

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation, a Single Employer and Arthur Salm and Fortuna Edery and International Ladies' Garment Workers Union, AFL-CIO and Local 99, International Ladies' Garment Workers Union, AFL-CIO Cases 29-CA-14548, 29-CA-14619, 29-CA-14681, 29-CA-14735, 29-CA-14845, 29-CA-14853, 29-CA-14896, 29-CA-14983, 29-CA-15012, 29-CA-15119, 29-CA-15124, 29-CA-15137, 29-CA-15147, 29-CA-15323, 29-CA-15324, 29-CA-15325, 29-CA-15332, 29-CA-15393, 29-CA-15413, 29-CA-15447, and 29-CA-15685

December 30, 2011

THIRD SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

This is the latest chapter in protracted litigation over remedial issues arising out of the Board's finding that the Respondent unlawfully failed to timely offer reinstatement to nearly 200 of its employees who had engaged in an unfair labor practice strike. The question now before us is whether to pierce the corporate veil of the Respondent in order to hold its principal shareholders derivatively liable for the backpay and interest owed those employees. The judge found that the Acting General Counsel failed to justify this extraordinary measure. We find merit in the Acting General Counsel's exceptions.¹

¹ On February 14, 2011, Administrative Law Judge Raymond P. Green issued the attached third supplemental decision. The Acting General Counsel filed exceptions and a supporting brief. Arthur Salm filed an answering brief. Salm also filed a cross-exception, which is argued in his answering brief.

The National Labor Relations Board has considered the third supplemental decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this third supplemental decision and Order.

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

We note that the Acting General Counsel initiated this phase of the proceeding by way of a notice of hearing, a method not provided for in the Board's Rules and Regulations. The substantive allegations in the notice of hearing, however, are those that would be made in an amend-

I. BACKGROUND

The background of this case is described in the judge's decision, so we only briefly summarize here and supplement as necessary. The Respondent, comprising Domsey Trading Company, Domsey Fiber Corporation, and Domsey International Sales Corporation, was engaged in the business of exporting and selling used clothing and textiles. The principal owners of the Respondent were Arthur Salm, with a 48-percent ownership interest, and Albert Edery, with a 50-percent interest.²

This case originated in a 1989 organizing drive among the Respondent's employees. Ultimately, the employees went on strike, and the Respondent unlawfully failed to timely reinstate them at the strike's conclusion. The Board ordered the Respondent to offer reinstatement to the former strikers and make them whole for their losses.³ In 1999, Administrative Law Judge Michael A. Marcionese issued his initial supplemental compliance decision, finding that the Respondent owed over \$1 million, plus interest, in backpay to the discriminatees.⁴ The Respondent appealed this supplemental decision to the Board.

While that appeal was pending, the Respondent, by Salm and Edery, executed a series of transfers that lie at the heart of the Acting General Counsel's argument for imposing derivative liability. At the beginning of 2002, the Respondent had \$848.66 in its corporate bank account. In January 2002, the Respondent and another entity—Edery-Salm Associates—sold a jointly owned property located at 431 Kent Avenue in Brooklyn, New York, for approximately \$12.3 million. The Respondent's stake in the building was its only significant asset. The Respondent's share of the proceeds exceeded \$9

ed compliance specification, and treating it as such will not result in prejudice to any party. Accordingly, we view the notice of hearing as an amended compliance specification, we direct the Region to so amend the name of the pleading, and we instruct the parties to refer to the pleading as an amended compliance specification in any future filings in this case. On a related point, we reject the Acting General Counsel's argument that all allegations in the notice should be deemed admitted because the Respondent did not file an answer. In fact, Salm filed an answer.

² As described by the judge, Edery's widow and executrix, Fortuna Edery, has entered into an agreement with the Acting General Counsel to pay Edery's share of backpay liability in the event Arthur Salm is found personally liable. The Acting General Counsel has reached a similar agreement with Salm's sons, Peter and David. As a result, this decision concerns only Arthur Salm's liability.

³ *Domsey Trading Corp.*, 310 NLRB 777 (1993), enf. 16 F.3d 517 (2d Cir. 1994).

⁴ The Board later reduced the principal backpay amount to approximately \$915,000.

million, and this money was deposited into its corporate bank account.⁵

Almost immediately, Salm wrote a corporate check to himself in the amount of \$3,262,966 and deposited it in his personal bank account. Within days, he routed \$4 million from that account into his personal brokerage account, and within weeks into a second of his personal brokerage accounts. Later, Salm transferred that money into his wife's brokerage account and eventually from there into another brokerage account in his own name. Salm wrote a second corporate check to Edery, for \$4,555,379.85, which Edery deposited into a personal brokerage account he held jointly with his wife.⁶ By January 22, 2002, following additional deposits and withdrawals, the Respondent's corporate bank account was again left with only \$848.66. By June 2002, the account had a negative balance.

Neither the Respondent nor Edery-Salm Associates set aside any money or made any arrangement to satisfy the backpay award that had been recommended by Judge Marcionese in 1999. Further, neither the Respondent nor the principals gave any notice to the Board of the foregoing transactions.

The Board proceeding was continuing, however. In 2007, the Board issued a supplemental decision in which it affirmed in part and reversed in part Judge Marcionese's recommendations, directed the Region to recalculate certain backpay amounts, and remanded certain issues to the judge.⁷ Following Judge Marcionese's decision on remand, the Board issued a second supplemental decision ordering the Respondent to pay all undisputed backpay amounts and to pay backpay to certain discriminatees as determined by the judge on remand.⁸

Currently, there are 181 discriminatees owed total backpay of \$914,784.37, plus interest. The Acting Gen-

eral Counsel estimates the Respondent's current total liability at over \$2 million. It is unclear whether or to what extent the Respondent is capable of satisfying this obligation. The three components of the Respondent each ceased operating on January 31, 2002, and Domsey Trading Corporation was formally dissolved in 2009.

II. DISCUSSION

As the Board has previously observed, a "Board order is a vindication of public policy and is binding not only on a named respondent but also is binding upon the respondent's 'officers, agents, successors and assigns.'"⁹ Thus, a corporate respondent's cessation of business, or even its dissolution, does not extinguish the responsibility for remedying its unfair labor practices. The officers, agents, successors, and assigns remain responsible for managing and preserving corporate assets so that those assets will be available to satisfy a Board-ordered, court-enforced money judgment.¹⁰ The question in this case is whether Salm's distribution of the Respondent's assets to himself and Edery justify imposing personal liability upon him.

In considering that question, we recognize that "[t]he insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception."¹¹ Yet, the law is also clear that the corporate veil is not inviolate. When equity demands, it may be pierced to prevent injustice. Thus, the Board, with court approval, has long held corporate officers personally liable for backpay where the circumstances warranted such measures.¹²

The Board's analytical framework for determining when it is appropriate to assess derivative liability against a corporate owner or officer is set forth in *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996). There, the Board, clarifying its

⁵ An additional \$2.6 million was paid to a law firm for the benefit of Domsey Fiber Corporation, a component of the Respondent. The whereabouts of that money is unknown.

⁶ Upon Edery's death, his widow became the sole owner of the brokerage account.

