IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAMES COLE, as Chairman on behalf of the Board of Trustees of The Iron Workers Local Union No. 167 Health and Welfare Plan and Trust; The Iron Workers Local Union No. 167 Pension Plan and Trust; The Iron Workers Local Union No. 167 Apprenticeship and Training Trust Fund; and Iron Workers Local Union No. 167,	)	No. 2:21-cv-02165-TLP-tmp
Plaintiff,	)	JURY DEMAND
v.	)	
ELITE IRON WORKS, ELITE IRON WORKS, LLC, and RUSSELL FEIVOU,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs are James Cole ("Mr. Cole") as Chairman and on behalf of the Board of Trustees of the Iron Workers Local Union No. 167 ("Union") Health and Welfare Plan and Trust, the Union Pension Plan and Trust, the Union Apprenticeship and Training Trust Fund, and the Union. (ECF No. 1.) They sue Defendants Elite Iron Works ("EIW"), Russell Feivou ("Mr. Feivou") as EIW's sole proprietor, and Elite Iron Works, LLC ("Elite") to collect contributions and union dues allegedly owed by Defendants under a collective bargaining agreement. (*Id.*) Plaintiffs, a group of entities representing the ironworks Union's interests, contend Elite is the alter ego of the defunct EIW, and should be bound by the collective bargaining agreement ("CBA") EIW entered with the Union. (*Id.*)

Defendants move for summary judgment. (ECF. No. 41.) Plaintiffs have responded (ECF No. 43), and Defendants have replied (ECF No. 44). For the reasons below, the Court **DENIES** Defendants' motion for summary judgment.

FACTUAL BACKGROUND

This dispute arises from alleged obligations by Elite, EIW, and Mr. Feivou to an ironworks union group. The question is whether EIW, a defunct ironworks company, is Elite's alter ego. In other words, the issue is whether Elite should be bound by EIW's obligations to the Plaintiffs because they are—by law—the same entity.

I. Undisputed Facts

First joining as an apprentice in 2010, Mr. Feivou became a member of the Union in 2014 when he began working for various contractors on ironworks-related projects. (ECF No. 43-1 at PageID 280.) In 2018, he formed EIW, an ironworks business, as sole proprietor. (*Id.*) Mr. Feivou operated EIW from his home address at 88 Rae Drive, Munford, Tennessee. (*Id.* at PageID 282.) Later, EIW entered into a CBA with the Union. (*Id.* at PageID 281.) The CBA required EIW to pay negotiated wages and other monthly benefit contributions. (*Id.*) The parties disagree as to when EIW ceased operations, but they do not dispute that EIW owed $10,232.01 to the Union in contributions, and that Mr. Feivou later satisfied this debt in a payment agreement. (*Id.* at PageID 282, 290.)

In January 2019, Mr. Feivou and Jonathan Glasco ("Mr. Glasco"), a former Union president who earlier owned an ironworks business, incorporated Elite as a limited liability company. (*Id.* at PageID 283.) Elite, also an ironworks business, is based out of the same address as EIW. (*Id.* at PageID 284.) Unlike EIW, Elite did not enter into any collective bargaining agreements with the Union. In mid-2019, Elite approached Mr. Cole and the Union

about "entering into a one project agreement," which Mr. Cole declined. (*Id.* at 289.) Those facts are the only ones the parties agree on—what follows is in dispute.

II. Disputed Facts and Procedural Posture

Plaintiffs contend that while Defendants have satisfied EIW's $10,232.01 debt through a payment plan, Defendants have skirted the plan's other requirements such as failing to "file monthly reports and pay required monthly contributions and dues," under the CBA. (ECF Nos. 1 at PageID 4; 43-1 at PageID 290.) Plaintiffs also allege that Mr. Cole rejected Elite's mid-2019 project proposal because EIW and Elite are "alter ago companies," and that Elite is "disguised continuance of" EIW. (ECF No. 43 at PageID 268.) Plaintiffs claim that although Mr. Feivou and Mr. Glasco contributed no capital to Elite, they are each listed as having 50% ownership of the company. (*Id.* at PageID 269.) Plaintiffs also claim Elite absorbed some of EIW's equipment, obtained EIW's insurance contracts by a simple name change, and used EIW's goodwill as a unionized company to imply "use of skilled, well-trained ironworkers." (*Id.* at 270.) Plaintiffs argue that Defendants intended to "form the LLC in order to avoid the obligations of the CBA." (*Id.* at 277.)

