

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

MCD PLUMBING, INC.

and

DMS MECHANICAL SERVICES, LLC

and

MICHAEL STACHOWIAK d/b/a DMS SERVICES

and

Case 03-CA-076777

MICHAEL DIEBOLD, Individually

and

**UNITED ASSOCIATION, PLUMBERS
& STEAMFITTERS LOCAL UNION #22**

**ACTING GENERAL COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS COMPLAINT**

The Acting General Counsel of the National Labor Relations Board (Board), by the undersigned counsel, hereby opposes the Motion to Dismiss filed by Respondents DMS Mechanical Services, LLC (DMS Mechanical) and Michael Stachowiak d/b/a DMS Services (DMS Services) (hereinafter collectively referred to as Respondents) on the grounds that there are genuine issues of material fact warranting a hearing before an administrative law judge. Accordingly, as a matter of law, Respondents are not entitled to the relief requested in their Motion to Dismiss.

The original charge in this proceeding was filed by United Association, Plumbers & Steamfitters Local Union #22 (the Union) on March 16, 2012, and the charge was subsequently amended on June 1, 2012 and on July 16, 2012. The original and amended charges were served

on Respondents on March 19, 2012, June 6, 2012, and July 17, 2012 respectively (the charges and affidavits of service are attached hereto as Exhibits A, B and C, respectively). A Complaint and Notice of Hearing issued on November 29, 2012. The Complaint alleges, inter alia, that Respondents, MCD Plumbing, Inc. (MCD), and Michael Diebold, an individual, are alter egos and single employers; that Respondents, MCD and Diebold have failed and refused to apply the terms of a collective-bargaining agreement with the Union; and that MCD has failed and refused to furnish the Union with information necessary for, and relevant to, the Union's performance of its duties as a collective-bargaining representative. Respondents filed an Answer to the Complaint on December 12, 2013. The Answer to the Complaint is attached hereto as Exhibit D. The administrative hearing is scheduled to commence on January 22, 2012.

The Motion to Dismiss should be denied, and the administrative hearing should proceed as scheduled. Pursuant to Section 102.24(b) of the Board's Rules and Regulations, the Board may deny a motion to dismiss where the motion and/or the pleadings fail to establish the absence of a genuine issue for hearing. Neither the Motion nor its Answer demonstrates that dismissal herein is warranted as a matter of law.

The Motion to Dismiss is based on the faulty premise that the Acting General Counsel is barred from issuing a complaint, pursuant to Section 10(b) of the Act, which alleges conduct that occurred more than six months prior to the filing of the charge or, in the instant case, prior to October 19, 2011, six months before Respondents were served with a copy of the original unfair labor practice charge.¹ However, it is well-established Board law that the 10(b) computation period does not commence until the charging party has "clear and unequivocal notice" of a violation of the Act." Leach Corp., 312 NLRB 990, 991 (1993). As the parties raising 10(b) as

¹ Section 10(b) is a statute of limitations that provides that "no complaint shall be based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ."

a defense, the burden is on Respondents to demonstrate that United Association, Plumbers and Steamfitters Local Union #22 (the Union) had clear and unequivocal notice prior to October 19, 2011 of the facts underlying the allegations in the Complaint. Broadway Volkswagen, 342 NLRB 1244, 1246 (2004). In A & L Underground, 302 NLRB 467, 469 (1991), the Board stated:

We adhere to the Board's long-settled rule that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. Further, as is the case with the 10(b) defense generally, the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on respondent.

Respondents do not assert in either their Motion or their Answer (attached hereto as Exhibit A) that the Union knew about the alleged unlawful conduct prior to October 19, 2011, nor do they contend that they apprised the Union that they were performing bargaining unit work at any time prior to, or even after, October 16, 2011. On the contrary, nothing in the Motion or Answer states, suggests or implies that the Union ever had clear and unequivocal notice of Respondent's business relationship with MCD.

It is unclear from Respondents' Motion whether they rely on the Union's information request and MCD's responses thereto (attached to the Complaint as Attachment A and attached hereto as Exhibit E) as evidence of the Union's knowledge. However, to the extent that Respondents do so, a review of the document demonstrates that there is no basis to conclude that the Union had clear and unequivocal notice that MCD and the Respondents herein were alter egos and/or a single employer, or joint employers, or that MCD had diverted work to Respondents prior to October 19, 2011. On the contrary, MCD was less than candid in its responses to the Union and, in fact, its answers to the information request demonstrate an intent to hide from the Union the relationship between MCD and the Respondents herein. Thus,

contrary to demonstrating clear and unequivocal notice, this information request and the responses thereto demonstrate an attempt to conceal the facts underlying the allegations of the charge from the Union. See Hebert Industrial Insulation Corp., 319 NLRB 510, 525, 526 (1995)(charge not barred by Section 10(b) where respondent's failure to provide the union with accurate information was motivated by an intent to conceal the true nature of its relationship to its alter ego.).

