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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 10, 2016

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| UNITED STATES OF AMERICA,<br>Complainant,<br><br>v.<br><br>SPECTRUM TECHNICAL STAFFING SERVICES,<br>INC., AND PERSONNEL PLUS, INC.,<br>Respondent. | ) | 8 U.S.C. § 1324a Proceeding<br>OCAHO Case No. 16A00010 |

ORDER GRANTING PERSONNEL PLUS, INC.'S MOTION TO DISMISS AMENDED COMPLAINT

## I. INTRODUCTION

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). Personnel Plus, Inc. filed a Motion to Dismiss the amended complaint which added the company as a respondent in the above captioned case. For the reasons discussed in detail below, the undersigned will grant Personnel Plus's Motion.

## II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

On November 5, 2015, the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant, ICE, or the government) filed a four-count complaint against Spectrum Technical Staffing Services, Inc. (Spectrum Staffing or Respondent). Counts I and II allege that Spectrum Staffing is liable for three violations of 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2), in that it knowingly hired and knowingly continued to employ individuals unauthorized for employment in the United States. Counts III and IV allege that Spectrum Staffing is liable for 2147 violations of 8 U.S.C. § 1324a(a)(1)(B), in that it failed to comply with the employment verification requirements of 8 U.S.C. § 1324a(b). ICE assessed a total fine amount of $1,434,719.00.

On January 13, 2016, Spectrum Staffing filed an "Answer, Affirmative Defenses and Motion to Dismiss." The company denied the material allegations of Counts I and II and admitted liability to 285 of the Count III violations and 172 of the Count IV violations.

On January 28, 2016, ICE moved to amend the complaint to remove Judie McKay as a named respondent.[1] In addition, ICE moved to reduce the baseline fine of the Counts I and II violations to $1375 per violation, resulting in an adjusted proposed penalty amount of $1,432,953.50.

On March 8, 2016, ICE filed a "Second Motion for Leave to Amend Complaint to Add Personnel Plus, Inc. as a Party and Memorandum in Support of Motion" (ICE's Second Motion). ICE attached the following exhibits in support of this motion: Ex. A) Spectrum Staffing's Certificate of Incorporation and Articles of Incorporation; Ex. B) Assignment of Incorporation to Judie McKay; Ex. C) 2005-13 Domestic Corporation Annual Renewal for Spectrum Staffing and Notice of Change of Registered Office/Registered Agent; Ex. D) Notice of Inspection and Immigration Enforcement Subpoena; Ex. E) List of Spectrum Staffing's owners; Ex. F) Immigration Enforcement Subpoena to the Minnesota Secretary of State, Personnel Plus's Certificate of Incorporation and Articles of Incorporation, and 2014-2015 Minnesota Corporation/Annual Renewal for Personnel Plus; Ex. G) Email correspondences between Spectrum Staffing and ICE; Ex. H) Notice of Suspect Documents with attachment; Ex. I) Letter from Judie McKay to ICE; Ex. J) Immigration Enforcement Subpoena to the Minnesota Department of Employment and Economic Development (DEED) with respect to Spectrum Staffing; Ex. K) Immigration Enforcement Subpoena to DEED with respect to Personnel Plus; Ex. L) Mr. McKay's Employment Eligibility Verification Form I-9; Ex. M) The McKay's Judgment and Divorce Decree; Ex. N) Printouts from Spectrum Staffing's and Personnel Plus's websites; and Ex. O) Copies of photographs of locations with Spectrum Staffing and Personnel Plus signs.

On April 5, 2016, Spectrum Staffing filed a Response to ICE's Second Motion. Spectrum Staffing did not oppose adding Personnel Plus as a party but stated it would contest ICE's arguments in law and fact that Personnel Plus is Spectrum Staffing's corporate successor.

On August 17, 2016, a telephonic prehearing conference was held. ICE, Spectrum Staffing, and Personnel Plus were all represented on the call by their respective counsel. During the call, I granted ICE's Second Motion, adding Personnel Plus as a respondent. ICE was consequently instructed to serve on Personnel Plus an amended complaint, including Personnel Plus in the caption. In addition, I granted ICE's First Motion to Amend Complaint "to remove Judie McKay as a named Respondent" and to reduce the penalty amount to $1375 per violation for the Counts I and II violations. ICE's proposed penalty amount is accordingly now $1,432,953.50.

[1] The original named respondents in this case were "Spectrum Technical Staffing Services, Inc.; and Judie McKay d/b/a Spectrum Technical Staffing Services, Inc."

Personnel Plus was also ordered to file a motion to dismiss regarding the corporate successor liability issue and ICE was ordered to file a timely response.