⁷ *Domsey Trading Corp.*, 351 NLRB 824 (2007). There, the Board directed Judge Marcionese to consider, in light of the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), whether six discriminatees were lawfully authorized to work in the United States during the backpay period and entitled to receive backpay.

⁸ *Domsey Trading Corp.*, 353 NLRB 86 (2008), affd. in 355 NLRB No. 89 (2010). The United States Court of Appeals for the Second Circuit, looking only at the *Hoffman Plastics* issue, denied enforcement of the Board's second supplemental decision and order, and remanded the case to the Board for further proceedings. See *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2010). In a separate decision (357 NLRB No. 164) also issued December 30, 2011, we have remanded that part of the case for further proceedings consistent with the court's decision.

⁹ *Bolivar-Tees, Inc.*, 349 NLRB 720, 728 (2007), enfd. 551 F.3d 722 (8th Cir. 2008).

¹⁰ *Id.*

¹¹ *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993), quoting *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-403 (1960).

¹² See, e.g., *Rome Electrical Systems, Inc.*, 356 NLRB No. 38 (2010); *D.L. Baker*, 351 NLRB 515 (2007); *Bolivar-Tees, supra*; *SRC Painting*, 346 NLRB 707 (2006), enfd. by consent order (7th Cir., June 14, 2007); *Reliable Electric Co.*, 330 NLRB 714 (2000), enfd. mem. 12 Fed.Appx. 888 (10th Cir. 2001); *West Dixie Enterprises*, 325 NLRB 194 (1997), enfd. 190 F.3d 1191 (11th Cir. 1999); *Bufco Corp.*, 323 NLRB 609 (1997), enfd. in pertinent part, remanded in part 147 F.3d 964 (D.C. Cir. 1998); *Genesee Family Restaurant*, 322 NLRB 219 (1996), enfd. mem. 129 F.3d 1264 (6th Cir. 1997); *AAA Fire Sprinkler, Inc.*, 322 NLRB 69 (1996), enfd. mem. 173 LRRM (BNA) 2182 (10th Cir. 2000); *White Oak Coal Co.*, 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996); and *IMCO/International Measurement & Control Co.*, 304 NLRB 738 (1991), enfd. 978 F.2d 334 (7th Cir. 1992).

precedent, adopted a two-prong test under which it will pierce a corporate veil when: (1) the shareholders and the corporation have failed to maintain separate identities; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to the evasion of legal obligations.¹³

Under the first prong of the *White Oak Coal* test, the Board considers the degree to which (a) corporate formalities have been maintained; and (b) individual and corporate funds, assets, and affairs have been commingled. Among the factors considered by the Board in applying the first prong are: (1) whether the corporation is operated as a separate entity; (2) commingling of funds and other assets; (3) failure to maintain adequate corporate records; (4) nature of the corporation's ownership and control; (5) availability and use of corporate assets, the absence of same, or undercapitalization; (6) 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; (8) diversion of the corporate funds or assets to non-corporate purposes; and (9) transfer or disposal of corporate assets without fair consideration. 318 NLRB at 735. Not all of these factors need to be present to conclude that the first prong has been met.¹⁴

The second prong of the *White Oak Coal* test requires a determination of whether respecting the corporate form would sanction a fraud, promote injustice, or lead to the evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing of the corporate veil must flow from misuse of the corporate form. Further, the individuals charged with liability must have participated in the fraud, injustice, or inequity.¹⁵

Applying this two-pronged analysis, the judge found that the Acting General Counsel had not established sufficient grounds to justify piercing the Respondent's corporate veil. As to the first prong, the judge acknowledged that not all of the factors need to be proven. He found no evidence, however, that the Respondent had failed to maintain corporate formalities. In his view, the only evidence supporting the Acting General Counsel's case was "that personal and corporate assets had been

commingled" in connection with the Respondent's sale of its Kent Avenue property. Even as to that evidence, the judge questioned whether what transpired "fits easily within the definition of commingling," given that Board cases finding commingling "typically involved multiple transactions over a period of time whereby the shareholders typically took money out of the corporation for their own personal use" while "the corporation . . . was still engaged in its normal business activities." The judge opined that "this one time liquidation and distribution of corporate assets, may not be the type of transactions [sic] that the Board has previously found to constitute commingling." Having concluded that the Acting General Counsel had not established the first prong of the *White Oak Coal* analysis, the judge did not expressly address the second prong.

Contrary to the judge, we find that the Acting General Counsel has justified holding Salm personally responsible for the Respondent's backpay liability. Under the first prong of the *White Oak Coal* test, we acknowledge that the Respondent has kept adequate corporate records and that it was historically operated as a separate entity from its principal owners. The latter changed in January 2002, however, when Salm and Edery used their virtually complete control over the Respondent to cause it to sell its most valuable asset, the Kent Avenue property. As described, Salm quickly moved his share of the proceeds into his personal bank and brokerage accounts, and later through additional accounts owned by him or his wife before finally depositing his share of the proceeds in his personal brokerage account. Salm also quickly acted in January 2002 to distribute nearly all that was left of the corporate money to Edery. As the Acting General Counsel asserts, there is no evidence that the disbursements to Salm and Edery in January 2002 served any valid corporate purposes or otherwise represented fair consideration for services.¹⁶ Rather, they evidence a lack of separation between the Respondent and its principals, as Salm clearly regarded the proceeds as being freely available for the taking, notwithstanding that they belonged to the Respondent.¹⁷ Instead of respecting that distinction, Salm commingled the Respondent's assets with his own, which the judge properly observed is one of the most serious forms of abuse of the corporate form.¹⁸ By doing

¹³ Although the *White Oak Coal* Board rejected the analytical framework previously articulated in *Riley Aeronautics Corp.*, 178 NLRB 495 (1969), it did not purport to overrule the result reached in any of the Board's prior cases in this area of the law.

¹⁴ See, e.g., *West Dixie Enterprises*, supra, 325 NLRB at 195 (finding the first prong met based on the absence of corporate formalities, commingling of funds, and diversion of corporate assets to non-corporate purposes).

¹⁵ *White Oak Coal*, supra at 735.

¹⁶ For example, there is no evidence of any outstanding shareholder loans at the time.

¹⁷ See *IMCO/International Measurement & Control Co.*, supra, 304 NLRB at 740, 744-745 (finding impermissible personal use of corporate assets where owners took proceeds from the respondent's liquidation of a condominium, a yacht, and automobiles).

¹⁸ See *D. L. Baker*, 351 NLRB 515, 522 (2007).

so, he effectively rendered the Respondent judgment proof.¹⁹

Unlike the judge and our dissenting colleague, moreover, we find it immaterial that Salm's transfer of the Respondent's assets into his and Edery's personal accounts was tied to one major corporate transaction as opposed to many smaller transactions occurring over months or years. Either way, a corporate respondent can be left undercapitalized and without the ability to satisfy its legal obligations. That is precisely what happened here.

