

SRC Painting, LLC, PBN, LLC, and Liquid Systems, and James Wierzbicki, Karen Wierzbicki, Edmund Wierzbicki, Eric Wierzbicki, Constance Wierzbicki, and Erin Wierzbicki, Individually and International Union of Painters and Allied Trades, District Council No. 7, AFL-CIO. Cases 30-CA-16577-1 and 30-CA-16813-1

March 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On September 14, 2005, Administrative Law Judge Joseph Gontram issued the attached decision. The General Counsel filed limited exceptions and a supporting brief. Exceptions were also filed by Respondents Edmund Wierzbicki and Liquid Systems, LLC, by Respondent Erin Wierzbicki, and by Respondents James, Karen, Eric, and Constance Wierzbicki. The General Counsel filed an answering brief, and answering briefs were also filed by Respondents Edmund Wierzbicki and Liquid Systems, LLC and by Respondents James, Karen, Eric, and Constance Wierzbicki.

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 and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt his recommended Order as modified and set forth in full below.²

The judge found that the three corporate respondents—SRC Painting, LLC (SRC Painting), PBN, LLC (PBN), and Liquid Systems, LLC (Liquid Systems)—were alter egos of each other³ and that the corporate respondents violated Section 8(a)(1), (3), and (5) of the Act.⁴ The

¹ Respondents Edmund Wierzbicki and Liquid Systems have accepted 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, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order to conform to the Board's standard remedial language and, pursuant to the General Counsel's exceptions, to make clear that the Respondents' liability is joint and several. We shall substitute a new notice to conform to the Order as modified.

³ There are no exceptions to the judge's finding that SRC Painting and PBN are alter egos. Respondents Edmund Wierzbicki and Liquid Systems except to the judge's finding that Liquid Systems is an alter ego of SRC Painting and PBN.

⁴ There are no exceptions to the judge's findings of unfair labor practices or to his finding that Liquid Systems did not violate Sec. 8(a)(3) by reducing the number of employees.

judge further found that each of the six individual respondents is individually liable for the unfair labor practices.⁵

We agree with the judge, for the reasons set forth in his decision, that Liquid Systems is an alter ego of SRC Painting and PBN.⁶ We further agree with the judge that Erin Wierzbicki is individually liable for Liquid Systems' unfair labor practices.⁷ We further agree with the judge, for the reasons set forth in his decision, that Edmund Wierzbicki is individually liable for the unfair labor practices.⁸ However, as explained below, we reverse the judge's findings that Karen and Constance Wierzbicki are individually liable for the unfair labor practices.

The Individual Liability of Respondents Karen
and Constance Wierzbicki

Whether the Board will pierce the corporate veil to hold an individual liable for corporate unfair labor practices is governed by the analysis set forth in *White Oak*

⁵ There are no exceptions to the judge's findings that James and Eric Wierzbicki are individually liable for the unfair labor practices or that Erin Wierzbicki is individually liable for the unfair labor practices of SRC Painting and PBN. Respondent Erin Wierzbicki excepts to the judge's finding that she is individually liable for the unfair labor practices of Liquid Systems. Respondents Edmund Wierzbicki and Liquid Systems except to the judge's finding that Edmund Wierzbicki is individually liable for the unfair labor practices. Respondents James, Karen, Eric, and Constance Wierzbicki except to the judge's findings that Karen and Constance Wierzbicki are individually liable for the unfair labor practices.

⁶ Chairman Battista adheres to his position that the General Counsel must show, among other things, an intent to avoid legal obligations under the Act in order to prove alter ego status. See *Crossroads Electric, Inc.*, 343 NLRB 1502 fn. 2 (2004). However, the Respondents here do not press this contention and Chairman Battista accordingly concurs in his colleagues' finding of alter ego status without reaching the motive for Liquid Systems' creation.

⁷ In finding that Erin Wierzbicki is individually liable for Liquid Systems' unfair labor practices, we rely on the judge's finding, which we adopt, that Liquid Systems is an alter ego of SRC Painting and PBN and on the judge's unexcepted-to finding that Erin Wierzbicki is individually liable for the unfair labor practices of SRC Painting and PBN. SRC Painting and PBN, as alter egos of Liquid Systems, are liable for Liquid Systems' unfair labor practices. Erin Wierzbicki is individually liable for SRC Painting's and PBN's unfair labor practices. Accordingly, Erin Wierzbicki is individually liable for Liquid Systems' unfair labor practices through her liability for SRC Painting's and PBN's unfair labor practices.

⁸ *A. J. Mechanical, Inc.*, 345 NLRB 295 (2005), is distinguishable. In that case, the Board found that the owner of the respondent corporation was not individually liable for the corporation's unfair labor practices. However, in *A. J. Mechanical*, the evidence, particularly the timing of the unfair labor practice charges, failed to demonstrate that the asset distributions to the owner (pursuant to a lawfully-adopted corporate liquidation plan) met the test for piercing the corporate veil. See discussion infra. In the instant case, by contrast, the evidence, including the timing of the unfair labor practice charges, demonstrates that the asset distributions for noncorporate purposes did meet the test. Member Liebman, consistent with her dissent in *A. J. Mechanical*, finds the factual distinction between that case and the present one immaterial.

Coal Co., 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996). Under *White Oak*, the General Counsel must prove both parts of a two-prong test. *Id.* at 734. Under the first prong, the Board analyzes whether the corporation and the individual have failed to maintain their separate identities. *Id.* at 735. Under the second prong, the Board analyzes whether third parties may be damaged by this failure—that is, whether “adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.” *Id.* This potential damage to third parties includes “the diminished ability of the [corporation] to satisfy [its] statutory remedial obligations.” *Id.* “The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form.” *Id.* In order to satisfy the second prong, however, the individual alleged to be individually liable must have “participated in the fraud, injustice, or inequity.” *Id.*

In the instant case, the judge found that the identities of the three corporations were commingled with the identities of the Wierzbicki family members. The judge also found that corporate assets were distributed for noncorporate purposes, thereby diminishing the corporations’ ability to satisfy their obligations, including their obligations to remedy their unfair labor practices.

With regard to the requirement that the individual must have “participated in the fraud, injustice, or inequity,” the judge found that Respondents James, Eric, Erin, and Edmund Wierzbicki each actively participated in the operations of the corporate respondents, including the distribution of corporate assets for non-corporate purposes. The judge did not address the issue of whether Respondents Karen or Constance Wierzbicki likewise actively participated in the operations of the corporate respondents. Instead, the judge noted evidence showing that the corporate respondents distributed corporate assets to and on behalf of Karen and Constance for noncorporate purposes—that is, the corporate respondents paid cash to Karen totaling over \$5000, paid Karen’s car payments, made mortgage payments on Karen’s principal residence as well as mortgage and utility payments on Karen’s alternate residence, paid cash to Constance totaling over \$21,000, and made payments on a car owned by either Constance or Erin. Relying upon these corporate payments to Karen and Constance for noncorporate purposes, the judge concluded that Karen and Constance had participated in the diminution of corporate assets and therefore were individually liable for the corporations’ unfair labor practices. We disagree.

Under *White Oak*, the mere receipt of corporate payments for noncorporate purposes does not establish that

Karen or Constance participated in the abuse of the corporation. As the Tenth Circuit explained in *NLRB v. Greater Kansas City Roofing*,⁹ whose analysis the Board explicitly adopted in *White Oak*: “[A] necessary element of the [piercing-the-corporate-veil] theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege.” 2 F.3d at 1053 (quoting from 1 Fletcher, *Cyclopedia of Corporations* § 41.20, at 639 (1990)). For this reason, a person’s passive receipt of benefits that derive from a diversion of corporate assets for noncorporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the *White Oak* analysis. See *Smith Barney, Inc. v. Strangie*, 192 F.3d 192 (1st Cir. 1999) (finding wife who may have personally benefited from husband’s diversion of corporate assets for noncorporate purposes not individually liable); *Firstmark Capital Corp. v. Hempel Financial Corp.*, 859 F.2d 92, 95 (9th Cir. 1988) (finding wife who personally benefited from husband’s diversion of corporate assets for noncorporate purposes not individually liable). In other words, where the individual alleged to be liable plays no active role in the corporation’s operations, that individual has not effectively become the business entity simply upon receipt of funds or other corporate assets, and accordingly cannot be held liable for the corporation’s obligations.¹⁰

Here, the General Counsel failed to present any evidence that Karen or Constance played an active role in the operations of any of the three respondent corporations. They did not even perform routine clerical functions or rank-and-file painting work. They did not become the business entity. Accordingly, even though they received assets from the corporations, they are not individually liable for the business entities’ obligations.

The General Counsel argues that Constance should be held individually liable because SRC Painting and PBN used a room in Constance’s house as their office but frequently failed to make monthly rental payments, and that Constance took no action in response to this failure.¹¹

⁹ 2 F.3d 1047 (10th Cir. 1993).

¹⁰ We note that there is no allegation or evidence that Karen or Constance is an owner of any of the corporations, and we accordingly do not address the issue of whether corporate ownership would satisfy the participation requirement.

¹¹ SRC Painting operated from mid-2000 through mid-2003; PBN operated from mid-2003 through early 2004. The 2002 and 2003 SRC Painting ledgers and the 2003 PBN ledger were introduced into evidence. The ledgers show rent payments to Constance of \$2000 in January, February, March, April, May, July, and September 2002, of \$3000 in February 2003, and of \$2500 and \$2000 in July 2003.

The General Counsel argues that Constance forewent monthly rent payments to which she was legally entitled and that by doing so she “actively aided” the corporations, thereby satisfying the *White Oak* participation requirement. The contention lacks merit.

Assuming arguendo that Constance aided the corporations by not seeking additional rent, such action would not satisfy the *White Oak* participation requirement. As the Board stated in *White Oak*: “The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from the misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity found.” *Id.* at 735. Here, the effect of Constance’s alleged aid to the corporations would have been to increase, not decrease, the corporate assets available to satisfy the corporations’ obligations to third parties. That is, her failure to collect rent meant more financial assets remained with the corporations. Accordingly, Constance’s alleged participation in the corporations’ operations did not extend to corporate operations falling within the second prong of the *White Oak* analysis and therefore does not satisfy the participation requirement. See *NLRB v. Greater Kansas City Roofing*, supra, 2 F.3d at 1055 (where net of owner’s transactions with corporation showed that owner contributed rather than withdrew corporate assets, owner not individually liable for corporation’s obligations).

For these reasons, we find that Respondents Karen and Constance Wierzbicki are not individually liable for the corporate respondents’ unfair labor practices.¹²

ORDER

The National Labor Relations Board orders that Respondents SRC Painting, LLC, PBN, LLC, and Liquid Systems, LLC, their officers, agents, successors, and assigns, and Respondents James Wierzbicki, Edmund

Wierzbicki, Eric Wierzbicki, and Erin Wierzbicki, individually, their agents, successors, and assigns, shall jointly and severally

1. Cease and desist from

(a) Failing and refusing to recognize International Union of Painters and Allied Trades, District Council No. 7, AFL–CIO (the Union) and to bargain collectively with the Union as the exclusive bargaining representative of unit employees.