ICE filed an amended complaint on August 30, 2016, which added "Personnel Plus, Inc." as a respondent. The amended complaint is the same as the original complaint, with the exception that the former reflects that ICE's proposed penalty for the Counts I and II violations is now $1375 per violation. Personnel Plus filed an answer to the amended complaint, asserting that it is "not a successor to or alter ego of Spectrum Staffing Services, Inc.," and that it consequently cannot answer the allegations "made of or about Spectrum [Staffing]." Personnel Plus's Answer at 1. In addition, Personnel Plus "defers to Spectrum [Staffing] and its Answers for and related to all such allegations." *Id.* at 1-2.

On September 19, 2016, Personnel Plus filed an amended[2] "Motion to Dismiss Amended Complaint and Memorandum in Support of Motion" (Personnel Plus's Motion). The motion includes the following proposed exhibits: Ex. A) The McKay's Judgment and Divorce Decree; Ex. B) Business Record Details for Spectrum Staffing; Ex. C) Business Record Details for Personnel Plus; and Ex. D) Notice of Inspection and Immigration Enforcement Subpoena.

On September 26, 2016, ICE filed an "Opposition to Personnel Plus's Motion to Dismiss Amended Complaint and Memorandum in Support of Motion" (ICE's Response). The response includes the following proposed exhibits: Ex. A) Printout of postings from Spectrum Staffing's Facebook page, June 2012–August 2014, and of postings from Personnel Plus's Facebook page, December 2014–September 2016; Ex. B) Printout of search from www.techbusinesses.org regarding Spectrum Staffing; and Ex. C) Business Record Details for Beyond Impact LLC.

## III. POSITIONS OF THE PARTIES

### A. ICE's Second Motion to Amend Complaint

ICE contends that Personnel Plus is a successor in interest to Spectrum Staffing and is therefore liable for Spectrum Staffing's debts and obligations. ICE acknowledges that the general rule is that a successor company does not acquire the liabilities and obligations of a predecessor company, subject to several exceptions, including "mere continuation." ICE states that to determine if a new company is a mere continuation of another company, the following factors

[2] Personnel Plus filed its Motion to Dismiss Amended Complaint and Memorandum in Support of Motion on September 16, 2016. The amended motion is almost identical to the original motion, with the exception that the former includes an additional paragraph regarding the nature of the staffing industry. Mr. McKay's affidavit in the amended motion also includes additional information about the nature of the staffing industry.

should be considered: "(1) the continuity of ownership; (2) the time lapse between dissolution and formation of the respective corporations; (3) the continuation of the business; and (4) the assumption of liabilities by the new entity." ICE's Second Motion at 6 (citing *United States v. Spring & Soon Fashion, Inc.*, 8 OCAHO no. 1003, 102, 123 (1998)).[3] According to ICE, Minnesota recognized these factors as well in determining whether the mere continuation exception is applicable. *Id.* at 7 (citing *Hankinson v. King*, 117 F. Supp. 3d 1068, 1072 (D.Minn. 2015)).[4] ICE argues that there is a continuity of ownership between Spectrum Staffing and Personnel Plus because Spectrum Staffing listed Ms. Goslin and Mr. McKay as owners in response to the Immigration Enforcement Subpoena and because Mr. McKay identified himself as an owner of Spectrum Staffing on his Form I-9. *See* ICE's Second Motion, Exs. D, L. In addition, their divorce decree states with respect to Spectrum Staffing and Personnel Plus that Ms. Goslin and Mr. McKay would maintain an "equal division of profits, losses, and liabilities of said company as set forth in in the company's current corporate governing documents." *Id.*, Ex. M.

ICE also contends that the mere continuation exception applies because Personnel Plus was incorporated sixteen days after service of the Notice of Inspection on Spectrum Staffing. *See* ICE's Second Motion at 9. ICE further states, "As far as Complainant is aware, Spectrum [Staffing] still exists in some form. However, as of the fourth quarter of 2015, Spectrum only employed 12 individuals. In comparison, Personnel [Plus] employed 1,155 individuals in the fourth quarter of 2015." *Id.* The government contends that this is evidence of the fact that Personnel Plus was "created to absorb" Spectrum Staffing's workforce. *Id.*

ICE also states that there is a continuation of Spectrum Staffing's business operations because Personnel Plus offers the same services and Personnel Plus also operated out of the same location as Spectrum Staffing. *See id.*, Exs. N, O. In addition, ICE notes that there was a

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[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[4] These factors are relevant to the determination of whether a "de facto" merger occurred, not whether the mere continuation exception is applicable. *Hankinson*, 117 F. Supp. 3d at 1072 ("In order to determine whether a de facto merger had occurred, Minnesota courts would consider whether the following four factors existed . . . .") (citations omitted).