Even before cessation of the Respondent's operations, its major asset was liquidated and the proceeds were moved to Salm's and Edery's personal accounts without providing for the Respondent's prospective backpay liability, which Salm was well aware of at the time.²⁰ His actions left the Respondent a shell with no apparent means of satisfying its substantial liabilities. This is particularly troublesome because the Respondent had less than \$1000 in its corporate bank account *at the beginning* of January 2002. The liquidation of the Kent Avenue property was an opportunity to replenish the Respondent's account and ensure the Respondent's ability to satisfy its creditors. Instead, Salm distributed the sale proceeds, returning the Respondent to a state of being undercapitalized relative to its obligations.²¹

Further, the transfers of the Respondent's assets clearly did not involve adherence to normal legal formalities or arm's-length dealings. Typically, upon a corporation's dissolution its officers and shareholders are entitled to recover their investments and payment for their services. But the principals cannot in the process turn their backs on corporate liabilities, including, in this case, the backpay owed to employees as a result of the Respondent's violations of the law.²² Salm, however, chose to ignore the legal fact that the corporation was a separate entity in order to enrich himself and Edery, at

the expense of the backpay claimants and any other remaining creditors.²³

Based on all of the foregoing, we find that the Acting General Counsel has satisfied the first prong of the *White Oak Coal* test.

For reasons largely discussed above, we find that the second prong of the *White Oak Coal* test has also been met. Adherence to the corporate form here would promote injustice and lead to the evasion of legal obligations, i.e., the Respondent's obligation to satisfy the requirements of the Board's orders. As described, Salm himself perpetrated this inequity when he transferred corporate proceeds from the sale of the Respondent's Kent Avenue property to his and Edery's personal accounts. We recognize, as did the judge, that these events occurred several years after Judge Marcionese issued his initial supplemental decision determining the Respondent's backpay liability. Based in part on that lapse of time, the judge observed that "it cannot be said with any certainty that the motivation for the sale was to evade the debts incurred to the discriminated employees." Specific intent is not required, however.²⁴ "Persons are held to intend the foreseeable consequences of their conduct."²⁵ Accordingly, the question is whether a corporate owner's or officer's conduct "would have the 'natural, foreseeable, and inevitable consequence' of diminishing a corporation's ability to satisfy the remedial obligation."²⁶ Salm's conduct clearly had that effect on the Respondent in this case.

Having thus found that both prongs of the *White Oak Coal* test have been satisfied, we find it appropriate to pierce the Respondent's corporate veil and hold Salm personally liable for the backpay owed to the discriminatees.²⁷

²³ Thus, this case is easily distinguishable from *Flat Dog Productions, Inc.*, 347 NLRB 1180 (2006), where the Board refused to assess personal liability. In *Flat Dog*, unlike here, there was no evidence of commingling of funds, undercapitalization, diversion of corporate assets to non-corporate purposes, or dispersal of corporate assets without fair consideration.

²⁴ See *D.L. Baker, Inc.*, supra, 351 NLRB at 524 fn. 25.

²⁵ *IMCO/International Measurement & Control Co.*, supra, 304 NLRB at 744.

²⁶ *D.L. Baker*, supra, 351 NLRB at 523, and cases cited therein; accord *Bufco Corp.*, supra, 323 NLRB at 629 (piercing a corporate veil where the "natural, foreseeable, and inevitable consequences" of the owners' misuse of corporate assets was the corporation's diminished ability to satisfy its remedial obligations).

²⁷ Our decision to hold Salm personally responsible for the Respondent's backpay liability is based on the analytical framework adopted in *White Oak Coal*. It is consistent with *F & W Oldsmobile*, 272 NLRB 1150 (1984), a pre-*White Oak* case where the Board imposed personal liability on corporate officers who dissolved a corporation and distributed its assets to themselves while they were on notice of a pending backpay claim against the corporation. In that case, the

¹⁹ See *IMCO/International Measurement & Control Co.*, supra.

²⁰ It is immaterial that the Board had not yet acted on Judge Marcionese's initial recommended supplemental decision and order. See *Bolivar-Tees, Inc.*, supra, 349 NLRB at 730; see also *Dahl Fish Co.*, 299 NLRB 413, 420 (1990), enfd. by consent order 1991 WL 86408 (D.C. Cir. 1991).

²¹ See *D. L. Baker*, supra.

²² See *Bolivar-Tees*, supra, 349 NLRB at 728, discussed supra; accord *Pierce v. United States*, 255 U.S. 398, 402-403 (1921) ("The corporation cannot disable itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. . . . [W]hen a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed.").

In reaching that conclusion, we have considered Salm's chief argument in response to the Acting General Counsel's exceptions: that piercing the corporate veil is unwarranted because there has been no showing that the Respondent is insolvent or unable to pay the backpay award. In support, Salm points out that Domsey Fiber, a component of the Respondent, received \$2.6 million from the sale of the Kent Avenue property, an amount sufficient to cover the Respondent's current backpay liability. As previously stated, however, the current whereabouts of those funds are unknown. If Domsey Fiber has sufficient funds to satisfy the backpay liability, Salm remains free to satisfy the liability solely with those funds.

Last, there is no merit to Salm's cross-exception to the judge's failure to find that the Acting General Counsel's claims against him are barred by the statute of limitations contained in Section 3306(b) of the Federal Debt Collection Procedure Act of 1990 (FDCPA), 28 U.S.C. § 3001-3308. The FDCPA pertains to the collection of debts. The issue here is whether Salm should be held personally liable for backpay. That being the issue, the only applicable statute of limitations is the 6-month period for the filing of a charge under Section 10(b) of the Act.

ORDER

The National Labor Relations Board orders that the Respondents, Domsey Trading Corporation, Domsey Fiber Corporation, and Domsey International Sales Corporation, a single employer, Brooklyn, New York, its officers, agents, successors, and assigns, and Arthur Salm, his agents, successors, and assigns, shall jointly and severally make whole the discriminatees at issue by paying them backpay as set out in the Orders contained in the Board's supplemental decision reported at 351

judge held, in a decision affirmed by the Board, "the Company and its officers were on notice of a pending backpay claim when the distribution of corporate assets took place. Accordingly, I believe that the corporate veil should be pierced to the extent of holding the individuals liable up to the amount of funds which were distributed to them from corporate assets." Id. at 1151 (footnote omitted). As the judge observed in *F & W*, this holding is consistent with New York State corporation law, where all of the components of the Respondent are or were incorporated. See N.Y. Bus. Corp. Law § 1005(a)(3); *Coleman v. Golkin, Bomback & Co.*, 562 F.2d 166, 169 fn. 6 (2d Cir. 1977); *Plastic Contact Lens v. Frontier of the Northeast*, 324 F.Supp. 213, 220 (W.D.N.Y. 1969), affd. 441 F.2d 67 (2d Cir. 1971), cert. denied 404 U.S. 881 (1971).

Given our reliance on *White Oak Coal*, moreover, we find it unnecessary to pass on counsel for the Acting General Counsel's proposed "transactional" analysis to the extent it may differ from the *White Oak Coal* analysis, or her argument that Salm was an alter ego of the Respondent. Further, we do not rely on the Acting General Counsel's "trust fund" theory based on state law because Salm's personal liability, based on a violation of the National Labor Relations Act, is governed by Federal law. See *White Oak Coal*, supra, 318 NLRB at 734.

