

Ristorante Donatello and the Stanford-Carlton Hotel Restaurant Company and Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL-CIO. Cases 20-CA-24136 and 20-CA-24137

August 8, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND DEVANEY

On December 3, 1993, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief, a motion to strike the exceptions,¹ and an answering brief to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings,² findings,³ and conclusions as modified and to adopt the judge's recommended Order as modified.

In her cross-exceptions, counsel for the General Counsel argues that the judge ignored uncontradicted testimony in support of three complaint allegations that the Respondents engaged in independent violations of Section 8(a)(1). We agree.⁴

¹In this motion, dated January 13, 1994, counsel for the General Counsel claims that the Respondents never served her with a copy of the exceptions. However, the Respondents filed proof of service on the General Counsel with the Board on January 3, 1994. Because we find that the Respondents' exceptions have no merit, we find it unnecessary to resolve whether the Respondents served the exceptions on the General Counsel or to pass on the General Counsel's motion to strike. (We note that counsel for the General Counsel acknowledges that she received the exceptions from counsel for the Charging Party and that she answered the exceptions.)

²The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³In adopting the judge's finding that the evidence clearly supports the General Counsel's theory that Respondents Ristorante Donatello and Respondent Stanford-Carlton Hotel Restaurant Company are alter egos, we find it unnecessary to pass on the judge's statement that the evidence does not support the theory that Respondent Stanford-Carlton is the successor of Respondent Ristorante Donatello.

⁴Member Devaney would remand to the judge those issues raised by the General Counsel's cross-exceptions. The complaint alleged certain violations of Sec. 8(a)(1) but the judge neglected to discuss these allegations and to set out the evidence in support of them. Although, as noted by his colleagues, the evidence regarding these allegations is "uncontradicted," Member Devaney notes that it does not necessarily follow that the evidence is credible. In Member Devaney's view, it would be better to permit the judge to review

1. First, the General Counsel contends that the Respondents violated Section 8(a)(1) when Respondent Ristorante Donatello's general manager, Zoran Matulic, informed an employee that his chances of being rehired after the sale of the restaurant to Respondent Stanford-Carlton Restaurant Company were very slim because of his union involvement.

The pertinent uncontradicted testimony is as follows. On July 25, 1991, Respondent Ristorante Donatello informed its employees that the Company was being sold to Respondent Stanford-Carlton and that they would have to apply with Respondent Stanford-Carlton if they wanted to continue their employment.

According to employee Saulo Diaz, a waiter with 10 years' experience with Respondent Ristorante Donatello, General Manager Zoran Matulic conducted an interview with him on July 25. When Diaz asked Matulic what his chances of being rehired were, Matulic replied they were very slim. When Diaz inquired why, Matulic responded, "Because of the union relations that you have." According to Diaz, Matulic further explained:

[H]e would be very happy to have me back, but they were going to hire just one or two persons. . . . Because if they hire all of us back again, they would still have the same problem with the union.

Waiter Eric Mendez, who was working nearby, corroborated Diaz' testimony. He testified that he overheard Diaz ask Matulic what chance he would have of being rehired and that Matulic's answer was, "[I]t was not too many chances, because we were union people, we belonged to a union."

We agree with the General Counsel that Matulic's statement that Diaz' chances of being hired were poor because the new employer wanted to avoid a bargaining obligation with the Union violated Section 8(a)(1).⁵

2. The General Counsel also contends that the Respondents violated Section 8(a)(1) when General Manager Zoran Matulic informed an employee he was not hired because of his involvement with the Union.

According to the undisputed testimony of employee Saulo Diaz, on August 6, 1991, he went to the executive offices of the hotel to pick up his final check. At that time, Diaz asked Matulic why he had not been rehired. According to Diaz, Matulic replied:

this evidence, assess its credibility, and thereafter make appropriate findings. Member Devaney notes further that because the judge did not address these issues, the Respondents did not address them in their brief. In sum, noting also that the General Counsel requested as an alternative position that this matter be remanded to the judge for findings on these allegations, Member Devaney would grant that alternative request. He would, however, issue a decision at this time adopting the judge on all those issues addressed by the judge. See *Harris-Teeter Super Markets*, 307 NLRB 1075 (1992).

⁵See *A.J.R. Coating Division Corp.*, 292 NLRB 148, 163 (1988); *Honda of Hayward*, 307 NLRB 340, 349 fn. 9 (1992).

Saulo, we'd love to have you back. You are one of my best waiters, but there were some unfavorable comments about you.

When Diaz asked Matulic for more details, Matulic explained, "Because of your relation with the Union and because you've been here too long."

We agree with the General Counsel that Matulic's statement to Diaz, that directly links an employer's refusal to hire with Diaz' union activity, violated Section 8(a)(1).

3. The General Counsel further contends that the Respondents violated Section 8(a)(1) when General Manager Zoran Matulic interrogated an employee about her union activities.