In Carr Finishing Specialties and G.P.C. Construction, Inc., Case 03-CA-027264, respondents filed a motion seeking dismissal on 10(b) grounds, similar to the Motion filed herein, claiming that certain correspondence established that the union knew of the alleged unlawful conduct outside of the 10(b) period. In an unpublished decision dated April 21, 2010, the Board denied respondents' motion, finding that they failed to demonstrate that there were no genuine issues of material fact.² In Electrical Workers IBEW Local 25 (SMG), 316 NLRB 932 (1995), the Board denied the respondent's motion to dismiss the complaint on 10(b) grounds, finding that there were substantial and material issues concerning when the charging party learned of and was able to verify the unlawful conduct that constituted the unfair labor practice.

The Motion herein, when viewed in the light most favorable to Respondents, at most raises an issue as to the timeliness of the charge that warrants a hearing before an administrative law judge. Accordingly, the Acting General Counsel respectfully requests that Respondents' Motion be denied, as Respondents have failed to establish the absence of any genuine issue of fact.

²The respondents in Carr Finishing relied on correspondence which they asserted demonstrated that the union knew outside of the 10(b) period about the alter ego. In a decision adopted by the Board, the administrative law judge found that the respondents failed to meet their burden in demonstrating that they had provided the union with clear and unequivocal notice of the alter ego relationship relying, in part, on respondents' lack of candor in responding to the union's information request. Carr Finishing Specialties, Inc. and G.P.C. Construction, 358 NLRB No. 165 (September 28, 2012).

Dated at Buffalo, New York this 31st day of December, 2012.

Respectfully submitted,

/s/ Jesse Feuerstein

JESSE FEUERSTEIN

Counsel for the Acting General Counsel

National Labor Relations Board – Region 3

Niagara Center Building – Suite 630

130 S. Elmwood Avenue

Buffalo, New York 14202

(716) 551-4965

(716) 551-4972 (fax)

jesse.feuerstein@nlrb.gov

E Exhibit A

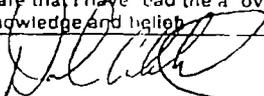
Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
 NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
03-CA-076777	3/16/2012

INSTRUCTIONS:

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer MCD Plumbing, Inc and DMS Mechanical Services, LLC, Alter Egos		b. Tel. No. (716) 668-5576
d. Address (street, city, state ZIP code) 2881 Southwestern Blvd, Unit 1 Orchard Park, New York 1412		c. Cell No.
e. Employer Representative Michael C. Diebold President		f. Fax No.
		g. e-Mail
		h. Dispute Location (City and State) Orchard Park, NY
i. Type of Establishment (factory, nursing home, hotel) plumber	j. Principal Product or Service plumbing & HVAC	k. Number of workers at dispute location
l. The above-named employer has engaged in and is engaging unfair labor practices within the meaning of section 8(a), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since on or about a time discovered by the union within six months of the filing of this charge, and all times thereafter, it, by its officers, agents, and representatives, has refused to bargain collectively with U.A. Plumbers & Steamfitters Local No. 22 Western New York, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by employing non-union employees in violation of the contract, failing to pay benefits for its employees, and operating an alter-ego for the purpose of evading its responsibilities under the Act.		
3. Full name of party filing charge (labor organization, give full name, including local name and number) U.A. Plumbers & Steamfitters Local No. 22 Western New York		
4a. Address (street and number, city, state, and ZIP code) 3651 California Road Orchard Park, NY 14127		4b. Tel. No. (716) 662-3952
		4c. Cell No.
		4d. Fax No. (716) 662-0819
		4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)		
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. (716) 662-3952
By: 	DAVID CRONKHITE Business Representative	Office, if any, Cell No.
(signature of representative or person making charge)	Print Name and Title	Fax No. (716) 662-0819
Address 3651 California Road Orchard Park, NY 14127	Date:	e-Mail

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
 PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

**MCD PLUMBING, INC. AND DMS
MECHANICAL SERVICES, LLC, ALTER EGOS**

Charged Party

and

**UNITED ASSOCIATION, PLUMBERS &
STEAMFITTERS LOCAL UNION #22**

Charging Party

Case 03-CA-076777

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on , I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

MICHAEL A. STACHOWIAK
DMS MECHANICAL SERVICES, LLC
301 HILLTOP DR
ELMA, NY 14059-9410

April 17, 2012

Date

LANNY LEDERHOUSE, Designated
Agent of NLRB

Name

/s/ LANNY LEDERHOUSE

Signature

Exhibit B

FORM NLRB-501
(11-88)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER
1st AMENDED

DO NOT WRITE IN THIS SPACE	
Case 03-CA-076777	Date Filed 6/1/2012

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer MCD Plumbing, Inc. and DMS Mechanical Services, LLC as single employer/alter egos		b. Number of workers employed.
c. Address (street, city, state, ZIP code) 2881 Southwestern Blvd Orchard Park, NY 14127	d. Employer Representative Michael C. Diebold- President	Telephone No. 716-677-1880 Fax: 716-677-1882
f. Type of Establishment (factory, mine, wholesaler, etc.) C plumbing contractor	g. Identify principal product or service: plumbing	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act

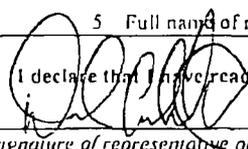
Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since on or about six months ago, and at all times thereafter, it, by its officers, agents, and representatives, has refused to bargain collectively with U.A. Plumbers & Steamfitters Local No. 22 Western New York, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment by failing to pay benefits to the Union Benefit Fund for its employees and by failing to apply the collective-bargaining agreement to unit work.