NLRB 824 (2007), and second supplemental decision reported at 353 NLRB 86 (2008), affirmed in 355 NLRB No. 89 (2010).

IT IS FURTHER ORDERED that the Respondents place in escrow with the Regional Director for Region 29 of the National Labor Relations Board for a period of 1 year the amounts listed, for the designated discriminatees, in the Board's decision reported at 353 NLRB 86 (2008), affd. in 355 NLRB No. 89 (2010).

In issuing the above Orders, we recognize the possibility that, as to certain discriminatees, the backpay amounts referenced may be adjusted as a result of the related matter we have remanded in light of the Second Circuit's decision, described in footnote 8, supra. Thus, we issue this Order without prejudice to Salm's ability to assert any such adjustments in the future. Otherwise, we see no reason to further delay the payment of backpay, the vast majority of those claims having been determined.

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

"But our outrage at [the] conduct should not obscure the boundaries of settled legal categories."¹

The issue presented is whether the Board may reach out to hold Arthur Salm, an owner and shareholder of the Respondent, personally liable for backpay under the theory of *White Oak Coal Co.*² After the Respondent ceased operations, Salm received money from a liquidation and distribution of corporate assets without making provision to satisfy the Board's claim as creditor for the amount of backpay owed certain discriminatees. Reversing the judge, my colleagues pierce the corporate veil and hold Salm personally liable. To reach this result, my colleagues apply the Board's *White Oak* analysis outside its intended framework and, in effect, find Salm personally liable under a theory of fraudulent transfer, a theory not encompassed by *White Oak* or alleged by the Acting

¹ *Chambers v. Nasco*, 501 U.S. 32, 60 (1991) (Kennedy, J., dissenting).

² 318 NLRB 732 (1995), enf. mem. 81 F.3d 150 (4th Cir. 1996).

General Counsel. In agreement with the judge, I find that the Board may not pierce the corporate veil and I accordingly dissent.

Facts

Arthur Salm and Albert Edery were the Respondent's principal owners and shareholders. In 1993, the Board found that the Respondent (Domsey Trading Corp., Domsey Fiber Corp., and Domsey International Sales Corp., a Single Employer) violated the Act by failing, inter alia, to reinstate unfair labor practice strikers upon an unconditional offer to return. The Board thus awarded the strikers remedial backpay.³ In a supplemental compliance decision issued in October 1999, Judge Marcionese found that the Respondent owed over \$1 million, plus interest, in backpay to the discriminatees. In September 2007, the Board reduced the amount of backpay owed to approximately \$915,000, and remanded certain issues to the judge and to the Regional Director for further consideration. See *Domsey Trading Corp.*, 351 NLRB 824.⁴

Meanwhile, by the end of 2001, the Respondent ceased operations at its principal place of business⁵ and then sold the property in an arm's-length transaction on January 9, 2002.⁶ As relevant here, Domsey Trading Corporation received a check in the amount of \$9,062,082.26 from the proceeds of the sale. Of this amount, the Respondent distributed \$3,262,966.21 to Salm, and \$4,555,379.85 to Edery. Each then transferred the funds among various personal accounts.⁷ No provision was

made to set aside funds to satisfy the Board's claim as creditor for backpay owed the discriminatees. The Acting General Counsel now alleges that Salm should be held individually liable for the backpay.⁸

Analysis

To determine whether an individual should be held personally liable for a corporation's liabilities, the Board applies the piercing-the-corporate-veil test announced in *White Oak*, supra. Rejecting as "unclear and unwieldy" the "multifaceted" approach to piercing the corporate veil previously set out in *Riley Aeronautics Corp.*, 178 NLRB 495 (1969),⁹ the Board adopted "a two-prong test derived from Federal common law." *White Oak*, supra, 318 NLRB at 732.

Under *White Oak Coal*, the Board will pierce a corporate veil when (1) the shareholders and the corporation *have failed to maintain separate identities*; and (2) adherence to the corporate form would sanction a fraud, promote injustice, or lead to the evasion of legal obligations. Under the first prong of this test, the Board considers *the degree to which* (a) corporate formalities have been maintained; and (b) *individual and corporate funds, assets, and affairs have been commingled*. . . . When assessing the second prong, the Board considers whether the inequity flowed from the misuse of the corporate form; moreover, the individuals charged with liability must have participated in the fraud, injustice, or inequity.¹⁰

Observing that "the party asserting that the corporate veil should be pierced, in this case the [Acting] General Counsel, has the burden of proof, and that burden is a heavy one,"¹¹ the judge here found that the first prong of the *White Oak* test was not satisfied because at all relevant times, i.e., when the Respondent was engaged in business, corporate formalities had been maintained, the corporate entities were adequately funded, and corporate funds and assets had not been commingled. I agree with the judge.¹² My colleagues likewise appear to agree that, as "historically operated," the Respondent did not run

³ *Domsey Trading Corp.*, 310 NLRB 777 (1993), enfd. 16 F.3d 517 (2d Cir. 1994).

⁴ Later, the Board ordered the Respondent to pay all undisputed backpay amounts and to pay backpay to certain discriminatees as Judge Marcionese determined on remand. See *Domsey Trading Corp.*, 353 NLRB 86 (2008), affirmed in 355 NLRB No. 89 (2010). The United States Court of Appeals for the Second Circuit has denied enforcement of that decision and remanded it to the Board to further consider certain backpay entitlement issues in light of the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). See *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011).

⁵ The judge found that the Respondent's operations "were probably terminated some time before the end of 2001." My colleagues' assertion that operations ceased on January 31, 2002 is based only on Salm's counsel's statement in a pleading.

⁶ Given the amount of time between Judge Marcionese's 1999 supplemental decision and the 2002 sale of the property, and the absence of any evidence as to reasons why the property was sold, the judge here found that there could be a number of legitimate reasons why Domsey's owners decided to sell the property and terminate the business. Thus, he found that "it [could not] be said with any certainty "that the motivation for the sale was to evade the debts incurred to the discriminated [sic] employees."

⁷ In an effort to suffuse these transactions with an element of evasion, my colleagues describe them as "quickly" accomplished, as if they were overnight transactions. Certain of these transactions, however, occurred 11 to 17 months after the sale.

⁸ The Acting General Counsel also alleges that Fortuna Edery, the widow and executrix of Edery's estate, and Salm's sons, Peter and David, should be held individually liable. However, since these individuals have agreed to pay a share of the backpay liability if Salm is found personally liable, Salm's liability is the only issue here.

⁹ *AAA Fire Sprinkler, Inc.*, 322 NLRB 69, 73 (1996), enfd. in part and remanded, 144 F.3d 685 (10th Cir. 1998). In passing, I thus note that my colleagues are in error in claiming that *White Oak* did not overrule any prior Board cases.

¹⁰ *D. L. Baker, Inc.*, 351 NLRB 515, 521 (2007) (emphasis added).

¹¹ *Flat Dog Productions*, 347 NLRB 1180, 1182 (2006).

¹² Like the judge, I thus find it unnecessary to decide whether the second prong of the *White Oak* test was satisfied.

afoul of *White Oak's* first prong. This should end the matter.