The undisputed evidence shows that Matulic interviewed Carol Lee, an employee of Respondent Ristorante Donatello, on July 25, 1991, for employment with Respondent Stanford-Carlton. During this interview, Matulic asked Lee if she was a member of a union.

We agree with the General Counsel that Matulic's questioning an employee in the context of a job interview about her union sympathies is inherently coercive and in violation of Section 8(a)(1).⁶

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 5 and renumber the remaining paragraphs.

"5. Since July 25, 1991, Respondents violated Section 8(a)(1) by informing employees that their chance of being rehired were lessened because of their union activities, telling an employee that he was not rehired because of his relationship with the Union, and interrogating an applicant for employment about her union affiliation."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Ristorante Donatello and its alter ego Stanford-Carlton Hotel Restaurant Company, San Francisco, California, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a), and reletter all subsequent paragraphs.

"(a) Informing employees that their chances of being rehired are lessened because of their union activities, telling employees that they were not rehired because of their relationship with the Union, and interrogating applicants for employment about their union affiliation."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT inform employees that their chances of being rehired are lessened because of their union activities, tell employees that they were not rehired because of their relationship with the Union, or interrogate applicants for employment about their union affiliation.

WE WILL NOT withdraw recognition from or repudiate our collective-bargaining contract with Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL-CIO.

WE WILL NOT discharge our employees in order to evade our obligation to bargain with that labor organization or because our employees were members of or have engaged in activities on behalf of that labor organization.

WE WILL NOT fail to pay wages to our employees and fringe benefit contributions on their behalf in accordance with the terms and conditions of employment as established by our collective-bargaining contract of April 3, 1991.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately recognize and bargain with Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL-CIO as the exclusive collective-bargaining representative of the employees employed in the appropriate bargaining unit and reestablish the collective-bargaining contract of April 3, 1991.

WE WILL offer the following employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits re-

⁶See, e.g., *Service Master*, 267 NLRB 875 (1983).

sulting from their discharge, less any net interim earnings, plus interest.

Hendrik Johannes	
Bouwen	Howard Huynk
Armando Cachapero	Johnny Lam
Mario Canizales	Carol Lee
Saulo Diaz	Jiam Lee
Roberto Donaire	Erick Mendez
Daniel Erman	Oscar Platero
Cesar Evangelista	Antonio Portugal
Clothilde Fernando	Steven Troung
Sing Hui	Claudio Vietti
Raymon Ortiz	Shahbaz Ilami

WE WILL make whole those employees who suffered wage and fringe benefit losses since August 6, 1992, plus interest.

WE WILL remove from our files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

RISTORANTE DONATELLO
STANFORD-CARLTON HOTEL RES-
TAURANT COMPANY

Margaret Dietz, for the General Counsel.

A. *Cal Rossi*, of San Francisco, California, CEO, Ristorante Donatello, Inc., for Respondents Ristorante Donatello, Inc., and Stanford-Carlton Hotel Restaurant Company.

Matthew Ross and *Beth Ross* (*Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar*), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in San Francisco, California, on June 22–26, 1992, and September 10, 1993,¹ on a complaint issued by the Acting Regional Director for Region 20 of the National Labor Relations Board on November 29, 1991. The consolidated complaint is based on charges filed by Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL–CIO (the Union) on July 24 and 26, 1991. The complaint, as amended and corrected, alleges that Ristorante Donatello and the Stanford-Carlton Hotel Restaurant Company (Respondents RD and SC, respectively) have committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

¹On the joint request of the parties during a scheduled hiatus, the hearing was postponed indefinitely by my order of September 25, 1992, to allow the parties to pursue a settlement and/or to permit discovery to run its course in a related action in U.S. district court under Sec. 301 of the Act. Counsel for the General Counsel subsequently sought to resume the hearing. It reopened and concluded on September 10, 1993.

Issues

The complaint offers two alternative theories with respect to the manner in which the Act was violated. The first alternative is that RD's principal owner created SC deceitfully, seeking to avoid RD's collective-bargaining obligations to the Union and that the two are alter egos, bound to the collective-bargaining contract in effect at the time of the transfer of operation from RD to SC.² The second alternative is that SC is a successor to RD under the *Burns*³ doctrine.