Since on or about October 2011, and at all times thereafter, it, by its officers, agents, and representatives, has refused to bargain collectively with U.A. Plumbers & Steamfitters Local No. 22 Western New York, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by failing to supply said labor organization with information relevant to its performance as bargaining agent.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act

3. Full name of party filing charge (if labor organization, give full name including local name and number) U.A. Plumbers & Steamfitters Local No. 22 Western New York	
4a. Address (street and number, city, state and ZIP code) 3651 California Road Orchard Park, NY 14127	4b. Telephone No 716-662-3952 Fax: 716-662-0819

5. Full name of national or international labor organization of which it is an affiliate or constituent unit	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	David Cronkhite Business Representative title if (any)
Address 3651 California Road, Orchard Park, NY 14127	716-677-1880 (Telephone No)
	June 1, 2012 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001) jmk

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCD PLUMBING, INC.

Charged Party

and

**UNITED ASSOCIATION, PLUMBERS &
STEAMFITTERS LOCAL UNION #22**

Charging Party

Case 03-CA-076777

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on June 6, 2012, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

MICHAEL DIEBOLD, President
MCD PLUMBING, INC.
2881 SOUTHWESTERN BLVD
UNIT 3
ORCHARD PARK, NY 14127-1255

MICHAEL A. STACHOWIAK
301 HILLTOP DR
ELMA, NY 14059-9410

June 6, 2012

Date

Lanny Lederhouse, Designated Agent of
NLRB

Name

/s/ LANNY LEDERHOUSE

Signature

Exhibit C

FORM NLRB-501
(11-88)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER
2nd AMENDED

DO NOT WRITE IN THIS SPACE

Case

03-CA-076777

Date Filed

7/16/2012

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: MCD Plumbing, Inc. and Michael A. Stachowiak, d/b/a DMS Services and Michael C. Diebold, an individual, and DMS Mechanical Services, LLC		b. Number of workers employed:
c. Address (street, city, state, ZIP code) 2881 Southwestern Blvd Orchard Park, NY 14127	d. Employer Representative Michael C. Diebold- President	Telephone No. 716-677-1880 Fax: 716-677-1882
f. Type of Establishment (factory, mine, wholesaler, etc.): C plumbing contractor	g. Identify principal product or service: plumbing	

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since on or about six months ago, and at all times thereafter, it, by its officers, agents, and representatives, has refused to bargain collectively with U.A. Plumbers & Steamfitters Local No. 22 Western New York, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment by failing to pay benefits to the Union Benefit Fund for its employees and by failing to apply the collective-bargaining agreement to unit work.

Since on or about October 2011, and at all times thereafter, it, by its officers, agents, and representatives, has refused to bargain collectively with U.A. Plumbers & Steamfitters Local No. 22 Western New York, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by failing to supply said labor organization with information relevant to its performance as bargaining agent.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

U.A. Plumbers & Steamfitters Local No. 22 Western New York

4a. Address (street and number, city, state, and ZIP code)
3651 California Road
Orchard Park, NY 14127

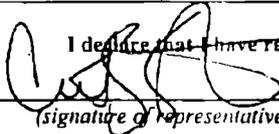
4b. Telephone No.
716-662-3952
Fax: 716-662-0819

5. Full name of national or international labor organization of which it is an affiliate or constituent unit

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By



(signature of representative or person making charge)

Catherine Creighton

Attorney

title if (any)

Address 295 Main Str., Suite 560, Buffalo, NY 14203

716-854-0007

July 17, 2012

(Telephone No.)

(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001) jmk

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCD PLUMBING, INC.