Instead, the majority takes the unprecedented step of extending *White Oak's* first prong beyond its intended framework to find that, while the first prong was not satisfied when the Respondent was in operation, it was satisfied *after* the Respondent ceased operations and went out of business. The result is a contorted analysis in which (1) a one-way, one-time distribution of funds from the Respondent to its owners upon the Respondent's going out of business becomes a "commingling" of funds; (2) the subsequent transfer of funds among Salm's and Edery's personal accounts becomes an "abuse of the corporate form"; and (3) the fact that the Respondent had no assets after it went out of business establishes that it was "undercapitalized."

The *White Oak* test—as my colleagues' analysis illustrates—was not intended to apply to a corporation that has ceased operations and gone out of business. To understand this, one need look no further than the language of the test itself: "[u]nder *White Oak Coal*, the Board will pierce a corporate veil when (1) the shareholders and the corporation *have failed to maintain separate identities . . . [and that] [u]nder the first prong of this test, the Board considers the degree to which . . . individual and corporate funds, assets, and affairs have been commingled.*" Such inquiries can only be undertaken when the scope of the analysis concerns the relationship of the corporation and its shareholders over a period of time, a period in which the corporation retains its distinct identity as an ongoing enterprise. This was the judge's understanding of the *White Oak* analysis, and this was why he rejected the assertion that the one-time distribution of funds was "commingling." The judge's understanding is supported by the fact that the Board has not previously applied the *White Oak* test to a one-time liquidation and distribution of corporate assets.

My colleagues, however, purport to hold Salm liable because he did not provide for backpay owed discriminatees in the various transfers of funds that occurred *after* the liquidation and distribution of assets, and because these distributions allegedly did not serve "any valid corporate purposes or otherwise [represent] fair consideration for services." However, these are not *White Oak* factors; they are considerations under a "fraudulent transfer" theory of liability, described by former Chairman Liebman as a theory applied to individuals who allegedly "received corporate assets without consideration under circumstances rendering them liable to corporate creditors to the extent of the value of the

transferred assets."¹³ This legal theory is separate and distinct from the piercing the corporate veil *White Oak* theory of liability advocated by the Acting General Counsel. The fraudulent transfer theory was neither alleged nor litigated and my colleagues therefore err in invoking it now.¹⁴

For all these reasons, I dissent from my colleagues' piercing the corporate veil in this proceeding and holding Arthur Salm personally liable for the backpay owed.¹⁵

Dated, Washington, D.C. December 30, 2011

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

Aggie Kapelman, Esq. and *Elias Feuer, Esq.*, for the General Counsel.

Philip Pierce, Esq. and *Errol F. Margolin, Esq.*, for Arthur Salm.¹

John P. Gibbons Jr., Esq. and *Peter S. Trentacoste, Esq.*, for Fortuna Edery and the Estate of Albert Edery.

Scott Markowitz, Esq., for David Salm.²

¹³ *SRC Painting, LLC*, 346 NLRB 707, 709 fn. 12 (2006), citing *inter alia F & W Oldsmobile*, 272 NLRB 1150 (1984), also cited by my colleagues at fn. 27 of their opinion.

¹⁴ See *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (citations and internal quotation marks omitted), where the Board indicated that "[t]o satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, the agency may not change theories in midstream without giving respondents reasonable notice of the change."

¹⁵ While the majority's Order requires Salm to pay the discriminatees backpay owed "as set out in the Order contained in the Board's second supplemental decision reported at 353 NLRB 86 (2008), *affd.* in 355 NLRB No. 89 (2010)," I would not require Salm to make the payments at this time even assuming that the corporate veil could be pierced. As noted, *supra*, fn. 4, in a separate proceeding, the Second Circuit has denied enforcement of the Board's 2010 decision and remanded the case to the Board for further processing consistent with its decision. The compliance proceeding will have to be reopened. Accordingly, there is at this time no sum certain owed. Since the backpay amounts owed have not been "reduced to judgment," an Order for payment of backpay cannot lie at this time. See *Pierce v. United States*, 255 U.S. 398, 403 (1921).

¹ The Caption is modified to reflect the amendments made at the trial. See G C Exh. 2.

² I permitted Mr. Markowitz to intervene over the objection of the General Counsel. In this regard, the parties agree that David and Peter Salm entered into a settlement of this case whereby they paid a certain sum of money in escrow to satisfy some portion of the back pay claim. As a consequence, the General Counsel moved to amend the notice of hearing so as to remove their names from the Caption and from all of the allegations. However, the parties also agree that the distribution of any monies from the escrow account can only be made if it is ultimate-

THIRD SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on November 10, 2010. The issue here is whether Arthur Salm and Albert Edery, as the principle shareholders of the Respondent corporations, but who were not named as Respondents in the original complaint nor in any of the supplemental proceedings, can be held to be personally liable for the backpay amounts owed to the discriminatees.³

In her brief, the General Counsel makes the following contentions, one of which was expressed at the hearing and one which was not:

1. That the corporate veil of the Respondent should be pierced under the rationale of *White Oak Coal Co.*, 318 NLRB 732, 735 (1995), *enfd.* 81 F.3d 150 (4th Cir. 1996), and therefore the corporate shareholders, Arthur Salm and Albert Edery, should be held personally liable.

2. That when the real property of the Respondent was sold, the recipients of that money (Arthur Salm and Albert Edery), held it as constructive trustees for the benefit of the National Labor Relations Board as a creditor and therefore those recipients should be held to be derivatively liable for satisfying the debt to the Board.

I note here that the theories about constructive trusts were not plead in the notice of hearing and were not articulated at the hearing. The Respondents were therefore not put on notice that these contentions were being made. Further, I am not aware of any Board case law which has ever utilized such a theory to conclude that individuals who were not named in the underlying complaint could be held personally liable for the debts of a corporation. Nor am I aware of any Board precedent that would rely on state law to find that individuals could be held personally liable for the obligations of a corporation.

ly concluded that Arthur Salm is personally liable. Thus, their obligation to make the payments was conditioned on the outcome of this case and therefore

³ The notice of hearing also claimed that Fortuna Edery, the widow of Albert Edery, should be held to be personally liable as the executrix of his estate or alternatively as the recipient of the money that Albert Edery derived from the sale of the Respondent's real property. After the close of the hearing the General Counsel and counsel for Fortuna Edery entered into an agreement whereby she would pay his portion of the backpay liability in the event that it was concluded that he was personally liable. As such, the General Counsel asked me to sever that portion of the case involving Fortuna Edery and remand those matters to the Regional Director. I did so by Order dated February 1, 1011. In this regard, the General Counsel, in response to my inquiry, stated: "Thus in your decision, there would be no need for you to make findings of facts or conclusions of law concerning Fortuna Edery."

Based on the record as a whole including my observation of the witnesses and after considering the Briefs filed I hereby make the following

FINDINGS AND CONCLUSIONS⁴

The history of this case started in 1989 when the Union commenced an organizing drive among the employees of Domsey Trading. In 1990 about 200 employees went out on strike and when they made an unconditional offer to return to work on August 10, 1990, the Company failed to reinstate them. Since then there have been numerous legal proceedings which will be summarized below.