(b) Failing and refusing to apply the terms and conditions of the collective-bargaining agreement between the Union and SRC Painting effective June 1, 2002, to May 31, 2004 (the Agreement), and any automatic renewals or extensions of the Agreement, including failing and refusing to make payments for or to the Union’s health, welfare, vacation, apprenticeship, pension, and other funds as required by the Agreement.

(c) Bypassing the Union as the exclusive representative of the employees in the bargaining unit and dealing directly with those employees over their terms and conditions of employment.

(d) Discharging or otherwise discriminating against any employee for supporting the Union or engaging in protected activities.

(e) Threatening employees with adverse employment actions, including discharge, for engaging in union activities.

(f) In any like or related 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) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All painters, drywall finishers, wall coverers, and similar or related classifications, excluding guards and supervisors as defined in the Act.

(b) Continue in full force and effect the Agreement, and any automatic renewals or extensions of it, unless and until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

(c) Make all delinquent payments to the Union’s health, welfare, vacation, apprenticeship, pension, and other funds as required by the Agreement, moneys which have not been paid and which would have been paid in the absence of the Respondents’ unlawful unilateral discontinuance of such payments on and after April 30, 2003, and reimburse employees for any expenses result-

¹² Member Liebman observes that the General Counsel has not argued that Karen and Constance Wierzbicki are individually liable under a fraudulent transfer theory of liability—that is, that Karen and Constance received corporate assets without consideration under circumstances rendering them liable to corporate creditors to the extent of the value of the transferred assets. See *F & W Oldsmobile*, 272 NLRB 1150, 1151 (1984) (applying fraudulent transfer theory despite use of piercing-the-corporate-veil terminology); *Marsco, Inc.*, 287 NLRB 923, 928 (1987), enf. denied on other grounds 873 F.2d 884 (6th Cir. 1989); *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 419 F.3d 594 (7th Cir. 2005) (Posner, J.) (articulating the different bases—fraudulent transfer and piercing the corporate veil—for imposing individual liability for corporate obligations). The Board, consequently, has made no findings or conclusions here concerning the merits of such a theory, and it may be relevant to satisfaction of the Respondents’ make-whole obligations under the Board’s order. Fraudulent conveyances may also be pursued under the Federal Debt Collection Procedure Act, 28 U.S.C. § 3304, 3306.

ing from the failure to make the required payments, in the manner set forth in the remedy section of the judge's decision.

(d) Make whole unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondents' failure to comply with the Agreement since April 30, 2003, in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, offer Brent George full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Brent George whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(g) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharge, and within 3 days thereafter notify Brent George in writing that this has been done and that the discharge will not be used against him in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their places of business and at each of their jobsites copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondents' authorized representative(s), shall be posted by the Respondents 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 the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Liquid Systems has gone out of business or closed its place of business at 3142 94th Place, Pleasant Prairie, Wisconsin, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all

current employees and former employees employed by the Respondents at any time since April 30, 2003.

(j) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it is willing, at its office and meeting halls, including all places where notices to members are customarily posted.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to recognize and bargain with the International Union of Painters and Allied Trades, District Council No. 7, AFL-CIO (the Union) as the exclusive bargaining representative of our unit employees.

WE WILL NOT fail or refuse to apply the terms and conditions of the collective-bargaining agreement between the Union and SRC Painting effective June 1, 2002, to May 31, 2004 (the Agreement), and any automatic renewals or extensions of the Agreement.

WE WILL NOT fail or refuse to make contributions for or to the Union's health, welfare, vacation, apprenticeship, pension, and other funds as required by the Agreement.

¹³ 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."

WE WILL NOT bypass the Union as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT deal directly with those employees over their terms and conditions of employment.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other union.

WE WILL NOT threaten employees with adverse employment actions, including discharge, for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All painters, drywall finishers, wall coverers, and similar or related classifications, excluding guards and supervisors as defined in the Act.

WE WILL continue in full force and effect the Agreement, and any automatic renewals or extensions of it, unless and until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

WE WILL make all delinquent payments to the Union's health, welfare, vacation, apprenticeship, pension, and other funds, as required by the Agreement, including any additional amounts due the funds, monies which have not been paid and which would have been paid in the absence of our unlawful discontinuance of such payments on and after April 30, 2003, and WE WILL reimburse employees for any expenses resulting from our failure to make the required payments.

WE WILL make whole unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure to comply with the Agreement since April 30, 2003.

WE WILL, within 14 days from the date of the Board's Order, offer Brent George full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Brent George whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Brent George and, WE WILL, within 3 days thereafter, notify him in writing that this has been

done and that the discharge will not be used against him in any way.

SRC PAINTING, LLC, PBN, LLC, LIQUID SYSTEMS, LLC, JAMES WIERZBICKI, EDMUND WIERZBICKI, ERIC WIERZBICKI, AND ERIN WIERZBICKI

Miann B. Navarre, Esq. and *Brent E. Childerhose, Esq.*, for the General Counsel.

Franklin M. Gimbel, Esq. and *Oliver Kaufman, Esq.* (*Gimbel, Reilly, Guerin & Brown*), of Milwaukee, Wisconsin, for Respondents, James, Eric, Karen, and Constance Wierzbicki.

Frederick L. Zievers, Esq. (*Zievers, Marry & Dowse, S.C.*), of Kenosha, Wisconsin, for Respondent, Erin Wierzbicki.

Piermario Bertolotto, Esq. and *William Nickolai, Esq.* (*Rizzo & Diersen, S.C.*), of Kenosha, Wisconsin, for Respondents Edmund Wierzbicki and Liquid Systems, LLC.

Donald H. Cardinali, Business Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was heard in Milwaukee, Wisconsin, on December 6–9, 2004, and March 6–8, 2005. The International Union of Painters and Allied Trades, District No. 7, AFL–CIO (the Union or the Charging Party) filed charge Case 30–CA–16577 against SRC, LLC¹ on September 3, 2003. The charge was amended four times, most recently on August 19, 2004.² A complaint was issued on March 30. The Union filed charge Case 30–CA–16813 against Liquid Systems on April 28. The charge was amended twice, most recently on August 19. On September 24, an amended and consolidated complaint was issued in both cases.

The complaint alleges that PBN, LLC (PBN) was started as a disguised continuation or alter ego of SRC Painting, LLC (SRC Painting), and that Liquid Systems, in turn, was started as a disguised continuation or alter ego of SRC Painting and PBN. The complaint alternatively alleges that PBN is a successor to SRC Painting, and Liquid Systems is a successor to SRC Painting and PBN. The complaint alternatively alleges that SRC Painting, PBN, and Liquid Systems constitute a single employer.

The complaint also alleges that James Wierzbicki, his wife Karen, his son Eric, and Eric's wife Constance, his son Edmund, and his daughter Erin (collectively, the Wierzbickis) acted as alter egos of PBN, SRC Painting, and Liquid Systems, and are personally liable for remedying the unfair labor practices of those companies.

The unfair labor practices alleged in the complaint are that the Respondents (1) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to transmit dues to the Union and contributions to the Union's health, wel-

¹ In the hearing, this company was called SRC, Inc. Accordingly, that designation will be used in this decision.

² All dates are in 2004, unless otherwise indicated.

fare, vacation, apprenticeship, and pension funds, by refusing to honor the terms of the collective-bargaining agreement with the Union, and by refusing to recognize and bargain with the Union; (2) violated Section 8(a)(1) by threatening an employee with discharge if the employee did not relinquish his union apprenticeship; and (3) violated Section 8(a)(1), (3), and (4) by laying off an employee and by eliminating unit employees in order to reduce the Respondents' obligations under the Act.

James, Eric, and Erin admit that they are supervisors and agents of SRC Painting and PBN; that they have controlled the day-to-day management, labor relations policies, business operations, and financial resources of SRC Painting and PBN; that they have failed to maintain the legal identities of SRC Painting and PBN distinct from themselves; that they have commingled their personal assets with the corporate assets of SRC Painting and PBN; and that, by failing to maintain the separate corporate identities of SRC Painting and PBN, they have engaged in fraud, injustice, and evasion of their legal obligations under the Act. (Amended and consolidated complaint, pars. 7, 8, 10, and 12; Tr. 746-749.) They also admit that PBN is an alter ego of SRC Painting. Edmund admits that he is a supervisor and agent of Liquid Systems pursuant to Section 2(11) and (13) of the Act.

With respect to identifying the party or parties who would be liable for the alleged unfair labor practices, the remaining issue for decision is whether Liquid Systems is the alter ego of or successor to or single employer with SRC Painting or PBN. Nevertheless, in order to appreciate and understand the relationship of Liquid Systems to SRC Painting and PBN, it is necessary to describe those companies and the Wierzbickis' involvement with SRC Painting and PBN. Moreover, while the Respondents do not concede the unfair labor practice charges, they have not seriously disputed the facts underlying the charges and have not addressed these charges in their posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Wierzbickis, and Liquid Systems, I make the following

FINDINGS OF FACT

I. JURISDICTION

SRC Painting and PBN were engaged in the painting subcontracting business and had an office and place of business at the residence of Eric Wierzbicki at 3020 94th Place, Pleasant Prairie, Wisconsin. Liquid Systems is engaged in the painting subcontracting business and has a place of business at the residence of Edmund Wierzbicki at 3142 94th Place, Pleasant Prairie, Wisconsin. Liquid Systems admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Moreover, SRC Painting and PBN engaged in the same business as Liquid Systems, although SRC Painting and PBN had more business and a larger work force than Liquid Systems. Accordingly, I find that SRC Painting and PBN are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.³ The Union has represented the fol-

lowing unit employees of SRC Painting, and has entered into a series of collective-bargaining agreements with SRC Painting: "All painters, drywall finishers, wall coverers, and similar or related classifications, excluding guards and supervisors as defined in the Act." I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

James Wierzbicki is 55 years old, and he has been married to Karen Wierzbicki for 37 years. James and Karen have three children, Edmund (31 years old), Eric (28 years old), and Erin (26 years old). The last time James reported any income from working was approximately 1985, when he was about 35 years old. Prior to 1985, James was in the painting business. He was injured in a car accident in approximately 1985. He claims to be disabled as a result of that car accident, and has collected social security disability benefits since that time. Despite his claim to the Social Security Administration that he is disabled, James refers to his working status as "retired." (Tr. 32.)⁴

Since approximately 1985, James has owned no real property. Nor has he owned or held any liquid personal property, such as bank accounts, although, curiously, when he was asked if he held any bank accounts, he replied, "None. None in my name." (Tr. 33.) He later corrected that statement by denying he held bank accounts in anyone else's name. Since approximately 1985, James has not owned any vehicles or any other item of personal property that has value or could be converted to cash. James has not filed Federal income tax returns for at least the past 4-5 years.

