

Nos. 12-70086, 12-70151, 12-70384

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STANDARD DRYWALL, INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

OPERATIVE PLASTERERS & CEMENT MASONS INT'L and LOCAL 200
Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

STANDARD DRYWALL, INC.
Intervenor

and

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS
Intervenor

**ON PETITIONS 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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GLOSSARY

“The Act”	The National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)
“The Board”	The National Labor Relations Board (Respondent in 12-70086; Respondent/Cross-Petitioner in 12-70151 and 12-70384)
“The Carpenters”	The Southwest Regional Council of Carpenters (Intervenor in 12-70151 and 12-70384)
“The Company”	Standard Drywall, Inc. (Petitioner in 12-70086; Intervenor in 12-70151 and 12-70384)
“The International”	The Operative Plasterers & Cement Masons’ International Association of the United States & Canada, AFL-CIO (Petitioner/Cross-Respondent in 12-70151 and 12-70384)
“Local 200”	The Operative Plasterers & Cement Masons’ International Association of the United States & Canada, AFL-CIO, Local 200 (Petitioner/Cross-Respondent in 12-70151 and 12-70384)
“The Plasterers”	The International and Local 200, collectively
“The Plan”	The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Putative Amicus Curiae)
“The PSA”	Project Service Agreement

- “SDI I”* 346 NLRB 478 (2006) (Board Section 10(k) Decision and Determination of Dispute)
- “SDI II”* 348 NLRB 1250 (2006) (Second Board Section 10(k) Decision and Determination of Dispute)
- “SDI III”* 357 NLRB No. 160 (2011) (The related Board Order pending review and enforcement before this Court in 12-70047, 12-70139, & 12-70379)
- “SDI IV”* 357 NLRB No. 179 (2011) (The Board Order pending review and enforcement in the instant case)

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	2
Statement of the issues presented	3
Statement of the case.....	4
Statement of facts.....	5
I. The Board’s findings of fact.....	5
A. The Company’s business and its relationship with the Carpenters; Plasterers Local 200 officials file a wage-and-hour lawsuit against the Company in an effort to obtain the Company’s plastering work ...	5
B. The unions claim the same plastering work at a Company jobsite; the Company files an unfair labor practice charge against the Carpenters; Local 200 offers to dismiss the Pullen lawsuit if the Company would sign an agreement with the Plasterers; Local 200 amends the Pullen lawsuit.....	6
C. The Board issues a Section 10(k) decision in <i>SDI I</i> awarding the Company’s plastering work at the CSF fine arts project to the Carpenters-represented employees	8
D. The unions claim the same work at additional company jobsites; the Plasterers offer to drop the Pullen lawsuit if the Company signs an agreement with the Plasterers in California; the Company files another unfair labor practice charge; the Plasterers pursue grievances against the Company.....	9
E. The Board issues a Section 10(k) decision in <i>SDI II</i> awarding the Company’s plastering work in 12 Southern California counties to the Carpenters-represented employees	12

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
F. Ignoring the Board’s Section 10(k) award in <i>SDI II</i> , the Plasterers Continue to pursue enforcement of the Kelly and Greenberg awards, file a plan complaint; file a tortious interference lawsuit against the Company and the Carpenters, and again amend the Pullen lawsuit	13
G. The General Counsel files another complaint; after a hearing, an Administrative Law Judge finds that the Plasterers violated the Act by filing and pursuing the Pullen and Tortious interference lawsuits, the Kelly and first Greenberg Award, and the 2007 plan complaint.....	14
H. Continuing to ignore the Board’s Section 10(k) award in <i>SDI II</i> , the Plasterers file a grievance seeking work at two additional company jobsites that the Board awarded to Carpenters-represented employees; the Plasterers seek enforcement of the resulting arbitration award.....	15
I. The Board issues <i>SDI III</i> , finding, in agreement with Administrative Law Judge, that the Plasterers violated the Act by filing and Pursuing the Pullen and Tortious interference lawsuits, the Kelly And first Greenberg Award, and the 2007 plan complaint.....	16
II. The Board’s conclusions and order	17
Summary of the argument.....	18
Argument.....	22
I. The Board reasonably found that the Plasterers violated Section 8(b)(4) (ii)(D) of the Act by pursuing a grievance and an arbitration award that are inconsistent with the Board’s Section 10(k) award of work to employees represented by the Carpenters	22
A. A union violated Section 8(b)(4)(ii)(D) by pursuing legal actions in contravention of a Section 10(k) award.....	22

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Board reasonably found that the Plasterers’ grievance and counterclaim to enforce the resulting arbitration award, both of which seek company plastering work, have an illegal objective because they undermine the Board’s Section 10(k) determination in <i>SDI II</i> awarding that work to the Carpenters.....	25
C. The Board reasonably rejected the Plasterers’ claim that the parties have an agreed-upon method for voluntarily resolving their disputes	27
1. Applicable principles and standard of review: Section 10(k) of the Act and the Board’s determination of threshold jurisdictional issues.....	28
2. The Board reasonably made the requisite jurisdictional finding that the Plasterers did not establish that the parties had an agreed-upon method for voluntary resolution of their far-ranging disputes.....	29
3. Given the broad award in <i>SDI II</i> of future plastering work throughout Southern California to employees represented by the Carpenters, the Plasterers err in asserting that they can utilize the PSA and the Plan to resolve the instant dispute	33
II. The court lacks jurisdiction to consider the Plasterers’ challenge to the portion of the Board’s order restraining their actions against “any other person or employer,” and the Board acted well within its broad remedial discretion in awarding attorneys fees and costs to the Company.....	34
A. The court lacks jurisdiction to consider the Plasterers’ untimely and meritless challenge to the portion of the Board’s order restraining their actions against “any other person or employer”	36

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Board acted well within its broad remedial discretion in directing the Plasterers to reimburse theCcompany for attorneys fees and costs associated with defending against their unlawful actions	39
Conclusion	42
STATEMENT OF RELATED CASES	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bill Johnson's Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983)	23,24
<i>Cal. Pac. Med. Ctr. v. NLRB</i> , 87 F.3d 304 (9th Cir. 1996)	35
<i>Can-Am Plumbing, Inc. v. NLRB</i> , 321 F.3d 145 (D.C. Cir. 2003)	24
<i>Carey v. Westinghouse</i> , 375 U.S. 261 (1964)	22, 34
<i>Carpenters Local 275 (Lymo Construction Co.)</i> , 334 NLRB 422 (2001)	28
<i>Cellnet Communications, Inc. v. FCC</i> , 149 F.3d 429 (6th Cir. 1998)	33
<i>Chevron Mining, Inc. v. NLRB</i> , ___ F.3d, ___, 2012 WL 2548821 (D.C. Cir. July 3, 2012)	38
<i>Diamond Walnut Growers, Inc.</i> , 312 NLRB 61 (1993), <i>enforced</i> , 53 F.3d 1085 (9th Cir. 1995)	40
<i>Eldred v. Reno</i> , 239 F.3d 372 (D.C. Cir. 1991), <i>aff'd</i> , 537 U.S. 186 (2003)	32
<i>Elec. Workers Local 3 (Slattery Skanska)</i> , 342 NLRB 173 (2004)	28
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (1964)	35