As found by Administrative Judge Ben Schlesinger in an opinion issued on November 1, 1991, Domsey Trading Corporation and Domsey Fiber Corporation were New York corporations located in Brooklyn, New York, where they were engaged in the grading, packing, and shipping of used clothing for export. The Judge also found that a third corporation called Domsey International Sales Corporation was located at the same address where it sold used clothing and textiles and related goods in a retail facility located next to the plant of the Trading and Fiber Corporations. He concluded that the three corporations were affiliated business enterprises with common officers, ownership, directors, management, and supervision and constituted a single-integrated business enterprise and a single employer within the meaning of the Act. The Respondent's premises were located at 431 Kent Avenue, Brooklyn, New York.

There is no dispute that the principle owners of the corporations were Arthur Salm and Albert Edery.⁵ The Judge also concluded that the day-to-day operation of the plant was entrusted to Arthur Salm's three sons, Peter, Clifford and David. There is no evidence to contradict the testimony of Fortuna Edery that she had nothing to do with the operations of the business.

On March 23, 1993, the Board issued a Decision at 310 NLRB 777, finding *inter alia*, that after the Union made an unconditional offer to return unfair labor practice strikers to work on August 10, 1990, the Respondent did not make a valid reinstatement offer until August 20, 1991. (A little more than 1 year later). Therefore, the Board ordered the Respondent to reinstate approximately 200 employees and make them whole for any loss of earnings caused by the illegal refusal to reinstate the

⁴ I note that there are no credibility issues and no disputed issues of fact.

⁵ According to the tax returns put in evidence as General Counsel Exhs. 4 and 5, Arthur Salm held 48 percent of the shares and Albert Edery held 50 percent of the shares. Peter and Clifford Salm each held 1 percent of the shares.

strikers.⁶ The backpay for these individuals has been litigated in subsequent proceedings and what is at issue in this proceeding is who should be responsible for paying the money. As the General Counsel believes that there is zero or insufficient funds available from the corporate entities comprising the Respondent, she is making a claim for money from individuals who were not named as Respondents either in the original unfair labor practice case or in the subsequent backpay proceedings.

On February 18, 1994, the United States Court of Appeals for the Second Circuit entered a judgment which enforced, in full, the first Board Order issued against Domsey, their officers, agents, successors, and assigns.

On October 27, 1997, a backpay hearing opened and this was presided over by Judge Michael Marcionese. During the course of the hearing the Judge refused to require the Board's Regional Office to reimburse the Respondent for the costs of an interpreter. The Respondent filed an interim appeal which resulted in a decision on March 28, 1998, by the Board at 325 NLRB 429 which sustained the Judge's ruling.

On October 14, 1999, Judge Marcionese issued his Supplemental Decision and Recommended Order in which he held that the Respondent owed the employees backpay in the amount of \$1,070,066.67 plus interest.⁷ (This number was later reduced somewhat).

As far as I know, the Respondent was still engaged in business operations at the time that it received this Decision.

On January 9, 2002, Domsey Trading sold the property located at 431 Kent Avenue, Brooklyn, New York. This was almost 3 years after the ALJ had issued his decision recommending that the Respondent reimburse employees in the amount of \$1,070,066.67 plus interest. There was no evidence presented by any party as to the reason or reasons why the property was sold. But absent any other evidence of motivation and given the amount of time between the ALJ's decision in October 1999 and the sale of the property in January 2002, it cannot be said with any certainty that the motivation for the sale was to

⁶ The Board also found numerous other unfair labor practices committed by the Respondent and in light of the egregious nature of those violations ordered the notice to be read to the employees by Peter Salm, the Respondent's manager.

⁷ In his Decision and the Board's later rulings on this decision, the amount of interest actually accrued was never calculated. It appears that internally the Regional Office calculated the interest at over \$1 million but those calculations were not shared with the Respondent. Nevertheless, given the size of the net backpay calculated by the ALJ and the number of years that had gone by since the original violations had occurred, the Respondent should reasonably be on notice that the amount of interest would be substantial.

evade the debts incurred to the discriminated employees. (At the time of the sale, the ALJ's decision was on appeal to the Board). There may be any number of other plausible and legitimate reasons that the owners of Domsey decided to sell the property and terminate their business.

In any event, in early January 2002, a parcel of property with two buildings located at 431 Kent Street and jointly owned by Domsey Trading Corp. and another entity called Edery-Salm Associates was sold to a buyer. The closing statement which is General Counsel Exhibit 3 shows that a check in the amount of \$9,062,082.26 was issued to Domsey Trading and a check in the amount of \$2,281,750.81 was issued to Edery-Salm Associates. In addition, the closing statements along with the testimony of Benjamin Weinstock, the attorney for the buyer, indicates that a payment of approximately \$2.6 million was made to a law firm for the benefit of Domsey Fiber Corporation.

General Counsel Exhibit 6 shows that as of December 31, 2001, Domsey Trading Corporation had a balance of \$848.66 in the North Fork Bank.⁸ This bank statement also shows that from December 31, 2001, through January 22, 2002, a series of deposits and payments were made in this account. The largest deposit was in the amount of \$9,102,429 representing the proceeds from the sale. The two largest payments were in the amounts of \$3,262,966.21 representing a payment to Arthur Salm and \$4,555,379.85 representing a payment to Albert Edery. After accounting for all deposits and payments, the ending balance in this account as of January 22, 2002, was back to \$848.66, exactly where the account stood on December 31, 2001. Thereafter by May 31, 2002, Domsey Trading's balance at North Fork Bank was \$5.66. As of June 30, 2002, its balance was negative \$4.34.

In connection with this sale, Mr. Weinstock testified that in addition to a conveyance of title, the purchaser received at the closing, a good standing certificate, which is a document from the New York Department of State confirming that the corporations owning the property were still validly in existence and had not either been voluntarily or involuntarily dissolved. Weinstock also testified that he received a resolution from the shareholders indicating approval for the sale.

Although I do not know exactly when the Respondent ceased operating its business, I shall conclude that no business operations at this location were conducted by

⁸ This bank was subsequently merged into Capital One Bank and the exhibits produced by the General Counsel were authenticated as business records by Wanda Torres, an employee of Capital One Bank.

the Respondent after the sale of the property.⁹ There was no evidence as to how the purchaser used this space. I would surmise based on the bank statements of Domsey Trading that its business operations at the Kent Avenue site were probably terminated some time before the end of 2001.

The record shows that after the sale and receipt of money, checks were issued to Arthur Salm and Albert Edery as follows:

A check signed by Arthur Salm drawn on the account of Domsey Trading at North Fork Bank, dated January 10, 2002, was made out to Arthur Salm in the amount of \$3,262,966. This was deposited into his personal account at the same bank.

A check signed by Arthur Salm drawn on the account of Edery-Salm Associates at North Fork Bank, dated January 10, 2002, was made out to Arthur Salm in the amount of \$1,096,785. This also was deposited into his personal account.

A check signed by Arthur Salm drawn on the account of Domsey Trading at North Fork Bank dated January 14, 2002, was made out to Albert Edery in the amount of \$4,555,379.85. This was deposited by Edery into a joint account with his wife Fortuna Edery into an account at Meryl Lynch.