James claims to be disabled and unable to work. James has made this claim to the Social Security Administration, and as a result, he receives approximately \$1400 per month from the Social Security Administration for his claimed disability. Karen works part time as a gift shop clerk. She works 20 hours a week and earns approximately \$9 per hour. Despite this limited income, James and Karen reside in a single-family house, and they drive and have unrestricted access to at least three vehicles. Their sons, Eric and Edmund, own James and Karen's residence; their daughter, Erin, owns the cars they drive. James spends much of his time at a house in Trego, Wisconsin. Edmund owns the Trego property. The ownership and location of the Wierzbickis' residences are:

tems appears to be limited to its subcontracting work for New England Builders at the Harbor Park project, while SRC Painting and PBN had work in addition to the Harbor Park project. SRC Painting and PBN filed no answer to the present complaint and were not represented at the hearing. However, in light of the admissions of James, Eric, and Erin, who were present and represented at the hearing, regarding their control of and fraudulent use of SRC Painting and PBN, all parties had notice of the jurisdictional allegations and sufficient opportunity to oppose or litigate these jurisdictional allegations.

⁴ References to the transcript of the hearing are designated as Tr.

³ The amount and extent of Liquid Systems' business is equal to or less than SRC Painting and PBN because the business of Liquid Sys-

Name	Residence	Owner
James, Karen, and Erin	6801 22nd Avenue, Kenosha, WI	Eric and Edmund
James and Karen	Ridge Road, Trego, WI	Edmund
Eric and Constance	3020 94th Place, Pleasant Prairie, WI	Constance
Edmund	3142 94th Place, Pleasant Prairie, WI	Erin

James Wierzbicki is a forceful, intelligent, self-confident individual who is devoted to his family and to the painting business he has built around his family. And while his demeanor displayed these characteristics, his demeanor just as clearly displayed an uninhibited mendacity when testifying about his and his family's business affairs. His family members followed his lead.

B. The Wierzbicki Businesses

1. SRC, Inc.

Southport Remodeling and Construction, Inc. (SRC, Inc.) was started in 1994.⁵ Throughout SRC, Inc.'s existence, its offices were located at James Wierzbicki's residence, 6801 22nd Avenue, Kenosha, Wisconsin. SRC, Inc.'s business was primarily painting, although it also did some remodeling. Eric Wierzbicki testified that he started SRC, Inc. when he was approximately 17 years old, and that he was the president and 100 percent owner. Eric testified that the only help his father provided to the business was assistance on some bids. That testimony is not credible.⁶ SRC, Inc. did work similar to the work James did before he began collecting social security disability benefits. He had no previous experience starting or operating a business, bidding for or obtaining jobs, handling financial and administrative matters, or managing employees.

Eric testified that he does not "think" his father was paid for his work on behalf of SRC, Inc. (Tr. 241.) That testimony is not credible. Eric hedged his testimony because he undoubtedly knew that his father could not work and get paid for it while he was collecting social security disability benefits. The only reason Eric would hedge on the answer is if James was paid be-

⁵ Eric testified that he obtained the company, which was inactive, from a friend, and that he did not pay any money for the transfer. In this decision, the start of SRC is deemed to have occurred on the date of this transfer.

⁶ All facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text. With respect to the testimony regarding what occurred at meetings or discussions with members of the Wierzbicki family, I have also taken into account the economic dependence of employees on employers, with awareness of an employee's attentiveness to intended implications of his employer's statements which might be more readily dismissed by a disinterested party. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

cause there would be no need to qualify the answer if James was not paid. Moreover, whether his father received compensation from SRC, Inc. is something Eric would likely remember without regard to Eric's ownership of the Company. Eric's testimony that he does not think his father was paid is not credible.

Eric Wierzbicki manages his personal affairs much like his father. Eric is married to Constance and has one child. Eric claims that he has no income. He has not filed a Federal income tax return since at least 2000. He does not have a bank account, and he has not had one since at least 2000. Eric owns no vehicles, but like his father, he currently drives any one of three vehicles. When asked if he currently has any assets, Eric replied, "Nope." (Tr. 233.) Eric's wife, Constance, like his mother, is employed. Constance has been employed as a medical technologist for approximately 5 years. She claims to work about 48 to 56 hours per week and earns \$21.60 per hour. Constance drives either of two vehicles.

There were two supervisors/managers at SRC, Inc.—James and Eric Wierzbicki. Eric did painting work and he acted as the foreman. James supervised SRC, Inc.'s operations, he supervised the completion of the contracts, and he supervised the work force. One of the workers James hired was Andrew Kellerman. James set Kellerman's wage at between \$8–10 per hour. Kellerman was about 18 years old when James hired him. Kellerman was a high school friend of Eric and had become friends with the Wierzbicki family.

2. SRC Painting, LLC

SRC, Inc. ceased operating in the summer of 2000, and the business was taken over by SRC Painting. In July or August 2000, James Wierzbicki told Kellerman that he wanted to close SRC, Inc. because the Painter's Union District Council 30, a union from Chicago, was suing it. James said he wanted to form a new company, which would be called SRC Painting, LLC. James told Kellerman that he (James) needed help, and he wanted Kellerman to be the figurehead president and nominal owner of SRC Painting. James would be the real owner as well as "the brains of the operation." (Tr. 623.) In return, James promised Kellerman a car, the use of a gas card, and an increase in pay.

SRC Painting was essentially a continuation of SRC, Inc. The same people were in control of both companies, many of the employees were the same, and the same job that comprised approximately 90 percent of SRC, Inc.'s work, viz., the contract with New England Builders at Harbor Park, comprised a similar percentage of SRC Painting's work. SRC, Inc. transferred equipment to SRC Painting, but there is no evidence that any consideration was paid by SRC Painting for the transfer.

James used his personal attorney, Frank Parise, who is related to James, to draw up the documents making Kellerman the figurehead president and owner of SRC Painting. Included in those documents was a hold-harmless agreement signed by James and Kellerman, which provided that Kellerman had no control over SRC Painting, that Kellerman could not make any business decisions for the Company without the written permission of James, and that Kellerman was not responsible for SRC Painting's debts.

The General Counsel called Parise as a witness and subpoenaed the hold-harmless agreement, but Parise refused to produce the agreement because of James and Erin's assertion of the attorney-client privilege. Moreover, Parise refused to produce the agreement, either to Kellerman or the General Counsel, in spite of his testimony that Kellerman was his client. Kellerman believes that Parise never represented him. Kellerman never sought representation from Parise, he never paid Parise any money, and he never signed a fee agreement. He had never met Parise until the day James drove him to Parise's offices. Several times, Kellerman asked Parise to provide him with a copy of the hold-harmless agreement and any other documents Kellerman may have signed, his most recent request being at the hearing. Parise refused every request.

Parise either represented Kellerman, in which event he was obligated to provide his client with a copy of whatever documents his client signed and requested, or Parise did not represent Kellerman, in which event the attorney-client privilege would not shield such documents from disclosure because confidentiality would be waived by James, Erin, and Parise's initial disclosure of the document to Kellerman. Nevertheless, Parise refused to produce the documents. Parise either failed to appreciate the conflict of interest he faced, or he did appreciate it and elected to disobey the Board's subpoena at the urging of his family members, James and Erin. Without regard to the impropriety of Parise's actions, Kellerman generally described the provisions of the hold-harmless agreement. Moreover, Kellerman was a credible witness, and his description of the hold-harmless agreement is consistent with his testimony describing James' conception and formation of SRC Painting.

As noted, it is not necessary to consider the impropriety of Parise's actions in accepting the credible testimony of Kellerman regarding the hold-harmless agreement. Nevertheless, Parise's actions tend to corroborate the complete control exercised by James Wierzbicki in all matters pertaining to James' and his family's businesses. Moreover, since Kellerman had already testified, before Parise testified, about some of the provisions of the hold-harmless agreement, and since James, Eric, and Erin would concede that they controlled the management, policies, and operations of SRC Painting and PBN, there was no apparent reason for the Wierzbickis to refuse to produce the agreement unless it contained provisions in further contravention of their final position in this case, viz., that James, Eric, and Erin had no authority in or involvement with Liquid Systems and that Liquid Systems was not an alter ego of or successor of SRC Painting or PBN.

Throughout its existence, the offices of SRC Painting were located at Eric's residence, 3020 94th Place, Pleasant Prairie, Wisconsin, in a separate room in the back of the residence. Kellerman was only allowed in SRC Painting's offices when another member of the Wierzbicki family was there. Kellerman's actual position at SRC Painting was the lead painter and occasional foreman, and he would sometimes run errands for James. Erin was the office manager of SRC Painting. She kept the books, she distributed paychecks, and she paid union benefits. Edmund worked mostly as a painter. Eric supervised all the jobs except for the Harbor Park job. And, as James had done for SRC, Inc., James oversaw all operations of SRC Painting.

Erin is currently a full-time student, and she is collecting State unemployment compensation from her employment at SRC Painting.⁷ Erin worked at SRC Painting from 2000 to 2003, and during this time she claims that she was paid \$1000 a week. However, she testified in a deposition before the hearing that she was paid only \$15 an hour at SRC Painting, but this is just one of many instances where her testimony does not appear to be accurate.

Although Erin kept SRC Painting's books, she professed ignorance about many of the entries she made in those books. Her entries reflect frequent payments from SRC Painting to the Wierzbickis, many labeled as rent and loan repayments, but also including Erin's salary of more than \$1000 per week. (In salary alone, Erin made more than twice as much as Kellerman.) Included in these payments was \$2000 per month paid to Constance for the use of the back room in her residence and \$2500 per month to Edmund for allegedly storing paint supplies in his garage. Edmund also received payments from SRC Painting labeled as interest income, rent, general, accounts payable, payroll, and split. Constance received payments labeled as reimbursed expenses, rent, accounts payable, and general. Erin received payments labeled as note payable Erin, note payable [officer], split, payroll, general, misc., and accounts payable. Karen Wierzbicki received at least one payment labeled as accounts payable, she received a \$1000 payment that she could not explain, and she received a \$4000 payment labeled as note payable Erin. Some of the payments to Edmund, Constance, and Erin were made without corresponding check numbers (e.g., GC Exh. 23, p. 52), indicating that such payments were simply a means of generating cash for Edmund, Constance, and Erin. (See below.)

Erin acknowledged that SRC Painting's books show that she loaned over \$240,000 to the Company in 2002, for which she received many corresponding "repayments," but she offered no credible explanation of where she allegedly obtained \$240,000 to lend to SRC Painting. Moreover, there are no rental or loan documents that would tend to corroborate the validity or accuracy of any such payments or loans to or from Erin or the Wierzbickis. At times, Erin claimed to have borrowed money from SRC Painting, but she could not explain why or what she did with the money. (Tr. 176.) Erin also claimed that she borrowed \$30,000 from SRC Painting to build her house, but there was no documentation of or terms to the alleged loan, such as interest rate or due date. Other times, the books show that payments were made directly to a Wierzbicki, such as Edmund, but Erin, who maintained these books, had no explanation for the payments. (Tr. 166.)