Under the first theory, RD's conduct is alleged to be a cover for the unlawful discharge of the entire bargaining unit and a subsequent avoidance of the contractual obligation to pay the proper wages and the fringe benefit plans. Under the second theory, SC is alleged to have discriminatorily refused to hire RD's union-represented employees and therefore has forfeited its right initially to set the terms and conditions of employment; that being the case, the appropriate remedy would include a requirement that the last lawfully set terms and conditions of employment, under Section 8(d) of the Act, be considered as those established by RD's collective-bargaining contract with the Union and that SC was bound to maintain those terms until lawfully changed.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondents are both California corporations which either operate or have operated the restaurant located in the Hotel Donatello in downtown San Francisco. Although their answers originally denied that the restaurant meets the Board's retail standard for the assertion of jurisdiction, it is not now in dispute that the restaurant's annual gross sales exceed \$500,000 and that its direct inflow exceeds the de minimus level. I find that the restaurant is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to 1980, the structure which is now the Hotel Donatello was known as the Barrett Motor Lodge. Located in a prime downtown San Francisco location, at 501 Post Street, it was a hotel of moderate reputation and operated a coffeeshop. About that time it was purchased by A. Cal Rossi and his wife. Rossi is a property developer and manager with expertise in the operation of hotels. He controls a

²See generally *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

³*NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

number of corporations which he collectively calls the Rossi Group.

He is also one of the persons responsible for establishing the Stanford Court Hotel located on the city's Nob Hill. Relying on his experience with the Stanford Court, Rossi spent about a year renovating the Barrett, renaming it the Pacific Plaza Hotel. After renovation, it had about 140 guest rooms.⁴ When it reopened in 1981, the hotel's restaurant, the Ristorante Donatello, quickly became known as a posh restaurant serving elegant Italian cuisine.

The restaurant's repute became international, attaining a four-star rating in the Mobil guide. Because of the fame, Rossi realized the Donatello name had become a marketable commodity. Holding the copyright, he began using it to commercial advantage in several ways. One thing he did in 1985 was to rename the Pacific Plaza Hotel as the Hotel Donatello.

Later, he decided to use the name in the operation of similarly named restaurants elsewhere. Among other things, he created the Caffe Donatello in other cities, including Sacramento.⁵

Visualizing a time-share resort in the middle of the city, in 1984 or 1985, Rossi also decided to condominiumize the hotel. He created another corporation to sell time-share units in the hotel rooms which he had converted to condominiums. The entity created to sell the time shares was originally known as Pacific Plaza Associates. A health spa was added and the entire time-share resort became known as Club Donatello. He created another corporation to be responsible for the common area of the condo complex and formed yet another to operate the health club which condo owners and hotel guests were entitled to use.

To assist in the sale of the units, one of the marketing techniques Rossi utilized was to provide potential time-share purchasers a free meal valued at \$100 at the Ristorante.

The Union had represented the Barrett's hotel and restaurant workers and when Rossi reopened it, he recognized it as the employees' collective-bargaining representative. At that time the entire property was owned by Rossi as an individual.⁶ The hotel, including the Ristorante, became a part of a multiemployer collective-bargaining unit. In 1985, the multiemployer bargaining unit broke up. Eventually, Rossi signed a collective-bargaining contract for the hotel. As it previously had, that contract covered both the hotel employees and the Ristorante employees.

As the 1985-1989 contract neared its end, Rossi determined that his interests would be best served if the hotel and the restaurant employees were split into two separate bargaining units. He believed the restaurant's labor costs were too high and also thought he could leverage money from the hotel as a separate entity. On April 19, 1990, Rossi created two new corporations, as evidenced by two initial corporate filings with the California secretary of state that day. The

⁴ Among his interests is the Rossi Hotels Corporation, a hotel operating company. Rossi Hotels has operated the Monterey Plaza Hotel in Monterey, California. When this hearing began, it was operating the Hotel Majestic in San Francisco and also the Club Donatello, the condominiumized portion of the Hotel Donatello.

⁵ The Caffe Donatello is owned by a partnership of two corporations, Grupo Donatello, owned by Rossi and his wife, and MPS, a corporation created by some foreign investors.

⁶ Subject to a mortgage.

first of these was a corporation known as 501 Post Investors, Inc. (501 Post). That corporation, with Rossi as the principal shareholder, purchased the hotel building from Rossi the individual. It received assistance from a financial organization called Kawasaki Corporation, which became both a part owner and a mortgagee. Another entity known as American Realty also had an interest as did Paz Company and Enismore Corp. Simultaneously, Rossi created the Ristorante Donatello corporation (RD) to operate the restaurant as a lessee of 501-Post. He was the chief executive officer of both.

On May 8, 1990, a lease between 501 Post and RD was signed. Rossi signed on behalf of both entities, the lessee, 501 Post, and the lessor, RD. The lease remained in effect up through 1992, when this hearing began. Indeed, in 1991, SC became an apparent sublessor.

The Union, although initially opposed to the division of the bargaining unit, eventually agreed to it and on August 13, 1990, signed a collective-bargaining agreement with 501 Post covering only the hotel employees.⁷ A new agreement covering the Ristorante was to be more difficult.