After receiving and endorsing checks from Domsey Trading and Edery-Salm Associates, Arthur Salm and Albert Edery went on to make further transfers as follows:

On January 14, 2002, Arthur Salm made out a check in the amount of \$4 million, which he deposited into his brokerage account at Meryl Lynch.

On or about March 5, 2005, Arthur Salm transferred money and stocks held in one of his Meryl Lynch accounts to another Meryl Lynch Account.

On or about December 5, 2002, Arthur Salm transferred the assets in his Meryl Lynch account to another Meryl Lynch account in the name of his wife, Carla Salm.

On or about June 12, 2003, the assets previously transferred to his wife were transferred back to an account in the name of Arthur Salm.

As noted above, the check received by Albert Edery was deposited into a joint account with his wife at Meryl Lynch. When he died on February 15, 2006, the money and assets in the account automatically passed to his wife

⁹ In his answer to the notice of hearing, counsel for Arthur Salm admitted that Domsey Trading, Domsey Fiber, and Domsey International ceased operating on January 31, 2002.

and she became the sole surviving owner of the account.¹⁰

Needless to say, neither Domsey Trading, Edery-Salm Associates, the other affiliated corporate entities, Arthur Salm nor Albert Edery (or his wife upon his death), made any arrangements to reserve money for or pay off the backpay amounts that likely were owing to the discriminatees against employees. Nor was any notice given to the Board.

While all of this was going on the Board's backpay case was proceeding in its own interesting way.

On September 30, 2007, the Board at 351 NLRB 824, issued a decision in the backpay case that had been heard back in 1997 and in which the Judge issued a decision and recommended order on October 14, 1999. The Board sustained the Judge's findings in part and reversed in part. Among other things, the Board held that strike benefits paid to the employees in the particular circumstances of the case should be construed as interim earnings. Additionally, in the hiatus between the ALJ's decision and the Board's decision, the Supreme Court decided that undocumented aliens may be denied backpay in certain circumstances. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). As a consequence, the Board remanded the case to the Region to recalculate the amount of backpay for about 160 individuals and remanded to the Judge the question of backpay for six discriminatees under *Hoffman*.

On September 25, 2008, a two member Board issued a Second Supplemental Decision in the backpay case. The Board ordered the Respondent to pay the recalculated backpay awards set out by the Region. The decision also ordered that the backpay claims of two discriminatees remanded to the judge be withdrawn and that the Respondent pay certain other discriminatees the amounts set out in his second supplemental decision. Finally, the Board adopted the judge's recommendation to place in escrow the backpay award for one discriminatee whom the General Counsel could not locate.

On August 16, 2010, and after the Supreme Court had concluded that the Board could not issue decisions without at least a three member quorum, the Board issued another decision in the backpay case. Without going into all the details, the Board basically affirmed the second

¹⁰ The estate of Albert Edery was probated in New York and Fortuna Edery was the estates' executrix. Letters Testamentary were issued by the Surrogate's court in 2006 and she was thereby authorized by the Court to dispose of and distribute any other property owned by Albert Edery in accordance with the terms of a will. It is unknown by me as to whether there was any other property, money, or assets that were owned by Albert Edery at the time of his death.

supplemental opinion of the Administrative Law Judge. However, the total backpay liability was modified and set at \$914,784.37 plus interest.

At some point after August 16, 2010, the Board filed with the United States Circuit Court, (Second Circuit), a petition to enforce the Board's backpay decision. That matter is currently pending before the Circuit Court. In addition, the Board has sought and obtained from the Court some kind of order freezing the personal assets of Arthur Salm.

And so this case came to me.

ANALYSIS

Let me state at the outset that my entire sympathy lies with the employees who suffered losses as a result of the Respondent's unlawful conduct against them. These people and their families have not been paid after almost 20 years of litigation notwithstanding the fact they were the victims of unlawful conduct. The owners of the Respondent companies committed unfair labor practices and but for the creation of a fictional person called a corporation, would be liable to recompense the victims of their unlawful actions and/or the unlawful actions of their agents.

Paying these workers is the morally correct thing to do. The issue here is whether that moral obligation is coextensive with a legal obligation.

The invention of the limited liability corporation, with the concept that the enterprise had a separate legal identity from its owners concomitantly gave rise to the concept that the owners did not incur personal liability for the actions or debts of the enterprise. This idea arose at a time of economic and industrial expansion in the United States and the public policy was to encourage people to invest their money and take risks. That is, the losses that might be incurred by tort victims or by vendors and lenders to a corporation were deemed to be outweighed by the benefits that would be derived by society at large by limiting risk and encouraging development. As pointed out in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993);

The corporate structure is an artificial construct of the law, a substantial purpose of which is to create an incentive for investment by limiting exposure to personal liability. "The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03, (1960).¹¹ In extreme circumstances,

however, the corporate form will be disregarded and the personal assets of a controlling shareholder or shareholders may be attached in order to satisfy the debts and liabilities of the corporation. However, the corporate veil should be pierced only reluctantly and cautiously. *Cascade Energy and Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir.), cert. denied, 498 U.S. 849. Piercing the corporate veil is an equitable action and as such is reserved for situations where some impropriety or injustice is evident.

For a very long time, the Board's case law dealing with the question of individual or personal liability of corporate shareholders was enunciated in *Riley Aero-nautics Corp.*, 178 NLRB 494 (1969). In that case the Board stated:

[T]he corporate veil will be pierced whenever it is employed to perpetrate a fraud, evade existing obligations, or circumvent a statute.... Thus, in the field of labor relations, the courts and Board have looked beyond organizational form where an individual or corporate employer was no more than an alter ego or a "disguised continuance of the old employer"....; or was in active concert or participation in a scheme or plan of evasion....; or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay....; or so integrated or intermingled his assets and affairs that "no distinct corporate lines are maintained."

In *White Oak Coal Co.*, 318 NLRB 732 (1995), a unanimous five member Board reconsidered the *Riley* standard because they felt that its "multifaceted approach to imposing personal liability to be unclear and unwieldy." Instead the Board adopted the 10th Circuit's two pronged approach enunciated in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993). The Board further stated that it was reaffirming "that personal liability for remedial obligations arising from corporate unfair labor practices under the National Labor Relations Act is a question of federal law because it arises in the context of a Federal labor dispute." Citing *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331, 335 (6th Cir. 1990) and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). As to the new standard the Board stated as follows:

Respondent had violated the Act and owed certain employees backpay. It also asked the Court to approve discovery on the grounds that it believed that the Respondent Deena Artware had transferred its assets to a new corporation and that the common owner was engaged in a shell game to evade the backpay liability that had not yet been ascertained by the Board in a supplemental backpay proceeding. In essence the Supreme Court held that the contempt proceeding was warranted and remanded the case so that the Board could conduct discovery.

¹¹ Interestingly enough, *NLRB v. Deena Artware, Inc.*, does not have that much to say about the corporate veil doctrine and its holding was quite limited. Essentially, the NLRB had petitioned the Court for a contempt order which had enforced the Board original holding that the

Under Federal Common law, the corporate veil may be pierced when: (1) there is such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.

