable for ULPs committed by other entities upon the showing of successor 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 a meaningful opportunity to defend against them. Accordingly, it is the Region's responsibility as the prosecuting body to assert allegations of derivative liability in a timely manner in order to avoid impinging upon the rights of another party. *See 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).

In the instant matter, as a result of the Region's failure to amend the Complaint, Fresh & Easy was never provided with notice that it would be bound by the Board's order, nor did it have an opportunity to participate in the appeals process, which is well recognized as a fundamental right. *See, e.g., Collier v. Estelle*, 488 F.2d 929, 932 (5th Cir. 1974); *Duperry v. Kirk*, 563 F. Supp.2d 370, 379 (D. Conn. 2008). Both the Board and federal courts have refused to impose derivative liability under these circumstances.

For example, in *Viking Industrial Security, Inc. v. NLRB*, 225 F.3d 131, 136 (2d Cir. 2000), the court found a violation of due process where the Region, without justification, failed to amend the complaint to include allegations of single employer status against a corporation

until the compliance phase of the proceeding. Similarly, in *Green Construction of Indiana, Inc.*, 271 N.L.R.B. 1503, 1506 (1984), the Board refused to permit the General Counsel to amend the complaint to introduce new evidence regarding the “single employer” status of an individual not originally named in the complaint, where the General Counsel was “repeatedly apprised of the problem of the proper identity of the Respondent but did nothing for more than 7 months.”

In both these cases, the Board and the court recognized that the interests of an alleged single employer are not always identical with the interests of the named respondent, and could potentially even be adverse. *Viking Industrial*, 225 F.3d at 135-36; *Green Construction*, 271 N.L.R.B. at 1503. Accordingly, had the General Counsel amended the complaint in a timely manner to include allegations of derivative liability, the unnamed parties may well have called different witnesses or introduced different evidence. *See Green Construction*, 271 N.L.R.B. at 1503.

ALJ Laws summarily disregards the holdings in *Viking Industrial* and *Green Construction*, noting only that the companies in those cases were alleged to be single employers, rather than successors. *See* ALJ Laws’ Decision at p. 7. This distinction is of no moment, however, as the rationale behind *Viking Industrial* and *Green Construction* applies even more forcefully in the successorship context. Indeed, because a successor is, by definition, an independent entity, it does not share an identity of interests with its predecessor, and therefore, there is no guarantee that its interests were properly represented by 2 Sisters in the underlying ULP proceedings.

The Region’s attempt to impose derivative liability is even more troubling when taking into account the circumstances surrounding the sale of the Riverside facility. Indeed, at the time of Fresh & Easy’s purchase of the facility, 2 Sisters was ceasing all operations in the United

States, and therefore, had little incentive to mount any real defense to the ULP allegations. Whatever the outcome of the matter, it could have no future effect on any operations of 2 Sisters. It is precisely such circumstances that led the court in *Viking Industrial* to find that the imposition of derivative liability at the compliance phase violated the Constitutional right to due process. *Viking Industrial*, 225 F.3d at 135-36 (derivative liability at compliance phase improper where named respondent was nearly insolvent and lacked incentive to mount real defense during underlying ULP proceedings). ALJ Laws' failure to consider this evidence constitutes clear error.

Finally, ALJ Laws' reliance on *Alexander Milburn Co.*, 78 N.L.R.B. 747 (1948) for the proposition that the Board may proceed against a potential successor during compliance proceedings is improper. Indeed, *Alexander Milburn* was decided over 60 years ago, and as ALJ Laws' Decision concedes, the procedures for imposing derivative liability have since changed. See ALJ Laws' Decision at p. 6. Moreover, the facts of the instant case are readily distinguishable from those in *Alexander Milburn*. In that case, the Board first learned that the named respondent had sold its assets during oral argument before the Board. In the instant matter, Fresh & Easy notified the Region of its purchase prior to the appeal proceedings and moved to intervene in order to ensure that its interests were protected, yet the Region failed to amend the Complaint to allow Fresh & Easy's participation. Accordingly, the holding in *Alexander Milburn* is not applicable to the facts of the instant case and should have no bearing on the analysis.