In spite of Erin's position as the office manager and the person who kept the books, there were many entries in SRC Painting's financial records, including payments to Erin and other members of the Wierzbicki family, which she would not or could not explain. On the other hand, and thanks to the explana-

⁷ Notwithstanding Erin's application to the State of Wisconsin for unemployment compensation benefits, there is no evidence that she was ever discharged or involuntarily laid off by SRC Painting. Indeed, the evidence shows that she left her employment with SRC Painting and PBN voluntarily in order to attend school.

tion by Andrea Rogowski, the office manager of PBN who had been instructed by Erin, Erin did have a method for obtaining cash from SRC Painting. This cash was used, at least in part, to pay employees' wages, thus enabling the Wierzbickis to further evade the Company's obligations to other governmental authorities. Erin generated cash by designating such cash withdrawals as fictitious expenses of and payments to SRC Painting's supplier, ICI.⁸ These fictitious expenses are noted in SRC Painting's books by the absence of a check number.

Erin, James, Eric, and Edmund were not credible witnesses. They have frequent contact with one another; for example, James speaks with Edmund every day, they all live near each other and in each other's houses, they are closely involved in the operation of the family's businesses, and they receive all their income from those businesses. From the similarity of their testimony, it seemed as if James, Eric, Erin, and Edmund met before the hearing and discussed what they should say and not say at the hearing. For example, James, Eric, and Erin consistently maintained throughout their testimonies that Kellerman was the owner and president of SRC Painting and the person who ran the company and negotiated their pay and the rent they received from SRC Painting. However, after the General Counsel presented evidence showing that the Wierzbickis controlled the operations of SRC Painting and PBN, James, Eric, and Erin admitted that they did control the day-to-day management, labor-relations policies, business operations, and financial resources of SRC Painting and PBN. The Wierzbickis' contrary testimony was consistent, but misleading, and was designed to give a false impression of the persons—the Wierzbickis—who actually controlled and manipulated the corporations.

Erin exhibited a good recollection of matters when she was asked questions by the Respondents' attorneys, but a poor recollection when she was asked questions by the General Counsel. She was evasive, as were James, Eric, and Edmund. And, the Wierzbicki family, led by James, was present throughout her testimony. Indeed, the family members, including James, were present when each of the Wierzbickis testified. Moreover, Edmund was noticeably hostile to the General Counsel throughout his testimony. He seemed to take offense that the government, through the present complaint, should be involved in his family's businesses, and especially this proceeding involving a charge brought by a union.⁹

⁸ Using fictitious payments to ICI was the way Erin instructed Andrea Rogowski to generate cash when Erin trained Rogowski on keeping the books for PBN.

⁹ An example of Edmund's incredible testimony, which also, perhaps, shows the attitude he exhibited on the witness stand is the following:

Q. Now, did you ever loan PBN any money?

A. I believe so.

Q. Okay. When did that occur?

A. Probably when PBN was a company.

Q. Okay, so—you said that they ended in November of 2003 and they operated for about a year—so roughly some time in 2003, how much money did you loan PBN?

A. I don't remember.

Q. Could you give us a ballpark?

A. I don't remember.

Another example of the Wierzbickis' consistency while advocating a misrepresentation is that each of the Wierzbickis concealed the fact that Kellerman was merely the nominal president of SRC Painting, and that he had no real ownership or authority in the corporation. Erin claimed, for example, that she negotiated her salary with Kellerman and that she conferred with Kellerman on the Company's financial matters. This testimony was false and was intended to convey the false impression that Kellerman controlled SRC Painting and that the Wierzbickis did not. The Wierzbickis testified similarly with respect to PBN and Scott Maurer. (See below.) However, after other witnesses testified and revealed that the Wierzbickis controlled SRC Painting and PBN, James, Eric, and Erin conceded their actual control of SRC Painting and PBN. However, these concessions were not made until after James, Eric, and Erin testified and knowingly gave false impressions about their roles and Kellerman's role in SRC Painting, as well as their roles and Maurer's role in PBN.

Although James, Eric, and Erin conveyed false impressions about their authority and control over SRC Painting and PBN, their testimonies concerned an issue they had not yet conceded. Edmund, on the other hand, testified in a similar false and misleading fashion concerning his family's involvement with SRC Painting and PBN, but his testimony was given after the concessions were made. Thus, after James, Eric, and Erin conceded that they controlled the day-to-day management, labor relations policies, business operations, and financial resources of SRC Painting and PBN, Edmund testified that he can only guess that his brother Eric owned SRC, Inc., but he knows that Kellerman owned SRC Painting and Maurer owned PBN (Tr. 757–763).

Many other portions of Edmund's testimony are not credible. For example, Edmund claims he does not remember if he ever received any money from SRC Painting except wages for paint-

Q. Who did you loan the money to.

A. PBN.

Q. And what kind of documents do you have to memorialize the loan?

A. Whatever you have probably got there. I don't have any.

Q. Who did you negotiate the loan with—what person?

A. I don't remember.

Q. What interest rate was given to the loan?

A. Don't remember.

Q. So there was no written documentation to accompany any loan that you provided to PBN, is that correct?

A. I didn't say that. I said I don't remember.

Q. What kind of work did you perform for PBN?

A. I didn't work for PBN.

Q. Okay, so you were never employed by PBN?

A. Nope.

Q. Other than rent that you described, you received no other compensation from PBN?

A. Don't remember.

Q. You never worked on a PBN job site?

A. Can you rephrase that question again?

Q. Sure. Did you ever work on a PBN job site?

A. Yes, I have.

(Tr. 765–766.) Edmund then explained that he had worked for PBN at the Harbor Park jobsite, contradicting his preceding statement that he had not worked for PBN. The foregoing is just an example of the type of testimony given by Edmund.

ing, despite SRC Painting's records, prepared by his sister, Erin, showing that he received substantial payments under different labels such as interest income, rent, general, and accounts payable. Edmund also states that he does not remember whether he ever loaned money to SRC Painting. This statement is not plausible. Moreover, it is not credible, especially in view of Edmund's attempt throughout his testimony to dissociate himself from SRC Painting and PBN. Also, if Edmund truly had no ownership interests in these companies, there is little likelihood he would lend money to either of them because (1) there is no evidence he possessed or had earned sufficient money to lend money to the corporations, and (2) Edmund is unaware of any terms to the loans, including interest. The unlikelihood that Edmund would lend money to the corporations is also increased by the hundreds of thousands of dollars that already had been allegedly loaned to the companies by his sister, Erin.

Edmund admits receiving \$2500 a month in rent from PBN, allegedly to store paint in his garage, but he denies knowing how that rental amount was determined. Moreover, he claims that he does not remember whether he ever actually stored paint in his garage. He claims to know that he loaned money to PBN, but he claims not to remember how much money he lent, when it was lent, who he negotiated the loans with, what the interest rates were, or whether there was any documentation of such loans. On balance, and in consideration of his failure to remember much of what he did for SRC Painting and PBN; his vague testimony regarding any involvement by himself or members of his family in either of those companies; and his demeanor, especially his apparent hostility toward the Government, the Union, and the process; Edmund was not a credible witness.

SRC Painting continued in operation from approximately 2000 until the summer of 2003. Edmund testified that he worked as a painter for SRC Painting throughout its existence, and he was paid union scale. It is curious, therefore, that on Edmund's 2002 Federal income tax return he reported no income from wages or salaries. (GC Exh. 56.)

SRC Painting's books reflect many payments by the company to satisfy the personal expenses of the Wierzbickis, including James, Karen, Eric, Constance, Edmund, and Erin. These personal expenses include car payments, mortgage payments, personal credit cards, home appliances, house repairs, home utilities, payments for the construction of the house Erin owns and in which Edmund lives, union dues for Eric and Edmund, and school payments for Erin. In conclusion, and consistent with the concessions of James, Eric, and Erin, the Wierzbickis commingled their funds with the funds of SRC Painting and used SRC Painting to overtly and covertly extract money from the company in disregard of the corporate form.

SRC Painting's books also reflect payments to and from SRC, Inc. (E.g., GC Exh. 23, p. 51; GC Exh. 22, pp. 5, 6, 7, 10, 12, 13, 18.) However, these "payments" lack a corresponding check number in SRC Painting's books. Accordingly, although these payments may have been used to generate cash for the Wierzbickis, similar to the cash payments to Edmund, Constance, and Erin, the use of SRC, Inc. to conceal such cash payments by SRC Painting demonstrates the Wierzbickis' con-

trol over and the intermingling of accounts between these companies.

After Kellerman left SRC Painting, Erin contacted him and told him she wanted him to sign a document acknowledging that he had resigned and that he was transferring ownership to her. Kellerman did as he was told.

3. PBN, LLC

SRC Painting operated from the summer of 2000 until approximately the summer of 2003. SRC, Inc. and SRC Painting were signatories to collective-bargaining agreements with the Union. The term of the most recent collective-bargaining agreement between SRC Painting and the Union was from June 1, 2002, to May 31, 2004. Nevertheless, by the spring of 2003 James wanted to oust the Union and to operate a nonunion company. Accordingly, SRC Painting made its last monthly contribution to the Union's health, welfare, pension, and other funds in March 2003. As of April 30, 2003, SRC Painting has failed and refused to comply with the provisions of its collective-bargaining agreement with the Union.

In July 2003, James held a meeting with SRC Painting's employees in a restaurant in Kenosha. Present at the meeting were James Wierzbicki and painters Justin Lois, Scott Christianson, and Brent George. At the meeting, James Wierzbicki told the employees that SRC Painting was going to change to a new company, and that the new company would be a nonunion company. Lois and George said that they wanted to remain a union shop. George asked James if George would be allowed to continue his apprenticeship program with the Union. James replied that George had the choice of either continuing with the apprenticeship program or quitting the program, and that if George quit the Union's apprenticeship program, James would increase his pay to the full-scale journeyman wage.

James Wierzbicki also told the employees that they would keep their jobs in the new company and that everything would stay the same. He explained that the workers would lose their union benefits, such as pension and health care benefits, but he promised that he would provide a new health care plan for the workers. James explained that if the new company did not have to pay the workers as much money in benefits, it would be able to pay the workers more money in wages.

The changeover from SRC Painting to PBN was seamless. Both companies had the same employees (with some exceptions), the same managers and supervisors, the same bookkeeping (although not the same bookkeeper), the same accountants, the same owners, the same operation, and the same work. The major differences were (1) James Wierzbicki disposed of Kellerman and replaced him with Maurer, and (2) as dictated by James, the new company was nonunion.

James Wierzbicki signed and sent a letter to Joel Spaulding advising him that the contract with New England Builders would not be completed by SRC Painting, but rather, would be completed by PBN. (GC Exh. 4.) There is no evidence that James sent this letter on anyone's authority other than his own. This letter supports a determination that James controlled SRC Painting and PBN.

Approximately 3 weeks after the meeting in the Kenosha restaurant, a meeting was held at SRC Painting's office in Eric's

residence. Present were James, Eric, Edmund, and Erin Wierzbicki, together with painters Donald Hall, Scott Maurer, Justin Lois, and Brent George, and Foreman Scott Christianson. Paychecks in the name of the new, nonunion company, PBN, were distributed. James said that the name of the new company was PBN, which stood for “paint by numbers.” James told the workers that their new health insurance, which would replace the insurance they formerly had through the Union, would be effective September 1. George asked James about his apprenticeship program. James replied that George had not had a lot of time in the Union and not a lot of money in the pension fund, so George would not lose a lot of money if he dropped out of the Union. James repeated that he would increase George’s wage to compensate for his loss of union benefits.