Even before the hotel agreement was reached, Rossi was treating the restaurant situation quite differently. On July 6, 1990, RD's negotiator, D. N. Cornford, wrote the Union's negotiator a letter, supposedly confirming an earlier telephone call with another union official. In that letter, Cornford stated that the Union's deadline for reaching a contract needed to be extended for 2 additional days, to July 19. Then he went on to say: "I do, however, need to point out that pending the conclusion of negotiations, that business reasons dictate that escrow be opened for the sale of the Ristorante *should the parties be unable to reach mutual agreement* on the terms of a new contract. At the present time, it is contemplated that escrow will be opened during the week of July 9, 1990 with an anticipated closure of escrow August 9, 1990 *if negotiations do not result in a mutually agreeable Collective Bargaining Agreement.*" (Emphasis added.)

Cornford went on to say that the sale was not designed as an antiunion action, but only as a reasonable business alternative because the current labor costs were too great to allow the restaurant to be profitable. He asserted that the prospective buyer was a corporation "solely owned" by George Brown IV.

When Brown testified about a prospective 1990 purchase, however, he was unable to describe it at all. He testified that he did not become interested in purchasing the Ristorante until the early summer of 1991, almost a year later than Cornford's letter described. If that is so, it demonstrates at the very least that RD was using the idea of a sale as a tactical threat to get what Rossi believed were favorable contract terms. There is certainly no evidence that Brown had ready a solely owned corporation poised to purchase the facility at that time.

The deadline came and went. The main thing which occurred during the remainder of 1990 was a temporary shutdown in August 1990 during which a computerized guest check system was installed and, Rossi says, the kitchen was remodeled. When the Ristorante reopened, RD imposed the terms of its last proposal. These involved both wage cuts and

⁷ It did cover room service waiters who were required to go to and from the restaurant.

reducing the employees' health insurance contributions, a decision which meant the employees had to pay half of the health insurance premium instead of none.

The Union responded by conducting a series of demonstrations and publicizing the situation. Although it did not call a strike, and none of the employees withheld their services, the demonstrations were noisy and disruptive of the business, particularly the luncheon trade. The demonstrations were usually manned by union officials who were accompanied by off-duty employees, either from RD or other union houses. At one time or another nearly all the RD employees participated. The record shows that at least the following RD employees were observed demonstrating by the Ristorante's managers: Armando Cachapero, Saulo Diaz, Clothilde Fernando, Erick Mendez, and Raymond Ortiz. Others, such as Steve Troung, Claudio Vietti, and Shahbaz Ilami had been on the Union's negotiating committee.

As a result both of the demonstrations and because one of the employees, Ortiz, was permitted to negotiate without the presence of a union negotiator, a collective-bargaining contract of sorts was agreed on on April 3, 1991. A truncated document, it seems to incorporate the preceding contract and to modify it. Although signed on April 3, 1991, its duration was from August 14, 1989, through December 31, 1992.

In the meantime, about March 15, Brown and Patrick Rossi, the Rossis' 24-year-old son, formed SC.⁸ The lawyer who prepared the filings for the California secretary of state's office signed them on that date; the actual filing date stamp mark is obscured by the copying process, but appears to be 3 days later, April 18. Brown supposedly had an 80-percent interest while Patrick Rossi owned the other 20 percent.

B. George Brown IV

If believed without reservation, George Brown IV appears to be a remarkable individual. He describes himself as an investor. He says he develops office buildings, has operated two hotel companies, developed over 40 restaurants, and has been the licensee for 85 fast food chain restaurants called the Waffle House in Georgia, Florida, and Virginia. He also owns two restaurants in Atlanta called the O.K. Cafe. He says he has been the chairman of Rock Resorts and head of the Ritz-Carlton Hotel Company; in addition, he held the franchise for the Marriott Hotel at Fisherman's Wharf in San Francisco. Big money does not seem to concern him. He testified that once he paid \$45 million for the name "Ritz-Carlton," another \$40 million for the property, lost \$7 million in the first year and then, 10 years later, received an offer for \$1.2 billion.

Despite that background, he says he went to work for Rossi in San Francisco as a "consultant," somewhat casually appearing on the payroll of Rossi Hotels. He explains that he has known Rossi for over 10 years and they are good personal friends. Before he moved to San Francisco in 1990, he lived with his family in Jacksonville Beach, Florida. Due to the dissolution of his marriage, he moved to San Francisco because, he says, he admired Rossi's concept of putting condominium clubs in hotels. He says Rossi was "generous

⁸At that time Patrick was both a student at San Francisco State University and training to be a chef. By 1993, he was pursuing a career as a firefighter.

enough" to allow him to learn that business. Accordingly, Rossi put him in charge of selling the condo units. He seems to have performed some other duties as well, including "managing the assets" of the Hotel Majestic, another Rossi property in San Francisco. That duty was not described in any detail, but he clearly drew a distinction between that function and managing the hotel itself.

During this period, 1990-1991, Brown had an office and living quarters in the Hotel Donatello. In addition to drawing payments from Rossi Hotels as a consultant, he earned some commissions from 501 Post for the time-share sales program. He says he didn't keep track of any of these earnings.