Charged Party

and

**UNITED ASSOCIATION, PLUMBERS &
STEAMFITTERS LOCAL UNION #22**

Charging Party

Case 03-CA-076777

AFFIDAVIT OF SERVICE OF SECOND AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 17, 2012, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

MICHAEL DIEBOLD, President
MCD PLUMBING, INC.
2881 SOUTHWESTERN BLVD
UNIT 3
ORCHARD PARK, NY 14127-1255

ARTHUR G. BAUMEISTER, Esq.
AMIGONE, SANCHEZ & MATTREY, LLP
1300 MAIN PLACE TOWER
350 MAIN ST
BUFFALO, NY 14202-3713

MICHAEL A. STACHOWIAK
301 HILLTOP DR
ELMA, NY 14059-9410

GERALD T. WALSH
ZDARSKY, SAWICKI & AGOSTINELLI,
LLP
404 CATHEDRAL PL
298 MAINST.
BUFFALO, NY 14202-4005

July 17, 2012

Date

Lanny Lederhouse, Designated Agent of
NLRB

Name

/S/ Lanny Lederhouse

Signature

Exhibit D

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

MCD PLUMBING, INC.

and

DMS MECHANICAL SERVICES, LLC

and

MICHAEL STACHOWIAK d/b/a DMS SERVICES

and

MICHAEL DIEBOLD, Individually

Case 03-CA-076777

and

**UNITED ASSOCIATION, PLUMBERS
& STEAMFITTERS LOCAL UNION #22**

**ANSWER OF DMS MECHANICAL SERVICES, LLC and
MICHAEL STACHOWIAK d/b/a DMS SERVICES**

Respondents DMS Mechanical Services, LLC (“DMS Mechanical”) and Michael Stachowiak d/b/a DMS Services (“DMC Services”)(referred herein collectively as “DMS Respondents”), by their undersigned attorneys, Zdarsky, Sawicki & Agostinelli LLP, for their Answer to the Complaint and Notice of Hearing (“Complaint”) filed by Rhonda P. Ley, Regional Director, Region 3, of the National Labor Relations Board (“NLRB”), hereby state as follows.

GENERAL DENIAL

Except as otherwise expressly stated herein, the DMS Respondents hereby deny each and every allegation contained in the Complaint, including, without limitation, any allegations contained

in the preamble, headings, or subheadings of the Complaint, and the DMS Respondents specifically deny that they violated the National Labor Relations Act (“NLRA”) in any of the manners alleged in the Complaint or in any other manner.

Pursuant to Section 102.20 of the Board’s rules, averments in the Complaint to which no responsive pleading is required shall be deemed as denied.

The DMS Respondents expressly reserve the right to seek to amend and/or supplement their Answer as may be necessary.

DEFENSES

Without assuming any burden of proof, persuasion or production not otherwise legally assigned to it as to any element of the claims alleged in the Complaint, the DMS Respondents assert the following defenses.

1. The Complaint and each purported claim for relief stated therein against the DMS Respondents fail to allege facts sufficient to state a claim upon which relief may be granted.

2. Neither DMS Services nor DMS Mechanical is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the NLRA.

3. Even if the actions described in the Complaint had constituted transfer of work to an alleged alter ego, which allegations the DMS Respondents expressly deny, the Union waived any rights it had with respect to such alleged actions.

4. The DMS Respondents have not engaged in any conduct affecting commerce within the meaning of Section 2(6) and (7) of the NLRA.

5. The DMS Respondents are not signatories to any agreement with the Union and any alleged conduct of MCD Plumbing, Inc or Michael Diebold is not attributable to the DMS

Respondents.

6. The DMS Respondents have not violated Section 8(a)(1) of the NLRA as they have not interfered with, restrained, or coerced employees represented by the Union in the exercise of their rights protected by the NLRA.

7. The remedy requested in the Complaint is impermissibly punitive and would cause an undue hardship on the DMS Respondents. Moreover, none of the DMS Respondents' alleged actions caused any hardship to any of DMS Respondents' employees or the Union's employees

8. The remedy requested in the Complaint, with respect to the DSM Respondents, is impermissibly retroactive because its legal basis represents a radical and not reasonably anticipated departure from current Board and court precedent.

9. The remedy requested in Paragraphs XVI, XVII, and the *ad damnum* clause of the Complaint is improper because DMS Respondents have not violated Section 8(a)(1) or 8(a)(5) of the NLRA.

10. Some or all of the claims asserted in the Complaint are barred by the six month statute of limitations set forth in Section 10(b) of the NLRA. As alleged in ¶ I(a) of the Complaint, the original charge in this proceeding was filed by the Union on March 16, 2012, served by regular mail on Respondent MCD Plumbing, Inc. on March 19, 2012, and on Respondents DMS Services and DMS Mechanical on April 19, 2012. The first page of Attachment "A" to the Complaint is an October 16, 2011 letter (dated more than six months prior to the alleged service of the original charge upon the DMS Respondents) from Michael McNalty, the Union's Business Manager, addressed to Respondent Diebold and Respondnet MCD Plumbing, Inc. The Complaint alleges conduct, allegedly attributable to the DMS Respondents, dating back to April 1, 2011 regarding

Respondent DMS Services [Complaint ¶ VI(b)] and August 8, 2011 [Complaint ¶ VI(c)] regarding DMS Mechanical, substantially more than six months prior to the service and filing of the charge against DMS Respondents. See, 29 U.S.C. § 160(b) [NLRA § 10(b)].

RESPONSE TO SPECIFIC ALLEGATIONS OF THE COMPLAINT

The DMS Respondents state as follows in response to specific allegations in the Complaint.