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Five Star Mfg.</i> , 348 NLRB 1301 (2006)	39
<i>Golden State Bottling Co. v. NLRB</i> , 414 U.S. 168 (1973).....	40
<i>Greske & Sons, Inc. v. NLRB</i> , 103 F.3d 1366 (7th Cir. 1997)	40
<i>Hickmott Foods</i> , 242 NLRB 1357 (1979)	39
<i>Int'l Ladies' Garment Workers v. Quality Mfg. Co.</i> , 420 U.S. 276 n.3 (1975).....	38
<i>Int'l Longshoremen's & Warehousemen's Union v. NLRB</i> , 884 F.2d 1407 (D.C. Cir. 1989).....	23
<i>Iron Workers Local 433 (Otis Elevator)</i> , 309 NLRB 273 (1992), <i>enforced mem.</i> , 46 F.3d 1143 (9th Cir. 1995)	23, 24, 25, 26
<i>Ironworkers, Local 563 (Spancrete Midwest Co.)</i> , 183 NLRB 1105 (1970)	30,31
<i>Johnson & Hardin Co. v. NLRB</i> , 49 F.3d 237 (6th Cir. 1995)	40
<i>Local 30, United Slate, Tile & Composition Roofers v. NLRB</i> , 1 F.3d 1419 (3d Cir. 1993).....	23, 24
<i>Local 32, Int'l Longshoremen v. NLRB</i> , 773 F.2d 1012 (9th Cir. 1985)	22, 23, 24, 29

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Longshoreman's & Warehousemen's Union, Local 62-B,</i> 781 F.2d 919 (9th Cir. 1986)	29
<i>NLRB v. Allied Prods. Corp.,</i> 548 F.2d 644 (6th Cir. 1977)	38
<i>NLRB v. ILWU,,</i> 378 F.2d 33 (9th Cir. 1967)	29
<i>NLRB v. ILWU,,</i> 413 F.2d 30 (9th Cir. 1969)	29
<i>NLRB v. Int'l Ass'n of Ironworkers, Local 433,</i> 549 F.2d 634 (9th Cir. 1977)	25
<i>NLRB v. Local 825, Operating Eng'rs,</i> 326 F.2d 213 (3d Cir. 1964).....	28
<i>NLRB v. Plasterers' Local 79,</i> 404 U.S. 116 (1971).....	28
<i>NLRB v. Plumbers Local No. 741,</i> 704 F.2d 1164 (9th Cir. 1983)	25, 29
<i>NLRB v. Radio & Television Broadcast Eng'rs,</i> 364 U.S. 573 (1961).....	22
<i>NLRB v. Sambo's Rest. Inc.,,</i> 641 F.2d 794 (9th Cir. 1981)	37, 38
<i>NLRB v. Teamsters Local 776,</i> 973 F.2d 230 (3d Cir. 1992)	24

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Operating Eng'rs, Local 318 (Kenneth E. Foeste Masonry, Inc.),</i> 322 NLRB 709 n.9 (1996)	32
<i>Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO &</i> <i>Operative Plasterers' & Cement Masons' Int'l Ass'n and Standard Drywall, Inc. &</i> <i>Sw. Reg'l Council of Carpenters, United Bhd. of Carpenters and Joiners of Am.,</i> <i>and Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO &</i> <i>Standard Drywall, Inc. & Sw. Reg'l Council of Carpenters, United Bhd. of</i> <i>Carpenters and Joiners of Am.,</i> 357 NLRB No. 160 (2011)	16
<i>Petrochem Insulation, Inc. v. NLRB,</i> 240 F.3d 26 (D.C. Cir. 2001)	39
<i>Plumbers & Fitters Local 761,</i> 144 NLRB 133 (1963)	31
<i>Quick v. NLRB,</i> 245 F.3d 231 (3d Cir. 2001).....	40
<i>Resident Counsel v. HUD,</i> 980 F2d 1043 (5th Cir. 1993)	32
<i>Sheet Metal Workers, Local 27 (E.P. Donnelly),</i> 357 NLRB No. 131 (2011)	26, 27
<i>Small v. Operative Plasterers' & Cement Masons Local 200,</i> 611 F.3d 483 (9th Cir. 2010)	23,24,26
<i>Sparks Nugget, Inc. v. NLRB,</i> 968 F.2d 991 (9th Cir. 1992)	30, 31, 33

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>SW Reg'l Council of Carpenters, United Bhd. of Carpenters & Joiners of Am. & Standard Drywall, Inc. & Operative Plasterers' & Cement Masons' Int'l Ass'n, Local No. 200, AFL-CIO,</i> 346 NLRB 478 (2006)	8
<i>SW Reg'l Council of Carpenters, United Bhd. of Carpenters & Joiners of Am. & Standard Drywall, Inc. & Operative Plasterers' & Cement Masons' Int'l Ass'n, Local No. 200, AFL-CIO,</i> 348 NLRB 1250 (2006).....	12
<i>Teamsters Local 917 v. NLRB,</i> 577 F.3d 70 (2d Cir. 2009).....	41
<i>United States v. L. A. Tucker Truck Lines, Inc.,</i> 344 U.S. 33 (1952).....	37
<i>Universal Camera Corp. v. NLRB,</i> 340 U.S. 474 (1951).....	25
<i>Va. Elec. & Power Co. v. NLRB,</i> 319 U.S. 533 (1943).....	35
<i>Woelke & Romero Framing, Inc. v. NLRB,</i> 456 U.S. 645 (1982).....	37

Statutes:

Page(s)

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 8(b)(4)(iii)(d) (29 U.S.C. § 158(b)(4)(ii)(D) 3,4,6,7,10,14,16,17-38

Section 10(a) (29 U.S.C. § 160(a))3

Section 10(c) (29 U.S.C. §160(c)).....35

Section 10(e) (29 U.S.C. §§ 160(e)) 3,37,39

Section 10(f) (29 U.S.C. §§ 160(f))3

Section 10(k) (29 U.S.C. § 160(k) 4,7,8,9,10,12,13,14,15,18,19,21,22,29-41

Section 10(l) (29 U.S.C. § 160(l)).....15

Rules:

Fed. R. App. P. 28(a)(9).....32

Fed. R. App. P. 28(a)(9)(A) 29,33

Fed. R. App. P. 42(b)2

Regulations:

29 C.F.R. § 102.48(d)(1).....36

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on two petitions for review, and the National Labor Relations Board's cross-application for enforcement, of the same Board Decision and Order, which issued on December 31, 2011, and is reported at 357 NLRB No. 179. (ER 12-16.)¹ The Operative Plasterers' & Cement Masons' International Association of the United States & Canada, AFL-CIO ("the International") and the Operative Plasterers' & Cement Masons' International Association of the United States & Canada, AFL-CIO, Local 200 ("Local 200") (collectively, "the Plasterers") have filed one of the petitions for review, and the Board has cross-applied for enforcement of its Order against the Plasterers. Standard Drywall, Inc. ("the Company"), and Southwest Regional Council of Carpenters ("the Carpenters") have intervened on the side of the Board.² In addition, the Company has filed a petition for review of the same Board Order.³

¹ "ER" refers to the Supplemental Excerpts of Record filed by the Plasterers with its opening brief. "SER" refers to the Board's Supplemental Excerpts of Record filed with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² Before the Board, the International and Local 200 were Respondents, and the Company was the Charging Party.