C. The Stanford-Carlton Hotel Restaurant Corporation

As noted earlier, SC was created on March 15, 1991. At that time RD's restaurant manager was Zoran Matulic, the assistant manager was Marla Aroesty, and the chef was Luigi Mavica. On June 10, Rossi and Brown signed a bulk sales agreement and opened an escrow with the Spring Mountain Escrow Company. That agreement was filed with the San Francisco recorder's office on June 20. It provided that the restaurant was to be sold for \$41,000, but no money was actually put into the escrow account at that time. It provided that \$11,000 cash was to be deposited together with \$30,000 in notes. Eventually, Patrick Rossi's note for \$12,000 was placed into the escrow. There is no evidence that Brown ever deposited anything. The escrow never closed, remaining open for over 2 years, finally being canceled sometime in July 1993. (See G.C. Exh. 45.)

On July 15, 1991, a notice was posted at the restaurant announcing that it had been sold to SC, advising the RD employees that if they wished to remain employed at the Ristorante they would have to file an employment application with SC.⁹ Most of the employees either filed application forms or resumes as requested. On August 6, when SC actually began operating the restaurant, only two of RD's employees were retained, both of whom were quite junior and neither of whom had been involved in union activity. The remaining individuals who had applied but were not retained are listed in the footnote.¹⁰ These 20 are the only employees whose names are listed in the complaint as amended.¹¹

On August 6, when SC apparently took over the operation of the Ristorante, the managers remained the same: Zoran

⁹From Brown, the notice's text reads: "As you know, the Restaurant has been sold. If any of you are interested in continuing to work for the new restaurant company, please send a current copy of your resume to [SC] [giving a postal mailing address]."

¹⁰These are:

Hendrik Johannes	Shahbaz Ilami
Bouwens	Johnny Lam
Armando Cachapero	Carol Lee
Mario Canizales	Jiam Lee
Saulo Diaz	Erick Mendez
Roberto Donaire	Raymon Ortiz
Daniel Erman	Oscar Platero
Cesar Evangelista	Antonio Portugal
Clothilde Fernando	Steven Troung
Sing Hui	Claudio Vietti
Howard Huynk	

¹¹G.C. Exh. 21 is a list of 35 individuals whose last day of employment by RD was August 6, 1991. Counsel for the General Counsel offered that list for comparison purposes with G.C. Exh. 22. She has offered no explanation why the complaint only seeks a remedy for 20 of those 35.

Matulic, Marla Aroesty, and Chef Luigi Mavica. When these individuals left and needed to be replaced, Rossi and Mavica flew to London to interview the individuals who eventually took over the operation of the Ristorante, Adriano Paganini and his wife Deborah Blum-Paganini. Brown, the putative owner of the Ristorante was not involved, although both Paganinis became employed by SC—he as chef and she as manager. They assumed those duties on their arrival from England in February 1992. Chef Paganini testified that he negotiated his salary with Rossi, first by letter, then by telephone. He did not meet Brown until well after he had taken charge of the Ristorante's kitchen. Even then, their principal reason for meeting was Brown's desire to eat at the restaurant. On one occasion, Paganini says Brown asked how the business was doing, but made no detailed inquiry. For the most part, the Paganinis dealt with the accountant's office on purchases and other financial matters. When Chef Paganini wanted to discuss menu changes, he did it with Rossi, whom he regarded as his boss.

There is also evidence that Rossi continued to control purchases. RD was in arrears for the purchase of advertising in the April and August 1991 issues of *San Francisco Focus*, the magazine published by KQED-TV, a public television station. On December 16, 1991, the magazine's credit manager wrote Rossi saying it had tried to get payment from the business office without success, asking him to personally intervene. On receiving the letter, Rossi wrote on it directions to Steve Pauley, SC's accountant/controller: "Steve, Need to pay Today, Club D Rest Coffe." The bill was promptly paid by an SC check, despite the fact that at least the April ad must have been an RD obligation. Similarly, SC paid in August 1991 a judgment against RD obtained by Kray Cabling Co. for installing RD's computer guest check system in August 1990. That check was cut at the request of 501 Post's controller, David Kopp. Also in August SC paid RD's chef, Mavica, his annual bonus—for work performed prior to the SC takeover. Similarly, on September 6, SC issued George "Geordy" Murphy a check which seems to have covered both salary and bonus which he had earned for RD. Murphy's duties for RD are not fully clear in the record. He seems to have been Matulic's supervisor. He may well have worked for other Rossi entities as some sort of executive. In August and September, SC made two payments to Miller's Meats covering an RD account payable. Also in August SC paid RD's outstanding breadstuffs bill to Bakers of Paris. Later, in December, it began paying off another vendor, Daniels Creamery, for an outstanding RD account payable.¹²

Finally, it appears for the most part that Brown was absent from San Francisco, in 1992 except for a week or two when he returned to testify. From early 1992 until the time the hearing ended in 1993, he resided in the Netherlands, having become the chairman of what he described as a hotel/resort investment arm of KLM Royal Dutch Airlines, Golden Tulip Investments.