Preamble: DMS Respondents deny the allegations contained in the preamble, except to admit that the United Association, Plumbers and Steamfitters Local Union #22 (“the Union”) filed a charge alleging generally that the DMS Respondents, without specification, allegedly engaged in certain unfair labor practices, and that the Regional Director of the NLRB has issued the instant Complaint and Notice of Hearing based upon the Union’s charge.

I. (a) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph I(a) of the Complaint, except to admit that, after April 12, 2012, DMS Mechanical received, by regular mail, a copy of a charge allegedly filed by the Union.

(b) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph I(b) of the Complaint, except to admit that, in or around June 2012, DMS mechanical received, by regular mail, a copy of an amended charge allegedly filed by the Union.

(c) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph I(c) of the Complaint, except to admit that, in or around July 2012, DMS mechanical received, by regular mail, a copy of a second amended charge allegedly filed by the Union.

II. (a) DMS Respondents lack knowledge or information sufficient to form a belief as to the

allegations of Paragraph II(a) of the Complaint.

(b) Respondent DMS Services denies the allegations of Paragraph II(b) of the Complaint, except admit that, from April 2011 to August 2011, said Respondent was engaged in providing HVAC services and some plumbing services in Western New York, and DMS Respondents deny the remaining allegations of Paragraph II (b) of the Complaint.

(c) Respondent DMS Mechanical denies the allegations of Paragraph II(c) of the Complaint, except admit that, beginning in August 2011, said Respondent was engaged in providing HVAC services and some plumbing services in Western New York, and DMS Respondents deny the remaining allegations of Paragraph II (c) of the Complaint.

(d) DMS Respondents deny the allegations of Paragraph II (d) of the Complaint and deny any allegations therein regarding any entities engaged directly in interstate commerce.

III. (a) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph III(a) of the Complaint.

(b) DMS Respondents deny the allegations of Paragraph III(b) of the Complaint that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (“NLRA”).

IV. DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph IV of the Complaint.

V. (a) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph V(a) of the Complaint.

(b) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph V(b) of the Complaint.

VI. (a) DMS Respondents deny the allegations of Paragraph VI(a) of the Complaint.

(b) DMS Respondents deny the allegations of Paragraph VI(b) of the Complaint.

(c) DMS Respondents deny the allegations of Paragraph VI(c) of the Complaint.

(d) DMS Respondents deny the allegations of Paragraph VI(d) of the Complaint.

(e) DMS Respondents deny the allegations of Paragraph VI(e) of the Complaint.

VII. (a) DMS Respondents deny the allegations of Paragraph VII(a) of the Complaint.

(b) DMS Respondents deny the allegations of Paragraph VII(b) of the Complaint.

(c) DMS Respondents deny the allegations of Paragraph VII(c) of the Complaint.

VIII. (a) DMS Respondents deny the allegations of Paragraph VIII(a) of the Complaint, except admit that Michael Stachowiak was the sole proprietor of DMS Services and is the sole member of DMS Mechanical.

(b) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph VIII (b) of the Complaint.

IX. DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph IX of the Complaint.

X. DMS Respondents deny the allegations of Paragraph X of the Complaint, or that any of their employees were ever members of any "Unit" alleged in the Complaint.

XI. DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph XI (a) through (d) of the Complaint.

XII. DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph XII (a) through (c) of the Complaint.

XIII. (a) DMS Respondents lack knowledge or information sufficient to form a belief as to

the allegations of Paragraph XIII (a) of the Complaint.

XIV. (a) DMS Respondents deny the allegations of Paragraph XIV(a) of the Complaint, and the allegation or suggestion that any “Unit” work alleged in the Complaint was transferred to the DMS Respondents.

(b) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph XIV(b) of the Complaint.

(c) DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph XIV(c) of the Complaint.

XV. DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph XV (a) through (c) of the Complaint.

XVI. DMS Respondents deny the allegations of Paragraph XVI of the Complaint, and deny that any of the employees of any “Unit” alleged in the Complaint were their employees.

XVII. DMS Respondents deny the allegations of Paragraph XVII of the Complaint.

XVIII. DMS Respondents lack knowledge or information sufficient to form a belief as to the allegations of Paragraph XVIII of the Complaint.

XIX. DMS Respondents deny the allegations of Paragraph XIX of the Complaint

The DMS Respondents reserve the right to raise any additional defenses not asserted herein of which they may become aware through investigation, as may be appropriate at a later time.

WHEREFORE, Respondents DMS Mechanical Services, LLC and Michael Stachowiak
d/b/a DMS Services respectfully submit that the Complaint against them should be dismissed.