In sum, ALJ Laws' failure to properly consider the prejudice caused by the Region's failure to name Fresh & Easy in a timely manner and apply clear Board precedent constitutes reversible error.

**(iii) ALJ Laws Failed to Consider That the Region's Delay in Naming Fresh & Easy as a Successor Was Without Justification**

ALJ Laws also failed to consider the undisputed facts that demonstrate that the Region's failure to name Fresh & Easy as a successor during the underlying ULP proceedings was, at best, a product of inexcusable neglect. In the instant matter, Fresh & Easy purchased all of 2 Sisters' assets and assumed operation of the Riverside meat processing plant in June 2010. It is undisputed that the Region was provided with clear notice of these facts in July 2010 when Fresh & Easy filed the Motion to Intervene in order to ensure that its interests were properly represented.

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 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. Given that the Region had unequivocal notice of the purchase through the Motion to Intervene, it is clear that the decision to proceed solely against 2 Sisters was a product of either inexcusable neglect, or even more troubling, a desire to gain a strategic advantage in the appeal proceedings.

Nonetheless, ALJ Laws, with barely any discussion, summarily disregards the Region's inordinate delay in naming Fresh & Easy as a respondent, noting only that "Fresh & Easy did not have a due process right to participate in the appeal of the ALJ's findings" and "[a]s such, . . . no right was foreclosed by the Region's failure to amend." ALJ Laws' Decision at p. 7. Not only is this statement entirely conclusory, but it appears to suggest that the Region had the discretion to name Fresh & Easy as a respondent at any time in the proceedings in order to gain a tactical advantage over the respondents. Such a result stands at odds with the principals of due process. *See Viking Industrial*, 225 F.3d at 131 (unjustified late addition of corporation at compliance

phase violates due process); *Green Construction*, 271 N.L.R.B. 1503 (1984) (amendment of complaint alleging single employer status 7 months after close of hearing was “so tardy that basic fairness requires that it be denied.”).

**B. ALJ Laws’ Remedy and Order Set Forth in the Decision are Inappropriate.**

As set forth above, ALJ Laws’ findings and conclusions with respect to the allegation that Fresh & Easy is liable to remedy the ULPs of 2 Sisters is inconsistent with the evidence and the law. As a result, her recommended remedy and order are also inconsistent with the evidence and the law and therefore should not be adopted.

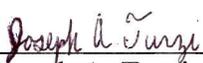
**C. The Board Lacks a Quorum to Act At This Time**

Fresh & Easy contends that, at the present time, the Board lacks a legal quorum required to issue an order under the principles set forth in the Supreme Court’s decision in *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). Indeed, as argued in *Noel Canning v. NLRB*, U.S.C.A. Case No. 12-1115 (D.C. Cir. 2012), President Obama’s January 4, 2012 recess appointments of Members Griffin, Flynn and Block occurred while the United States Senate was in session without seeking the advice and consent of the Senate in violation of Article II, Section 2, Clause 2 of the Constitution. Because the President’s appointments were unconstitutional, the Board does not possess a quorum to act at this time. Nonetheless, for purposes of this Brief, Fresh & Easy shall request relief from the Board as if it currently possesses a legal quorum that vests it with the authority to act.

**III. CONCLUSION**

For the foregoing reasons, Fresh & Easy respectfully requests that the Board refuse to adopt ALJ Laws’ Decision and instead dismiss the Compliance Specification in its entirety as to Fresh & Easy.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 19th day of December 2012, a copy of the foregoing Brief in Support of Exceptions of Respondent to Administrative Law Judge Eleanor Law's Decision was filed electronically and sent via electronic mail to the following:

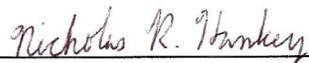
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