"significant employee overlap" between Spectrum Staffing and Personnel Plus. *Id.*, Exs. H, J, K. ICE recognizes that the staffing industry is transient and typically experiences a high turnover and that it is unlikely that all of the Spectrum Staffing employees who became Personnel Plus employees are still employed by Personnel Plus, but considers the "timeline" of Personnel Plus's creation and growth to be crucial. ICE also notes that it has not determined whether Personnel Plus assumed any of Spectrum Staffing's liabilities and/or obligations but states it will seek this information during discovery. Finally, ICE contends that the government's evidence establishes that Personnel Plus is a successor in interest to Spectrum Staffing. *Id.* at 14.

B. Personnel Plus's Motion to Dismiss

Spectrum Staffing was incorporated in Minnesota on June 4, 2004. Personnel Plus's Motion, Ex. B. Ms. Goslin is the company's registered agent and CEO. Spectrum Staffing "offers temporary employment services for professional staff placements." *Id.* at 2. According to Personnel Plus, Mr. McKay often consulted Spectrum Staffing on management issues. *Id.*

Personnel Plus was incorporated in Minnesota on September 11, 2013. *See id.*, Ex. B. Mr. McKay is Personnel Plus's CEO. *Id.*, Ex. C. Mr. McKay "wished to work" in the same general industry as Spectrum Staffing but "had a greater interest in placing workers in clerical, light industrial, skilled/technical, and administrative jobs." *Id.* at 2. Personnel Plus avers that its formation was not related to ICE serving Spectrum Staffing with the Notice of Inspection on August 26, 2013. Rather, approximately June 2013, Mr. McKay had begun to discuss with his accountant his interest in forming a new entity. *Id.*, McKay Aff. 1. This coincided with the fact that he and Ms. Goslin began divorce proceedings in March 2013. *Id.* at 3-4. They were divorced on January 30, 2014.

The McKay's divorce decree identifies that Mr. McKay will receive 55% and Ms. Goslin will receive 45% of the profits if either Spectrum Staffing or Personnel Plus is sold; however, according to Personnel Plus, the divorce decree "does not describe either of the McKay's interest in Spectrum [Staffing] or Personnel [Plus] as a percentage of ownership, nor does it purport to transfer or create any ownership interests outside of what the State of Minnesota had, or currently has, on record as the accurate sole-ownership arrangements of each business." *Id.* at 4, Ex. A at 9, 18-19.

Personnel Plus and Spectrum Staffing "shared an office space for a short period of time, which necessarily resulted in sharing of contact information such as phone/fax." *See* Personnel Plus's Motion at 2. Mr. McKay states that "Personnel Plus borrowed from Spectrum [Staffing]'s resources for convenience purposes only" and that Spectrum Staffing has since moved to a new location in Minneapolis, while Personnel Plus operates out of two locations in Minneapolis and St. Paul. The St. Paul location, which is the location that both companies shared, "still has a Spectrum [Staffing] banner because Personnel Plus did not wish to incur the expense to replace the awning in light of the city providing notice that the building would be torn down." *Id.*,

McKay Aff. 2. Personnel Plus contends that both companies operate separately and that Spectrum Staffing also provides "administrative services to Personnel, for a pre-arranged fee." *Id.* at 4-5.

Personnel Plus seeks dismissal of the amended complaint pursuant to OCAHO rule 28 C.F.R. § 68.10(a). Personnel Plus contends that ICE's factual allegations, even if true, are insufficient to support the government's position that Personnel Plus is a successor in interest to Spectrum Staffing. *Id.* at 6. Specifically, Personnel Plus states that as a matter of law, it is not a proper party to the instant matter because "Spectrum [Staffing] did not transfer financial assets, real property or fixtures to Personnel Plus, nor did Personnel Plus pay money to Spectrum [Staffing] for any assets." *Id.* In addition, Personnel Plus contends that there is no continuity of ownership, both companies operate in distinct areas of the temporary staffing industry, and "Spectrum [Staffing] is still very much operational." *Id.*

Personnel Plus considers the lack of "any significant transfer of assets" to be a dispositive issue because pursuant to Minnesota and OCAHO case law, a sale or a transfer of assets is required before addressing a "mere continuation" analysis. *Id.* at 7. Personnel Plus also argues that even under the "mere continuation" analysis, ICE has failed to plead sufficient supporting facts. The mere continuation theory is an exception to Minnesota's general rule that "where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor." *Id.* (citing *Hankinson*, 117 F. Supp. 3d at 1072). Personnel Plus states that in Minnesota, the traditional rule of mere continuation "refers principally to a 'reorganization' of the original corporation under federal bankruptcy law or through state statutory devices." *Id.* at 10 (citing *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99 (Minn. 1989)). According to Personnel Plus, ICE has not, and cannot, show that Mr. McKay had an ownership interest in Spectrum Staffing.