Dated: Buffalo, New York
December 12, 2012

Respectfully Submitted,

ZDARSKY, SAWICKI & AGOSTINELLI LLP

Gerald T. Walsh

Digitally signed by Gerald T. Walsh
DN: cn=Gerald T. Walsh, o=Zdarsky, Sawicki and
Agostinelli LLP, ou, email=gtwalsh@zsa.cc, c=US
Date: 2012.12.12 13:17:48 -05'00'

By: s/Gerald T. Walsh

Gerald T. Walsh
Attorneys for DMS Respondents
404 Cathedral Place
298 Main Street
Buffalo, New York 14202
(716) 855-3200
gtwalsh@zsa.cc

STATEMENT AND CERTIFICATE OF SERVICE

The undersigned, an attorney at law, duly licensed and admitted to practice law in the State of New York by the New York State Supreme Court, Appellate Division, Fourth Department, the United States District Court for the Western District of New York, the United States Court of Appeals for The Second Circuit, and the United States Supreme Court, hereby certifies that a copy of the DMS Respondents' Answer was electronically served on December 12, 2012 and sent by personal delivery* or overnight delivery** to each of the following parties and attorneys:

RHONDA P. LEY, REGIONAL DIRECTOR*
NATIONAL LABOR RELATIONS BOARD-REGION 3
Niagara Center Building
130 S. Elmwood Avenue, Suite 630
Buffalo, New York 14202

MICHAEL DIEBOLD, President**
MCD PLUMBING, INC.
2881 Southwestern Boulevard, Unit 3
Orchard Park, New York 14127

MICHAEL DIEBOLD**
MCD PLUMBING, INC.
3958 N. Buffalo Street
Orchard Park, New York 14127

ARTHUR BAUMEISTER, ESQ.
AMIGONE, SANCHEZ & MATTREY,
LLP *
1300 Main Place Tower
350 Main Street
Buffalo, New York 14202

DAVID CHRONKHITE, Business Rep.
UNITED ASSOCIATION, PLUMBERS &
STEAMFITTERS LOCAL UNION #22**
3561 California Road
Orchard Park, New York 14127

CATHERINE CREIGHTON, ESQ.*
CREIGHTON, JOHNSEN & GIROUX
295 Main Street, Ste 560
Buffalo, New York 14203

Dated: Buffalo, New York
December 12, 2012

Gerald T. Walsh

Digitally signed by Gerald T. Walsh
DN: cn=Gerald T. Walsh, o=Zdarsky, Sawickic
and Agostinelli LLP, ou, email=gtwalsh@zsa.cc,
c=US
Date: 2012.12.12 13:18:27 -0500

s/Gerald T. Walsh
Gerald T. Walsh

Exhibit E

**PLUMBERS AND STEAMFITTERS LOCAL UNION 22
3651 CALIFORNIA ROAD
ORCHARD PARK, NEW YORK 14127
(716) 662-3952**

October 6, 2011

MCD Plumbing, Inc.
2881 Southwestern Blvd. Unit 3
Orchard Park, New York 14127

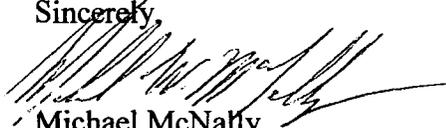
RE: Local 22 Collective Bargaining Agreement

Dear Mr. Diebold,

It has come to the attention of Local Union 22 that there is substantial evidence to support the conclusion that MCD Plumbing, Inc. and DMS Mechanical Services, LLC are interrelated companies and operate in such a fashion that these two companies are alter egos. As such, both companies would be equally bound and responsible for full adherence to Local 22's collective bargaining agreement signed by MCD Plumbing, Inc. In order to fully investigate this matter and to determine whether a grievance should be filed, we request, in our capacity as collective bargaining representative, a response to the request for information attached to this letter.

Due to the serious nature of this matter, we request that you respond promptly. Therefore, we request that your response arrive in this office within two weeks from the date of this letter. Please direct all questions and correspondence to the undersigned.

Sincerely,



Michael McNally
Business Manager

*all Financial records can
be obtained thru Audit*

*Thanks,
Mike*

**PLUMBERS AND STEAMFITTERS LOCAL UNION 22
3651 CALIFORNIA ROAD
ORCHARD PARK, NEW YORK 14127
(716) 662-3952**

To MCD Plumbing, Inc. :

Instructions: Respond fully in writing to each question or provide the requested documents where indicated. If a question asks for a written response but you have a document to provide the answer, you may submit the document and so indicate in your written answer.

1. Describe the type of business in which MCD Plumbing, Inc. engages.

Plumbing Contractor

Describe the type of business in which DMS Mechanical Services, LLC engages.

~~Plumbing~~ HVAC contractor

2. Define the geographic area in which MCD Plumbing, Inc. does business.

WAY

Define the geographic area in which DMS Mechanical Services, LLC does business.

Does not apply

JDK - Buffalo maybe PA and
I heard he has gone to ~~Passaic~~
So Water Town to do work JDK

PLUMBERS AND STEAMFITTERS LOCAL UNION 22
3651 CALIFORNIA ROAD
ORCHARD PARK, NEW YORK 14127
(716) 662-3952

3. State the business address(es) and identify all office locations of MCD Plumbing, Inc.

*2881 South Western Blvd
O. Park, NY 14127*

State the business address(es) and identify all office locations of DMS Mechanical Services, LLC

Does not apply

4) Identify MCD Plumbing, Inc. business phone number(s) and directory listing (s).