Defendants deny these allegations. They argue that EIW's management, ownership, and supervision are not substantially identical to Elite's because the former is a sole proprietorship where Mr. Feivou had "sole decision-making authority," while the latter is a "two-member LLC owned in equal shares," with Mr. Feivou and Mr. Glasco "shar[ing] decision making authority." (ECF No. 44 at PageID 546.) They also argue that Elite is distinct from EIW because it has an in-house fabrication shop, a larger market share, and a capacity to perform large-scale structural work. (*Id.* at 547–48.) Finally, Defendants contend that Plaintiffs give no evidence showing that Elite is "an intentional circumvention of EIW's CBA obligations." (*Id.* at 551.)

Plaintiffs sued requesting that Defendants be jointly and severally liable for outstanding dues, auditor fees, attorney fees, and court costs under 29 U.S.C. § 1132(g)(2). (ECF No 1. at PageID 6.) Defendants move for summary judgment. (ECF No's. 41–44.) For the reasons below, the Court **DENIES** Defendants' Motion for Summary Judgment.

LEGAL STANDARD

A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012) (citing *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984)).

"In considering a motion for summary judgment, [the] court construes all reasonable inferences in favor of the nonmoving party." *Robertson v. Lucas*, 753 F.3d 606, 614 (6th Cir. 2014) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). And "[t]he moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact." *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party may satisfy this burden by showing "that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case." *Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir. 2005).

"Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." *Id.* at 448–49; *see also* Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 587. This means that, if "the non-moving party

fails to make a sufficient showing of an essential element of his case on which he bears the burden of proof, the moving parties are entitled to judgment as a matter of law and summary judgment is proper." *Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 914 (6th Cir. 2013) (quoting *Chapman v. United Auto Workers Loc. 1005*, 670 F.3d 677, 680 (6th Cir. 2012) (en banc)); *see also Kalich v. AT & T Mobility, LLC*, 679 F.3d 464, 469 (6th Cir. 2012).

What is more, "to show that a fact is, or is not, genuinely disputed, both parties are required to either cite to particular parts of materials in the record or show that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Bruederle*, 687 F.3d at 776 (internal quotations and citations omitted); *see also Mosholder*, 679 F.3d at 448 ("To support its motion, the moving party may show 'that there is an absence of evidence to support the nonmoving party's case.'" (quoting *Celotex*, 477 U.S. at 325)). But "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Martinez*, 703 F.3d at 914 (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). As a result, "[t]he court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

In the end, the "question is whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015) (quoting *Liberty Lobby*, 477 U.S. at 251–52). "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving

party must present evidence upon which a reasonable jury could find in her favor." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (quoting *Liberty Lobby*, 477 U.S. at 251). And statements in affidavits that are "nothing more than rumors, conclusory allegations and subjective beliefs" are insufficient evidence. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584–85 (6th Cir. 1992).

ANALYSIS

I. The Alter Ego Doctrine

The alter ego doctrine allows courts to "treat two companies as the same entity when necessary to prevent either of them from manipulating its corporate form to evade its labor obligations." *Trustees of Operating Engineers Local 324 Pension Fund v. Bourdow Contracting, Inc.*, 919 F.3d 368, 376 (6th Cir. 2019) (citations omitted). It is an equitable doctrine that "binds an employer to a collective bargaining agreement if it is found to be an alter ego of a signatory employer." *Trustees of Detroit Carpenters Fringe Benefits Funds v. Industrial Contracting, LLC*, 581 F.3d 313 (6th Cir. 2009). Courts apply it in two contexts: first is when a new company is "merely a disguised continuance of an older company," and second is when two co-existing companies are really one business separated "only in form." *Bourdow*, 919 F.3d at 376.