Personnel Plus also argues that unlike the cases that ICE cited to in its Second Motion, Spectrum Staffing "is still in operation serving the industry, albeit on a smaller scale than Personnel [Plus], but operational nonetheless." *See* Personnel Plus's Motion at 12. Personnel Plus further contends that the fact that there was a sixteen-day period between service of the Notice of Inspection on Spectrum Staffing and incorporation of Personnel Plus does not establish successor liability, as Mr. McKay had been "working on the Personnel [Plus] plan well in advance of" service of the Notice of Inspection. *Id.* at 12-13. Finally, according to Personnel Plus, ICE's remaining allegations that there was some employee overlap between both companies and that Personnel Plus used Spectrum Staffing's website text, contact information, and physical location are insufficient facts to establish successor liability.

C. ICE's Response

According to ICE, "OCAHO has a choice to apply either federal common law or Minnesota law when determining whether Personnel Plus . . . is a successor-in-interest to Spectrum [Staffing]."

ICE's Response at 2. ICE recognizes that under the "federal common law," as in Minnesota, the general rule is there is no successor liability on a corporation that acquires the assets of another; however, this rule is subject to four exceptions. *Id.* at 3 (citing *State of N.Y. v. Storonske Cooperage Co.*, 174 B.R. 366 (N.D.N.Y. 1994)). ICE agrees that the threshold issue in this matter is whether Spectrum Staffing sold or transferred assets to Personnel Plus.

ICE contends that a "sale of assets" is not necessary to find successor liability and that a transfer of assets suffices. *Id.* ICE states that Personnel Plus and Spectrum Staffing once occupied the same "brick-and-mortar stores" and that Personnel Plus also used the same telephone numbers, fax lines, and "website copy" that Spectrum Staffing used. Spectrum Staffing has since moved to a new location while Personnel Plus occupies the same location "that Spectrum [Staffing] once occupied and uses the same telephone lines and fax lines that Spectrum [Staffing] once used." *Id.* at 4. ICE recognizes that Mr. McKay stated that Personnel Plus used Spectrum Staffing's resources for "convenience purposes only," but argues this "appears to be a semantic distinction only." *Id.* ICE also considers Mr. McKay's explanation that the Spectrum Staffing banner remains at the Personnel Plus location because that building may be torn down by the city to be disingenuous, as Personnel Plus was incorporated in September 2013 and the Spectrum Staffing banner still remains.

According to ICE, it is currently unaware of the "mechanism that Spectrum [Staffing] employed to transfer its buildings, its phone and fax resources and its website copy to Personnel [Plus]," but has requested evidence regarding this transfer of property through its discovery requests to Personnel Plus. *Id.* ICE also states that Personnel Plus acquired a significant portion of Spectrum Staffing's employees—482 individuals—and that "as Spectrum [Staffing] was winding down its employee roster, Personnel Plus was ramping up its employee roster with many of Spectrum [Staffing]'s former and terminated employees." *Id.* at 5. ICE further argues that it appears that Personnel Plus has many of the same clients that Spectrum Staffing served and that ICE intends to "uncover the nature of Personnel [Plus]'s client base and the extent that Personnel Plus is conducting its business based on Spectrum [Staffing]'s goodwill." *Id.*

ICE argues that it can further establish Personnel Plus's successor liability pursuant to the "continuing enterprise/substantial continuity" exception. ICE's Response at 6. According to ICE, this test is "primarily factual in nature and based on a totality of the circumstances of a given situation, requires a focus on whether the new company has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Id.* (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987)). There are several factors that courts analyze in determining whether this exception applies and ICE contends that several of those factors are present here, including: (1) whether the successor company had notice of the charge or pending lawsuit prior to acquiring the business or assets of the predecessor, (2) whether there has been a substantial continuity of business operations, (3) whether the new employer uses the same plant, (4) whether he uses the same or substantially the same workforce, (5) whether he uses the same machinery, equipment and

methods of production, and (6) whether he produces the same product. *Id.* (citing *Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 404 (S.D.N.Y. 2012)).

ICE argues that Personnel Plus had notice of ICE's audit because the Notice of Inspection was served on Spectrum Staffing on August 26, 2013, prior to Personnel Plus's incorporation. ICE reiterates that Personnel Plus employed nearly 500 of Spectrum Staffing's "former and terminated employees" and that Personnel Plus "presumably" provided the same services to many of Spectrum Staffing's clients. ICE's Response at 7. In addition, ICE argues that although Mr. McKay claims that Personnel Plus offers different services than Spectrum Staffing, based on both companies' websites and Facebook pages, they place employees in the same kinds of industries. *Id.*, Ex. A.