About 2 weeks later, George telephoned Eric about the apprenticeship program. Eric did not return George’s call, but James responded by meeting with George at Harbor Park. James told George that if he wanted to attend school to complete the apprenticeship program, he would have to work for someone else. However, George told James that he found a school not affiliated with the Union, which was open to all applicants, union and nonunion. James then agreed to allow George to attend the school.

After this conversation between James Wierzbicki and Brent George, James met with Christianson and told him to fire George. Christianson did not want to fire George so he did not immediately carry out James’ directive. However, shortly before Thanksgiving 2003, Christianson laid off George. Except for a 2-week period in January 2004 when George was recalled, George was not rehired.

As noted above, PBN was essentially a continuation of SRC Painting, except it was a nonunion company. PBN took over and completed the same work that SRC Painting had begun and was doing—the Harbor Park project. (GC Exh. 55, p. 2.) The same person operated and controlled the business, James Wierzbicki. James Wierzbicki again used a childhood friend of his son to install as the nominal, but fictitious, owner of the company. Edmund continued to work as a painter for PBN as he had for SRC Painting. PBN used the same painters as had worked for SRC Painting, and these painters did not need to apply for work at PBN. They simply continued working as if there had been no change. And, James, Edmund, Eric, and Erin continued to extract money from PBN, as they had from SRC Painting, through rent payments,¹⁰ undocumented loans, unexplained payments on account, and payment of personal expenses. In addition, PBN used the same offices as SRC Painting—the back room of Eric’s residence.

However, Erin stopped being the office manager because she had returned to school in 2002. To replace Erin as the office manager, James hired Andrea Rogowski, who had been a friend of Erin and the Wierzbicki family. When James hired Rogowski, he also told her that PBN was going to be nonunion. Otherwise, as James told Brent George, “Everything would stay

the same. The same employees would still perform the same work.” (Tr. 393.)

As noted above, James Wierzbicki found a friend of his youngest son, Eric, to install as the nominal owner of his newest company. This person was Scott Maurer, a childhood friend of Eric’s who was also a friend of the Wierzbicki family. Maurer was 28 years old, the same age as Eric, at the time Maurer was made the president and owner of PBN. Maurer had been employed as a laborer and a painter with SRC, Inc. and SRC Painting. James told Maurer that he, James, wanted to be a partner with Maurer, and that Maurer would be paid a percentage of each job performed by PBN. These statements were not true. James also told Maurer that PBN would be nonunion and that James would obtain the business for PBN and handle the money. These statements were true.

James Wierzbicki installed Maurer as the nominal owner and president of PBN, but Maurer never became an actual owner of or partner in PBN, and he was not paid a percentage of the work undertaken by PBN. Maurer had no access to PBN’s records or financial documents, and, like Kellerman was treated, he had no access to PBN’s offices unless a member of the Wierzbicki family was present. Indeed, Maurer had as little authority in PBN as Kellerman had in SRC Painting, which is to say, none.

As he had done for SRC Painting, James retained Frank Parise to handle the legal work in forming PBN. James also contacted New England builders to advise them that PBN would take over SRC Painting’s obligations under the contract. The accountant for PBN was the same as it was for SRC Painting. This accountant, Scott Olson, is also the accountant for other members of the Wierzbicki family.

PBN continued to operate until the next Wierzbicki company, Liquid Systems, was started. However, the record is not clear exactly when PBN stopped operating and Liquid Systems began. In November, Rogowski told Maurer that PBN had no money in its bank account and that employee withholding taxes were not being paid. Accordingly, Maurer sought legal assistance. Maurer resigned from his position at PBN, and he closed the PBN checking account after using personal funds to replenish the overdrawn account. The Internal Revenue Service subsequently contacted Maurer and advised him of his potential liability for PBN’s failure to pay withheld taxes of approximately \$30,000. Nevertheless, PBN/Liquid Systems painters continued working throughout this period with no apparent break in service, change in duties, or location of work.

After Maurer left PBN in November, the Wierzbickis continued to work at Harbor Park and fulfill PBN’s contract. However, when New England Builders put out new contracts for bid, the Wierzbickis decided to make their bids through a new corporation.

4. Liquid Systems, LLC

Liquid Systems, LLC formally came into existence on March 5, 2004, with Edmund Wierzbicki as the only owner and member of that company. (GC Exh. 57.) Besides its incorporation, there is no evidence that Liquid Systems engaged in any other formal corporate activity, such as the adoption of bylaws. Liquid Systems’ place of business is either at Edmund’s residence

¹⁰ The rent payments to Edmund were allegedly for the storage of paint in Edmund’s garage, although Edmund could not remember whether paint was stored in his garage. (Tr. 760.)

or his automobile. Notwithstanding its later date of formation, Liquid Systems submitted proposals dated February 27, 2004, to paint buildings 11, 12, and 15 at Harbor Park. Thus, Liquid Systems was operating and bidding on projects before it was formally organized or authorized to operate.

Edmund Wierzbicki testified that he submitted the February 27, 2004 proposals to Joel Spalding of New England Builders. Edmund testified he spoke to Spalding before Liquid Systems was organized, but he could not remember any details about the alleged conversation. Spalding is the senior project manager and secretary-treasurer for New England Builders, which is the general contractor at Harbor Park. On April 1, 2004, New England Builders, in a subcontract signed on its behalf by Joel Spalding, awarded Liquid Systems the painting contract for buildings 11, 12, and 15 at Harbor Park. Under this contract, Liquid Systems would receive in excess of \$270,000 from New England Builders for painting work at the three buildings. (GC Exh. 62.)

Like his brother Eric, who claims to have started SRC, Inc. with no previous experience starting or operating a business, or bidding for or obtaining jobs, or handling financial or administrative matters, or managing employees, Edmund claims to have started Liquid Systems with a similar lack of qualifications. Since his graduation from college in 1999, Edmund worked exclusively as a painter or laborer. He worked for SRC, Inc. where he did painting and wallpapering and was paid less than \$10 an hour.¹¹ Edmund could only guess that he worked 4 or 5 years for SRC, Inc. He next worked for SRC Painting from 2000 to 2003, where he did painting and was paid union scale.

Edmund does not dispute that he had no or virtually no qualifications to operate Liquid Systems, much less to obtain a \$270,000 painting contract from New England Builders before his company had ever done a single painting job. For example, in his attempt to divorce himself from any meaningful involvement with SRC Painting and PBN, he states in his posthearing brief that he had no managerial or supervisory role in SRC Painting, and that no evidence was introduced showing that Edmund was anything more than a painter employed by SRC Painting. (Posthearing Br., p. 6.) Edmund also argues that the General Counsel produced no evidence showing that he played any part in the management of PBN. *Id.* at 7.

Liquid Systems employs only three painters: Edmund, Christianson, and Casey Grams, although Eric occasionally does painting work in addition to his managerial responsibilities. All of these painters had been employed by PBN; Edmund, Eric, and Christianson also had worked for SRC Painting. Edmund's role and duties stayed the same at Liquid Systems as his role and duties had been for SRC Painting and PBN. For all of the companies, Edmund did spray outs, rerolls, and touch ups at the Harbor Park project. Every painter employed by Liquid Systems had previously worked for SRC Painting or PBN. Some of the equipment used by Liquid Systems had been used by SRC Painting and PBN. The work Liquid Systems performs

at the Harbor Park project is the same work that PBN performed, the only difference being the buildings being painted.

Moreover, Eric maintains a managerial position with Liquid Systems, and his responsibilities are essentially the same at Liquid Systems as they were at PBN. New England Builders' superintendent, Dennis Kamps, primarily deals with Eric in matters involving Liquid Systems' work at Harbor Park. Eric also attends the weekly meetings at the construction site for foremen. Kamps believes that Eric is the owner of Liquid Systems, and he describes Edmund's role in Liquid Systems as a painter.

New England Builders, through Spalding, awarded Liquid Systems the \$270,000 contract to paint buildings 11, 12 and 15 at Harbor Park. Edmund testified that he had previously painted Spalding's house, and there was no evidence whether Spalding paid for the painting of his house, or if so, how much. This personal interest affects Spalding's credibility, but it does not necessarily explain why Spalding would have awarded such substantial contracts to a company allegedly owned, managed, and operated by a person so devoid of qualifications. Unless, of course, it is inferred that Edmund's painting of Spalding's house was a quid pro quo for the grant of the contracts by New England Builders to Liquid Systems. No such inference is made. Moreover, that rather harsh alternative enhances and increases the probability of the findings and inferences that are made, viz., that Spalding primarily granted Liquid Systems these contracts because he knew that James Wierzbicki, the person with whom he had dealt in matters involving SRC Painting and PBN, and who controlled those corporations, was also the person who was behind and controlled Liquid Systems.

Edmund's alleged earnings under Liquid Systems could hardly be more different than his alleged earnings, or lack of earnings, under SRC Painting. Edmund testified that, at Liquid Systems, he simply takes money out of the company whenever he needs it. However, Edmund did not fully describe why he "needed" the unusually large amounts of money he withdrew from the company. Liquid Systems' records disclose that for the first 9 months of its existence, Edmund withdrew approximately \$121,000 from the Liquid Systems account, all for his personal use. Edmund denies that any of this money went to his father, his mother, his sister, his brother, or his brother's wife. These denials are not credible.

In 2002, Edmund reported on his Federal income tax return total income of approximately \$14,000, none of which was wages. Yet, for 2004, Edmund claims to have received at least \$121,000 (not counting any earnings he had during the period January to March 2004), all for his personal use and without any apparent change in his standard of living. Moreover, and in addition to Edmund's cash income, Liquid Systems paid his personal expenses, such as his student loans, his home utilities, his home cable, his truck, and his telephone.

In view of Edmund's lack of credibility, considering his father's control of SRC Painting and PBN, and considering his, his father's, and his siblings' use of those corporations to extract money and pay personal expenses, I believe the opposite of Edmund's testimony is more likely the truth, and that much of the cash Edmund withdrew from Liquid Systems was withdrawn for the benefit not only of himself, but for the benefit of

¹¹ Further detracting from Edmund's credibility, he testified that he did not know who owned SRC, and could only guess that his brother, Eric, owned SRC.

his father and mother, James and Karen, and his siblings, Eric and Erin. See *NLRB v. Walton Mfg. Co.*, supra at 408; *Reigel Electric*, 342 NLRB 847, 849 (2004).

During the 5 years before Liquid Systems was formed, James Wierzbicki employed Edmund as a laborer and painter in the family's painting businesses. During those years, Edmund's father, and his younger brother and sister admitted that they controlled the day-to-day management, labor relations policies, business operations, and financial resources of SRC Painting and PBN; that they failed to maintain the legal identities of SRC Painting and PBN distinct from themselves; that they commingled their personal assets with the corporate assets of SRC Painting and PBN; and that, by failing to maintain the separate corporate identities of SRC Painting and PBN, they engaged in fraud, injustice, and evasion of their legal obligations under the Act. During the years Edmund was employed by SRC Painting and PBN, he and his family members used various devices to siphon money from the businesses. It is not plausible that in 2004 Edmund would suddenly become the only member of this Wierzbicki group (i.e., James, Eric, Erin, and Edmund) to earn money. Nor is it plausible that in 2004 Edmund would suddenly become the only member of the Wierzbicki family to receive money from the family's painting business. James had long operated and controlled the family businesses. Liquid Systems was another family business employing the same painters, using the same equipment, and working the same job. Observing the Wierzbickis on the witness stand and testifying in front of one another, it is apparent that James is the leader, the initiator, and the person in charge of the family businesses, and that Eric, Erin, and Edmund follow in step.