The Sixth Circuit test for determining whether one company is an alter ago of the other looks at whether two companies have "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership." *Id*. Courts also consider an employer's "'intent to evade' its labor obligations." *Id.* All the factors are considered together and "[n]o individual factor is determinative." *Id.*

The test is a "flexible, balance-striking, functional analysis." *NLRB v. Crossroads Elec., Inc.*, 178 Fed. Appx. 528, 535 (6th Cir. 2016) (citing *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 336 (6th Cir. 1990)). In deciding whether entities are alter egos of each other, the Court may look at "similarities that existed at formation, even though the companies' identities *diverged* as time went on." *Id.* at 534 (emphasis in original). To carry out federal labor policies, the Sixth Circuit applies the test in a "more relaxed, less exacting fashion than would be required under federal common law principles." *Fullerton*, 910 F.2d at 336; *see also Road Sprinkler Fitters Local Union v. Dorn Sprinkler Co.*, 669 F.3d 790, 794 (6th Cir. 2012). The Court now turns to consider these factors.

A. Ownership

The ownership factor weighs towards an alter ego finding where there is a significant overlap of ownership interest. *Bourdow*, 919 F.33d at 379. Where there is no ownership overlap, courts have found two companies are not alter egos of each other. *See Dorn*, 663 F.3d at 794–95. Courts have also ruled that "some overlap" in ownership could "weigh[] slightly in favor of imposing alter ego liability." *Trustees of the Painters Union Deposit Fund v. Interior/Exterior Specialist Co.*, 731 Fed. App'x 654, 660 (6th Cir. 2010).

Defendants point out that the companies' ownership is not substantially identical because EIW was Mr. Feivou's sole proprietorship, while Elite is a limited liability company with Mr. Feivou and Mr. Glasco each owning 50% of the company. (ECF No. 41-2 at PageID 147.) Plaintiffs argue that the two companies' ownership is substantially identical because "[a]ll the Defendants did was file paperwork to establish an LLC." (ECF No. 43 at PageID 275.) In support, Plaintiff points out that Mr. Feivou and Mr. Glasco both own 50% of Elite and that

neither contributed any capital to its formation. (ECF Nos. 43-1 at PageID 283–84; 43-2 at PageID 327; 43-9 at PageID 431–32).

With Mr. Feivou owning 100% of EIW and 50% of Elite, there is no question that there is at least some ownership overlap between the two companies. Because the overlap is 50%,—rather than 100% or none—it has limited probative value. But it is not so limited to compel this Court to find that there is no triable issue of material fact on the ownership factor. Resolving any inferences in Plaintiffs' favor as it must, the Court finds that ownership factor could favor a jury's finding of alter ego status.

B. Management and Supervision

The management factor looks to the companies' "management structure" and the "overlap in those who 'played a managerial role.'" *Bourdow*, 919 F.3d at 376 (citations omitted). Where there is "minimal overlap," courts determine that this factor favors a finding that the entities are not alter egos of each other. *Id.* That said, courts have invoked the alter ego doctrine where firms' management had "some overlap." *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist Co.*, 371 Fed. Appx. 654, 660 (6th Cir. 2010). Meanwhile, the supervision factor "looks into those who hold supervisory roles." *Bourdow*, 919 F.3d at 378. Under the National Labor Relations Act, a supervisor exercises "independent judgment," and has authority to "fire, transfer, suspend, lay off," and other similar actions. 29 U.S.C. § 152(11). Courts have found alter ego status where the same individual holds a supervisory role in both companies. *See NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986).

Defendants argue that Elite's management and supervision are not much like that of EIW. In EIW, Mr. Feivou handled all aspects of the business, while responsibilities are now split in Elite between Mr. Feivou and Mr. Glasco. (ECF No. 41-2 at PageID 147.) In Elite, Mr. Feivou

focuses on "managing financial matters," with no responsibility for "site supervision or client relations," as these items fall on Mr. Glasco's role. (ECF No. 44 at PageID 546–47.) Defendants also claim that unlike EIW where Mr. Feivou had the sole decision-making authority, in Elite, both Mr. Feivou and Mr. Glasco have "equal voting power." (ECF No. 41-2 at PageID 156.)

Plaintiffs disagree. They argue that management and supervision are substantially identical because Mr. Feivou's "continued management of [Elite] and ownership was and is substantial," and that using EIW's existing infrastructure was "the only way [Elite] could perform its 'first' job." (ECF No. 43 at PageID 275; No. 43-12 at PageID 532–33.) Plaintiffs also point out that Mr. Feivou admitted in his deposition that he still maintains a supervisory role at Elite. (ECF No. 43-2 at PageID 344–45.)

The Court finds that Plaintiffs have put forth enough evidence to show a genuine issue of fact related to management and supervision of the companies. While Plaintiffs may have an uphill battle to invoke imposition of alter ego between the companies, there is enough evidence of management and supervisory overlap for a reasonable jury to find these factors favor an alter ego finding.