The government also states that Personnel Plus is a successor-in-interest to Spectrum Staffing under the "de facto merger" exception. The four relevant factors in determining whether there has been a de facto merger, according to ICE, are (1) continuity of enterprise, evidenced by the same management, personnel, assets, and physical location, (2) continuity of stockholders, (3) dissolution of the selling corporation, and (4) assumption of liabilities by the purchaser. ICE's Response at 8 (citing *Storonske*, 174 B.R. at 382). Based on the facts presented thus far, ICE argues that the first factor is present. In addition, ICE contends that the second factor is present because as Mr. McKay and Ms. Goslin will receive a 55% and 45% share of the profits, respectively, if Spectrum Staffing or Personnel Plus is sold, and there are no other individuals who have an ownership interest in the companies, both entities have identical stockholders. ICE finally states that Spectrum Staffing does not appear "to be genuinely operational" because of its diminished workforce, as well as the fact that an Internet search of the company did not reveal any information about its current existence. In addition, there has not been a posting to Spectrum Staffing's Facebook page since August 2014. *Id.* at 9; Ex. A.

According to ICE, Minnesota's successor liability scheme is very similar to the federal scheme, and, therefore, the government's analysis is the same under the state test.

## IV. DISCUSSION

### A. Legal Standards & Analysis

OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted, which is modeled after Federal Rule of Civil Procedure 12(b)(6). *See* 28 C.F.R. § 68.10; *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994). A court is required to liberally construe the complaint and view "it in the light most favorable to the plaintiff." *Zarazinski*, 4 OCAHO no. 638 at 436 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

When matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision. *See Barone v. Superior Washer & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013). Notice to the nonmoving party is then required to allow that party to present relevant materials. Here, however, notice of the conversion to ICE or additional time for ICE to present contravening evidence is not necessary because ICE's response in opposition to the motion to dismiss also refers to materials not included in the pleadings, including the attachments to its Second Motion. *See United States v. Split Rail Fence Co.*, 11 OCAHO no. 1216, 3 (2014).

Summary decision is appropriate where the pleadings and other materials show there is no genuine issue of material fact, and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Federal Rule of Civil Procedure 56(c), which provides for summary judgment in federal cases. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 2 (2010). A party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 2 (2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

1. Corporate Successor Liability

The Eighth Circuit,[5] like many other jurisdictions, has recognized the "traditional rule that mere asset purchasers are not liable as successors," unless: (1) the purchasing corporation expressly or impliedly agrees to assume the liability; (2) the transaction amounts to a de facto consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into in order to escape liability. *United States. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992) (citing *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990)). The second and third exceptions—a mere continuation corporation and de facto merger—are at issue in the instant matter.

Similarly, in Minnesota, prior to 2006 the "general rule [was] that where one company sells or otherwise transfers all its assets to another company, the purchasing company is not liable for the debts and liabilities of the transferor." *J.F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 37 (1973) (citing 15 Fletcher, Cyclopedia of the Law of Corporations § 7122 (perm. ed.)), *superseded by statute*, Minn. Stat. § 302A.661, subd. 4 (2006). The four exceptions to the traditional rule in Minnesota were the same as those recognized by the Eighth Circuit. *Id.* at 37-38. However, in 2006, the Minnesota Legislature amended the Business Corporations Act by adding the last two sentences:

> The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or

[5] Case law from the U.S. Court of Appeals for the Eighth Circuit is authoritative, as Spectrum Staffing and Personnel Plus conduct business in Minnesota. *See, e.g., United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 880 n.5 (1997).

> agreement between the transferee and the transferor or to the extent provided by this chapter or other statutes of this state. A disposition of all or substantially all of a corporation's property and assets under this section is not considered to be a merger or a de facto merger pursuant to this chapter or otherwise. The transferee shall not be liable solely because it is deemed to be a continuation of the transferor.

*See* Minn. Stat. § 302A.661, subd. 4; *Hankinson*, 117 F. Supp. 3d at 1073. The Reporter's Notes to the statute provides that subdivision four was "amended to confirm the general rule that transferees of corporate assets are not liable for the obligations of their transferors." *See* John Matheson, Minn. Stat. § 302A.661, Reporter's Notes (2006). In addition, "[b]eyond [the] two explicit statutory exceptions, however, there are no common law exceptions to the rule of transferee non-liability." *Id.*; *see also Hankinson*, 117 F. Supp. 3d at 1073. Liability under other state statutes, such as Minnesota's environmental laws or the Minnesota fraudulent transfer act, "as is liability under federal statutes," is still possible. Reporter's Notes (citing *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291 (Minn. 2003)).