¹²The General Counsel also offered evidence that SC was paying other bills incurred by RD, including the electric and gas utility bill from Pacific Gas & Electric Co. (PG&E). The evidence here is more tenuous, because the documentation chain is broken by intermediate payments to a bank for the purchase of cashier's checks, but fails to connect the checks to the payment of the PG&E bills. I therefore decline to rely on them.

Having absented himself with that endeavor, in December 1992, Brown allowed SC's temporary liquor license application extensions, which he had filed with the California Department of Alcoholic Beverage Control (ABC), to nearly expire and the sales transaction to be canceled. On December 3, 1992, Rossi had his son, Patrick, withdraw SC's liquor license application. At the time Patrick signed the form retracting SC's license application, he was no longer associated with SC. Rossi says Patrick had abandoned his interest in the Ristorante sometime before. He had, however, signed some of the liquor license extension requests, so his connection was known to the ABC.

There is very little evidence regarding how SC was funded. Brown does mention at one point that Rossi had lent SC some money and perhaps he had put some capital into it himself. SC, of course, had the obligation to pay rent to RD (which still held the lease from 501 Post). It also was obligated to pay Rossi a license fee for the use of the Donatello name. There is no evidence that such payments were ever made. Rossi and Brown both explain that 501 Post and the Club both owed large amounts payable to SC due to meals incurred and paid for by their guests but not transmitted to the Ristorante. Therefore, they say rent and license payments were not necessary and simply amounted to bookkeeping entries against one another. However, they offered no documentation to support that claim.

IV. ANALYSIS AND CONCLUSIONS

Although the General Counsel has offered two alternative theories regarding the manner in which Respondent(s) have violated the Act, the evidence clearly leads to the alter ego theory, not the successorship theory. That conclusion is based on my assessment of the business relationship between RD and SC as controlled by Rossi and to some extent based on my mistrust of both Rossi and Brown's testimony.

To start with, I simply do not understand, from a business point of view, why Rossi, controlling RD, would sell it for only \$41,000. It is a four-star restaurant regarded by many as the best Italian restaurant in San Francisco. It is located in the city's downtown theater district, just one block off Union Square. Surely its value as an ongoing business is far greater than that sum. It does appear that the Restaurant was in debt, but there has been no showing that in the summer of 1990 it owed so much that its equity value had become only \$41,000. Even its salvage value would seem to exceed that amount. Furthermore, the purchase seems to have been too good to be true. Neither cash nor notes were originally put into the business. Indeed, there has been no showing that the principal shareholder ever put any cash into the business. (I recognize Brown said he did, but there is no confirmation of that fact and no showing of the amount.) The only person to put value into the purchase money was Rossi's son Patrick, and he only put in a note for \$12,000 from which he was later released. Finally, the sale was never consummated, but held in escrow for over 2 years, a circumstance which put a buffer between RD and outside creditors, including the Union and/or the fringe benefit trust funds, all of whom were put on hold, hoping for something positive to occur.

Brown, therefore, seems to have been a strawman from the very beginning insofar as this transaction is concerned. Crediting both his and Rossi's testimony that they were longtime business friends, Brown's appearance on the scene was fortu-

itous in the sense that Rossi had come to believe that labor costs were preventing the restaurant from financial success and he had conceived a scheme by which he could escape the strictures of the collective-bargaining contract. Having failed to convince the Union or his union-member employees that lower wages and changed benefit contributions were appropriate to the Ristorante's success, he sought to contrive a means by which he could once again set the wages. To do that, he had to convince the Union that the purchase was by a new owner, someone who could take advantage of the *Burns* rule permitting a new owner to establish the initial terms and conditions under which he would offer employment. Brown was the perfect shield to hide behind.

The other thing which Rossi had to do was replace the activist employees who had forced him to sign the contract in April. By substituting an apparently new employer and by releasing the union members, Rossi was free to reestablish the full profit base which he thought he should have.

Rossi had tried a similar scheme earlier, one which was lawful but which had resulted in raucous labor demonstrations to the detriment of the business. That stratagem was to declare an impasse and to impose a last offer. In carrying that plan out, Rossi either miscalculated the relative labor costs or miscalculated the Union's perseverance in asking for wage parity with the other restaurants in the area. When he realized his mistake, he still had to deal with the labor cost situation. Yet, from his point of view, the hourly wage and fringe benefit costs remained well out of hand. In making that observation, I only point to Rossi's perspective; I do not suggest or find that the negotiated wage and fringe levels were objectively out of the ordinary insofar as the industry is concerned. There has been no factual showing one way or the other. Moreover, even if his assessment is accurate, it is legally immaterial, for inability to pay is not a justification for abrogating a collective-bargaining agreement. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614 (1973).