When Edmund was asked about whether his family members were involved in Liquid Systems or whether they received any money from that business, Edmund exhibited none of the uncertainty, vagueness, and forgetfulness that he displayed when answering all other questions about his and his family members' involvement with SRC Painting and PBN. Edmund adamantly denied that his family members received money from Liquid Systems. This change in demeanor further detracts from Edmund's credibility. Moreover, Edmund's testimony that his family members were not involved in Liquid Systems contradicts James' statement to New England Builders that "they," the Wierzbickis, had started Liquid Systems. (Tr. 297.)

Edmund's assured testimony denying that his family members received money from Liquid Systems was not candid. For example, Liquid Systems pays the mortgage on the property in Trego, which is where James spends approximately 90 percent of his time. Liquid Systems also pays for the utilities and television at the Trego residence. There is no evidence that James pays rent to Edmund for living at the Trego property. Moreover, Edmund's tax return fails to report rental income from the Trego property. Thus, James directly benefits from Liquid Systems' mortgage, utilities, and television payments for the house in which he lives. In addition, Liquid Systems makes the monthly payments for one of the vehicles owned by Erin, although Edmund tried to nullify the effect of such payments by claiming that he borrows that vehicle from Erin.

Edmund was unable to explain who prepared approximately 33 Liquid Systems' checks that had been stamped with his signature. Edmund was unable to explain what he did with the money he withdrew from Liquid Systems. He could not explain what he did with any of his cash withdrawals from Liquid Systems, including a \$7003 withdrawal on April 5, 2004. And, he could only guess that a withdrawal of \$11,500 on October 25, 2004, was used to pay "for lawyers or something." (Tr. 817.) Such testimony, from the person who is allegedly the only owner and officer of Liquid Systems, is not credible. However, the credibility of such testimony increases with the realization that Edmund did not control or truly own Liquid Systems. James owned and controlled Liquid Systems, as he had owned and controlled SRC Painting and PBN. Moreover, Edmund's inability to explain who had prepared 33 Liquid Systems' checks also contradicts his own testimony that he was the only person who writes Liquid Systems' checks. Edmund had little control over Liquid Systems' handling of, and accounting for, financial matters.

Moreover, the limited records of Liquid Systems, pertaining to Edmund's supposition that Liquid Systems' \$11,500 payment to him in October was for attorney fees, support the finding that James, not Edmund, was the true owner of Liquid Systems. These records disclose that on October 12, 2004, check number 1107 was issued to the attorney who represented James, Karen, Eric, and Constance during the present proceeding. Liquid Systems lists this check as "Professional Fees." (GC Exh. 68, p. 23.) However, the \$11,500, unnumbered "check," supposedly dated October 25, 2004, that Edmund believed was for attorney fees, was not listed under professional fees. Rather, the payment was simply listed as one of the many withdrawals by Edmund. (GC Exh. 68, pp. 4 and 14.) Thus, Liquid Systems identifies the legal expenses of James and Eric, and their wives, as professional fee expenses. However, the supposed legal expenses of Edmund are not listed as an expense, much less a professional fee expense. This accounting by Liquid Systems supports the finding that James is the owner of Liquid Systems, not Edmund.

In addition, Edmund's certainty with regard to such implausible and incredible matters as James and Eric's alleged noninvolvement in the affairs of Liquid Systems, in conjunction with his demeanor, his hostility and his resentment toward the General Counsel, the Union, and the process, which was noted above, leads me to believe that the opposite of his testimony is the truth. See *NLRB v. Walton Mfg. Co.*, supra at 408 (noting that certain testimony may be uttered with such arrogance or defiance as to give the assurance that the testimony is a fabrication); *Mar-Kay Cartage*, 277 NLRB 1335, 1340 (1985). Accordingly, Edmund's testimony confirms my finding that James controls Liquid Systems, and that Liquid Systems is operated by and for the benefit of James, Karen, Eric, Constance, Erin, and Edmund, just as SRC Painting and PBN were.

III. ANALYSIS

A. *Alter Ego*

SRC Painting recognized the Union as the exclusive representative of its painters, and it was a party to collective-bargaining agreements with the Union. The most recent collec-

tive-bargaining agreement expired on May 31, 2004. PBN began operating in approximately the summer of 2003, and Liquid Systems began operating approximately in the winter or spring of 2004. PBN and Liquid Systems did not recognize the Union as the exclusive representative of its painters, they did not comply with the provisions of SRC Painting's collective-bargaining agreement with the Union, and they did not bargain with the Union regarding any employment conditions of their painters.

PBN did not have a duty to recognize the Union as the exclusive representative of its painters, to comply with the provisions of the collective-bargaining agreement, and to bargain collectively with the Union unless it was the alter ego of, or was a single employer with, or was a successor to, SRC Painting or PBN. Similarly, Liquid Systems did not have a duty to recognize the Union, to comply with the collective-bargaining agreement, or bargain with the Union unless it was the alter ego of, or was a single employer with, or was a successor to, SRC Painting or PBN. The single-employer doctrine generally applies to companies that concurrently perform the same or similar function, and where one company recognizes the Union and the other does not. *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 152 (3d Cir. 1994); *NLRB v. Hospital San Rafael*, 42 F.3d 45 (1994). The alter ego doctrine generally applies where a nonunion company replaces a union company. *Id.*

In the present case, PBN replaced SRC Painting by taking over the work SRC Painting had been doing at the Harbor Park project. Upon being replaced by PBN, SRC Painting ceased operating. Similarly, Liquid Systems replaced PBN by taking over the painting work at the Harbor Park project. Upon being replaced by Liquid Systems, PBN ceased operating. Accordingly, the alter ego doctrine will be examined to determine if PBN is the alter ego of SRC Painting and if Liquid Systems is the alter ego of PBN.¹²

A corporation will be deemed the alter ego of a predecessor corporation if there was not "a bona fide discontinuance and a true change of ownership" or if there was "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Alter ego cases

involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same em-

ployer and is subject to all the legal and contractual obligations of the predecessor.

Howard Johnson Co. v. Hotel & Restaurant Employees, 417 U.S. 249, 259 (1974). The determination of alter ego status is a question of fact for the Board. *Southport Petroleum Co.*, supra.

The factors that are considered in determining alter ego status include whether "the two enterprises have 'substantially identical' management and supervision, business purpose, operations, equipment, customers, as well as ownership." *Midwest Precision Heating & Cooling*, 341 NLRB 435 (2004); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Intent to evade responsibilities under the Act is an additional factor that must be considered, but a finding of antiunion animus is not required in order to find an alter ego relationship. *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), *enfd.* 725 F.2d 1416 (D.C. Cir. 1984). No single factor is determinative and not all the indicia need be present for the Board to conclude that one entity is the alter ego of another. *Standard Commercial Cartage, Inc.*, 330 NLRB 11, 13 (1999).

James, Eric, and Erin admit that PBN is the alter ego of SRC Painting. Although Edmund has made no such admission, neither does he dispute PBN's alter ego status. The admission by James, Eric, and Erin was made in conjunction with their admission that they are supervisors and agents of SRC Painting and PBN, and that they have controlled the day-to-day management, labor relations policies, business operations, and financial resources of SRC Painting and PBN. Moreover, and without detailing the facts set forth herein, the evidence is more than sufficient to support the concessions of PBN's alter ego status. The next question is whether Liquid Systems is the alter ego of PBN or SRC Painting. Liquid Systems' alter ego status is opposed by Edmund, but is not disputed by James, Eric, or Erin.

At Liquid Systems, Eric continued the supervisory and managerial duties he had at PBN and SRC Painting.¹³ Eric was the primary Liquid Systems' representative who interacted with New England Builders during Liquid Systems' performance of its contract. Eric attended the weekly construction meetings at Harbor Park on behalf of Liquid Systems. Indeed, Dennis Kamps, the site superintendent for New England Builders, believed that Eric was the owner of Liquid Systems and that Edmund worked for Liquid Systems as a painter.

The business purpose and operation of Liquid Systems is identical to the business purpose and operation of PBN and SRC Painting. Moreover, all the employees who worked for Liquid Systems had previously worked for PBN. Liquid Systems is the same operation as PBN, and essentially the same as SRC Painting except on a smaller scale. See *Marquis Printing Corp.*, 213 NLRB 394, 401 (1974).

It is unclear whether the equipment used by Liquid Systems is the same equipment used by PBN and SRC Painting. Edmund identified four pieces of equipment used by Liquid Systems. He testified that he purchased a Graco 1000 pump from

¹² The record is unclear regarding the precise dates that SRC Painting, PBN, and Liquid Systems started and stopped operating. During these changeover periods, it is possible that SRC Painting and PBN, on the one hand, and PBN and Liquid Systems, on the other, were ongoing businesses coordinated by a common master. *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994). Accordingly, the single-employer doctrine could be examined to determine if SRC Painting or PBN and Liquid Systems are single employers. This examination will not be undertaken in this decision because of the uncertainty of the factual predicate for applying the doctrine, viz., the concurrent operation of the relevant corporations, and because the remedy would not be affected under the single-employer doctrine if the alter ego doctrine were found to be applicable.

¹³ Edmund claims that Eric was not paid for his work at Liquid Systems. Without regard to the incredibility of this claim, the fact remains that Eric worked for Liquid Systems.

Eric in 1998 or 1999. Edmund does not claim to have had a painting business in 1998 or 1999, and he did not explain why he would have purchased this pump in this time period. Edmund produced no receipt for the purchase of this pump. Edmund claimed that he purchased another Graco 1000 pump in 2001 or 2002 from a person by the name of Barry Brown. Again, Edmund did not explain why he had originally purchased this equipment nor did he produce a receipt.

Edmund claimed to have purchased two additional pieces of equipment after Liquid Systems was formed. However, he produced no receipts for these alleged purchases. Moreover, SRC Painting and PBN had simply stopped operating when the Wierzbickis decided to form successor corporations. But, there is no evidence relating to the disposal of the equipment owned and used by those corporations. On balance, it is likely that PBN and SRC Painting had previously used some, and possibly all, equipment used by Liquid Systems. However, the evidence is unclear. Accordingly, this factor neither adds to nor detracts from an alter ego finding.

The customer of Liquid Systems was the same customer of PBN and SRC Painting, viz., New England Builders. Indeed, Liquid Systems, PBN, and SRC Painting worked on the same project for New England Builders—the Harbor Park project. Thus, SRC Painting, PBN, and Liquid Systems constitute “the same business in the same market.” *Fugazy Continental Corp.*, supra at 1301–1302, quoting *International Harvester Co.*, 247 NLRB 791 (1980).