*677-1880 - office
677-1892 - fax*

Identify DMS Mechanical Services, LLC business phone number(s) and directory listing (s).

913-0122

5) Identify the banking institution, branch location, and account number of MCD Plumbing, Inc. bank account(s) including payroll account.

*M&T Bank
Transit & Depew Branch*

Identify the banking institution, branch location, and account number of DMS Mechanical Services, LLC account(s) including payroll account.

Does not apply

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ORCHARD PARK, NEW YORK 14127
(716) 662-3952**

6) Identify where and by whom MCD Plumbing, Inc. accounting and financial records are kept.

in office

Identify where and by whom DMS Mechanical Services, LLC accounting and financial records are kept.

Does not apply

7) Identify MCD Plumbing, Inc. principal accountant and accounting firm.

Sue Victor

Identify DMS Mechanical Services, LLC principal accountant and accounting firm.

Does not apply

8) Identify where and by whom MCD Plumbing, Inc. business and corporate records are kept.

at offices

Identify where and by whom DMS Mechanical Services, LLC business and corporate records are kept.

Does not apply

9) Provide a copy of MCD Plumbing, Inc. most recent annual corporate filing.

Provide a copy of DMS Mechanical Services, LLC most recent annual corporate filing.

Does not apply

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10) Identify MCD Plumbing, Inc. principal bookkeeper.

Misty Dusek

Identify DMS Mechanical Services, LLC principal bookkeeper.

Does not apply

11) Identify MCD Plumbing, Inc. principal payroll preparer.

Applied Services

Identify DMS Mechanical Services, LLC principal payroll preparer.

Does not apply

12) Identify MCD Plumbing, Inc. personnel who hold licenses for the company and identify the jurisdictions within which they are licensed.

Mike Dabolek - Many

Identify DMS Mechanical Services, LLC personnel who hold licenses for the company and identify the jurisdictions within which they are licensed.

Does not apply

13) Identify the carrier and policy number for MCD Plumbing, Inc. workers compensation insurance.

Creser Group Inc.

Identify the carrier and policy number for DMS Mechanical Services, LLC workers compensation insurance.

Does not apply

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(716) 662-3952**

14) Identify the carrier and policy number for MCD Plumbing, Inc. health insurance program(s) for its non-union employees.

Does not apply

Identify the carrier and policy number for DMS Mechanical Services, LLC health insurance program(s) for its non-union employees.

Does not apply

15) Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between MCD Plumbing, Inc. and DMS Mechanical Services, LLC from July 1, 2006 to the present.

There wasn't any

16) Identify equipment, vehicles or material, reason(s) for, and date(s) of transfer of these items between MCD Plumbing, Inc. and DMS Mechanical Services, LLC from July 1, 2006 to the present.

There is a lot of any

17) Regarding equipment transactions between MCD Plumbing, Inc. and DMS Mechanical Services, LLC, identify the purchase, rental, or lease rate, equipment involved, calendar period, and dollar volume of each transaction.

There isn't any

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18) Identify business(es) to whom MCD Plumbing, Inc. rents, leases or otherwise provides office space.

MCD Plumbing

Identify business(es) to whom DMS Mechanical Services, LLC rents, leases or otherwise provides office space.

Does not apply

19) Does either MCD Plumbing, Inc. or DMS Mechanical Services, LLC purchase services, supplies or materials from the other company and if so is it reimbursed? Identify the services, supplies or materials involved and, if applicable, identify the amount of reimbursement.

There isn't Any

20) Identify equipment or vehicles of MCD Plumbing, Inc. used at any time since July 1, 2006 to the present by DMS Mechanical Services, LLC

There isn't Any

Identify equipment or vehicles of DMS Mechanical Services, LLC used at any time since July 1, 2006 to the present by MCD Plumbing, Inc.

Does not apply

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21) Identify those of the following services that are provided or have been provided in the past to MCD Plumbing, Inc. by DMS Mechanical Services, LLC and explain the extent to which each is provided:

- a) administrative - *Misty Dusek*
- b) bookkeeping -
- c) clerical
- d) drafting
- e) engineering
- f) estimating - *Mike Diebold*
- g) managerial *Mike Diebold*
- h) sales - *Mike Diebold*

Identify those of the following services that are provided or have been provided in the past to DMS Mechanical Services, LLC by MCD Plumbing, Inc. and explain the extent to which each is provided:

- i) administrative
- j) bookkeeping
- k) clerical
- l) drafting
- m) engineering
- n) estimating
- o) managerial
- p) sales

Does not apply

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24) Identify customers or jobs MCD Plumbing, Inc. has referred to DMS Mechanical Services, LLC customers or jobs DMS Mechanical Services, LLC has referred to MCD Plumbing, Inc.