Rossi therefore had a strong motive for concealing his true control over SC. Furthermore, he had a ready foil available in Brown. It was therefore relatively easy to create a sham corporation/purchaser such as SC to deceive the employees, their union, and the fringe benefit plans. He had threatened to take the action a year earlier, but held off until he realized he could not evade the Union's demands and/or insistence on maintaining the contract terms any longer.

That this entire scheme was a sham cannot be doubted. The purchase was never an arm's-length transaction, it was not adequately funded and it had no chance of succeeding on its own. It needed Rossi from the get-go. That is why Patrick was installed as an officer and that is why Brown believed he knew it was not a problem for him if he walked away from it.

As I have earlier observed, the Board's test for determining whether or not one employer is the alter ego of another is set forth in *Fugazy Continental Corp.*, 265 NLRB 1301. The test requires an examination of the following factors:

1. Ownership; do the employers have common management and ownership?
2. Do they have a common business purpose?
3. How does the nature of their operation and supervision compare?
4. Do they have customers in common; i.e., is it the same business in the same market?

5. What is the nature and extent of the negotiations and formalities surrounding the transaction?

6. Was the putative alter ego created for legitimate reasons or was it to evade responsibilities under the Act?

None of these factors standing alone is controlling. They are to be taken as a whole and a determination of alter ego status is to be made based on the totality of the answers.

In going down that checklist, and considering all of the factors, it is apparent that the General Counsel has easily proven that SC is the alter ego of RD under the Act. First, although there is a document showing that Brown has an ownership interest in SC, he walked away from the purchase. Indeed, he never put any cash whatsoever into that corporation. The only person shown to have invested anything was Patrick, Cal Rossi's son, and that was a note which was later forgiven or ignored. At the time, Patrick was a college student; later he became a firefighter. There is no showing that he ever did anything but his father's bidding when it came to the Ristorante. At his father's request, he even signed documents withdrawing SC's liquor license application at a time when he was no longer associated with SC and after Brown had walked away. The only real owner was Rossi. He controlled the hiring of the new chef and his wife/manager, the Paganinis. He even went to London to interview them. A nonowner does not do such a thing.

Clearly the Ristorante, under RD or SC had the same business purpose. They both operated a first-rate Italian restaurant in the Hotel Donatello. Furthermore, they use(d) the same premises and the same equipment. The daily operation was basically the same. The chef was in charge of the kitchen and the manager ran the front end. Financial matters were taken care of by an accountant or controller officer in the hotel. In both situations, the person to whom these individuals reported was Rossi. Brown's involvement ranged from minimal to nonexistent. The customers are, in generic terms, the same. The Ristorante caters to Hotel Donatello guests, Club Donatello members, and the general public who seek fine Italian cuisine.

As previously noted this sale was not an arm's-length transaction. Rossi has kept his fingers on the Ristorante's pulse ever since it was turned over to SC. Yet it is true that certain formalities have been observed. For example, SC signed a sublease with RD who held the lease with 501 Post. SC also signed a licensing agreement with Rossi personally to use the Donatello name. Yet no payments have ever been made under the terms of those agreements. And, the Rossi-Brown claim that bookkeeping entries were made to account for those transactions has not been substantiated. Furthermore, Rossi seems to have had control of the SC checking account, for he directed certain payments be made from it. Indeed, SC has paid a significant number of RD's accounts payable. There has been no explanation for that practice. In a very real sense, SC has been used by Rossi in the same fashion RD would have been used had SC not been created. SC's liquor license never was finalized. In fact, when that application was withdrawn, Rossi's own liquor license was immediately available. The formalities of this transaction must be viewed as tissue thin. Indeed, the failure of the escrow to close and the actual reversion to RD demonstrates that Rossi was at all times in control.

Finally, I have previously observed that the entire transaction appears to have been designed to allow RD to evade

its responsibilities under the Act. This transaction clearly had no other purpose.

In these circumstances, there is no doubt that SC is RD's alter ego within the meaning of *Fugazy Continental Corp.*, supra. In that event, both RD and SC are jointly and severally liable to remedy the unfair labor practices. Specifically, I find that Respondents have violated Section 8(a)(1), (3), and (5) of the Act by discharging the employees listed in the footnote, supra. In addition, I find Respondents have violated Section 8(a)(1) and (5) of the Act by repudiating the collective-bargaining agreement which it signed on April 3, 1991, and thereby unlawfully withdrew recognition of the Union.

REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include orders requiring them to recognize the Union as the 9(a) representative of their employees in the bargaining unit described in the collective-bargaining agreement of April 3, 1991; pay the employees it has employed since August 6, 1991, the difference between the wage rates it actually paid them and the wage rates as required by the collective-bargaining contract. See *Ogle Protection Service*, 183 NLRB 682 (1970). Interest on the difference shall be calculated pursuant to the requirements of the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall also pay to the trust funds the contractually required fringe benefit contributions on behalf of those employees hired since August 6, 1991.