C. Business Purpose and Customers

The business purpose factor examines the overlap in the "type of work performed." *Boudrow*, 919 F.3d at 368. When companies are "engaged primarily in the same type of work," this factor weighs towards finding alter ego status. *Crossroads*, 178 F.App'x at 533. But alter ego status can also be imposed even where the purposes are "generally separate but not mutually exclusive." *Painters*, 371 Fed. Appx. at 660 (finding alter ego status between two painting contractors where one focused on the public sector and the other on the private sector).

Meanwhile, the customers factor looks for overlap in both actual "customers" and "customer base." *Boudrow*, 919 F.3d at 378 (favoring the finding of alter ego status where 15 of 22 customers were former customers of the defunct company); *see also Dorn*, 669 F.3d at 796 (disfavoring the finding of alter ego status where 9 of 250 customers were former customers of the defunct company).

Defendants argue that both business purpose and customers are not substantially identical. Even if both entities are ironworks companies, Defendants argue that Elite has an in-house fabrication shop that EIW did not have, and that Elite performs "large-structural and beam work" projects that EIW could never do. (ECF No. 41-2 at PageID 158–59.) And Defendants argue that Elite has projects in Nashville and Florida where EIW limited its reach to the Memphis area. (*Id.*)

Plaintiffs point out that Elite's expansion in both scope of work and customer base should not discount the fact that both companies primarily engage in "structural and miscellaneous steel fabrication and metal building installation in the Memphis area." (ECF No. 43 at PageID 275–76.) They also contend that both companies bid for the same type of work. (ECF No. 43-12 at PageID 533.)

The Court finds that Plaintiffs have proffered enough evidence to claim that both business purpose and customers factors could favor a finding for the Plaintiffs. Both Elite and EIW are ironworks business. While Elite has grown both the scope and clientele of its ironworks business, a reasonable jury could weigh the companies' similarities at Elite's infancy and find that these factors favor an alter ego finding.

D. Operations and Equipment

The operations factor considers the business operations and the continuity of the workforce. *See Allcoast*, 780 F.d at 583; *Boudrow*, 919 F.3d at 377. And the equipment factor "looks to whether new company acquired any of the older company's equipment, and if so, whether the acquisition was an arm's-length transaction." *Boudrow*, 919 F.3d at 378.

Defendants argue that even though both EIW and Elite share the same "address of record," they only did it for convenience as Elite "never operated the business" from there. (ECF No. 44 at PageID 548; 43-1 at PageID 284.) Defendants also contend that Elite has 42 employees, and only 3 were employed by EIW. (ECF No. 41-2 at PageID 159.) As for equipment, Defendants argue that Elite has acquired "the bulk" of its equipment from other sources, and any equipment acquired from EIW is "insubstantial." (ECF No. 44 at PageID 550.)

Plaintiffs maintain that Defendant Elite still lists its address of record at 88 Rae Drive, Munford, Tennessee—the same location as EIW's principal place of business. (ECF No. 43 at PageID 276; 43-9 at PageID 457.) Plaintiffs also contend that the only way Elite "could perform its 'first' job would be with the participation of Russell Feivou, his welding machine, truck, and [EIW] employees Alexander Cook and Blaine Samudio." (ECF No. 43 at PageID 275.) Plaintiffs also submit that, aside from the welding machine, Defendants use Mr. Feivou's truck which still has an "[EIW] sign on it." (ECF No. 43-12 at PageID 533.) Finally, Plaintiffs argue that "[EIW] allegedly ceased doing business just as [Elite] began to do business." (ECF No. 43 at PageID 275.) Plaintiff presented deposition testimony suggesting that at a minimum, Elite absorbed unfinished EIW projects, and that Mr. Feivou transferred EIW's insurance contacts into Elite by simply "changing the name from [EIW] to [Elite]." (ECF No. 43-2 at PageID 334–36.)