2. Federal or State Choice of Law

In *United States v. WSC Plumbing, Inc.*, 8 OCAHO no. 1045, 696, 707 (2000), Administrative Law Judge Robert Barton first addressed when presented with an issue of corporate successor liability whether he "should adopt applicable state law regarding successor liability . . . or whether the circumstances justify the invocation of a federal common law rule of successor liability." He determined that this was a "purely academic" question because "the traditional state law rules governing successor liability are functionally identical to the Ninth Circuit's 'common law' rule." *Id.* (citations omitted).[6] Judge Barton further noted that "to the extent that the federal common law of successor liability does not provide a rule of decision for this case," he would apply "appropriate California law unless doing so would create a 'significant conflict' between state law and the federal policy underlying § 1324a." *Id.* at 708 (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994)). He applied California corporations law because there was no showing in *WSC Plumbing* that application of state law would "frustrate" the objectives of 8 U.S.C. § 1324a to ensure compliance with the nation's employment eligibility verification requirements and to hold employers liable for hiring and continuing to employ unauthorized individuals. *Id.*

As explained above, the federal law and Minnesota law on corporate successor liability are not the same because Minnesota has abolished the four common law exceptions. However, as indicated in the Reporter's Notes, liability may still be available under federal statutes. In *Johns*,

[6] In *WSC Plumbing*, the respondent company was located in California.

which is the case cited to in the notes, corporate liability was found in a Title VII employment discrimination suit pursuant to the "federal doctrine of successor-employer liability," which is "separate and broader" than state successor-corporation liability, that developed in the context of the Labor Act. 664 N.W.2d at 297, 299 (referencing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 544 (1964)).

ICE contends that federal law should be applied. Here, the Eighth Circuit's rule of successor liability provides "a rule of decision for this case." *WSC Plumbing*, 8 OCAHO no. 1045 at 708. Prior to 2006, the Eighth Circuit's and Minnesota's rule were "functionally identical." *Id.* at 707; *see also Mexico Feed & Seed*, 980 F.2d at 487 n.9 ("The issue of whether federal or state law should be used in analyzing successor liability was not raised by the parties and we do not decide it. However, considering the national application of CERCLA and fairness to similarly situated parties, the district court was probably correct in applying federal law.") (citations omitted).[7] Assuming there was a transfer of assets between Spectrum Staffing and Personnel Plus, if I applied the current Minnesota corporate law, Personnel Plus could not be liable for hiring unauthorized workers and for failing to comply with the employment verification requirements, thus creating a conflict between state law, which does not recognize the four common law exception, and the federal policy underlying § 1324a. However, regardless of which test is applied, ICE has failed to demonstrate Spectrum Staffing transferred all or substantially all of its assets to Personnel Plus and, therefore, has failed to meet its burden of proof.

3. A Sale or Transfer of Assets is Required

For corporate successor liability to attach, there must have been a sale or transfer of assets between the two entities. *Niccum*, 438 N.W.2d at 98; *A.P.I., Inc. Asbestos Settlement Trust v. Home Ins. Co.*, 877 F. Supp. 2d 709, 734 (D. Minn. 2012); *see also* 15 Fletcher Cyc. Corp. § 7122 at n.14.30. In *J.F. Anderson*, the Minnesota Supreme Court held:

> Where one corporation transfers its assets to another corporation, absent consolidation, merger, or a mere continuation of the selling corporation such as a reorganization, the receiving corporation is not responsible for the debts of the transferring corporation except (a) where the purchaser agrees, expressly or impliedly, to assume such debts, or (b) the transfer of assets is entered into for inadequate consideration, or otherwise fraudulently, in order to escape liability for such debts.

[7] CERCLA refers to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75.

296 Minn. at 40-41. In addition, the Supreme Court in *J.F. Anderson* held that "[i]n the absence of a transfer of assets without adequate consideration, the alternative basis for the decision, appearing to rest on continuity of business, name, and management alone, is not, we think, sufficient basis for holding a transferee liable for the debts of the transferor." *Id.* at 40 (referencing *Fena v. Peppers Fruit Co.*, 185 Minn. 137 (1931)). The Minnesota Business Corporations Act does not define "transfer,"[8] but state court precedent strongly suggests that consideration is required for a transfer of assets to result in corporate successor liability.

Neither party contends that Spectrum Staffing sold any assets to Personnel Plus. Rather, ICE contends that Personnel Plus's use of Spectrum Staffing's previous location, website, telephone number, and fax numbers, as well as the fact that multiple Spectrum Staffing employees then worked for Personnel Plus, constitute a transfer of assets. Black's Law Dictionary defines "transfer"[9] broadly. However, pursuant to Minnesota case law, consideration for the transfer of assets appears to be required in order for there to be a predecessor-successor relationship. ICE has not alleged any facts or presented any evidence to show that Spectrum Staffing received any consideration for allowing Personnel Plus to simultaneously use its resources.[10] The fact that Spectrum Staffing used it resources simultaneously with Personnel Plus without any consideration undermines the notion that Spectrum Staffing actually "transferred" any assets to Personnel Plus. Moreover, ICE admitted that Spectrum Staffing and Personnel Plus no longer

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[8] According to Minn. Stat. § 302A.601, subd. 3, "A corporation may sell, lease, transfer, or otherwise dispose of all or substantially all of its property and assets in the manner provided in section 302A.661."

[9] "Transfer" is defined as:

> 1. Any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method - direct or indirect, absolute or conditional, voluntary or involuntary - of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. 2. Negotiation of an instrument according to the forms of law. The four methods of transfer are by indorsement, by delivery, by assignment, and by operation of law. 3. A conveyance of property or title from one person to another.