The affirmative order shall also require Respondents immediately to offer reinstatement to their former jobs to those employees it unlawfully discharged on August 6, 1991 (if necessary, dismissing any replacement employees), and to make them whole for any loss of earnings, including fringe benefits,¹³ they may have suffered from the date of their discharge to the date a proper offer of reinstatement was made. Backpay for these employees shall be computed on a quarterly basis, less interim earnings, as prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *New Horizons for the Retarded*, supra. It shall also include an order requiring Respondents to remove from its records any reference to the unlawful discharge of those employees and shall require Respondents to notify the employees in writing that they have done so and that the discharges will not be used against them in any way. *Sterling Sugars*, 261 NLRB 472 (1982).

Furthermore, because Respondents have engaged in egregious conduct, including a mass discharge of employees and a total rejection of the bargaining obligation, thereby demonstrating a general disregard for the employees' statutory rights, a broad cease-and-desist order is appropriate. *Hickmott Foods*, 242 NLRB 1357 (1979)

Based on the foregoing findings of fact, analysis, and the record as a whole, I make the following

¹³To qualify for reimbursement, such a fund must be a mandatory subject of bargaining. See *Fox Painting Co.*, 263 NLRB 437 (1982), enf. 732 F.2d 554 (6th Cir. 1984).

CONCLUSIONS OF LAW

1. Respondents Ristorante Donatello and Stanford-Carlton Hotel Restaurant Company are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Beginning on August 6, 1991, and continuing thereafter, Respondents Ristorante Donatello and Stanford-Carlton Hotel Restaurant Company have been alter egos within the meaning of the Act.

4. As alter egos, Respondents Ristorante Donatello and Stanford-Carlton are and have been since August 6, 1991, obligated to continue to recognize the Union as the 9(a) representative of their employees in the bargaining unit described in the collective-bargaining contract which Ristorante Donatello signed on April 3, 1991, and are bound by that same contract.

5. On or about August 6, 1991, Respondents violated Section 8(a)(5) and (1) by withdrawing recognition of the Union and by repudiating the collective-bargaining contract of April 3, 1991.

6. On or about August 6, 1991, Respondents discharged the following employees in violation of Section 8(a)(5), (3), and (1) of the Act because the discharges were for the purpose of evading its/their obligation to continue to recognize and bargain with the Union and because of their union membership and union activities.

Hendrik Johannes

Bouwens

Armando Cachapero

Mario Canizales

Saulo Diaz

Roberto Donaire

Daniel Erman

Cesar Evangelista

Clothilde Fernando

Sing Hui

Howard Huynk

Shahbaz Ilami

Johnny Lam

Carol Lee

Jiam Lee

Erick Mendez

Raymon Ortiz

Oscar Platero

Antonio Portugal

Steven Troung

Claudio Vietti

7. Since August 6, 1991, Respondents have violated Section 8(a)(5) and (1) by paying its bargaining unit employees wages which were not in accordance with the collective-bargaining contract and by failing to meet its/their obligations to pay the appropriate contributions to the fringe benefit trust funds as established by the collective-bargaining contract of April 3, 1991.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondents, Ristorante Donatello and the Stanford-Carlton Hotel Restaurant Company, San Francisco, California, their officers, agents, successors, and assigns, shall

¹⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Withdrawing recognition from and repudiating the collective-bargaining contract with Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL-CIO.

(b) Discharging employees in order to evade the obligation to bargain with that labor organization and because the employees were members of and had engaged in activities on behalf of that labor organization.

(c) Failing to pay wages to its employees and fringe benefit contributions on their behalf in accordance with the terms and conditions of employment as established by the collective-bargaining contract of April 3, 1991.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately recognize and bargain in good faith with Local 2, Hotel & Restaurant Employees Union, Hotel & Restaurant Employees International Union, AFL-CIO as the exclusive collective-bargaining representative of the employees employed in the appropriate bargaining unit and reestablishing the collective-bargaining contract of April 3, 1991.

(b) Offer the following employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed (if necessary, dismissing any replacement employees) and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

Hendrik Johannes

Bouwens

Armando Cachapero

Mario Canizales

Saulo Diaz

Shahbaz Ilami

Johnny Lam

Carol Lee

Jiam Lee

Roberto Donaire

Daniel Erman

Cesar Evangelista

Clothilde Fernando

Sing Hui

Howard Huynk

Erick Mendez

Raymon Ortiz

Oscar Platero

Antonio Portugal

Steven Troung

Claudio Vietti

(c) Make whole those employees who have suffered wage and fringe benefit losses since August 6, 1991, in the manner set forth in the remedy section of this decision.

(d) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its restaurant in San Francisco, California, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondents' authorized representative, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents have taken to comply.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."