³ Pursuant to Fed. R. App. P. 42(b), the Company and the Board have filed a stipulated motion for voluntary dismissal of the Company's petition for review. *See* Docket Entry dated 6/8/12 in Ninth Cir. Case No. 12-70086.

The petitions and the cross-application are timely because the Act imposes no time limitation for such filings.

The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)), because the Order is final and the unfair labor practices took place in California.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board reasonably found that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by pursuing a grievance and enforcement of an arbitration award that are inconsistent with the Board’s Section 10(k) work assignment awarding the work in dispute to employees represented by the Carpenters.
2. Whether the Court lacks jurisdiction to consider the Plasterers’ untimely and meritless challenge to the portion of the Board’s Order restraining their actions against “any other person or employer,” and whether the Board acted within its broad remedial discretion in awarding attorneys’ fees and costs to the Company for defending against the Plasterers’ unlawful actions.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Company, the General Counsel filed a complaint alleging that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by pursuing a grievance to arbitration, and petitioning to enforce the resulting arbitration award, when such legal actions were inconsistent with previous Board Decision and Determinations under Section 10(k) of the Act (29 U.S.C. § 160(k)). (ER 216-20, SER 126-33.) The Plasterers filed an answer denying the charges. (SER 134-35.)

In September 2009, the Company and the Plasterers filed cross-motions for summary judgment. The General Counsel filed a statement in support of the Company's motion, and an opposition to the Plasterers' motion. On November 17, 2009, the Board issued an order transferring the proceeding to the Board and a notice to show cause as to why each summary judgment motion should not be granted. The Company and the General Counsel filed responses. (ER 12.)

On December 31, 2011, the Board granted summary judgment in favor of the Company and denied the Plasterers' motion for summary judgment. (ER 12-16.) In doing so, the Board found that the Plasterers violated the Act as alleged by the General Counsel. The Board ordered the Plasterers to withdraw its petition to enforce the arbitration award, and to reimburse the Company for reasonable legal expenses and fees associated with its defenses against the Plasterers' actions. The

Board also ordered the Plasterers to cease and desist from taking similar threatening, coercing, or restraining actions against the Company or any other person or employer. (ER 15.)

Below, we begin with the factual findings that the Board adopted from three earlier proceedings, covering events through 2007. *See* A-F, below. We then set forth the Board's findings of fact and conclusions of law regarding the Plasterers' additional actions in 2009, which triggered the instant proceeding. *See* G-I, below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Business and Its Relationship with the Carpenters; Plasterers Local 200 Officials File a Wage-and-Hour Lawsuit Against the Company in an Effort to Obtain the Company's Plastering Work

The Company, a California corporation engaged in the construction industry, has had a collective-bargaining relationship with the Carpenters for at least 10 years. (ER 17, 23-24; SER 44-54.) Pursuant to that relationship, the Company has assigned its plastering work at public works projects in 12 southern California counties to employees represented by the Carpenters. *Id.* The Company has never had a bargaining relationship with the Plasterers. (ER 32, 39; SER 99.)

In October 2004, Local 200 Business Manager Robert Pullen and Business Agent David Frichtel, as individuals, filed a lawsuit in California state court ("the Pullen lawsuit") alleging that the Company violated state wage-and-hour laws by

underpaying plastering apprentices at southern California public works sites at a time when the Plasterers operated the only state-approved apprenticeship program for that kind of work. (ER 17, 23; SER 61-70.) The Pullen lawsuit sought, among other remedies, backpay for alleged underpaid employees, and an injunction requiring compliance with state law. (SER 61-70.)

B. The Unions Claim the Same Plastering Work at a Company Jobsite; the Company Files an Unfair Labor Practice Charge Against the Carpenters; Local 200 Offers To Dismiss the Pullen Lawsuit if the Company Would Sign an Agreement with the Plasterers; Local 200 Amends the Pullen Lawsuit

In December 2004, the Company began work on the CSF Fine Arts project, using employees covered by its collective-bargaining agreement with the Carpenters. (ER 39.) In January 2005, Local 200 Business Agent Russ Nicholson went to the CSF Fine Arts project jobsite and told Superintendent David Corona that he would “like to have the guys come back and sign with Local 200.” *Id.* Upon learning of this demand, the Carpenters told the Company that its employees would strike if the Company gave the work to Local 200. *Id.*

In February 2005, the Company filed an unfair labor practice charge alleging that the Carpenters violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by threatening to strike the Company if it assigned plastering

work to employees represented by the Plasterers.⁴ (ER 39.) Pursuant to Section 10(k) of the Act (29 U.S.C. § 160(k)), the Region held the charge in abeyance while the Board convened proceedings to determine if the two unions had a bona fide jurisdictional dispute and, if so, to whom to assign the disputed work.⁵

While the unfair labor charge was pending, both unions continued to claim the work in dispute. On April 28, 2005, the Carpenters sent a letter to the Company again threatening to strike over the disputed work at the CSF Fine Arts project. (ER 39.) In May 2005, Plasterers representatives told company representatives that if the Company would sign an agreement giving the Plasterers the disputed work, they would try to secure dismissal of the Pullen lawsuit. (ER 39-40.)

On August 9, 2005, Pullen and Frichtel amended the complaint in the Pullen lawsuit to add Local 200 as a plaintiff, to seek backpay for all Local 200 apprentices not employed by the Company, and to seek restitution and injunctive relief against the Company for failing to make apprenticeship contributions for

⁴ Section 8(b)(4)(ii)(D) prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to employees in a particular labor organization rather than to employees in another labor organization.

⁵ Section 10(k) of the Act provides that, “[w]henver it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(ii)(D)], the Board is empowered to hear and determine the dispute out of which such unfair labor practice has arisen”

apprentices it did not hire on all of its past, present, and future public works projects in 12 southern California counties. (ER 23, 32, 40, SER 71-83.)

C. The Board Issues a Section 10(k) Decision in *SDI I* Awarding the Company's Plastering Work at the CSF Fine Arts Project to the Carpenters-Represented Employees

On September 9, 2005, the Region held a hearing under Section 10(k) of the Act (29 U.S.C. § 160(k)) concerning the dispute between the Carpenters and the Plasterers over the work at the CSF Fine Arts project. On January 31, 2006, the Board (Chairman Battista, Members Liebman and Schaumber) issued a Section 10(k) Decision and Determination of Dispute.⁶ (ER 39-44.) First, the Board (ER 41-42) made the required threshold finding that reasonable cause existed to believe that: (1) the two unions had competing claims to the disputed work; (2) the Carpenters had used proscribed means by threatening to strike to enforce its claim to the work; and (3) the parties did not have an agreed-upon method for voluntary adjustment of the dispute. The Board then considered the relevant factors and awarded the disputed plastering work at the Company's CSF Fine Arts project to

⁶ *Sw. Reg'l Council of Carpenters, United Bhd. of Carpenters & Joiners of Am. & Standard Drywall, Inc. & Operative Plasterers' & Cement Masons' Int'l Ass'n, Local No. 200, AFL-CIO*, 346 NLRB 478 (2006) ("*SDI I*").

the employees represented by the Carpenters.⁷ Accordingly, the Board also dismissed the charge against the Carpenters.⁸ (ER 42-44.)

D. The Unions Claim the Same Work at Additional Company Jobsites; the Plasterers Offer To Drop the Pullen Lawsuit if the Company Signs an Agreement with the Plasterers in California; the Company Files Another Unfair Labor Practice Charge; the Plasterers Pursue Grievances Against the Company

On February 21, 2006, Plasterers representatives told the Company that they would drop the Pullen lawsuit, but only as it applied to the CSF Fine Arts project in Fullerton. (ER 32; SER 56.) On February 23, the Company informed the Carpenters that, because the Pullen lawsuit covered numerous other jobsites, the Company “may have no choice” but to assign such plastering work to employees represented by the Plasterers. (ER 32; SER 55-56.)

On February 24, Carpenters representatives wrote to the Company, stating that if the Company “attempts to reassign any work” currently being performed by its members, the Carpenters “will immediately strike” the Company. (ER 33-35; SER 60.) Around the same time, International Secretary-Treasurer Patrick Finley told Company Vice President Blaine Caya that Finley would try to get “the

⁷ The relevant factors are: certification and collective-bargaining agreements; employer preference and past practice; area and industry practice; relative skills; and economy and efficiency of operations. (ER 42-45.)

⁸ See 29 U.S.C. § 160(k) (“[u]pon compliance by the parties to the dispute with the decision of the Board . . . such charge shall be dismissed”).

[Pullen] lawsuit dropped” if the Company signed an agreement requiring the use of Plasterers-represented employees on the Company’s California projects. (ER 33, 35; SER 122-23.)

On March 2, 2006, the Company filed a charge alleging that the Carpenters violated Section 8(b)(4)(ii)(D) of the Act by threatening to strike the Company if it assigned its plastering work in southern California to employees represented by the Plasterers.⁹ (SER 15.) The Region held the charge in abeyance while the Board convened a second proceeding under Section 10(k) of the Act to determine if the two unions had another bona fide jurisdictional dispute and, if so, to whom to assign the additional work in dispute.

In April and May 2006, the Region conducted the second Section 10(k) hearing, which concerned a dispute over 97 public works projects in 12 southern California counties. (ER 34; SER 21-24.) At the hearing, Carpenters representative Gordon Hubel testified and repeated the Carpenters’ earlier strike threat—that the Carpenters would strike if the Company reassigned any of the plastering work being performed by Carpenters-represented employees on the Company’s southern California projects. (ER 33; SER 3-13.)

⁹ Initially, the Company also filed a charge against the Plasterers, but eventually dropped it.

On May 29, 2006, the International pursued a grievance to arbitration pursuant to a Project Stabilization Agreement (“the PSA”) and a corresponding Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“the Plan”) before arbitrator Tony Kelly. Kelly awarded plastering work being performed by company employees at the Central Los Angeles High School # 2, the East Valley New Middle School # 1, and the Cal Trans Replacement Facilities Shop # 7 to employees represented by Plasterers Local 200 (“the Kelly award”). (ER 24; SER 84-89.)

On July 7, 2006, the International pursued another grievance under the Plan, alleging that the unfair labor practice charges that the Company had filed against the Plasterers were impeding the enforcement of the Kelly award. (ER 18; SER 90-93.) Arbitrator Paul Greenberg issued an award that ordered the Company to withdraw any unfair labor charges filed with the Board (“the first Greenberg award”). (*Id.*)

**E. The Board Issues a Section 10(k) Decision in *SDI II*
Awarding the Company's Plastering Work in 12 Southern
California Counties to the Carpenters-Represented Employees**

On December 13, 2006, the Board (Chairman Battista, Members Liebman and Schaumber) issued a second Section 10(k) Decision and Determination.¹⁰ (ER 32-38.) Again, the Board made the required threshold finding that reasonable cause existed to believe that: (1) the Plasterers and the Carpenters had competing claims to the disputed work in 12 southern California counties; (2) the Carpenters used proscribed means by threatening to strike to enforce its claim to the work; and (3) the parties did not have an agreed-upon method for voluntary adjustment of the disputed work. After considering the relevant factors, the Board awarded the disputed work to the Carpenters.¹¹ (ER 36-38.) Given the likelihood of future jurisdictional disputes and the wide breadth of the Carpenters' threats to strike, the Board concluded that "the determination of this dispute applies not only to the jobs in which the dispute arose [97 specifically-identified jobsites in Southern California] but to all similar work done or to be done by [the Company] on any other public works projects in the 12 Southern California counties, where the

¹⁰ *Sw. Reg'l Council of Carpenters, United Bhd. of Carpenters & Joiners of Am. & Standard Drywall, Inc. & Operative Plasterers' & Cement Masons' Int'l Ass'n, Local No. 200, AFL-CIO*, 348 NLRB 1250 (2006) ("*SDI II*").

¹¹ See n.7 above.

jurisdiction of the two Unions overlap.” (ER 38.) The Board then dismissed the charge against the Carpenters. *Id.*

F. Ignoring the Board’s Section 10(k) Award in *SDI II*, the Plasterers Continue To Pursue Enforcement of the Kelly and Greenberg Awards, File a Plan Complaint, File a Tortious Interference Lawsuit Against the Company and the Carpenters, and Again Amend the Pullen Lawsuit

On January 9, 2007, the International, on behalf of Local 200, petitioned for enforcement of both the Kelly and Greenberg awards by filing claims for enforcement under the Plan. (ER 24, SER 94.) That same day, the International, on behalf of Local 200, petitioned the Plan’s Administrator to file another complaint against the Company seeking plastering work at all Los Angeles Unified School District public work projects in the 12 southern California counties. (ER 24; SER 95.)

On May 14, 2007, the Plasterers filed a second lawsuit in California state court against the Company and the Carpenters (“the Tortious Interference lawsuit”). (ER 24; SER 96-106.) The Tortious Interference lawsuit alleges that the Company and the Carpenters tortiously interfered with the Plasterers’ prospective economic advantage by participating in a “kickback” scheme, resulting in the Company assigning its plastering work in 12 southern California counties to employees represented by the Carpenters. The complaint seeks punitive damages

of \$70 million, compensatory damages of \$7 million, and injunctive relief. (ER 24-25; SER 96-106.)

On June 21, 2007, about six months after the Board issued its Decision and Determination of Dispute in *SDI II*, the Plasterers amended the complaint in the Pullen lawsuit for a second time. (SER 107-20.) The second amended complaint, which is substantially similar to the first amended complaint, continues to seek the work performed by the Carpenters for the Company in the 12 southern California counties in contravention of the Board's Section 10(k) rulings in *SDI I* and *II*. (ER 27; SER 107-20.)

G. The General Counsel Files Another Complaint; After a Hearing, An Administrative Law Judge Finds that the Plasterers Violated the Act By Filing and Pursuing the Pullen and Tortious Interference Lawsuits, the Kelly and First Greenberg Award, and the 2007 Plan Complaint

Acting on new charges filed by the Company against the Plasterers, the General Counsel issued a complaint alleging that the Plasterers' legal actions through 2007 violated Section 8(b)(4)(ii)(D) of the Act because they contravened the Board's earlier Section 10(k) work assignments in *SDI I* and *SDI II*. Following a hearing, a Board administrative law judge issued a decision and recommended order, finding that the Plasterers violated the Act by pursuing the Pullen and Tortious Interference lawsuits, the Kelly and first Greenberg award, and the 2007

Plan complaint in contravention of the Board's earlier work assignments in *SDI I* and *SDI II* awarding the work to Carpenters-represented employees.¹²

H. Continuing To Ignore the Board's Section 10(k) Award in *SDI II*, the Plasterers File a Grievance Seeking Work at Two Additional Company Jobsites that the Board Awarded to Carpenters-Represented Employees; the Plasterers Seek Enforcement of the Resulting Arbitration Award

On January 5, 2009, the International, acting on behalf of Local 200, pursued a grievance to arbitration under the Plan. The grievance sought plastering work being performed by the Company's employees at Valley Regional Elementary Schools Nos. 7 and 9, both located in southern California. (ER 14; ER 194.) On January 22, 2009, Arbitrator Greenberg issued a second award giving the work to the Plasterers ("the second Greenberg award").¹³ (ER 14; ER 193-99.)

On January 29, 2009, the Company filed a complaint in federal district court to vacate the second Greenberg arbitration award as contrary to the Board's Decision and Determination of Dispute in *SDI II*. (ER 14; ER 182-91.) On March

¹² On August 4, 2008, the Regional Director of the Board's Los Angeles Regional Office petitioned the District Court for the Central District of California to enjoin the Plasterers' legal actions against the Company under Section 10(l) of the Act (29 U.S.C. § 160(l)). The district court granted the injunction and, on July 8, 2010, this Court upheld it, pending the Board's issuance of a final order in *SDI III*. See *Small v. Operative Plasterers' & Cement Masons Local 200*, 611 F.3d 483 (9th Cir. 2010).

¹³ As noted above at p. 11, Arbitrator Greenberg previously issued a separate arbitration award ("the first Greenberg award") ordering the Company to withdraw any unfair labor practice charges filed with the Board.

5, 2009, the Plasterers filed a counterclaim to enforce and confirm the award. (ER 14; ER 201-13.)

I. The Board Issues *SDI III*, Finding, in Agreement with Administrative Law Judge, that the Plasterers Violated the Act by Filing and Pursuing the Pullen and Tortious Interference Lawsuits, the Kelly and First Greenberg Award, and the 2007 Plan Complaint

On December 30, 2011, the Board (Chairman Pearce and Members Becker and Hayes) issued its Decision and Order in *Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO & Operative Plasterers' and Cement Masons' Int'l Ass'n & Standard Drywall, Inc. & Sw. Reg'l Council of Carpenters, United Bhd. of Carpenters and Joiners of Am., & Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO & Standard Drywall, Inc. & Sw. Reg'l Council of Carpenters, United Bhd. of Carpenters & Joiners of Am.*, 357 NLRB No. 160 (2011) ("*SDI III*"), appeal docketed, Nos. 12-70047, 12-70139, 12-70379 (9th Cir. Jan.17, 2012), finding, in agreement with the administrative law judge, that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing the Pullen and Tortious Interference lawsuits, the Kelley and first Greenberg awards, and the January 9, 2007 Plan complaint. (ER 17-31.)

In so ruling, the Board found that the Plasterers' actions had an unlawful object of improperly coercing the Company to assign work to Plasterers-represented employees, despite the Board's contrary award of the work to Carpenters-

represented employees in *SDI II*. (ER 17-31.) With regard to the remedy, the Board in *SDI III* issued its customary cease-and-desist order, requiring the Plasterers to cease and desist from the unfair labor practices found against the Company. (ER 21.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) found that the Plasterers again violated Section 8(b)(4)(ii)(D) of the Act by pursuing to arbitration its January 2009 grievance seeking company plastering work at Valley Regional Elementary Schools Nos. 7 and 9 that the Board had awarded to Carpenters-represented employees in *SDI II*, and by filing a counterclaim in federal district court to enforce the resulting arbitration award (the second Greenberg award). (ER 12-16.)¹⁴ The Board found that the Plasterers' actions had an unlawful object of improperly coercing the Company to assign work to Plasterers-represented employees, despite the Board's contrary award of the work to Carpenters-represented employees in *SDI II*. (ER 14.)

The Board's Order requires the Plasterers to cease and desist from engaging in the unfair labor practices found and from "threatening, coercing, or restraining" the Company, "or any other person or employer engaged in commerce or in an industry affecting commerce, where an object of their actions is to force or require

¹⁴ 357 NLRB No. 179 (2011) ("*SDI IV*").

the employer to assign plastering work to Local 200's members, rather than to its own employees who are not members of Local 200." Affirmatively, the Board's Order requires the Plasterers to withdraw the counterclaim to enforce the second Greenberg award, and to reimburse the Company for reasonable legal expenses and fees associated with the defense against the second Greenberg award and the Plasterers' counterclaim, with interest. (ER 15.) The Board also ordered the Plasterers to physically post and, if appropriate, electronically distribute a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

This case is the most recent in a series stemming from the competing claims of the Plasterers and the Carpenters to perform work on public projects across southern California. After the Board issued its first Section 10(k) decision in 2006 in *SDI I* awarding work to the Carpenters at one such jobsite, the Plasterers persisted in their quest to obtain work at other jobsites. This led to the Board's issuance of its second Section 10(k) decision in *SDI II*, in which it awarded work to Carpenters-represented employees at 97 jobsites, as well as at future public works projects "in the 12 southern California counties, where the jurisdiction of the two unions overlap." (ER 38.) Despite these rulings, the Plasterers continued to seek the Carpenters' work by pursuing lawsuits, grievances, and a Plan complaint. Accordingly, in *SDI III* the Board found that the Plasterers violated Section

8(b)(4)(ii)(D) of the Act by taking those actions in contravention of the Section 10(k) award in *SDI II*.

In the instant case, *SDI IV*, the Board reasonably found the Plasterers again violated Section 8(b)(4)(ii)(D) of the Act by pursuing yet another grievance and seeking enforcement of yet another arbitration award in contravention of the Section 10(k) award of the disputed work in *SDI II* to Carpenters-represented employees. Under well-settled law, a union's actions in contravention of such awards have an illegal objective and therefore may be enjoined as an unfair labor practice under Section 8(b)(4)(ii)(D) of the Act.

Here, the Plasterers do not challenge the Board's finding that their pursuit of another grievance and arbitration award contravenes the Board's Section 10(k) award in *SDI II*. Instead, the Plasterers defend their actions by repeating the false mantra that the PSA and the Plan allow them to pursue the grievance and arbitration award at issue here. To the contrary, well-settled precedent establishes that the Board's Section 10(k) determination in *SDI II*, which awarded the disputed work to employees represented by the Carpenters, forecloses the Plasterers from seeking a different result under the PSA and the Plan.

Thus, as they did in *SDI III*, the Plasterers again attack the Board's threshold determination in *SDI II* that it had jurisdiction to issue the award because the PSA and the Plan did not provide the parties with an agreed-upon method for

voluntarily resolving their far-ranging disputes. Contrary to the Plasterers, the Board reasonably found in *SDI II* that it could issue an award of the work because the Plasterers had failed to meet their burden of showing that the parties had an agreed-upon voluntary dispute resolution mechanism.

In their opening brief, the Plasterers do not challenge the broad scope of the Board's award of work in *SDI II*, which spans 97 jobsites and any future work at additional jobsites in southern California where the two unions' jurisdiction overlap—including the two jobsites at issue here. By failing to challenge in their opening brief the scope of the award in *SDI II*, the Plasterers have waived any challenge to the award. Accordingly, the Court should reject the Plasterers' suggestion that because the PSA and the Plan happen to cover the two jobsites at issue here, the Plasterers could proceed with their attempt to obtain a ruling from the Plan in contravention of the award in *SDI II*. The Plasterers simply cannot avoid the import of the Board's broad award to Carpenters-represented employees in *SDI II* by requesting a "do-over" under the Plan.

The Plasterers also fail in their challenges to the Board's remedial order in the instant case. To begin, the Court lacks jurisdiction to consider the Plasterers' untimely claim that the Board exceeded its discretion by issuing *sua sponte* an order directing them to cease and desist from threatening, coercing, or restraining not only the Company but also "any other person or employer." The Plasterers

could have brought the argument to the Board's attention by filing a motion for reconsideration with the Board. Both the Supreme Court and this Court recognize that in these circumstances, such inaction is fatal to a claim on appellate review. In any event, the Plasterers utterly fail to show that the Board abused its broad remedial discretion in issuing such an order, given the Plasterers' repeated violations of the Act not only in the instant case but in *SDI III* as well.

Finally, there is no merit to the Plasterers' fleeting challenge to the portion of the Board's Order directing them to reimburse the Company for reasonable attorneys' fees and costs incurred in defending against the Plasterers' unlawful legal actions. The Plasterers base their claim on two false premises: that such status quo ante relief is somehow punitive, and, yet again, that they should be allowed to use the Plan to decide the dispute despite the Board's prior Section 10(k) determination in *SDI II* awarding the work to employees represented by the Carpenters. The Plasterers therefore fail to demonstrate that the Board abused its broad remedial discretion by ordering them to reimburse the Company for attorneys' fees and costs associated with defending against the Plasterers' unlawful actions.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE PLASTERERS VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT BY PURSUING A GRIEVANCE AND AN ARBITRATION AWARD THAT ARE INCONSISTENT WITH THE BOARD’S SECTION 10(k) AWARD OF WORK TO EMPLOYEES REPRESENTED BY THE CARPENTERS

A. A Union Violates Section 8(b)(4)(ii)(D) by Pursuing Legal Actions in Contravention of a Section 10(k) Award

Sections 8(b)(4)(ii)(D) and 10(k) of the Act, taken together, establish the statutory scheme for resolving jurisdictional disputes, and protect interstate commerce by relieving employers trapped between the claims of rival unions from costly disruptions of their businesses occasioned by such disputes. *NLRB v. Radio & Television Broadcast Eng’rs*, 364 U.S. 573, 574-75, 579-82 (1961). Indeed, “Congress intended to make the Section 10(k) proceeding the ‘peaceful and binding’ final determination of a disputed work assignment.” *Local 32, Int’l Longshoremen v. NLRB*, 773 F.2d 1012, 1020-21 (9th Cir. 1985) (“*Local 32*”), quoting *Radio & Television Broadcast Eng’rs*, 364 U.S. at 580.

While parties may initially use other forums, such as arbitration or the courts, to resolve a work dispute, the Board’s determination of that dispute takes precedence over, and precludes enforcement of, a contrary decision. *See, e.g., Carey v. Westinghouse*, 375 U.S. 261, 272 (1964) (Board’s ruling takes precedence over arbitration award). Accordingly, it is well-settled in this Court that pursuit of

a grievance or arbitration award to obtain work awarded by the Board under Section 10(k) of the Act to employees represented by another union, or monetary damages in lieu of the work, has an illegal objective and violates Section 8(b)(4)(ii)(D) of the Act. *Small v. Operative Plasterers' & Cement Masons Local 200*, 611 F.3d 483, 492 (9th Cir. 2010) (upholding injunction in earlier proceedings in the instant case); *see also Local 32*, 773 F.2d at 1020; *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274, 283-85 (1992), *enforced mem.*, 46 F.3d 1143 (9th Cir. 1995). Other circuits have reached the same conclusion. *See, e.g., Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1426-1429 (3d Cir. 1993); *Int'l Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1414 (D.C. Cir. 1989) (“*Longshoremen*”).

Moreover, the Supreme Court recognizes that a legal action having an objective that is illegal under federal law may be enjoined without violating the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983).¹⁵ “Thus, where the Board has previously ruled on a given matter, and

¹⁵ In what is now commonly referred to as simply “footnote 5,” the Court in *Bill Johnson's* stated, in relevant part:

We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from

where a legal action is aimed at achieving a result that is incompatible with the Board's ruling, the legal action falls within the 'illegal objective' exception to *Bill Johnson's*." *Teamsters Local 776*, 305 NLRB 832, 835 (1991), *enforced sub nom. NLRB v. Teamsters Local 776*, 973 F.2d 230 (3d Cir. 1992).

Accordingly, a plaintiff pursuing a legal action "for an illegal objective . . . simply could not obtain the relief it sought regardless of the evidence it produced" and "regardless of . . . motivation." *Teamsters Local 776*, 973 F.2d at 236.

Whatever a union's motive in pursuing legal action, and "no matter how persuasive" its case, it "cannot force an employer" to ignore a Section 10(k) award. *Otis Elevator*, 309 NLRB at 274, 283-85. In this circumstance, the litigation enjoys no First Amendment protection. *Small*, 611 F.3d at 492-93; *Local 32*, 773 F.2d at 1021; *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003). Indeed, it cannot "be successfully argued otherwise" (*Bill Johnson's*, 461 U.S. at 737 n.5), regardless of whether the legal action has a reasonable basis in fact and law and a benevolent motive. *See, e.g., Roofers*, 1 F.3d at 1426, n.11; *Local 32*, 773 F.2d at 1021 (lawsuit that has an illegal objective is per se baseless); *Longshoremen*, 884 F.2d at 1414, n.12 (interpreting the Ninth Circuit's decision in

prosecuting court suits for enforcement of fines that could not be imposed under the Act

461 U.S. at 738 n.5 (citation omitted).

Local 32 as rejecting any requirement that litigation with an illegal objective be declared baseless prior to being enjoined); *Otis Elevator*, 309 NLRB at 274, 283-85.

The Board's determination that a union violated Section 8(b)(4)(ii)(D) of the Act is subject to limited review, and must be affirmed if the Board's underlying factual findings are supported by substantial evidence and its legal conclusions are not arbitrary or capricious. *NLRB v. Int'l Ass'n of Ironworkers, Local 433*, 549 F.2d 634, 640 (9th Cir. 1977); *NLRB v. Plumbers Local No. 741*, 704 F.2d 1164, 1166 (9th Cir. 1983). Thus, a reviewing court may not displace the Board's choice between conflicting views, even if it could justifiably have made a different choice *de novo*. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. The Board Reasonably Found that the Plasterers' Grievance and Counterclaim To Enforce the Resulting Arbitration Award, Both of Which Seek Company Plastering Work, Have an Illegal Objective Because They Undermine the Board's Section 10(k) Determination in *SDI II* Awarding that Work to the Carpenters

Applying the above principles, the Board reasonably found (ER 14-15) that despite a contrary Section 10(k) determination in *SDI II* awarding work at all company projects in 12 southern California counties to Carpenters-represented employees, the Plasterers filed a grievance seeking the very same work at two jobsites, Valley Regional Elementary Schools Nos. 7 and 9, covered by the award. The Plasterers then sought an arbitration award of the work under the Plan. After

an arbitrator issued an award in the Plasterers' favor (the second Greenberg award), the Company sought to vacate the award because it conflicted with the Board's determination in *SDI II*. Nevertheless, the Plasterers continued to pursue the arbitration award by filing a counterclaim to enforce it in federal district court. As the Board found, the Plasterers' actions—which are “virtually identical” to the unlawful actions that they took in *SDI III*—constitute additional violations of Section 8(b)(4)(ii)(D) of the Act. (ER 14-15, citing *Sheet Metal Workers, Local 27 (E.P. Donnelly)*, 357 NLRB No. 131 (2011) (union violated Section 8(b)(4)(ii)(D) of the Act by pursuing enforcement of arbitration award to obtain work awarded by the Board to another union under Section 10(k) of the Act), *appeal docketed*, Nos. 11-4480, 12-1047 (3d Cir. Dec. 19, 2011).) *Accord Small*, 611 F.3d 483, 493 (9th Cir. 2010). *See also Local 32*, 773 F.2d at 1015, 1020-1021; *Otis Elevator*, 309 NLRB 273, 274, 283-85 (1992).

Contrary to the Plasterers (Br. 28), the Board did not fail to engage in reasoned decision-making by comparing the instant case to *Sheet Metal Local 27*. That case is wholly consistent with the Board's finding here. Both cases involve Section 10(k) determinations in which the Board awarded disputed work to one group of employees over another. And, in both cases, the Board first made the requisite jurisdictional finding that the relevant work—at one jobsite in *Sheet Metal Local 27*, and at numerous southern California jobsites here—was not

subject to an agreed-upon voluntary method for resolution. In both cases, the Board then reasonably found that the losing union's actions in contravention of a Section 10(k) award violated Section 8(b)(4)(ii)(D) of the Act. (ER 15.) *Accord Sheet Metal Local 27*, 357 NLRB No. 131, 2011 WL 6120725 at *3.

C. The Board Reasonably Rejected the Plasterers' Claim that the Parties Have an Agreed-Upon Method for Voluntarily Resolving Their Disputes

As noted, the Plasterers do not dispute that their pursuit of the new grievance and enforcement of the second Greenberg award run counter to the Board's award of work to Carpenters-represented employees in *SDI II*. Instead, the Plasterers assert (Br. 28), as they unsuccessfully did in *SDI III*, that the Board lacked jurisdiction to issue the Section 10(k) award in *SDI II* because the PSA and the Plan allegedly provided an agreed-upon method for determining the dispute at three of the 97 jobsites at issue in *SDI II*. Again ignoring the scope of the Board's Section 10(k) award in *SDI II*, the Plasterers also erroneously assert (Br. 27-29) that they were entitled to pursue the new grievance and second Greenberg award under the PSA and the Plan. As we now show, under settled principles governing Section 10(k) proceedings, both claims are without merit.

1. Applicable principles and standard of review: Section 10(k) of the Act and the Board's determination of threshold jurisdictional issues

As explained above (p.22), Congress enacted Section 10(k) of the Act to resolve jurisdictional disputes between competing unions, and thereby protect employers and the public from the detrimental economic impact of such disruptions to commerce. *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 123-24 (1971). Before the Board may make a work award under this Section, it must make certain threshold findings to determine that the dispute is a jurisdictional one. Specifically, the Board must find reasonable cause to believe that (1) there are competing claims for the disputed work; (2) a party (the Carpenters) used proscribed means (a strike threat) to enforce its claim to the work; and (3) the parties have no agreed-upon method for the voluntary adjustment of the dispute. See *Elec. Workers Local 3 (Slattery Skanska)*, 342 NLRB 173, 174 (2004) (competing claims and proscribed means); *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001) (no agreed-upon method for voluntary adjustment of the dispute).

The scope of judicial review of a Section 10(k) award is narrowly limited. *NLRB v. Local 825, Operating Eng's*, 326 F.2d 213, 218 (3d Cir. 1964). This is so because the Board, in making its award, is "called upon to apply its experience and special expertise in considering all relevant factors,

unfettered by rigid standards.” *NLRB v. ILWU*, 413 F.2d 30, 33 (9th Cir. 1969). In reviewing a Section 10(k) award in the context of a Board decision and order finding a violation of Section 8(b)(4)(ii)(D) of the Act, the court must sustain the Section 10(k) award so long as substantial evidence supports the Board’s findings of fact and the Board has not acted arbitrarily or capriciously in making the award. *See NLRB v. Plumbers Local 741*, 704 F.2d 1164, 1166 (9th Cir. 1983); *Local 32*, 773 F.2d at 1015; *Int’l Longshoreman’s & Warehousemen’s Union, Local 62-B*, 781 F.2d 919, 923 (9th Cir. 1986).¹⁶

2. The Board reasonably made the requisite jurisdictional findings in *SDI II*, including its finding that the Plasterers did not establish that the parties had an agreed-upon method for voluntary resolution of their far-ranging disputes

As an initial matter, the Board reasonably found in *SDI II* that the parties had competing claims to the work in dispute, and that the Carpenters’ strike threats constituted proscribed means to enforce their claim. (ER 35-36.) Because the Plasterers do not contest these findings in their opening brief, they have waived any challenge to them. *See Fed. R. App. P. 28(a)(9)(A)* (party waives argument

¹⁶ Since the Act does not provide for independent judicial review of a Section 10(k) award, the only stage at which the losing party in that proceeding can challenge the award is in conjunction with judicial review of the Board’s subsequent Section 8(b)(4)(ii)(D) unfair labor practice finding. *NLRB v. ILWU*, 378 F.2d 33, 35-36 (9th Cir. 1967).

not raised in opening brief); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992) (same).