Liquid Systems employed Christianson, who had been a foreman at SRC Painting and PBN. Although Edmund also claimed to be a supervisor for Liquid Systems, there is no corroborating evidence of his supervisory actions or duties. Edmund was not a credible witness, and this bald claim is not accepted. Except for Eric and Christianson, there is no credible evidence of any other supervisor for Liquid Systems, and both Eric and Christianson had been supervisors for SRC Painting and PBN.

James Wierzbicki owned SRC Painting and PBN despite his installation of Kellerman and Maurer as the nominal owners. Edmund is the owner of Liquid Systems. In spite of this apparent difference in ownership between James and his son, Edmund, the common ownership factor is not defeated. As the Board stated in *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), enfd. 888 F.2d 125 (2d Cir. 1989), “a finding of common ownership may be made where, although the same individuals are not shown to be owners of each corporation, the corporations are solely owned by members of the same family.” Ownership by members of the same family does not compel a finding of substantially identical ownership. “However, it ‘militates in favor of an alter ego finding’ where, as here, other relevant factors are shown.” *Midwest Precision Heating & Cooling*, supra (quoting *Cofab, Inc.*, 322 NLRB 162, 163 (1996), enfd. 159 F.3d 1352 (3d Cir. 1998)). James Wierzbicki and his three children owned and controlled SRC Painting, PBN, and Liquid Systems. James told New England Builders that the Wierzbickis had started Liquid Systems. Accordingly, common ownership is established and militates in favor of an alter ego finding.

There is also a significant lack of an arm’s-length relationship between these corporations and the Wierzbickis. For example, there is no documentary evidence of the purchase or sale of painting equipment by the corporations or the Wierzbickis. This absence of bills of sale and receipts is irregular and indicates a lack of arm’s-length relationship. See *Fugazy Continental Corp.*, supra at 1302. Moreover, SRC Painting paid rent to Constance, and SRC Painting and PBN paid rent to Edmund, but there are no lease documents or terms to those lease relationships. Erin allegedly made loans to SRC Painting and PBN, but there are no documents establishing such loans. Thus, Erin received substantial payments from SRC Painting and PBN, allegedly for repayment of loans, but since the loans cannot be documented, there is no support or corroboration to disclose when such alleged loans would be paid back. Erin could continue to siphon money from the corporation, supposedly tax-free as loan repayments, until the corporation was drained of assets. These transactions are without documentation, are irregular, and indicate a lack of arm’s-length relationship. The lack of arm’s-length relationships between the Wierzbickis and the corporations suggest alter ego status. *Valley Electric*, 336 NLRB 1272, 1275 (2001); *Reigel Electric*, supra.

The temporal proximity between PBN’s cessation of business and Liquid Systems’ creation, together with Liquid Systems’ takeover of the Harbor Park project that PBN had been doing, are additional factors suggesting the alter ego status of Liquid Systems. *Twin Cities Electric*, 296 NLRB 1014, 1020 (1989); *Cofab, Inc.*, 322 NLRB 162, 163 (1996).

With respect to motivation, the question is “whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act.” *Fugazy Continental Corp.*, supra at 1302. James Wierzbicki created PBN for the purpose of evading SRC Painting’s responsibilities under its collective-bargaining agreement with the Union. However, there is no direct evidence of antiunion animus in the creation of Liquid Systems.

On the other hand, there was no evidence showing that Liquid Systems was created for legitimate reasons. Moreover, there is the curious circumstance that Liquid Systems is 100 percent owned by Edmund. Of his siblings and his father, the one person least qualified to own and operate a painting company is Edmund. There is no apparent reason why Edmund would start, own, and operate a painting company as opposed to any one of his siblings or his father. The single reason that comes to mind is that Edmund had no involvement in the management or control of SRC Painting and PBN. Thus, if any one of the Wierzbickis who did control those companies were to be found liable for SRC Painting or PBN’s violations of law (and, James, Eric, and Erin conceded during the hearing their individual liability for any unfair labor practices committed by SRC Painting and PBN), then Liquid Systems might be protected if it were owned by the one sibling, Edmund, who did not exercise such control over SRC Painting and PBN.

Moreover, Edmund did not explain why Liquid Systems was formed or why he decided, or someone decided for him, to be its owner. In these circumstances, an adverse inference regarding motive might be appropriate. See *Custom Mfg Co.*, 259 NLRB 614, 615 fn. 7 (1981) (where the Board noted that the

absence of a credible explanation for changes in the corporate entity, coupled with other factors, undermined the Respondent's contention that it was not an alter ego); cf. *Liberty Source W*, 344 NLRB 1127 (2005) (where the judge made an adverse inference, but the Board did not rely on the adverse inference in affirming the judge's decision). Nevertheless, no adverse inference is applied herein. Accordingly, the evidence does not show that the purpose behind the creation of Liquid Systems was legitimate or was to evade responsibilities under the Act. However, as with other indicia, a showing of improper motive is not necessary to a finding of alter ego status. *Fugazy Continental Corp.*, supra; *Johnstown Corp.*, 313 NLRB 170, 171 (1993), remanded sub nom. *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994), on remand 322 NLRB 818 (1997).

Considering all of the circumstances in the creation, formation, and operation of Liquid Systems; in view of Liquid Systems, SRC Painting, and PBN's substantially identical management, business purpose, operation, customer, supervision, and ownership; considering all of the other circumstances, such as the Wierzbickis disregard of corporate formalities and blurring of the corporations' structures in their operation of SRC Painting, PBN, and Liquid Systems; I find that Liquid Systems is a disguised continuance of and the alter ego of SRC Painting and PBN.

B. Individual Liability

The corporate veil may be pierced when: "(1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *White Oak Coal Co.*, 318 NLRB 732 (1995). In assessing the first prong, the Board considers "(a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled." *Id.* at 735. Factors to consider in making these determinations are:

- (1) whether the corporation is operated as a separate entity;
- (2) the commingling of funds and other assets;
- (3) the failure to maintain adequate corporate records;
- (4) the nature of the corporation's ownership and control;
- (5) the availability and use of corporate assets, the absence of same, or under capitalization;
- (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation;
- (7) disregard of corporate legal formalities and the failure to maintain an arm's-length relationship among related entities;
- (8) diversion of the corporate funds or assets to non-corporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

Id. James, Eric, and Erin have conceded their personal liability for the actions of SRC Painting and PBN. In any event, the evidence amply demonstrates that the corporate veil of SRC Painting and PBN should be pierced to hold James, Eric, and Erin personally liable. With respect to Liquid Systems, the majority of the foregoing nine factors has been established, and the evidence demonstrates that Edmund and Liquid Systems have failed to maintain separate identities.

If an individual freely withdraws funds from a corporation, without supporting documentation or other indicia of an arm's-length relationship, then the corporation's separate identity is blurred. *Reliable Electric Co.*, 330 NLRB 111 (2000). Edmund withdrew money at will from Liquid Systems. Indeed, he testified that he withdrew money whenever he needed it.

Edmund commingled his own funds with Liquid Systems' funds, which is shown by Liquid Systems' payment of Edmund's personal expenses, such as his telephone bill, his student loans, his home mortgage, his Direct TV and cable bill, his home utilities, and the purchase of a \$1000 camera for Edmund's trip to Fiji. Moreover, there was a disregard of corporate legal formalities and there was a diversion of the corporate funds or assets to noncorporate purposes to the extent that Liquid Systems' funds were commingled with personal funds.

Liquid Systems failed to maintain adequate corporate records. For example, Edmund withdrew approximately \$121,000 during the first 9 months of Liquid Systems' existence. These withdrawals were made on approximately 42 separate occasions. (GC Exh. 68.) However, there is no check number listed for any of the 42 withdrawals by Edmund, leading to the inference that all of Edmund's withdrawals were in cash. The use of cash, especially by a corporation and the owner of the corporation, demonstrates a failure to maintain adequate corporate records. In addition, the effect of this failure to maintain adequate corporate records is reflected in Edmund's ignorance of the purpose(s) for any of his withdrawals.

The formal documents show that Edmund is the owner and operator of Liquid Systems, but the facts show that Eric manages the company while Edmund's real status is a painter. Moreover, James had previously installed nominal, figurehead owners in Liquid Systems' two predecessor corporations while he maintained actual ownership and control of those corporations. Thus, James had established a pattern that was consistent with the creation of Liquid Systems—installing persons, without qualifications and without consideration, to ownership and management positions, while retaining actual control for himself. The evidence, together with all reasonable inferences from the evidence, shows that James repeated this pattern with Liquid Systems, except that here he installed his son as the figurehead rather than a nonfamily member.

Liquid Systems was also used as a conduit to benefit James and Karen, as well as Edmund. This is demonstrated by Liquid Systems' payment of the mortgage for Edmund's Trego property where James resided for 90 percent of his time and Karen resided part time. Liquid Systems also paid the utilities' bills for the Trego property. Liquid Systems was also used as a conduit to benefit Erin or Constance. This is shown by Liquid Systems' monthly payments for a vehicle owned by Erin and a Jeep owned by either Erin or Constance. Edmund did not know whether the payment was for Erin's or Constance's Jeep, but this uncertainty did not appear to concern him.

The second prong of the test for piercing the corporate veil is whether adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. *White Oak Coal Co.*, supra. Moreover, the second prong must have some causal relationship to the first prong. "In other words, the fraud, injustice, or evasion of legal obligations must

flow from the misuse of the corporate form.” *AAA Fire Sprinkler*, 322 NLRB 69, 74 (1996), citing *White Oak Coal*, supra at 735.

Liquid Systems’ corporate documents fail to reflect any property or money contributed by Edmund when Liquid Systems was formed. (GC Exh. 57.) Edmund testified, from a handwritten note he prepared in connection with the present litigation, that he contributed certain equipment. However, neither Edmund nor Liquid Systems produced records to corroborate the purchase of this equipment by Liquid Systems or its value. There was no credible evidence of any capitalization of Liquid Systems when it was formed or subsequent corporate ownership of assets. A corporation’s under-capitalization adversely affects its ability to satisfy remedial and backpay obligations. Accordingly, under-capitalization, one of the factors demonstrating Liquid Systems’ (and the Wierzbickis’) misuse of the corporate form, would cause Liquid Systems to evade its legal obligations.

Liquid Systems’ payment of Edmund’s mortgage, utilities, telephone bills, and personal expenses, its payment of James and Karen’s living expenses, and its payment of Erin or Constance’s automobile expenses show that the corporation is dissipating its assets for noncorporate purposes. Thus, Liquid Systems is less likely to be able to fulfill and comply with any adverse order or judgment, especially one requiring the payment of back wages. Accordingly, all of this evidence relating to capitalization, ownership of assets, and dissipation of funds support the second prong of the *White Oak Coal* standard because respecting the corporate form would likely lead to Liquid Systems’ evasion of legal obligations.