There isn't any

25) State the gross amount of sales in each of the past five calendar or fiscal years for each company.

MCD - average of about \$2,000,000

DMS - Does not apply

26) Identify those persons who estimate, prepare bids and or negotiate MCD Plumbing, Inc. work.

Mike Diebold

Identify those persons who estimate, prepare bids and or negotiate DMS Mechanical Services, LLC work.

Does not apply

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27) Identify by job, customer, calendar period, and dollar volume any work that MCD Plumbing, Inc. work has subcontracted to DMS Mechanical Services, LLC work.

There isn't any

Identify by job, customer, calendar period, and dollar volume any work that DMS Mechanical Services, LLC work has subcontracted to MCD Plumbing, Inc. work.

There isn't any

28) Identify by job, customer, calendar period, and dollar volume any projects on which both companies have performed work.

Does not apply

PLUMBERS AND STEAMFITTERS LOCAL UNION 22
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29) Identify by job title or craft position the number of employees employed by MCD Plumbing, Inc. per pay period per year from 2006 to the present and supply copies of the January and July payroll records for each of those years.

They were union employees and you should have ~~the~~ copies of these as per audit

Identify by job title or craft position the number of employees employed by DMS Mechanical Services, LLC per pay period per year from 2006 to the present and supply copies of the January and July payroll records for each of those years.

I don't know

30) Identify by name, job title or craft position and respective employment dates those employees of MCD Plumbing, Inc. who also are or have been employees of DMS Mechanical Services, LLC

There wasn't any

Identify by name, job title or craft position and respective employment dates those employees of DMS Mechanical Services, LLC who also are or have been employees of MCD Plumbing, Inc.

Does not apply

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31) Identify MCD Plumbing, Inc. (a) project managers, (b) job superintendents, (c) general foreman, (d) foreman and (e) other supervisory persons who have worked for the company at any time from July 1, 2006 to the present and identify their dates of employment.

Mike Diebold

Identify DMS Mechanical Services, LLC (a) project managers, (b) job superintendents, (c) general foreman, (d) foreman and (e) other supervisory persons who have worked for the company at any time from July 1, 2006 to the present and identify their dates of employment.

Don't know

32) Identify MCD Plumbing, Inc. personnel who are or have been authorized to supervise DMS Mechanical Services, LLC employees.

There isn't anybody

Identify DMS Mechanical Services, LLC personnel who are or have been authorized to supervise MCD Plumbing, Inc. employees.

Does not apply

**PLUMBERS AND STEAMFITTERS LOCAL UNION 22
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ORCHARD PARK, NEW YORK 14127
(716) 662-3952**

33) Identify the owners, including the percentage of each's ownership interest, and officers of MCD Plumbing, Inc.

Mike Diebold
he 100% of nothing!!!

Identify the owners, including the percentage of each's ownership interest, and officers of DMS Mechanical Services, LLC

Does not apply

34) Identify the individual or individuals responsible for the day-to-day management of MCD Plumbing, Inc.

Mike Diebold

Identify the individual or individuals responsible for the day-to-day management of DMS Mechanical Services, LLC

Does not apply

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35) Provide copies of financial statements for MCD Plumbing, Inc. and DMS Mechanical Services, LLC the two most recent years statements have been prepared.

36) Identify loans or lines of credit for which the two companies have jointly applied or pledged assets for the same loan or line of credit and provide documents evidencing this joint activity.

 There isn't any

37) Identify any pension plans maintained by MCD Plumbing, Inc. for its non-union employees and state whether or not any employees of participate in the plan.

 Does not apply
There isn't any

Identify any pension plans maintained by DMS Mechanical Services, LLC for its non-union employees and state whether or not any employees of participate in the plan.

Does not apply

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38) Identify all of MCD Plumbing, Inc. jobs or service contracts since July 1, 2006.

Don't have any service contracts

Identify all of DMS Mechanical Services, LLC jobs or service contracts since July 1, 2006.

does not apply

STATEMENT OF SERVICE

I hereby certify that copies of Acting General Counsel's Response in Opposition to Respondents' Motion to Dismiss Complaint were filed electronically with the National Labor Relations Board and served by electronic mail, as designated below, on the 31st day of December 2012 on the following parties:

For DMS Mechanical Services, LLC and DMS Services:

Gerald T. Walsh
Zdarsky, Sawitch and Agostinelli, LLP
404 Cathedral Place
298 Main St.
Buffalo, NY 14202
gtwalsh@zsa.com

For MCD Plumbing, Inc. and Michael Diebold:

Arthur G. Baumeister
Amigone, Sanchez & Mattrey, LLP
1300 Main Place Tower
350 Main St.
Buffalo, NY 14202
abaumeister@amigonesanchez.com

For United Association, Plumbers and Steamfitters Local Union #22

Catherine Creighton
Creighton, Johnsen & Giroux
295 Main St.
Suite 560
Buffalo, New York 14203
ccreighton@cpjglaborlaw.com