Defendants may claim that Elite operates its business elsewhere and only used EIW's address "for convenience." But they do not dispute that Elite's principal place of business is the same as EIW's. On that basis, a reasonable jury could find that this factor favors the Plaintiffs. What is more, Defendants may claim that the equipment Elite received from EIW is "insubstantial," but this is also an assessment that a jury should make given Plaintiffs' proffered testimony in opposition. Finally, the Court acknowledges that Elite's current employee roster has grown far bigger than EIW's. But Plaintiffs' contention that circumstances of Elite's beginning at EIW's ending could persuade a jury to favor an alter ego finding. As a result, the Court finds that a jury could find both operations and equipment factors weigh for the Plaintiffs.

E. Defendants' Intent

The intent factor looks to "evidence of intent on the part of two companies to avoid the effect of a collective bargaining agreement." *Dorn*, 669 F.3d at 796.

Defendants argue there is "no evidence that the formation of [Elite] was part of an intentional effort to shirk obligations of EIW under the CBA." (ECF No. 41-2 at PageID 161.) They submit that "EIW simply failed as a business," and that "[Elite] was a new and different enterprise" that was "careful to satisfy all outstanding debts of EIW." (*Id.*) And Defendants point out that Elite even tried to pursue "possible individual job contracts with the Union, but the Union refused." (*Id.*)

Plaintiffs do not dispute that Mr. Feivou satisfied EIW's $10,232.01 debt to the Union. Plaintiffs' position is that EIW's obligations, as part of the payment plan, did not end at payment: Defendants breached other plan requirements like failing to "file monthly reports and pay required monthly contributions and dues." (ECF No. 1 at PageID 4; 43-1 at PageID 290.) Plaintiffs also submit Mr. Cole's declaration that the Union rejected Elite's proposal to execute

an agreement with the Union because EIW and Elite are "alter ago companies," and Elite is a "disguised continuance of [EIW]." (ECF No. 43 at PageID 268; 43-1 at PageID 289.) Besides, Mr. Cole claims that Mr. Glasco "has hard feelings for the Local Union" as Mr. Glasco was terminated from the Union's "Training Fund Committee." (ECF No. 43-12 at PageID 533.) So he claims that "Glasco and Feivou . . . are attempting to benefit from the trained skilled ironworkers without having to comply with the [CBA]." (*Id.*)

In the end, both parties argue over the intent factor which, without direct evidence, becomes a credibility contest between Mr. Feivou and Mr. Glasco for the Defendants, and Mr. Cole for the Plaintiffs. This conundrum is best illustrated by the Parties' contrasting views on the CBA's significance in finding intent. Plaintiffs argue that Mr. Feivou and Mr. Glasco "decided not to honor the collective bargaining obligations," when they founded Elite. (ECF No. 43 at PageID 276.) Defendants' counter that Plaintiffs "mischaracterized Mr. Feivou's testimony as stating that he and Glasco decided not to honor the CBA . . . when in reality the testimony was that [Elite] elected not to enter into a [CBA]" at all. (ECF No. 44 at PageID 551.) But Plaintiffs' ultimate point is that Elite already has a CBA with the Union because EIW and Elite are "alter ago companies," and that Elite is a "disguised continuance of" EIW. (ECF No. 43 at PageID 268; 43-1 at PageID 289). As it currently stands, a finding of intent depends on who is telling the truth. Because the Court must construe inferences in the Plaintiffs' favor, the Court finds that the intent factor favors Plaintiffs.

CONCLUSION

Whether or not Elite and EIW are alter ego entities, the Court notes that Defendant Elite has expanded significantly since its incorporation. It follows that its customers, equipment, and operations have changed over time. But the Sixth Circuit's test is flexible, and permits

inspection of the factors at Elite's inception. And the Court recognizes the Sixth Circuit's command to apply the test in a "more relaxed, less exacting fashion . . . to effectuate federal labor policies." *Dorn* 669 F.3d at 794 (quoting *Fullerton*, 910 F.2d at 336).

All in all, whether Elite is a "disguised continuance" of EIW is a fact-intensive inquiry that depends on the totality of circumstances related to the eight factors discussed above. Because the Court must construe the evidence in the light most favorable to Plaintiffs and draw all factual inferences their favor, the Court finds that a balancing of the factors supports a finding that there remain genuine issues of material fact over whether Elite is EIW's alter ego. The Plaintiffs have proffered enough evidence to support triable issues of material fact for all eight factors. Defendants are not entitled to judgment as a matter of law, and a jury will have to decide this dispute. The Court therefore **DENIES** Defendant's motion for summary judgment.

SO ORDERED, this 22nd day of September, 2022.

s/Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE