Nos. 11-4345 & 11-4537

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GRANE HEALTH CARE and EBENSBURG CARE CENTER LLC, d/b/a CAMBRIA CARE CENTER

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Act, as amended
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Grane Healthcare Co. ("Grane") and Ebensburg Care Center LLC, d/b/a Cambria Care Center ("Cambria"), a single employer (collectively, "the Company") to review, and the cross-application of the National Labor Relations Board, to enforce, a final Board Decision and Order issued against the Company on November 30, 2011, and

reported at 357 NLRB No. 123. (J.A. 3-37.)[1] The Board found that Grane and Cambria were a single employer and successor that had unlawfully (1) refused to recognize and bargain with Local Union No. 1305, Professional and Public Service Employees of Cambria County a/w the Laborers International Union of North America ("Local 1305"), as the exclusive collective-bargaining representative of the Company's nonprofessional unit employees; and (2) refused to hire five individuals because of their union activities.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice occurred in Pennsylvania. The Company's petition for review and the Board's cross-application for enforcement were timely filed, as the Act places no time limit on such filings.

[1] "J.A." references are to the joint appendix. "S.A." references are to the Board's supplemental appendix filed with this brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Company was a successor employer to Laurel Crest and, therefore, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Local 1305 as the collective-bargaining representative of the Company's unit employees.

2. Whether credited and substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire employee-applicants Mark Mulhearn, Sherry Hagerich, Joseph Billy, Beverly Weber, and Roxanne Lamer because of their union activity.

3. Whether substantial evidence supports the Board's finding that Grane and Cambria are a single employer.

STATEMENT OF THE CASE

Upon charges filed by Local 1305, the Board's General Counsel issued a complaint alleging that Grane and Cambria were a single employer and a successor employer that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 1305 as the collective-bargaining representative of the unit employees. The complaint further alleged that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire five employee-applicants because of their union support and activities. After a hearing, the administrative law judge found that Grane and Cambria were a single employer and successor, and had violated the Act as alleged. (J.A. 36-37.) The Board found no merit to exceptions filed by the Company and adopted, with modifications, the judge's findings and recommended order. (J.A. 3 & n.3.)[2]

[2] The Board also affirmed the judge's dismissal of a separate allegation that the Company unlawfully refused to bargain with another union, the SEIU, regarding a different unit of employees, which is not at issue here. (*Id.*)

I. THE BOARD'S FINDINGS OF FACT

A. Background

For decades, Cambria County, Pennsylvania owned and operated Laurel Crest Nursing and Rehabilitation Center ("Laurel Crest"), a 370-bed nursing home located in Ebensburg, Pennsylvania. The Laurel Crest employees were employed by Cambria County, who as a public employer was subject to the Pennsylvania State Public Employee Relations Act, 43 P.S. § 1101.301(1) ("PERA"). (J.A. 6; 124 at ¶¶ 1-6, 49.) In years prior, the County had occasionally hired private management companies to manage the facility, including Grane, which did so from about January 2003 to June 2003. (J.A. 26; 124 at ¶ 4.)

Since its certification in 1971 by the Pennsylvania Labor Relations Board ("PLRB"), Local 1305 was the collective-bargaining representative of a unit of approximately 180 nursing aides, housekeepers, and other nonprofessional employees at Laurel Crest. Pursuant to this certification, Cambria County recognized Local 1305 as the unit employees' exclusive bargaining representative and entered into a series of collective-bargaining agreements with Local 1305, the most recent of which expired in December 2008. (J.A. 6, 12; 124 at ¶¶ 5-9.)

B. Grane Creates a New Corporation to Purchase the Laurel Crest Nursing and Rehabilitation Center, Establishes Cambria to Rent the Facility and Run It, and Then Hires Itself to Provide Management Services to Cambria

1. Grane Healthcare Co.

Grane, a Pennsylvania corporation that manages the operations of Grane-related nursing homes, was established on December 14, 1993, by Richard Graciano, Jr. and Ross J. Nese. Grane's owners are Richard Graciano, Jr., David Graciano, Jeffrey Graciano, and Ross J. Nese. The Gracianos are brothers, but are unrelated by either blood or marriage to Nese. (J.A. 6, 25; 132, 136, 454, 1067.) For the year preceding the purchase of Laurel Crest and continuing thereafter, Grane's officers were:

Richard A. Graciano, Jr.	CEO/Chairman
Ross J. Nese	President
Leonard S. Oddo	Vice President/Chief Operating Officer
Herb Hennell	Vice President Reimbursement
David J. Kearney	CFO/Treasurer
Theresa Creagh	General Counsel/Secretary

Grane's office is located at 209 Sigma Drive, Pittsburgh, Pennsylvania. (J.A. 25; 132, 135.)

2. Grane Acquires Laurel Crest

In September 2009, Grane entered into an asset-purchase agreement with Cambria County to purchase Laurel Crest. Laurel Crest's assets were formally sold to Ebensburg Associates, LLC ("Ebensburg Associates") on January 1, 2010,

a vehicle that Grane created. (J.A. 6 & n.8; 124 at ¶ 11, 1075.) Then, prior to finalizing its acquisition of Laurel Crest, Grane established a new entity, Ebensburg Care Center, LLC d/b/a Cambria Care Center ("Cambria") to operate it. (J.A. 4, 25; 156, 184-98.) Ebensburg Associates in turn entered into a five-year lease for the facility with Cambria. (J.A. 6, 26; S.A. 32, 47, 53, 69.)

3. Cambria's Management and Ownership Mirrors Grane's

As just shown, Grane created Cambria to operate Laurel Crest. Cambria's registered corporate offices are, like Grane's, at 209 Sigma Drive, Pittsburgh, Pennsylvania. (J.A. 25; 156, 453.)[3] According to its organizational document, Cambria's officers are:

Ross J. Nese	President
Richard A. Graciano, Jr.	CEO/Chairman
Leonard S. Oddo	Vice President
Herb Hennell	Vice President
David J. Kearney	Vice President/Treasurer
Jeff Brown	Assistant Treasurer
Theresa Creagh	General Counsel/Secretary

(J.A. 25; 160-61.) Thus, except for Brown, the officers of Cambria are also officers of Grane. Grane Associates, Inc., the general partner of Cambria, owns 99.5 percent of Cambria, and Trebro, Inc., a member (owner) of Cambria, owns the

[3] Cambria's principal place of business is listed as 429 Manor Dr., Ebensburg, Pennsylvania, which is the Laurel Crest address. (J.A. 453.)

remainder. Graciano Jr. is the Chairman and CEO of Grane Associates, and Nese is the president of Trebro. (J.A. 25; 160-61, 453.)

The same individuals—Oddo, Nese, Kearney, and Hennell—are independently authorized to write checks on both Cambria's and Grane's bank accounts. (J.A. 25; 133, 153.) As noted, Cambria leases the facility from Ebensburg Associates, which has the same ownership as Cambria, and which receives Cambria's profits as rent pursuant to the lease. (J.A. 26; S.A. 33, 54 .)

4. Grane Controlled the Organization of Cambria

Before commencement of operations at Laurel Crest on January 1, 2010, Grane, through its officers and agents (consultants),[4] made all initial operating decisions for Cambria. More specifically, Grane's Vice President Oddo (who is also Cambria's Vice President) was involved in all managerial hiring decisions. (J.A. 11, 27; 1085-86.) Grane, through its Vice President of Nursing Services, Beth Lengle, hired the nurses, certified nursing assistants, and unit clerks. (J.A. 11 27; 1083-94, 1254.) Grane, through its consultant, Practical Administrative

[4] A number of "consultants" used by Grane are related companies inasmuch as they share common ownership. (J.A. 27-29; 724, 728-32, S.A. 1, 3.) Grane-related vendors and consultants used by Cambria include: Practical Administrative Solutions, and Quality Nursing Solutions (human resources, training, and administrative support), Grane Supply (pharmaceuticals), Trade Facility Services, L.P. (maintenance and construction services), Apex Rehabilitation Solutions (physical therapy), and Preferred Laundry Service (laundry). (J.A. 27-29 & nn.46, 49-50; 640, 1079-85, 1532, 1546.)

Solutions ("PAS"), hired the business-office personnel. (J.A. 12; 1084.) Oddo established all initial wages, terms and conditions of employment offered to employees. (J.A. 11, 27; 1079, 1085, 1090, 1172-76.) Following the sale, Oddo hired Owen Larkin to become Cambria's Administrator effective January 1, 2010. (J.A. 7; 125 at ¶¶ 19-20.)

Grane also established Cambria's initial nursing policies (J.A. 1096-97), operating budget (J.A. 1087, 1090), staffing levels (J.A. 1087, 1117-18), and selected vendors to supply goods, materials and services, all without consulting Larkin. (J.A. 27-29; 1094, 1639-40.) Grane created a new vehicle, Preferred Laundry Service, to act as Cambria's subcontractor in providing laundry services. (J.A. 29; 724, 1781, 1788.) Further, Grane determined that Cambria would utilize a new financial software package to track all financial transactions, including resident/patient trust accounts. (J.A. 28; 1569.) Grane's representatives and employees of its consultant, PAS, have direct remote access to Cambria's financial records. (J.A. 2177.)

5. Cambria's Application for a State Operating License Promised an Ongoing Interrelationship with Grane

As a necessary part of the sale, Cambria obtained a license to operate a health care facility from the Pennsylvania Department of Health. The application described Cambria's relationship to Grane. More specifically, it reports that Cambria's managing partner, Ebensburg Associates, is owned by the same persons

who own and operate Grane. (J.A. 26; 454-55.) It further explains that Grane manages the operations of all Grane-related nursing facilities. (*Id*.) It also states that Graciano, Nese, Kearney, Hennell and Brown, who except for Brown are officers of Grane, are "responsible for the overall business direction of [Cambria]." (*Id*.)

The application asserts that Grane will continue to exercise control over Cambria's hiring decisions, and to formulate and implement changes to how Cambria provides resident/patient care services. For example, regarding anticipated changes in present staffing, the application states that, "on an *on-going* basis *Grane* will be looking to recruit new staff from outside the facility that will provide additional knowledge and experience to that of the existing staff." (J.A. 26; 456, § 6(b)(ii) (emphasis supplied).) Further, regarding anticipated innovations in the delivery of services, the application states that:

> The operation of the facility *will be* evaluated by the Administrator, *Grane's* management team (including Quality Assurance, DON, RNAC, Dietary Director, Therapy Director, etc.) . . . On an *ongoing basis*, *Grane's* management team is continually looking for, analyzing and discussing new approaches to the delivery of services. *Grane implements* those changes that the facility and medical staff agree will be beneficial to the residents.

(J.A. 26; 457-58, §6(b)(iii) (emphasis supplied).) In this regard, Cambria's license application acknowledges its lack of experience in operating health care facilities, but relies upon its affiliation through common ownership with Grane and other

Grane-related institutions to bolster its qualifications to operate Laurel Crest. (J.A. 26; 453, § 1, 457, § 6(b)(i), (iii).)

6. Following Cambria's Acquisition of Laurel Crest, Its Management Services Agreement with Grane Gave Grane Substantial Authority Over the Facility's Operations

On December 5, 2009, Cambria signed a Management Services Agreement ("the Management Agreement") with Grane to become effective January 1, 2010. (J.A. 27-31.) The Management Agreement established that Grane will manage the business operations of the facility. With respect to "personnel policies," the Management Agreement specifically provides that the manager (Grane) shall provide consultation, information, research, and suggested language regarding personnel policies, job descriptions, wage scales and benefits. (J.A. 28; 365-66 at § 1.2.1.)

The Management Agreement purports to reserve to the operator (Cambria) the ultimate authority to determine staffing requirements, wage and salary scales, employee benefits, and general personnel policies, which Grane established preliminarily when it was preparing for the commencement of operations. Yet, to the extent Larkin proposes to change employment-related issues, he seeks Grane Vice President Oddo's suggestions and recommendations. (J.A. 30, 33-34; 2136.) Oddo made the initial decisions and, as the Vice President of Cambria, he has the authority to fire Larkin. (J.A. 11, 27, 34; 1652, 1950-51.)

Larkin did not participate in many operationally significant decisions for Cambria. For example, he did not participate in the negotiations for the Management Agreement, did not know how management fees to Grane were calculated, and was otherwise unable to identify who was specifically responsible for calculating that fee, which was significant.[5] (J.A. 28, 30; 1651-52, 1705-06, 1715.) He was also unfamiliar with the lease for the facility between Cambria and Ebensburg Associates, and was unfamiliar with Ebensburg Associates itself. (J.A. 30, 33; 1699, 1770, 2204.) He did not know why Cambria used Cambria Supply, a Grane-related company, to supply nearly all its pharmaceuticals, a decision Oddo made. (J.A. 29; 1946-48.)

Larkin also did not hire the numerous consultants Grane sends to Cambria; rather, Larkin was simply "informed who my consultants were." (J.A. 33; 1993.) When Grane-related personnel work at Cambria, they do not report to Larkin. (J.A. 28; 1167.) Lengle, for example, was at Cambria five days a week during early 2010 (J.A. 28; 1302), and, thereafter, she and her staff maintain a regular presence at the facility, training staff, supervisors, and managers and implementing clinical practices and procedures (J.A. 1303). They did not provide Larkin with any paperwork during that time, and Lengle did not have regular meetings with

[5] Grane's financial statement for the period ending May 31, 2010, shows that Cambria paid a total of $505,786 in management fees to Grane. (J.A. 1027.)

Larkin. (J.A. 1303-06.) PAS employees, in turn, continue to work at Cambria, and to influence hiring decisions made after the initial hiring was completed. (J.A. 30; 1560-61, 1570, 1589-90.)

C. On January 1, 2010, the Company Assumes Operations from Laurel Crest in an Essentially Unchanged Form

On January 1, 2010, the Company assumed operations of the nursing home, now as Cambria. The parties stipulated that, as of that day, Cambria (1) continued operating the facility as a nursing home; (2) continued serving the same residents and patients that were at Laurel Crest; (3) hired many of Laurel Crest's managers to perform the same managerial duties for Cambria; (4) employed a "substantial and representative compliment" of employees; and (5) employed in a majority of unit positions former Laurel Crest employees represented by Local 1305. (J.A. 7-8; 125-26 at ¶¶ 18-42.) In sum, the Company's employees were, at the time of the takeover, for the most part working the same jobs, using the same work methods and equipment, in an enterprise devoted to the same purpose—the operation of a nursing home—for the same residents and patients, as they had for Laurel Crest. (J.A. 8.)

D. The Company Hires the Vast Majority of Laurel Crest Employees, But Rejects Local 1305's President, Business Manager, Vice President, and Secretary-Treasurer, as Well as an SEIU-Represented Employee Who Openly and Actively Supported that Union

In December 2009, company officials conducted the initial hiring and retained most, but not all, of the individuals who had been employed at Laurel Crest. Among those who applied, but were not hired, were Local 1305's Business Manager, Mark Mulhearn; its President, Sherry Hagerich; its Vice President, Joseph Billy; and its Secretary-Treasurer, Beverly Weber. The Company also declined to hire Roxanne Lamer, an SEIU-represented employee, who was not a union officer, but who was active in SEIU's efforts opposing the transfer of Laurel Crest's operations to Grane in 2009. (J.A. 11, 23; 1412-13, 1487, 1610-11, 1629-30.)

Hagerich, Mulhearn, Billy, and Weber had a long history of open union activity at Laurel Crest. Hagerich had been Local 1305's President for four years when the Company took over the facility. She handled grievance and disciplinary meetings and conducted regular membership meetings. (J.A. 11, 13; 1410, 1485.) Mulhearn, similarly, had served as Local 1305's Business Manager for over three years, where he set up and conducted labor-management meetings and oversaw the Union's business. (J.A. 11, 13; 1407-09.) Billy, who had previously been a shop steward and a Local 1305 executive board member, was Vice President for about a

month when the Company assumed operations. (J.A. 13; 1409.) Weber likewise had served as Local 1305's president, vice-president, and business manager, and became its secretary-treasurer in mid-2009. (J.A. 13; 1447-51.) All four Local 1305 officials were identified by name as union officers on public postings displayed at the facility through the time of the sale in 2009. (J.A. 22-23; 1456, 1817.) Lamer, in turn, had been extensively involved with the SEIU's public activities in 2009 regarding the sale of the facility, including attending county commissioner meetings, and travelling with a union official to Grane headquarters in an effort to meet with Grane officials. (J.A. 14; 1610-11, 1629-30.)

The decisions not to hire Mulhearn, Hagerich, Billy, and Lamer were made by Grane's Vice-President of Nursing, Beth Lengle. (J.A. 11-13; 1257-58, 1278.) The decision not to hire Weber was made by Vivian Andrascik, a consultant with Grane-spinoff PAS, who hired the employees to work in the Company's business office. (J.A. 19; 1531, 1576, 1580.) In making hiring decisions, Lengle and Andrascik did not review any personnel files or annual evaluations. Nor did they interview applicants for these non-management positions. (J.A. 12, 20-21; 1256-58, 1579.)

The Company concluded its hiring process in December 2009. It hired about 140 former Laurel Crest employees. It hired at least 80 percent of bargaining unit employees who were not union officers. In contrast, it rejected 80

percent of the employees who held union office, including Hagerich, Mulhearn, Billy, and Weber. (J.A. 12.) Applicants whom the Company did not hire received no notification of that decision. (*Id*.)

E. The Company Refuses to Recognize or Bargain with Local 1305

In December 2009, in anticipation of the impending sale, Local 1305 requested by e-mail that the Company recognize it as the exclusive bargaining representative of the unit employees. By letter dated January 11, 2010, the Company refused. (J.A. 7; 126 at ¶¶ 43-44.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) affirmed, with modifications, the administrative law judge's findings that Grane and Cambria were a single employer (and, therefore, jointly and severally liable for the violations found) and a successor employer that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 1305 as the exclusive collective-bargaining representative of the unit employees. The Board also found that the Company violated Section 8(a)(3) and (1) by refusing to hire Mark Mulhearn, Sherry Hagerich, Joseph Billy, Beverly Weber, and Roxanne Lamer because of their union activities. (J.A. 3, 36.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, 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 (29 U.S.C. § 157). Affirmatively, the Board's Order requires the Company to: recognize and, upon request, bargain with Local 1305 as the exclusive bargaining representative of the unit employees, and, if an understanding is reached, embody it in a signed agreement; offer instatement to the employees it unlawfully refused to hire to the positions they applied for, or if these positions no longer exist, to substantially equivalent positions, and make those employees whole for any loss of earnings or other benefits suffered as a result of the discrimination against them; remove from its files any references to the unlawful refusals to hire these employees, and notify them in writing that this has been done and that the refusals will not be used against them; and post and electronically distribute a remedial notice. (J.A. 3-4, 36-37.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

The U.S. District Court for the Western District of Pennsylvania previously granted the Board's request for an injunction under Section 10(j) of the Act[6] requiring the Company, as a single employer, to bargain in good faith with Local 1305 pending the issuance of the Board's decision.[7] This Court affirmed that injunction, finding it "plainly warranted."[8] That injunction automatically expired when the Board issued the November 30 Order that is presently before the Court.

The District Court denied the Board's request for interim instatement of two of the discriminatees, Local 1305 President Hagerich and Business Manager Mulhearn. However, this Court found that the District Court committed reversible error by assessing that request under the wrong standard, and remanded for further consideration of the issue under the proper test.[9] That remand was moot under Section 10(j) upon issuance of the Board's decision.

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[6] 29 U.S.C. § 160(j).

[7] *See Chester v. Grane Healthcare Co.*, 797 F.Supp.2d 543, 547, 562-65 (W.D.Pa.2011).

[8] *See Chester v. Grane Healthcare Co.*, 666 F.3d 87, 100 (3d Cir. 2011) (*"Grane II"*).

[9] *Id.* at 103.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole.[10] Moreover, the Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it *de novo*.[11] Further, the Board's credibility determinations are entitled to "great deference" and must be affirmed unless they are shown to be "inherently incredible or patently unreasonable."[12] Finally, the Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act.[13]

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company (Grane and Cambria) was a successor employer to Laurel Crest and, therefore, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 1305 as the representative of its unit employees. The Board's successor finding is

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[10] Section 10(e) of the Act (29 U.S.C. § 160(e)). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1151-52 (3d Cir. 1993).

[11] *See Universal Camera Corp.*, 340 U.S. at 488; *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

[12] *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (citations and internal quotations omitted).

[13] *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

supported by the stipulated facts that the Company filled a majority of unit positions with former Laurel Crest employees and continued its operations as a nursing home without change. The Company acknowledges these facts but claims that the usual successor principles do not apply in the context of a transition from a public to private employer. Settled law rejects that claim. Indeed, the purpose of the successorship doctrine—encouraging stability in collective-bargaining relationships and preserving employee free choice of representative—would be negated if the Company could simply refuse to bargain with the union that has for 40 years been the employees' recognized bargaining representative.

Substantial evidence also supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire five employees because of their union activities. Four of those employees were senior officials of Local 1305, and the fifth was an open and active union adherent. Under settled law, the Company's reliance on pretextual justifications for refusing to hire these employees—it claimed to rely on a reference-check procedure that the credited evidence shows did not in fact occur—amply supports a finding of unlawful motive. In challenging these well-reasoned and detailed pretext findings, the Company attacks the Board's resolution of the conflicting testimony, but fails to prove that it was "inherently incredible or patently unreasonable."

The Board's finding that Grane and Cambria are a single employer is also well supported. Substantial record evidence shows their interrelation of operations, common management and ownership, and centralized control over labor relations. It is undisputed that Grane and Cambria have common ownership and management. Further, their continued interrelations are confirmed by Cambria's license application, which represented that Grane would remain involved in Cambria's staffing and operations, and the Management Agreement between the entities, which ensures that Grane remains deeply entrenched in Cambria's daily operations. Finally, Grane uses its common ownership and management to retain centralized control over Cambria's labor relations. Grane's management—particularly Leonard Oddo, the Vice President of both Grane and Cambria—set the initial terms of employment, wages, hours, and nursing policies for Cambria. The Company's claim that Cambria independently sets its labor policies raises form over substance because Grane's representatives and consultants continue to wield influence in that area, and Grane retains the ultimate authority to fire and direct Cambria's administrator.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY WAS A SUCCESSOR EMPLOYER TO LAUREL CREST, AND, THEREFORE, VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH LOCAL 1305

The Company does not dispute the facts underlying the Board's finding that it was a successor employer, including that it continued its predecessor's operations in an essentially unchanged form. Indeed, those facts are stipulated. Instead, it claims only that the usual successorship principles do not apply to a public-to-private employer transition. As shown below, both the Board and the courts have repeatedly rejected that claim.

A. Applicable Principles and Standard of Review

As the Board noted here, "[t]he object of [the Act] is industrial peace and stability, fostered by collective bargaining agreements providing for the orderly resolution of labor disputes . . . ." (J.A. 7 (quoting *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996)).) Furthering this policy, Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ,"[14]

[14] A violation of Section 8(a)(5) results in a "derivative" violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act (29 U.S.C. § 157)]." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

and an employer's duty to bargain is premised on the support of a majority of employees within the bargaining unit for union representation.[15] The Board has "adopted various presumptions about the existence of majority support for a union within the bargaining unit."[16] One such presumption is that a union that has been voluntarily recognized by an employer, or certified though an election process, enjoys a presumption of majority support.[17]

When a new employer acquires a unionized business, it must recognize and bargain with the union representing the predecessor's employees if the new employer is a "successor employer" to the predecessor.[18] A successor employer is one who "makes a conscious decision to maintain generally the same business and

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[15] *See* 29 U.S.C. §§ 158(a)(5) and 159(a).

[16] *Auciello Iron Works, Inc.*, 517 U.S. 781, 785-86 (1996); *accord Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001) (presumption of majority status furthers industrial peace and recognizes that, for the employees' free choice of representative to be meaningful, collective-bargaining relationships must not be subject to constant challenges).

[17] *Levitz*, 333 NLRB at 720 n.17, 725. The presumption is irrebuttable for a reasonable amount of time, usually a year, following recognition, or during the life of a collective-bargaining agreement; thereafter, the employer may rebut the presumption and refuse to bargain with the union by proving with objective evidence that the union has actually lost majority support. *Id.*; *accord Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 407-08 (D.C. Cir. 2008).

[18] *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 279, 281, 287-88 (1972); *accord Canteen Corp. v. NLRB*, 103 F.3d 1355, 1361 (7th Cir. 1997); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991) (en banc); *NLRB v. Rockwood Energy and Mineral Corp.*, 942 F.2d 169, 174 (3d Cir. 1991).

to hire a majority of its employees from the predecessor," and the imposition of an obligation to bargain follows from the new employer's intention "to take advantage of the trained work force of its predecessor."[19]

The goal of the Board's successorship doctrine is to encourage stability in collective-bargaining relationships, without impairing the free choice of employees.[20] In *Fall River Dyeing and Finishing Corp. v. NLRB*,[21] the Supreme Court endorsed the Board's view that a union's presumption of majority support should continue where there has been a change in employer.[22] Indeed, the Supreme Court observed that "[t]he rationale behind the presumptions [of majority support] is particularly pertinent in the successor situation," given the "uncertainty" that employees and their unions experience during "this unsettling transition period."[23] As the Supreme Court further explained, "[i]f the employees find themselves in essentially the same jobs after the employer transition and if

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[19] *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *see also Rockwood*, 942 F.2d at 174; *Systems Management, Inc. v. NLRB*, 901 F.2d 297, 301-04 (3d Cir. 1990).

[20] 482 U.S. at 38.

[21] *Id.* at 39.

[22] *See also Burns*, 406 U.S. at 279 (explaining that the successorship doctrine ensures that employees' representation rights are not curtailed by the "mere change of employers or of ownership in the employing industry").

[23] *Fall River*, 482 U.S. at 39.

their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest."[24] Accordingly, the successorship doctrine furthers the fundamental policies of the Act by encouraging industrial peace and stability in collective-bargaining relationships, without impairing the free choice of employees.[25]

Three requirements must be satisfied before the new employer's obligation to bargain is triggered. First, there must be "substantial continuity" between the enterprises of the predecessor and the new employer.[26] This includes such continuity of the workforce that the new employer "would confront the same union representing most of the same employees in the same unit."[27] Second, the unit of employees comprising the new operation must remain an appropriate unit for collective bargaining.[28] Finally, a majority of the new employer's work force must be comprised of the predecessor's former employees at a time when the new work

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[24] *Id.* at 43-44.

[25] *Id.* at 38. *See also* 29 U.S.C. § 151 (declaring congressional policy of "encouraging practices fundamental to the friendly adjustment of industrial disputes").

[26] *Id.* at 43; *accord Grane II*, 666 F.3d at 100; *U.S. Marine Corp.*, 944 F.2d at 1315.

[27] *Burns*, 406 U.S. at 280 n.4; *accord Fall River*, 482 U.S. at 43.

[28] *See NLRB v. Joe B. Foods, Inc.*, 953 F.2d 287, 292-93 (7th Cir. 1992); *accord Dattco, Inc.*, 338 NLRB 49, 50 (2002).

force has reached a "substantial and representative complement."[29] Once those criteria are satisfied, the successor is obligated to recognize and bargain with the incumbent labor organization.

Moreover, it is settled that these successorship principles continue to apply where, as here, the predecessor is a public employer.[30] Applying the successorship doctrine in this context furthers the Act's purpose by ensuring that employees' representation rights are not curtailed by the "mere change of employers."[31]

Congress gave the Board "the primary responsibility for marking out the scope of the statutory language and of the statutory duty to bargain," and the courts' review in that area is circumscribed.[32] The Board's construction of the Act is therefore "entitled to considerable deference" and must be upheld if reasonable

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[29] *Fall River*, 482 U.S. at 46-47; *accord U.S. Marine Corp.*, 944 F.2d at 1317 n.12.

[30] *See Dean Transp., Inc.*, 350 NLRB 48, 50-51, 58 (2007) (holding that *Fall River*'s "substantial continuity" test applies where predecessor is public entity), *enforced*, 551 F.3d 1055, 1062 (D.C. Cir. 2009); *Cmty Hosp. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003) ("The change from public to private ownership of hospital does not undermine the Board's finding that [the employer] was a successor."); *Van Lear Equip., Inc.*, 336 NLRB 1059, 1064 (2001) ("[T]he successorship doctrine continues to apply even though the predecessor . . . is a public employer."); *accord Lincoln Park Zoological Soc. v. NLRB*, 116 F.3d 216, 219-20 (7th Cir. 1997) (finding that incumbent union was entitled to presumption of majority support, and successor was obligated to bargain with union, where predecessor was public employer).

[31] *Burns*, 406 U.S. at 279.

[32] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979).

and consistent with the policies of the Act.[33] As the question of successorship is "primarily factual in nature," the Board's resolution of that question must be affirmed if supported by substantial evidence.[34]

B. The Stipulated Facts Support the Board's Finding that the Company Was a Successor Employer, and, As Such, Required to Recognize and Bargain with Local 1305

The question of whether the Company violated the Act depends on whether it is a legal successor to Laurel Crest, and therefore has a duty to recognize and bargain with Local 1305. The Board (J.A. 8-9), and this Court in the Section 10(j) proceeding,[35] concluded that the stipulated facts, namely, that the Company had filled a majority of its workforce with Laurel Crest employees and continued the operations of Laurel Crest as a nursing home without change, provided ample grounds to conclude that the basic successorship test was met. Thus, as the Board explained:

> [I]t is not seriously disputed . . . that [the Company] is a successor to Laurel Crest. The Cambria Care employees are, for the very most part, working the same jobs, using the same work methods and equipment, in a enterprise devoted to the same purpose—the operations of a nursing home—for the same residents and patients,

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[33] *Id*. at 497; *accord Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001).

[34] *Fall River*, 482 U.S. at 43-44; *accord Comm. Hosp. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1082-83 (D.C. Cir. 2003).

[35] *See Grane II*, 666 F.3d at 101.

> with many of the same supervisors, as they did for Laurel Crest. [The Company] began operation of the nursing home without hiatus in operations, at the same facility, at the same location. This is, undoubtedly, what a successor looks like.

(J.A. 8.) Accordingly, the Board reasonably determined (J.A. 8-9) that the Company, under longstanding successorship principles, enjoyed an obligation to recognize and bargain with Local 1305.

C. The Board Properly Applied Settled Law in Rejecting the Company's Claim that Successorship Principles Do Not Apply in the Context of a Transition from a Public-to-Private Employer

The Board properly rejected (J.A. 9 & n.11) the Company's primary defense (Br. 10-26), which it had also urged before this Court in the Section 10(j) proceeding,[36] that successorship principles do not apply in the context of a transition from a public-to-private employer. Specifically, the Company claims (Br. 10-12, 14) that because its predecessor, Laurel Crest, was a "public" employer under state labor law, and therefore excluded from coverage under the Act, the Company cannot be a "successor" employer under the Act. However, as this Court noted in the Section 10(j) case, the Board's public-to-private successorship theory "is hardly a novel legal position," as other courts, including the D.C. and Seventh Circuits, as well as the Board, have "in several cases . . . applied successorship

[36] *See Grane II*, 666 F.3d at 101-02 (finding that settled law provides reasonable cause to reject this defense).

principles in the context of the public to private transition."[37] The Board properly relied on this same line of cases, observing that this "argument has been specifically rejected." (J.A. 9 & n.11.) Given this settled law, and the undisputed facts showing that the Company met the test for successorship, the Board reasonably concluded (J.A. 11) that the Company violated Section 8(a)(5) of the Act by failing to recognize and bargain with Local 1305.

1. The Company Offers No Grounds for Departing from Settled Law

The Company erroneously claims (Br. 19-26) that the settled law discussed above at p. 26, did not directly and/or adequately address the issue of successorship in the context of a public-to-private transition. The Company is simply wrong. Those cases not only fully and explicitly address the issue, they reject arguments similar to those presented by the Company here. This Court should reject those same arguments now based on the same settled law.

In *Dean Transp., Inc. v. NLRB,*[38] for example, the employer before the Board, much like the Company here (Br. 10-12), specifically argued against a

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[37] *Id.* (citing *Dean Transp., Inc.*, 350 NLRB 48, 50-51, 58 (2007), *enforced*, 551 F.3d 1055, 1062 (D.C. Cir. 2009); *Cmty Hosp. of Cent. Cal. v. NLRB,* 335 F.3d 1079, 1084 (D.C. Cir. 2003); *Van Lear Equip., Inc.*, 336 NLRB 1059, 1064 (2001); *Lincoln Zoological Soc.*, 322 NLRB 263, 364-65 (1996), *enforced*, 116 F.3d 216, 219-20 (7th Cir. 1997)).

[38] 551 F.3d 1055, 1062 (D.C. Cir. 2009).

successorship finding on the ground that the employees had been public-sector employees governed by state law when employed by the predecessor, but were now subject to a different statutory scheme, the Act. The D.C. Circuit, agreeing with the Board, expressly rejected that view, noting that it had previously "ruled that '[t]he change from public-to-private ownership of the hospital does not undermine the Board's finding that [the employer] was a successor.'"[39] To be sure, as the Company notes (Br. 25), the court then refused to address the different, and more specific, argument that the employer raised for the first time on appeal—that the now private-sector employees will have a right to strike under the Act that they did not have under state law—because it had not been raised to the Board.[40] The salient point, however, is that the court expressly held that the usual successorship principles apply in the context of a public-to-private transition.[41]

Likewise, contrary to the Company's argument (Br. 23), *Lincoln Park Zoological Society v. NLRB*,[42] supports the Board's findings. That case also involved a private employer's duty to bargain after taking over the operations of a public employer. Although the employer admitted that it was a successor

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[39] *Id.* (quoting *Cmty Hosp. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003)).

[40] *Id.* at 1063.

[41] *Id.* at 1062.

[42] 116 F.3d 216, 217-20 (7th Cir. 1996).

employer, it argued, much like the Company (Br. 10-12), that the usual presumption of majority union support under the Act—and the successor employer's correlate duty to bargain—should not apply where the union was initially recognized and certified under state (Illinois) law.[43] The Seventh Circuit's rejection of that argument is instructive. The court, like the Board (J.A. 8), emphasized the settled law that a union enjoys a presumption of majority status in a successor situation, and that the successor doctrine furthers the Act's fundamental purpose of "achiev[ing] industrial peace" by maintaining stability in the administration of collective-bargaining agreements.[44] The court, like the Board (J.A. 8-9), held that crediting a union that has been voluntarily recognized by a public predecessor employer with a rebuttable presumption of "majority status would have this same steadying effect and be consistent with [the Act]."[45] That reasoning applies with particular force here where Local 1305 has been recognized as the employees' bargaining representative since its certification following a representation election in 1971. (*See* J.A. 9; 124 ¶¶ 5-9.)

The Company, therefore, plainly errs in claiming (Br. 10-11) that *Burns* and *Fall River* preclude the Board's decision to apply successorship principles—

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[43] *Id.* at 218-19.

[44] *Id.* at 219 (citing *Burns* and *Fall River*).

[45] *Id.* at 219-20.

including the presumption of majority union support—in the context of public-to-private transition. Rather, as shown, settled law holds the opposite. Moreover, it is the Company's view, not the Board's, that conflicts with *Burns*'s and *Fall River*'s emphasis on maintaining industrial peace and stable collective-bargaining relationships. *See* pp. 24-25. Thus, if the Company had its way, its employees' representation rights would be curtailed by the "mere change of employers,"[46] potentially leading to labor unrest during the challenging time of transition, which is the very result that the successorship doctrine is meant to avoid.[47] The Company, however, fails to come to grips with how allowing it to refuse to bargain with the incumbent union in these circumstances would contravene the fundamental policies of the Act, and negate the very purpose of having the successorship doctrine in the first place.

2. The Board's Decision is Consistent with the Act

The Company claims (Br. 11-12) that applying the successorship doctrine to public-to-private employer transitions is contrary to the express terms of the Act. Specifically, it observes (*id.*) that the Act's definition of "employer" excludes state entities like Laurel Crest, and, thus, Local 1305 was not a labor organization within

[46] *NLRB v. Burns Int'l Security Servs.*, 406 U.S. 272, 279 (1972).

[47] *See id.; Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 43-44 (1987).

the meaning of the Act prior to the Company's acquisition of Laurel Crest in 2010. Based on this, the Company posits (Br. 12) that imposing a successorship bargaining obligation would effectively treat Laurel Crest as if it had been covered by the Act.

As the Board explained (J.A. 8-9), however, the Company fundamentally misconceives the issue, which is about *the Company's* bargaining obligation beginning on January 1, 2010, when it took over its predecessor's operations and was admittedly an "employer" under the Act, not about the Board enforcing any obligations that arose beforehand. (J.A. 9.) The Board did not treat Laurel Crest as if it were covered by the Act, only the Company. Likewise, the Company misses the mark with its hypothetical (Br. 12) about the Board holding it liable for remedying its state-entity predecessor's unfair labor practices. No such situation or liability is at issue here.

The Company's remaining contention rests solely on inapposite case law. Contrary to the Company's argument (Br. 14-18), *Linden Lumber Division v. NLRB*,[48] does not preclude the imposition of a bargaining obligation here. Unlike the situation here, *Linden Lumber* dealt with an employer's obligation to recognize a *new union* asserting its claim of majority support for the *first time*.[49] *Linden*

[48] 419 U.S. 301 (1974).

[49] *Id.* at 302.

Lumber stands for the basic principle that an employer is not legally bound to recognize a union seeking initial representation on the basis of authorization cards "purporting" to show majority support.[50] Part of the rationale for not imposing a bargaining obligation in those circumstances is that majority status may not be clearly established or determined absent a prior determination of an appropriate bargaining unit.[51] That concern is not implicated in a successorship situation, as here, where an incumbent union has a history of representing employees in an established bargaining unit. Thus, as the Board aptly summarized it: "the presumption of majority support is unremarkable, stemming from Laurel Crest's [almost 40] years of recognition of [Local 1305] as the unit's collective-bargaining representative, and that recognition, in turn, having been based on certification after an election conducted in the unit in which a majority of employees chose [Local 1305] as their exclusive collective-bargaining representative." (J.A. 9.) There is, therefore, no basis to the Company's sheer hyperbole (Br. 18) that it has been made "a successor to an imaginary predecessor."

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[50] *Id*. at 310.

[51] *Id*. at 308-309.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE FIVE EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure or any term or condition of employment . . . to encourage or discourage [union] membership."[52] An employer thus violates the Act by taking adverse employment actions against employees for engaging in protected activity.[53] To demonstrate a violation of Section 8(a)(3), the General Counsel must prove that antiunion motive was a factor in the employer's refusal to hire.[54] And it is well-settled that unlawful motive can be inferred from circumstantial as well as direct evidence, including the employer's knowledge of union activities and the employer's reliance on implausible, shifting, or pretextual reasons for the action.[55] Indeed, where (as here) the employer proffers an implausible or pretextual explanation, the courts of appeals and the Board have made clear that the

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[52] 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) results in a "derivative" violation of Section 8(a)(1) of the Act. *See* n.14.

[53] *NLRB v. Trans. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).

[54] *Id.* at 400, 402-03.

[55] *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125-26 (D.C. Cir. 2001); *accord NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991); *see also* cases cited at n.56.

employer's untrue justification for the hiring decision may create an inference of discriminatory motivation.[56]

Once the Board establishes unlawful motivation as a factor in the hiring decision, the employer's action constitutes unlawful discrimination unless it proves, as an affirmative defense, that it would have taken the same action even absent the employees' protected union activities.[57] However, where the employer's proffered reason is shown to be a mere pretext, the employer has failed to meet its burden.[58]

The Board's factual findings underlying its findings of unlawful motive must be affirmed if they are supported by substantial evidence.[59] Further, this

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[56] *See NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("implausible or shifting explanations" suggest unlawful motive); *accord NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424-25 (11th Cir. 1998); *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[57] *Trans. Mgmt. Corp.*, 462 U.S. at 397-98 (approving *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)); *NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991).

[58] *Painters Local 227 v. NLRB*, 717 F.2d 805, 812 (3d Cir. 1983); *Wright Line*, 251 NLRB at 1084.

[59] *See* 29 U.S.C. § 160(e); *Omnitest Inspection Servs.*, 937 F.2d at 122-23.

Court will defer to the Board's credibility determinations unless they are "inherently incredible or patently unreasonable."[60]

B. The Company Unlawfully Refused to Hire the Five Discriminatees

Applying the foregoing principles, the Board reasonably found that the Company unlawfully refused to hire Mark Mulhearn, Sherry Hagerich, Roxanne Lamer, Joseph Billy and Beverly Weber because of their protected union activities, and thereby violated Section 8(a)(3) and (1) of the Act. As shown (pp. 14-15), Hagerich, Mulhearn, Billy, and Weber were all senior Local 1305 officials whose names and union positions were posted at the Company's facility at the time the hiring decisions were made. Lamer, while not a union officer, was particularly active in SEIU's efforts to meet with company and county officials regarding the transfer of Laurel Crest's operations in 2009. Following settled law, the Board found (J.A. 15-17, 24-25) that the Company's reliance on entirely pretextual grounds for not hiring these employees—it claimed to have relied on a reference-check procedure, which the credited evidence showed did not actually occur—supports a finding of unlawful motive. Before this Court, the Company challenges

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[60] *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (citations and internal quotations omitted); *accord Vitek Elec., Inc. v. NLRB*, 763 F.2d 561, 571 (3d Cir. 1985) (court "must defer" to Board administrative law judge's credibility determinations where judge has "examined in detail the conflicting versions" and made a reasoned analysis).

the Board's finding of pretext, primarily relying on discredited testimony and assaults on detailed credibility findings. As the Board's decision is grounded in solid credibility determinations that resolve conflicting testimony and fully explain the basis for the determinations, it is not "inherently incredible or patently unreasonable." *See* cases cited at n.60.

1. The Board discredited the Company's pretextual reasons for refusing to hire Hagerich, Mulhearn, Lamer, and Billy

The Company's defense of its rejection of four of the discriminatees—Hagerich, Mulhearn, Lamer, and Billy—boiled down to company Vice President of Nursing Beth Lengle's ultimately discredited testimony. As the Board initially found, the Company was amply aware of Mulhearn's, Hagerich's, and Billy's roles as Local 1305's senior officials, which were posted at the facility, and Lamer's open and public support for her union, the SEIU. (J.A. 22-23.) Yet, Lengle claimed that she decided not to hire these employees based on negative references she received from Rebecca Nelen, Laurel Crest's then Director of Nursing. Specifically, Lengle asserted that Nelen told her that Mulhearn had poor performance and attendance problems; Hagerich also had attendance issues, was loud and obnoxious, and caused trouble with co-workers; Billy had a negative attitude towards his work and coworkers; and Lamer had poor work performance. (J.A. 14-15; 1256-58.)

As the Board explained, however, even if Lengle's account initially appeared reasonable "in the abstract," the "most salient problem" with it was "that Nelen—the putative source for Lengle's references, and the person Lengle proposes was central to the reference process—endorses not a word of [it]." (J.A. 15.) Specifically, contrary to Lengle's story, Nelen could not recall any conversations with Lengle about individual employees and their job performance; did not recall discussing Billy with Lengle; did not even recall who Lamer was; denied speaking with Lengle about Mulhearn's attendance and could not recall any problems with his work performance; and flatly denied assessing *any* employee's attendance, as she was not involved with their attendance issues and generally "knew very little about the employees." (J.A. 15-16; 1191-93, 1200.) The Board expressly found that "nothing in Nelen's testimony—nothing—provided the slightest endorsement, support, or corroboration for Lengle's testimony" that she sat with Nelen and went over, in alphabetical order, every Laurel Crest employee applicant for a nursing-related position with Nelen. (J.A. 16.)

The Board accordingly rejected the Company's baseless assertion, which it repeats to this Court (Br. 32-34), that Lengle's account was "uncontroverted." To the contrary, Nelen directly and materially contradicted Lengle's claim that Nelen had assessed employees' attendance. Further, the Board noted (J.A. 16) that if, as Lengle claimed, she and Nelen "had sat down and gone over the performance,

attendance, attitude, and willingness of Nelen to rehire each applicant, or even each alleged discriminantee," then Nelen would have at least remembered something of that process. But she did not.

Nelen's credibility was bolstered by her status as a disinterested party (J.A. 16), who demonstrated no bias for or against the Company, and her cooperative demeanor in forthrightly answering questions about employees whenever she had relevant knowledge to provide. Thus, the Board had ample grounds for discrediting Lengle's contrary account "as a fabrication" and "pretext," where the credited evidence showed that "the process described by Lengle . . . did not occur, and was not the basis for the decision not to hire [Mulhearn, Hagerich, Billy, and Lamer]." (J.A. 17, 24-25.) Such credibility-based findings are entitled to judicial deference where, as here, the Board has "examined in detail the conflicting versions"[61] and made a reasoned analysis, and there is nothing showing that its findings are "inherently incredible or patently unreasonable."[62]

Given the foregoing, the Board reasonably concluded that Nelen's fictitious reference-check procedure was "a ruse designed to conceal the true motive for [the Company's] actions," namely, a desire to rid itself of leading union adherents. (J.A. 24.) Pursuant to settled law (*see* cases cited at nn.56, 58 and J.A. 21, 24-25),

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[61] *Vitek Elec.*, 763 F.2d at 571.

[62] *Atlantic Limousine*, 243 F.3d at 718-19.

the Company's reliance on pretext supports the Board's finding of unlawful motive, and defeats its attempt to prove its affirmative defense. As the Ninth Circuit has explained, if the Board finds that "the stated motive for [an adverse action] is false," it can "infer that the [real] motive is one that the employer desires to conceal—an unlawful motive."[63]

Contrary to the Company's claims (Br. 39-41), the Board properly gave little weight to Lengle's other asserted justifications for not hiring Billy. As the Board initially observed (J.A. 17), Lengle did not explicitly state what other factors she relied upon, or how they contributed to her decision not to hire Billy. The Board inferred (J.A. 17; 1261-62) that she was claiming to have relied on negative personal observations of Billy and comments about him that she solicited from Charge Nurse Sheila Knee. Having discredited Lengle's fabrication about the reference-check basis for not hiring Billy and others, however, the Board was understandably disinclined to rely on a claim, which Lengle did not even explicitly make, that she would not have hired Billy based solely on her observations and Knee's comments. (J.A. 17.) Moreover, as the Board noted, the record showed that Knee's alleged comment to Lengle about Billy's attitude was likely made sometime *after* the hiring decisions were made, which further undermines Lengle's

[63] *Shattuck Denn*, 362 F.2d at 470; *see also McClain*, 138 F.3d at 1423-25 (antiunion motive may be inferred from employer's use of pretext to justify discharge); *accord Laro Maint. Corp.*, 56 F.3d at 230.

credibility. (*See* J.A. 12 (hiring decisions completed by December 21) *and* J.A. 17 & n.29; 1363-65, 1368 (Knee on leave until at least Christmas and spoke with Lengle thereafter).) Finally, Lengle's personal observations of Billy were disputed by Billy, and otherwise uncorroborated.

Nor did the Board ignore (Br. 41 n.11) Billy's credibility issues. Rather, the Board weighed them against Lengle's own issues to assess their *relative* credibility. Thus, while acknowledging Billy's discrepancy as to the scope of his disciplinary record—a collateral issue given that Lengle admittedly did not look at such records—the Board compared this to Lengle's misstatements on the central issue, namely, her pretextual claims to have not hired Billy and others based on a non-existent reference-check procedure. (J.A. 18 & n.33.)

Contrary to the Company's argument (Br. 37-38, 41), the Board did not wrongly discount the employment evaluations and disciplinary records of the discriminatees. Rather, the "most salient point" is that Lengle admittedly did not review these records as part of the hiring process. Thus, the Board noted (J.A. 18) that any relevance of these documents was limited to their potential to support Lengle's claim that Nelen provided references as Lengle alleged. However, given that the discriminatees' recent evaluations were generally positive, this evidence does not support Lengle's claims. (J.A. 18 & nn.34-35; 387, 399-423, 443-51, 503-16, 555-64.) Moreover, contrary to the Company's argument that some of the

records support Lengle's story, the Board noted (J.A. 18 & n.35) that even the records arguably consistent with Lengle's claim "could have been consulted after-the-fact and then attributed to Nelen and the reference process." Indeed, as the Board noted, that is what appears to have happened with regard to Knee's post-hiring comments about Billy. (*Id.*)

2. As with the other four discriminatees, the Board reasonably discredited the Company's pretextual reasons for refusing to hire Weber

The Company again relies on pretext grounded in discredited testimony to support its refusal to hire the fifth and final discriminatee, Local 1305 Vice President Weber. The Company's defense boils down to PAS consultant Vivian Andrascik's discredited testimony that she declined to hire Weber, based not on Weber's activities as a leading union official, but on negative references she allegedly received from Weber's former co-worker, Office Manager Nancy McMahon, and Andrascik's personal observations of Weber as "unfriendly." (J.A. 19-21, 24-25.) Andrascik, however, was not credible.

First, as the Board observed, Andrascik's misstatements, confusion, and shifting and implausible explanations suggesting that the Company eliminated Weber from consideration as part of the health-screening process—before Andrascik had received her application—were highly suspect. (J.A. 19-20, 24-25; 1539, 1583-84.) As the Board fairly explained, even if *some* of Andrascik's

confusion and misstatements could be attributed to nervousness, at the end of the day, "there was no coherent explanation for them all," and this was "the witness that [the Company] put forward as responsible for the decision not to hire Weber." (J.A. 19.) Andrascik's account of her decision not to hire Weber was "fraught with inexplicable assertions, and backpedaling." (J.A. 19.) Next, Andrascik claimed that the chief basis for Weber's rejection was a negative report from McMahon on Weber's teamwork and attendance. (J.A. 19, 24-25; 1579, 1587-88.) However, McMahon had a different recollection of her comments about Weber, remembering that she "pretty much" remarked only in passing about Weber's communication and team work, and did not say anything about attendance problems. (J.A. 19-20, 24-25; 1375-79.) Finally, the Board reasonably gave little weight to Andrascik's personal observation of Weber as "unfriendly" given that the timing of Weber's medical leave meant that Andrascik's observations would have occurred over just a few days, and Andrascik declined to review Weber's personnel files to corroborate her fleeting observations. (J.A. 20-21; 1579.)

Thus, the Board did not credit Andrascik's account. The Board found that "Andrascik's demeanor, compounded with the testimonial missteps, lead [the Board] to believe her testimony was not accurate." (J.A. 20 n.38.) As was the case with the other four discriminatees, the Company's reliance on discredited and pretextual reasons for rejecting Weber supports a finding of unlawful motive, and

defeats the Company's attempt to prove its affirmative defense. *See* pp. 40-41 and cases cited at n.63, above.

C. The Company's Remaining Contentions are Without Merit

There is no merit to the Company's claim (Br. 35-45) that it did not know of the five discriminatees' union activities. Notwithstanding Lengle's and Andrascik's denials of personal knowledge of the discriminatees' union activities, the Board reasonably concluded that "the evidence is strong, albeit indirect" that the Company knew. (J.A. 22 (citing *Windsor Convalescent Ctr. of North Long Beach,* 351 NLRB 975, 983 n.36 (2007) ("The General Counsel need not prove knowledge by direct evidence; knowledge may be reasonably inferred or imputed."), *enforced in relevant part*, 570 F.3d 354 (D.C. Cir. 2009)).) Indeed, as described below, the Board made careful, detailed findings of the Company's knowledge of each employee's union activities. (J.A. 22-23.) These well supported findings further support a finding of unlawful motive. *See* cases cited at n.55 (employer's knowledge of protected union activities is circumstantial evidence of unlawful motive).

First, the names and positions of Local 1305's officers—including Mulhearn, Hagerich, Billy, and Weber—were posted on bulletin boards at the facility through December 2009, when the Company was preparing to assume operations and making the relevant hiring decisions. (J.A. 22; 1456, 1817.)

Moreover, company representatives, including Lengle and Andrascik, were frequently at the facility at the relevant times. (J.A. 22; 1260, 1565, 1647.) Thus, as the Board aptly put it, "[i]f Grane representatives did not know who the union officers were, then the whole concept of posting notices must be reconsidered." (J.A. 22 (citing *Windsor Convalescent Ctr.*, 351 NLRB at 983 n.36 (display of steward certificates on union bulletin board when successor toured plant before assuming operations supports finding it knew of stewards' activities)).) As the Board further observed: "[Company] representatives would have to be indifferent to the labor relations at the facility they were taking over in order to not make note of the posted names of the union representatives. They were clearly not. Indeed, the postings were gone *one day* after [the Company] assumed operations, indicating [it] was not indifferent to—or unaware of—the postings." *Id.* (emphasis in original).

Similarly, Lamer was extensively involved with the SEIU's public activities opposing the sale of the facility to the Company in 2009. This included attending county commissioner meetings, and travelling with an SEIU official to Grane's headquarters in Pittsburgh to try to speak with Grane Vice President Oddo in November of 2009. (J.A. 11, 23; 1610-11, 1629-30.) While Oddo did not meet with them after they announced themselves and their positions to the receptionist, the credited evidence shows that their names were "relayed upstairs and probably

written down for Oddo." (J.A. 23.) Thus, close in time to the Company's decision not to hire Lamer, she was at Grane's headquarters on union business, with a union representative. (*Id.*) Accordingly, the Board had ample grounds on which to infer that Lengle and Andrascik knew of the discriminatees' union activities.

Moreover, even assuming *arguendo* that this strong evidence was somehow insufficient, the Board detailed other evidence of the Company's knowledge, both from around the time of the hiring decisions in late 2009, and dating back to its prior management of the facility in 2003. (*See* J.A. 11, 14, 23.) This included, for example, the Company's receiving, shortly before the takeover in late 2009, union correspondence listing the names and titles of union leaders such as Mulhearn (J.A. 476-78), and Hagerich's and Lamer's extensive and public union activities in late 2009 protesting the sale of Laurel Crest, some of which was featured in local newspaper and television coverage. (J.A. 11, 14, 23; 499, 1412-13, 1452, 1496, 1609-11, 1629-31, 1647.)

Contrary to the Company's claim (Br. 36-39) it is not dispositive whether there is direct evidence that Lengle and Andrascik knew of the union activities of the employees they refused to hire. Rather, as the Board reasonably concluded: "indirect and circumstantial evidence [presented here] strongly supports the conclusion that at least some Grane representatives were aware of the union activity of each discriminatee. These representatives' knowledge is appropriately

imputed to [the Company]," which includes Lengle and Andrascik, the company representatives who made the relevant hiring decisions. (J.A. 23 (citing *State Plaza*, 347 NLRB 755, 756 (2006) (supervisor's knowledge of union activity appropriately imputed to employer); *Dobbs Int'l Servs.*, 335 NLRB 972, 973 (2001)).) Moreover, given Lengle's and Andrascik's pretextual reasons for not hiring these individuals, their claimed lack of awareness of the employees' union activities need not be accepted at face value. (J.A. 23 n.42.) Finally, the Company's "grossly disproportionate" refusal to hire Local 1305's officials compared to other applicants further supports a finding that antiunion considerations motivated its decision not to hire those officials. (*See* J.A. 12, 23.)[64]

In sum, the Board's finding that the Company unlawfully refused to hire the five discriminatees is amply supported by the Company's pervasive reliance on pretext, its knowledge of the discriminatees' protected conduct, and its disproportionate non-hiring of Local 1305 officials. Moreover, the employer's affirmative defense—that it would have taken the same actions absent that protected conduct—fails because its proffered reasons were pretextual.

[64] The Board found it unnecessary (J.A. 3 n.3) to address whether this finding alone would establish unlawful motive, but did not disavow that such disproportionality supports finding discrimination. (*See* J.A. 23 (citing settled law that disparate treatment of union adherents evidences unlawful discrimination).)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT GRANE AND CAMBRIA ARE A SINGLE EMPLOYER

A. Applicable Principles and Standard of Review

Where the Board finds two nominally separate entities to be a single employer for the purposes of the Act, both are jointly and severally liable for remedying unfair labor practices committed by any of them.[65] In determining whether single-employer status exists, the Board considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership.[66] Not all of these factors need to be present before the Board can find single-employer status, and no one factor is controlling.[67] As this Court has recognized, "single employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies.'"[68] Moreover, this Court has

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[65] *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1287-89 (7th Cir. 1989).

[66] *See IBEW Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.3d 169, 174 (3d Cir. 1991); *NLRB v. Al Bryant, Inc*., 711 F.2d 543, 551 (3d Cir. 1983).

[67] *Al Bryant*, 711 F.2d at 551.

[68] *Id*. (quoting *Local No. 627 Int'l U. of Op. Eng'rs v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom. S. Prairie Constr. Co. v. Local No. 627 Int'l U. of Op. Eng'rs*, 425 U.S. 800 (1976)).

recognized that "[t]he single employer question is primarily factual, and the Board's conclusion must be upheld if supported by substantial evidence."[69]

B. Grane and Cambria are a Single Employer

Substantial evidence supports the Board's finding that Grane and Cambria constitute a single employer. Indeed, all of the four factors for single-employer status are shown here.

To begin, the ongoing interrelation of operations between the two entities is undeniable and confirmed in Grane's application for a healthcare license, the management agreement between the two entities, and in the daily operation of the facility. Thus, Grane's application for a healthcare license explicitly stated that, after it assumed operation of Laurel Crest, Grane would remain involved in staffing and general operations. (J.A. 26; 456-57; *see* pp. 10-11, above.) Then, after creating Cambria, Grane and Cambria executed the Management Agreement—entered into without any negotiation and signed by persons who serve as officers in both entities—stating that Grane will "manage the business and operations" of Cambria. (JA 28; 365 at § 1.1.) According to the Board, "[t]he

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[69] *Al Bryant*, 711 F.2d at 551. *See also NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1289 (7th Cir. 1989) (noting that single employer status "is essentially a factual [determination] and not to be disturbed provided substantial evidence in the record supports the Board's findings") (citations and internal quotations omitted).

management agreement appears to be the formal basis justifying the presence and utilization for a coterie of Grane-affiliated individuals and entities working at and on behalf of Cambria Care." (J.A. 28.)

Specifically, via the Management Agreement, Grane continues to provide Cambria with legal consultants, laundry consultants, facility maintenance consultants, construction consultants, pharmaceutical consultants, marketing and business consultants, accounting consultants, and human resources consultants. Grane's director of nursing, Lengle, spends considerable time at Cambria, setting resident care practices and training employees and managers. All of these consultants work for Grane or a Grane-owned entity, providing services to Cambria's administrator, Owen Larkin. Larkin, in turn, referred to these persons as his "consultants from Grane Healthcare." (J.A. 28; *see* pp. 8-13 & n.4, above.) The Board concluded: "Grane is deeply entrenched in the operations of the facility through the myriad of consultants it provides to Cambria Care." (J.A. 33.)

Accordingly, this pattern of control over Cambria by Grane and its consultants was ongoing, and was not, as the Company wrongly suggests (Br. 51, 53), limited to the period of initial acquisition and staffing of Cambria, before the facility was fully operational. Rather, as the Board found, "Grane determined that Cambria Care would be bound by a management agreement that guaranteed that Grane personnel would be deeply and permanently involved in the management of

the facility." (J.A. 32.) Thus, as shown (*see* pp. 8-13 & n.4, above), a corps of Grane consultants continued working at Cambria, several days a week, well after it assumed operations on January 1, 2010.

Further, the lack of an arms-length relationship is evident from the fact that, under the Management Agreement, Grane has complete access to Cambria's checking account, as well as its most sensitive financial records. Indeed, Grane, through its consultant, calculates its own management fee without any oversight by Cambria. Thus, the Board reasonably concluded (J.A. 25, 28) that these agreements effectively intertwine the relationship between Grane and Cambria with respect to the operation of the facility. The interrelation of operations strongly militates towards a single-employer finding.

Next, the record amply demonstrated common management and common ownership, the second and fourth factors the Board considers in evaluating single employer status. *See* cases cited above at p. 49. The managerial commonalities are strong. Grane set the initial terms and conditions of employment, including wages, hours, benefits, schedules, staffing requirements, supervisory structure, and corporate structure, and even selected vendors (including itself to serve as the manager of Cambria's operations). Grane (or its consultants) conducted the interviews, pre-employment screenings and made the decisions concerning who should be offered employment. (*See* pp. 8-9, above.) And, the Management

Agreement not only intertwines Grane and Cambria's operations, it confirms their day-to-day common management. Finally, to the extent Cambria's administrator Owen Larkin does act independently, he indisputably reports to Cambria Vice-President Oddo; Oddo, in turn, is Grane's Chief Operating Officer and holds the right to discharge Larkin at-will. (J.A. 27; *see* p. 11, above.) Thus, Oddo enjoys the ultimate managerial authority over Cambria on behalf of both entities. As to ownership, the three Graciano brothers and Ross Nese own Grane; Grane itself and Trebro, Inc. (of which Nese is president) own Cambria. (J.A. 32; *see* pp. 6-7, above.)

Indeed, both before the administrative law judge (J.A. 32) and in its brief to this Court (Br. 50), the Company concedes that Grane and Cambria share "common ownership and common management at the executive level," and those facts cannot be doubted. In this light, the Board reasonably found (J.A. 32) that the two entities' common ownership and common management further confirmed their single-employer status.

In other words, as the Board found (J.A. 32), contrary to the Company's argument (Br. 51, 53), "Grane did not get Cambria Care up and running than walk away, leaving Cambria Care as an independently functioning operation." Rather, as the Board aptly summarized it: "[T]he potential control of Cambria that is a function of Grane's common ownership and common upper management with

Cambria is actualized every day by the ubiquitous presence of Grane personnel in the affairs of Cambria—a state of affairs deliberately established by Grane when it set up Cambria's operations." (J.A. 33.)

As to the third single-employer factor, centralized control of labor relations, the Company contends (Br. 54-57) that the Management Agreement vests Cambria with the ultimate authority to set labor relations policies. In practice, however, Grane effectively retains centralized control over labor relations matters. This is shown, for example, by Grane's compilation of information upon which labor relations decisions will be made on a going-forward basis, and how it established all initial wages and other terms and conditions of employment. (J.A. 11, 27; *see* pp. 8-9, above.) Additionally, because there is a commonality of officers between these two entities, Cambria's reservation of authority to set labor relations policies appears to be more form over substance. This inference is especially warranted given the repeated reliance upon Grane's expertise by Cambria in its application for its operating license and the assertions that Grane would make decisions with respect to operations on an ongoing basis. (J.A. 26; *see* pp. 10-11, above.) Again, as noted above, Oddo serves as Vice President for both Grane and Cambria, and he possesses the ultimate authority to fire Cambria's Administrator Larkin. As such, regardless of whether Larkin has some authority to act independently, any exercise of that authority is subject to Oddo's ultimate review and approval. Thus, what

Grane styles as "'consulting' and 'advising' . . . is, by virtue of the ownership and, particularly with upper management control, more than a suggestion—it is a directive." (J.A. 34.)

Based on the foregoing, the Board reasonably rejected (J.A. 34) the "nub" of the Company's defense against single-employer status, repeated here (Br. 52-57), namely, Larkin's self-serving—and ultimately discredited—assertions of autonomy. Larkin's claim is "overwhelmed" (J.A. 34) by the objective record evidence showing Grane's ongoing control over Cambria's operations, and Larkin's admitted lack of knowledge of, or involvement in, key operational decisions. For example, Larkin knew little of Cambria's financial dealings with Grane, *e.g.*, that it leased its nursing facility through an unusual arrangement with Ebensburg Associates—another Grane entity—whereby Cambria shares revenues. As the Board observed, this would be "inexplicable" if Cambria truly operated at arms length from Grane, or if Larkin truly exercised independent control over Cambria. (*See* J.A. 33 and pp. 12-13, above.) Likewise, Larkin could not explain why it made sense for Cambria to use Cambria Supply—another Grane-related company—to supply virtually all its pharmaceuticals, except to say that it was Oddo's decision. (*Id.*) While Grane was deeply entrenched in Cambria's operations through the consultants it sent to Cambria, Larkin admitted in a candid moment that he was simply "informed who my consultants were," and apparently

had no say in the matter. (*Id.*) It strains credibility that Larkin independently controlled Cambria's operations, but was left out of, and, indeed, uninformed about, such critical operational decisions.

Thus, contrary to the Company's claims (Br. 54), labor relations were not, in practice, carved out of Grane's overall control over Cambria and independently conducted by Larkin. Tellingly, the Company claimed the opposite when it applied for a state operating license, asserting then that Grane would have an "ongoing" role in "recruit[ing] new staff" for the facility. (*See* J.A. 33 and p. 10, above.) Consistent with that statement, Oddo, a senior executive of both companies, testified that Grane officials working at Cambria report to him, not Larkin. (J.A. 33.) In this regard, while Larkin characterized his discussions with Oddo as "suggestions," as if to minimize Oddo's authority, the fact remains that Larkin reports to Oddo, and Oddo can fire him. Thus, even assuming *arguendo* that Oddo and Grane merely "advise" Larkin, or that the Management Agreement provided Larkin with theoretical control over Cambria's day-to-day operations, the facts on the ground demonstrate that Grane controlled the operational aspects on which it "advised." (J.A. 34.)

In sum, the foregoing amply demonstrates Grane's and Cambria's interrelation of operations, common management and ownership, and centralized

control over labor relations. Accordingly, the Board properly found that Grane and Cambria are a single employer.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review, and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GRANE HEALTH CARE AND EBENSBURG CARE CENTER LLC, d/b/a CAMBRIA CARE CENTER	*	
Petitioner/Cross-Respondent	*	Nos. 11-4345, 11-4537
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 6-CA-36791
Respondent/Cross-Petitioner	*	

COMBINED CERTIFICATES OF CONTENT AND VIRUS SCAN

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,342 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 11.0.6100.645 and is virus-free according to that program.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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