When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (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. Among the specific factors we will consider 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 undercapitalization; (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 maintained 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.

When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from 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 that is found.

To state the obvious, this category of cases would not be litigated if the corporate entity or entities that had incurred liabilities could pay the debts. It is only when the coffers are empty that one begins to look elsewhere for payment. And what better place to look than to the principle shareholders of the corporation where the corporate pockets are empty either because of normal and adverse business conditions *or* by the transfer of assets to favored persons. (Usually the shareholders or their relatives).

The *White Oak* test is a two pronged test. It is simply not enough that only the second prong has been met; that

it would be unjust not to have access to the shareholder's assets. The whole point of a corporation is to shield its shareholders from the corporation's creditors.

Therefore, by definition, the doctrine of limited liability is inherently unfair insofar as the corporation's creditors are concerned. Inequity is the name of the game, provided of course that the shareholders observe the prescribed corporate forms. Under current Board law, except for the limited circumstances described in *White Oak* and subsequent cases, to say that it would be unjust to allow the shareholders to escape liability, is simply to state a circumstance which is insufficient by itself to hold them personally liable.

Since the Decision in *White Oak*, the Board has issued a number of decisions dealing with this issue, the most recent of which was *Rome Electrical Systems Inc. et al*, 356 NLRB No. 38 (2010). Other fairly recent cases relied on by the General Counsel and the Respondents include *A.J. Mechanical*, 352 NLRB 874 (2008), *enfd.*, 186 LRRM 2224 (11th Cir. 2009); *D.L. Baker Inc. t/a Baker Electric*, 351 NLRB 515 (2007); *Flat Dog Productions Inc.*, 347 NLRB 1180 (2006); and *SRC Painting, LLC*, 346 NLRB 7070 (2006). All of these cases, and others not cited by the parties, involve backpay proceedings with complex factual patterns.

It seems to me that the outcomes in these cases were highly fact specific given the large number of factors that need to be analyzed under the *White Oak* standard. And although it seems to me that with respect to the first prong that not all of the eight factors need to be proven, in none of the cases was personal liability found where only one factor was proven. Even if that factor (the most important in my opinion), was evidence that personal and corporate assets had been commingled.

Moreover, in weighing the various factors, the majority opinion in *Flat Dog Productions Inc.*, 347 NLRB 1180 (2006), stated that "the party asserting that the corporate veil should be pierced, in this case the General Counsel, has the burden of proof, and that burden is a heavy one. See *Contractors, Laborers, Teamsters & Enitg. v. Hroch*, 757 F.2d 184, 190-191 (8th Cir. 1985)."

In the present case the General Counsel has produced evidence as to only a single element; namely the "commingling" factor listed by the Board in *White Oak*. She produced no evidence to contradict the testimony of the Respondent's CPA that the corporate entities were adequately funded; that there was no commingling of funds between the shareholders and the corporations (other than the final distribution of assets); that they maintained adequate and separate corporate books and records; and that the corporations and the shareholders filed separate tax returns.

As noted above, in *White Oak* the Board stated that “when assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (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.”

And even as to the alleged commingling, I am not so sure that what transpired in January 2002 fits easily within the definition of commingling as that term has been used in these types of cases. As I read the cases, the transactions that the Board has described as “commingling” have typically involved multiple transactions over a period of time whereby the shareholders typically took money out of the corporation for their own personal use. (On occasion, shareholders may transfer their own money into the corporation). These types of transactions, other than normal salaries or authorized dividends, generally have occurred over an extended period of time during which the corporation was still engaged in its normal business activities.

In my opinion, the facts in the present case are somewhat distinguishable and are more like the situation that would occur when a corporation ceases its business operations and its assets are then liquidated and distributed to its shareholders. It is difficult to commingle assets with a de facto defunct corporation, even one which has not yet been officially dissolved. In this case, the building and property at Kent Avenue was sold in an arm’s length transaction to a third party for around \$12 million. And after the larger portion of that money was deposited in the accounts of Domsey Trading Corporation and Ederly Salm Associates, those same amounts were transferred to the two principal owners of the Respondent, namely Arthur Salm and Albert Ederly who then transferred the monies to their own personal accounts. (I have no idea what happened to the money that was paid by the purchaser to Domsey Fiber Corporation.) In my opinion this one time liquidation and distribution of corporate assets, may not be the type of transactions that the Board has previously found to constitute commingling.¹²

¹² It may be that the Board might decide to modify the *White Oak* standards so that the single factor of commingling would be sufficient to establish personal liability. Or it might decide, subject to court review, that when there has been a liquidation and substantially complete transfer of corporate assets to shareholders without notice to creditors, that this type of transaction amounts to a “fraudulent conveyance” and therefore would be an independent ground for piercing the corporate veil. But as I understand the cases decided by the Board this is not the current view of the law and I am bound by existing precedent.

In her brief, the General Counsel offers an alternative theory as to the claim that Arthur Salm and Albert Ederly should be held to be personally liable. As stated by the General Counsel, although “this case falls within the purview of Board law, it is also a corporate dissolution case and, as such, New York State Business Corporation Law (BCL) and supporting cases are applicable.” She asserts that under New York law, the shareholders of a corporation, after a dissolution, are construed to “hold the assets they received in trust for the benefit of creditors” and are therefore “jointly and severally liable to existing creditors of the corporation.” Citing *Rodgers v. Logan*, 121 A.D. 2d 250, 253; *Long Island Light Co. v. Chestnut Sta., Inc.*, 2010 N.Y. Misc. Lexis 3476 and *Wells v. Ronning*, 269 A.D. 2d 690, 692, 702 N.Y.S. 2d 718.

I have a couple of problems with this alternative theory of personal liability.

1. The original notice of hearing made no mention of this theory and the General Counsel asserted at the hearing that the only theory upon which she was asserting personal liability against the corporate shareholders was the *White Oak Coal* theory. This alternative theory was only raised for the first time when the General Counsel filed her brief and the Respondents were not put on notice that this was being asserted. In my opinion, this theory cannot be legitimately asserted at this time. See *New York Post*, 353 NLRB 343, 344 (2008).

2. As noted above, the law regarding “piercing the corporate veil” insofar as NLRB cases are concerned, has been defined by the Board and reviewing United States Circuit Courts as being a question of federal law. That means that the laws of the individual states are, in effect, preempted because of a policy of administering a uniform body of law that governs labor relations for those employers, their employees and labor organizations that fall within the Board’s jurisdiction. Thus, to the extent that New York statutes or case law may have a different standard for holding a corporation’s shareholders personally liable, that standard is not, in my opinion, applicable to cases litigated as unfair labor practices under the National Labor Relations Act. As I am aware of no precedent giving me the authority to apply New York law to this issue, my role as an Administrative Law Judge does not really permit me to establish new precedent on behalf of the Board.

Accordingly, for the foregoing reasons and based on the current state of Board law, I am constrained to find that the General Counsel has not shown that the corpo-

rate veil should be pierced in order to hold the shareholders personally liable.¹³

Dated Washington D.C., February 14, 2011.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.