Black's Law Dictionary (10th ed. 2014).

[10] There was also no showing that Personnel Plus impliedly or expressly assumed any of Spectrum Staffing's liabilities. *J.F. Anderson*, 296 Minn. at 40-41.

share the same location and that it is unlikely that all the former Personnel Plus employees are still employed there, due to the nature of the staffing industry. *See* ICE's Second Motion at 11; ICE's Response at 4. Accordingly, ICE has failed to establish the prerequisite to corporate successor liability that there was a transfer of all, or substantially all, of Spectrum Staffing's assets to Personnel Plus.

a. Exceptions

The exceptions are only applicable if there was a sale or transfer of assets between Spectrum Staffing and Personnel Plus. Assuming for the sake of argument that there was such a transfer, the undersigned concludes that ICE also failed to establish that the following exceptions to the general rule are applicable.

i. Mere Continuation

The mere continuation exception "emphasizes an 'identity of officers, directors, and stock between the selling and purchasing corporations.'" *Mexico Feed & Seed*, 980 F.2d at 488 (citing *Tucker v. Paxson Machine Co.*, 645 F.2d 620, 626 (8th Cir. 1981)). The mere continuation exception in Minnesota prior to 2006 also referred to a "'reorganization' of the original corporation, such as is accomplished occasionally under Chapter X of the Bankruptcy Act . . ., and perhaps under other state statutory devices." *J.F. Anderson*, 296 Minn. at 38. The focus is not on whether there was a continuation of the enterprise or product line.

ICE argues that this exception is applicable because pursuant to their divorce decree, Ms. Goslin and Mr. McKay would receive the same percentage of the profits if either Spectrum Staffing or Personnel Plus is sold and thus there is a common identity of stock and ownership between the two companies. *See* ICE's Second Motion, Ex. M at 18-19. Although this provision of the divorce decree is relevant, it does not sufficiently demonstrate that there was a common identity of officers, directors, and stock between Spectrum Staffing and Personnel Plus. Notably, as Personnel Plus points out, the relevant Minnesota filings show that Ms. Goslin is the CEO of Spectrum Staffing and Mr. McKay is the CEO of Personnel Plus. *See* ICE's Second Motion, Exs. B, F; Personnel Plus's Motion, Ex. B. Spectrum Staffing informed ICE in response to the Immigration Enforcement Subpoena that Ms. Goslin and Mr. McKay were owners of Spectrum Staffing and Mr. McKay's Form I-9 states he is an owner of Spectrum Staffing. *See* ICE's Second Motion, Exs. D, L. Although these two pieces of evidence are suspect, they do not sufficiently demonstrate Mr. McKay's ownership in Spectrum Staffing in light of the contravening evidence from the State of Minnesota. Moreover, although ICE alludes to shared stock between Spectrum Staffing and Personnel Plus, the record does not contain any such supporting evidence. There was also no showing that Personnel Plus is the result of a reorganization of Spectrum Staffing. *J.F. Anderson*, 296 Minn. at 38. Accordingly, even if ICE had demonstrated a transfer of assets between both companies, the government nevertheless

failed to show there was a continuity in the officers, directors, and stock based on any reorganization of Spectrum Staffing.

ii. De Facto Merger

The Eighth Circuit has recognized the following elements to be necessary in finding there was a de facto merger:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations;
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation;
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible;
> (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

*Keller v. Clark Equip. Co.*, 715 F.2d 1280, 1291 (8th Cir. 1983).

Prior to 2006, Minnesota courts would consider the following four factors, which were similar to the Eighth Circuit, to determine if there had been a de facto merger:

> (1) continuity of management, personnel, assets and operations; (2) continuity of shareholders which result[ed] from the purchasing corporation paying for the acquired assets with shares of its own stock; (3) . . . the seller cease[d] operations, liquidate[d], and dissolve[d] as soon as legally and practically possible; and (4) . . . the purchasing entity assume[d] the obligations of the seller necessary for uninterrupted continuation of business operations.

*Hankinson*, 117 F.Supp. 3d at 1072 (citations omitted). In Minnesota, a showing of each of the four elements was not required; however, the courts generally required the "continuity of shareholders" factor. *Id.* "Whether a continuity of shareholders exists is '[t]he key factor in distinguishing between a merger and an asset purchase,' because a mere asset purchase results in the exchange of cash for assets, rather than stock for assets." *Id.* (citing *T.H.S. Northstar Assocs.*

*v. W.R. Grace & Co.-Conn.*, 840 F. Supp. 676, 678 (D. Minn. 1993), *superseded by statute*, Minn. Stat. § 302A.661, subd. 4).