The Wierzbickis’ actions in rendering Liquid Systems unable to satisfy a judgment against it apply equally to their operation of SRC Painting and PBN. Those corporations were started and shut down for no apparent legitimate purpose. SRC Painting was started to enable SRC, Inc. to evade payment of an obligation to a union in Chicago. And, James Wierzbicki made clear that the purpose of PBN was to get rid of the Union. SRC Painting and PBN paid money to, and paid the personal expenses of, James and Karen, Eric and Constance, Erin, and Edmund. There is no evidence that those companies have any remaining assets. Thus, the evidence relating to SRC Painting and PBN, the companies for which Liquid Systems is an alter ego, also supports the second prong of the standard.

The Board has also applied the second prong’s “promote injustice” factor affirmatively by stating that the corporate veil will be pierced when “justice so requires, where the individual’s personal affairs and the company’s affairs have been so intermingled that corporate boundaries have been effectively blurred.” *Best Roofing Co.*, 311 NLRB 224, 226 (1993) (quoting *Greater Kansas City Roofing*, 305 NLRB 720 fn. 3 (1991)). Although this particular example appears to be similar to one or more of the factors used in determining the first prong, it is not the same as any of those factors. The credible evidence in this case demonstrates that the personal affairs of the Wierzbickis and their corporations’ affairs have been so intermingled that the boundaries of those corporations have been effectively blurred. Accordingly, justice requires that the corporate veil be pierced.

“[I]ndividuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.” *White Oak Coal Co.*, supra at 735. James, Eric, Erin, and Edmund participated in the injustice and inequity. They participated through their creation, ownership, operation, use, and receipt of funds and benefits from SRC Painting, PBN, and Liquid Systems. Karen and Constance also participated in the injustice and inequity found herein through their receipt of funds and benefits from these corporations. Karen received cash payments from SRC Painting, as well as car payments. Karen also benefited from Liquid Systems’ payment of the mortgage and expenses on the Trego property where Karen lived part time. Constance received rent and home expense payments from SRC Painting. She possibly received payments for her Jeep from Liquid Systems. Edmund’s uncertainty on this matter demonstrates the fluidity of the Wierzbickis’ relationships with the corporations.

Karen and Constance received money and payments of personal expenses from the corporations. These benefits were, at least in part, for noncorporate purposes. As a result of these payments, the legal obligations of the corporations, including Liquid Systems, would be evaded if the corporate structure were recognized. Accordingly, Karen and Constance are liable, together with their spouses and Erin and Edmund, for the unfair labor practices found herein.

C. Section 8(a)(1)¹⁴

Employers violate Section 8(a)(1) of the Act when they threaten employees with job loss or loss of work as a result of their union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003). The complaint charges that about mid-September 2003, PBN, acting through James Wierzbicki, threatened an employee with discharge if the employee did not voluntarily give up his union apprenticeship.

In approximately September 2003¹⁵ after George had called Eric to speak about his union apprenticeship program, James met with George at Harbor Park and told him that if he wanted to attend school to complete the apprenticeship program, he would have to work for someone else. Thus, James threatened George with discharge if he did not give up his union apprenticeship program. This threat violates Section 8(a)(1).

D. Section 8(a)(3) and (1)—Discharge of Brent George

When an employer is alleged to have violated Section 8(a)(3) in discharging an employee, the General Counsel has the burden of proving by a preponderance of the evidence that anti-union sentiment was a motivating factor in the discharge. To meet this burden, the General Counsel must offer credible evi-

¹⁴ During the course of the hearing, including posthearing briefs, the Respondents have not opposed or addressed the unfair labor practice allegations in the complaint.

¹⁵ James’ initial meeting with SRC Painting’s employees at the Kenosha restaurant occurred in July. About 3 weeks later, the Wierzbickis held a meeting at SRC Painting’s offices in Eric’s residence. About 2 weeks later, James met with George. Accordingly, the meeting occurred in approximately September, and this is substantially consistent with the complaint allegations.

dence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus. Once such unlawful motivation is shown, the burden shifts to the employer to prove its affirmative defense that the alleged discriminatory discharge would have taken place even in the absence of the protected activity. The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

George engaged in protected activity by asking James Wierzbicki on several occasions to allow George to complete the Union's apprenticeship program. Animus is demonstrated by James' various reactions to George's requests, including James' statement that if George wanted to complete the apprenticeship program, he would have to work for someone else. After James' last conversation with George about the apprenticeship program, James went to Christianson and told him to fire George. Christianson did not immediately discharge George, but he did discharge George shortly before Thanksgiving. George was not recalled except for a 2-week period in January 2004. Accordingly, the General Counsel has established a prima facie case of unlawful discrimination.

The Respondents did not attempt to disprove any of the facts constituting this charge. James testified, but he did not address George's discharge. In addition, and like the other unfair labor practices set forth in the complaint, the Respondents have not addressed this charge in their posthearing briefs. The unopposed evidence establishes that PBN discharged George, and has failed to recall him, because of his protected union activity. Accordingly, PBN violated Section 8(a)(3) and (1) of the Act.

E. Section 8(a)(5) and (1)—Contributions to the Union's Welfare and Other Funds

An employer violates Section 8(a)(5) and (1) of the Act by failing to contribute to the appropriate union funds as required by its collective-bargaining agreement. *Alexander Painting*, 344 NLRB 1346 (2005). The Respondents do not dispute that the last payment to the Union's health, welfare, vacation, apprenticeship, pension, and other funds, as required by the collective-bargaining agreement between SRC Painting and the Union, was in March 2003, and that no further payments were made. SRC Painting, as well as its respective alter egos, PBN and Liquid Systems, was obligated to make those payments on April 30, 2003, and thereafter pursuant to its collective-bargaining agreement. Accordingly, the Respondents, SRC Painting, PBN, and Liquid Systems, violated Section 8(a)(5) and (1) of the Act.

F. Section 8(a)(5) and (1)—Failing to Honor the Collective-Bargaining Agreement

An employer violates Section 8(a)(5) and (1) of the Act by failing to honor the terms of its collective-bargaining agreement. *Alexander Painting*, supra. The Respondents do not dispute the failure of PBN and Liquid Systems to comply with the terms of the collective-bargaining agreement between SRC Painting and the Union. Indeed, PBN was created for the specific purpose of taking over SRC Painting's business without

the Union. And, Liquid Systems simply took over PBN's business when PBN's figurehead owner departed. The Respondents also do not dispute that SRC Painting stopped complying with its collective-bargaining agreement as of April 30, 2003. Accordingly, the Respondents, SRC Painting, and its alter egos, PBN and Liquid Systems, violated Section 8(a)(5) and (1) of the Act by failing to honor the terms of the collective-bargaining agreement between SRC Painting and the Union, which was effective from June 1, 2002, to May 31, 2004.

G. Section 8(a)(5) and (1)—Bypassing the Union and Dealing Directly with Employees

An employer violates Section 8(a)(5) and (1) by bypassing its employees' exclusive representative and dealing directly with the employees regarding terms and conditions of employment. *Midwest Precision Heating & Cooling*, supra. When James Wierzbicki was forming PBN, he met twice with SRC Painting's employees without a union official. He told the employees that they would lose the health care and pension benefits they received from the Union, but that he would provide a new health care plan for them. He also told them he would increase their wages because of the money he would save by not making payments to the Union's funds. James offered Brent George a raise if George would quit the Union's apprenticeship program. The dishonesty of these statements and promises is not relevant to the violation, which was complete when James dealt directly with the employees concerning these terms and conditions of employment. Accordingly, PBN, and its alter ego, Liquid Systems, violated Section 8(a)(5) and (1).

H. Intentionally and Unlawfully Reducing the Number of Unit Employees

The complaint charges that Liquid Systems intentionally reduced the number of unit employees in an effort to reduce its obligations under the Act. Although the evidence indicates that Liquid Systems employed fewer than all of PBN's employees, the record was not fully developed for this charge. In particular, there is insufficient evidence to establish that the reduced number of employees was for the unlawful purpose alleged in the charge. Accordingly, I will recommend that this charge be dismissed.

CONCLUSIONS OF LAW

1. Respondents SRC Painting, PBN, and Liquid Systems are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Painters and Allied Trades, District No. 7, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Liquid Systems is the alter ego of SRC Painting and PBN. Respondent PBN is the alter ego of SRC Painting.

4. Respondents SRC Painting, PBN, and Liquid Systems are jointly and severally liable for the unfair labor practices found in this proceeding.

5. Respondents James, Karen, Eric, Constance, Erin, and Edmund Wierzbicki are personally liable for the unfair labor practices committed by the corporate Respondents as found in these proceedings.

6. At all material times, the Union has been the designated exclusive collective-bargaining representative of the employees of SRC Painting, and its alter egos, PBN, and Liquid Systems, in the following appropriate bargaining unit within the meaning of Section 9(b) of the Act:

All painters, drywall finishers, wall coverers, and similar or related classifications, excluding guards and supervisors as defined in the Act.

7. Respondents PBN and James Wierzbicki violated Section 8(a)(1) of the Act by threatening an employee that he would have to work for someone else if he did not refrain from protected, union activities.

8. Respondent PBN violated Section 8(a)(3) and (1) of the Act by unlawfully discharging Brent George.

9. Respondents SRC Painting, PBN, and Liquid Systems violated Section 8(a)(5) and (1) of the Act by:

(a) Failing and refusing to recognize and bargain with the Union.

(b) Failing to make payments for or to the Union's health, welfare, vacation, apprenticeship, pension, and other funds as required by the collective-bargaining agreement between the Union and SRC Painting for the period June 1, 2002, through May 31, 2004 (Agreement).

(c) Failing to continue in full force and effect the terms and conditions of the Agreement by failing to apply the Agreement to the unit employees.

(d) Bypassing the Union as the exclusive representative of employees in the bargaining unit and dealing directly with employees over terms and conditions of employment.

10. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act in its discriminatory discharge of Brent George, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union, the Respondents will be ordered to recognize the Union as the exclusive representative of its unit employees and, on request, to meet and bargain in good faith with the Union. The Respondents also shall abide by and give full force and effect to the agreement, and any automatic renewals or extensions of it, unless and until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to make payments for or to the Union's various welfare funds as required by the Agreement, the Respondents must make all contractually-required payments that they have failed to make, including any additional amounts due to the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondents shall reimburse unit employees for any expenses resulting from their failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing and refusing to apply the terms and condition of the Agreement, the Respondents shall be required to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondents' failure to comply with the agreement since April 30, 2003, in the manner set forth in *Ogle Protection Service*, with interest as prescribed in *New Horizons for the Retarded*, supra.

Additionally, and in view of the nature of employment in the painting/construction industry, and in view of the purported location of Liquid Systems' place of business, which is at Edmund Wierzbicki's residence or his automobile, and of SRC Painting's and PBN's places of business at Eric Wierzbicki's residence, I find that posting notices at the Respondents' place of business is inadequate to inform the Respondents' present and former employees of their rights under this Decision and Order. Therefore, I shall order that in addition to posting the attached notice at their place of business, the Respondents will post copies of the notice at their jobsites, and furnish signed copies of the notice to the Union for posting at the Union's office and meeting places. See *Kenmore Contracting Co.*, 289 NLRB 336, 339-340 (1988), enfd. 888 F.2d 125 (2d Cir. 1989).

[Recommended Order omitted from publication.]