The record does not demonstrate that there were a de facto merger between Spectrum Staffing and Personnel Plus. Again, although Ms. Goslin and Mr. McKay will respectively receive 45% of the profits and 55% of the profits if either company is sold, ICE has not indicated and the record does not support that there was a sale of assets for *stock*, or that there was some transfer of stock between Spectrum Staffing and Personnel Plus. *See, e.g., T.H.S. Northstar*, 840 F. Supp. at 679 ("This continuity of shareholders, rather than the percentage of ownership assumed, is significant to a finding of merger."). The "continuity of shareholders" factor is key in establishing that there was a de facto merger. ICE has alleged facts supporting factor number one regarding continuity of management, however, this alone is insufficient. In addition, ICE claims factor number three is present because it contends that Spectrum Staffing is winding down and has not had any recent social media activity. However, ICE stated, "As far as Complainant is aware, Spectrum [Staffing] still exists in some form." *See* ICE's Second Motion at 9. Moreover, the record does not show that Spectrum Staffing has ceased its operations, liquidated, or dissolved. Therefore, ICE has also failed to meet its burden of showing there was a de facto merger between both companies.

iii. Continuing Enterprise/Substantial Continuity

The continuing enterprise/substantial continuity test is an exception to the general rule of no liability for asset-purchasers that is broader than the four common law exceptions. This exception arose in the context of labor relations cases. *See Johns*, 664 N.W.2d at 297 (citing *Wiley*, 376 U.S. at 544); *see also Mexico Feed & Seed*, 980 F.2d at 487-88 (citing *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)). In *Wiley*, there was a merger between two corporations and the U.S. Supreme Court determined that the purchaser was obligated to arbitrate with the union pursuant to an agreement between the union and the merged corporation. 376 U.S. at 551. The Court found that "relevant similarity and continuity of operation across the change in ownership" was an important factor to its determination. *Id.* This doctrine was further expanded in *Golden State*, where the Court held that a "bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of [unfair labor practices]." The relevant factors in determining whether this exception applies include "an identity of stock, stockholders, and officers, but not determinatively." *Mexico Feed & Seed*, 980 F.2d at 488 n.10. "It also considers whether the purchaser retained the same facilities, same employees, same name, same production facilities in the same location, same supervisory personnel; and produced the same product; maintained a continuity in assets; continued the same general business operations; and held itself out to the public as a continuation of the previous enterprise." *Id.* (citations omitted). Under this doctrine, "the method of transfer of assets is not determinative of whether a successor has liability." *Johns*, 664 N.W.2d at 298-99 (citing *Golden State*, 414 U.S. at 182 n.5). Pursuant to this federal doctrine, in *Johns*, the Supreme Court of

Minnesota found an acquiring corporation liable for the judgments against its predecessor corporation in a Title VII sexual harassment action. *Id.* at 299.

ICE has alleged facts and presented evidence to show that Spectrum Staffing had notice of the pending lawsuit, both companies used substantially the same workforce, and are engaged in similar businesses. However, this exception has generally been applied in the context of cases involving labor disputes and employment discrimination, as well as products liability and federal environmental regulation. *Mexico Feed & Seed*, 980 F.2d at 487. The purpose of this doctrine, as are all the exceptions, is to ensure that corporations will not avoid liability by changes in corporate formation. *Id.* This broader exception further aims to ensure that the victims in such cases receive the relief they are entitled to from the entity that can provide such relief. *See Johns*, 664 N.W.2d at 298-99; *see also Mexico Feed & Seed*, 980 F.2d 487 (noting that this "broadened test of successorship . . . evolved . . . in contexts where the public policy vindicated by recovery from the implicated assets is paramount to that supported by the traditional rules delimiting successor liability"). In addition, in the context of labor disputes, the U.S. Supreme Court noted in *Wiley*, "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." 376 U.S. at 549.

These concerns are not present in the instant matter because should liability for noncompliance with 8 U.S.C. § 1324a be established, Spectrum Staffing will be ordered to pay a civil money penalty. *See* 8 C.F.R. § 274a.10(b)(2). Although the record shows that the size of Spectrum Staffing's operations has decreased, there is no evidence showing that the company has ceased all operations or has dissolved; accordingly, the responsible party will be held accountable for any established violations.

B. Conclusion

For all these reasons, I will grant Personnel Plus's Motion to Dismiss, which has been converted to a Motion for Summary Decision. ICE failed to demonstrate that there was a transfer of all or substantially all of Spectrum Staffing's assets to Personnel Plus, which is a prerequisite to establishing corporate successor liability. Even assuming there was such a transfer, the record does not support liability based on the relevant exceptions to the general rule that a successor corporation does not acquire the debts and obligations of its predecessor corporation. Accordingly, Personnel Plus is no longer a respondent in the instant matter.

SO ORDERED.

Dated and entered on November 10, 2016.

Robert J. Lesnick
United States Administrative Law Judge
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