Instead, the Plasterers contest (Br. 27) the Board's reasonable finding (ER 36) in *SDI II* that the Plasterers failed to demonstrate "satisfactory evidence" that the parties to the dispute "agreed upon methods for the voluntary adjustment of the dispute" (29 U.S.C. § 160(k)), which spanned 97 jobsites in 12 southern California counties. (ER 36.) As shown below, however, the Board's finding in *SDI II* is supported by substantial evidence and is not arbitrary or capricious.

The Plasterers have argued throughout these proceedings, and repeat here (Br. 23-27), that the PSA provided that the Plan was an agreed-upon method to resolve disputes at three of the jobsites that were at issue at time of the Section 10(k) proceedings in *SDI II*—the Central Los Angeles High School # 2, the East Valley New Middle School # 1, and the Cal Trans Replacement Facilities Shop # 7. However, as noted above, the dispute in *SDI II* concerned the Company's plastering work at 97 jobsites in 12 southern California counties. Accordingly, the Board in *SDI II* reasonably found (ER 36) that even "assuming arguendo that the PSA resolves the jurisdictional dispute at 3 of the projects," it would leave unresolved the remaining projects in dispute.

In so finding, the Board cited (ER 36 n.23) its decision in *Ironworkers, Local 563 (Spancrete Midwest Co.)*, 183 NLRB 1105, 1007 (1970), in which it

held that an agreed-upon method for voluntary adjustment must resolve the entire dispute before divesting the Board of jurisdiction to issue a Section 10(k) award. *Id.* at 1007 (finding dispute properly before Board for determination where the parties had no agreed-upon method for the adjustment of dispute at “all [of the] projects involved”). Here, as in *Spancrete*, the dispute spans jobsites for which the asserted agreed-upon method is inapplicable, and thus the Board is not deprived of jurisdiction over the dispute. Accordingly, the Plasterers err in contending (Br. 23-27, 27) that the Board was divested of jurisdiction to make the work assignment in *SDI II* because the PSA and the Plan allegedly provided an agreed-upon method for determining the dispute at three of the 97 jobsites at issue.¹⁷

The Plasterers’ reliance (Br. 26) on *Plumbers & Fitters Local 761*, 144 NLRB 133, 140 (1963), a pre-*Spancrete* case, is also wide of the mark. In *Local 761*, different types of work were in dispute for only one project, and the Board quashed the 10(k) hearing with respect to one type of work (welding) because the parties had agreed to submit that work to arbitration. *Id.* at 140. In contrast, in *SDI II*, as in *Spancrete*, the work in dispute covered more than one project, and the purported agreed-upon resolution method would not resolve the dispute at all

¹⁷ Accordingly, the Board noted (ER 36 n.25) that it was unnecessary for it to pass on whether all three parties were bound by the PSA and the Plan at the three jobsites.

projects. Accordingly, the factually inapposite *Local 761* does not require the Board to reach a different result.

In *SDI II*, the Board also reasonably determined (ER 36) that because the Company's collective-bargaining agreement with the Carpenters provided another forum for the arbitration of jurisdictional disputes (the Drywall Joint Adjustment Board), there were potentially conflicting forums for resolving disputes. On this additional basis, the Board (ER 36, 36 n.24), applying settled precedent, declined to find that the parties had an agreed-upon method for voluntary adjustment of the dispute. *See, e.g., Operating Eng's, Local 318 (Kenneth E. Foeste Masonry, Inc.)*, 322 NLRB 709, 712 n.9 (1996) (“[t]he possibility of conflicting awards means that if the Board does not resolve the dispute, it may not be resolved definitively”).¹⁸ Accordingly, consistent with its precedent, the Board in *SDI II*

¹⁸ The Plasterers do not challenge this independent finding in the argument section of their opening brief. They merely assert (Br. 9-10) in their Statement of Facts that the PSA has a supremacy clause that would trump the Carpenters' collective-bargaining agreement. This assertion, presented without argument or development, is not properly before this Court because it was summarily raised. *See* Fed. R. App. P. 28(a)(9) (party must raise contentions and reasons for them with citations to authority). Although the putative amicus appears to raise the claim more directly in its proposed brief in *SDI III* (*see* Prop. Amic. Br. 24-26 in *SDI III*, adopted by Proposed Amicus Letter in *SDI IV*)), it is well-settled that an amicus cannot expand the scope of appeal to raise issues not argued by the parties. *See Eldred v. Reno*, 239 F.3d 372, 378-79 (D.C. Cir. 1991), *aff'd*, 537 U.S. 186 (2003) (quoting *Resident Counsel v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993) (“amicus [is] constrained by the rule that [it] generally cannot expand the scope of an appeal to implicate issues not presented by the parties to the appeal”)); *Cellnet*

decided a far-ranging work dispute that spanned many jobsites, after the Plasterers failed to submit satisfactory evidence that the parties had a voluntary method to resolve their entire dispute.

3. Given the broad award in *SDI II* of future plastering work throughout southern California to employees represented by the Carpenters, the Plasterers err in asserting that they can utilize the PSA and the Plan to resolve the instant dispute

As the Board reasonably found in *SDI II*, a broad Section 10(k) award of work covering all future jobsites in 12 southern California counties was justified given the wide berth of the Carpenters' threat to strike, the Plasterers' repeated actions to claim the work in dispute, and the strong possibility that disputes would recur. (ER 38, 38 n.34.) It is also undisputed that the Board's broad award in *SDI II* covers the work at the two southern California jobsites at issue here.

In their opening brief, the Plasterers do not contest the broad scope of the work award in *SDI II*, and thus they have waived any such challenge to the award. *See* Fed. R. App. P. 28(a)(9)(A); *Sparks Nugget*, 968 F.2d at 998. Indeed, the Plasterers' failure to challenge here the breadth of the award in *SDI II* dooms their

Communications, Inc. v. FCC, 149 F.3d 429, 443 (6th Cir. 1998) (to the extent that amicus raises issues or make arguments that exceed those properly raised by the parties, court may not consider such issues). In any event, as the Board found (ER 36), and as discussed above, even if the PSA could have resolved the dispute at the three jobsites, it would not have resolved the entire dispute at the remaining sites.

further contention (Br. 26-29) that the PSA and the Plan should govern resolution of the instant dispute. Permitting the Plasterers to resolve this dispute under the Plan's grievance and arbitration procedure would eviscerate the Board's Section 10(k) determination in *SDI II*, which awarded the disputed work—including future work at the two jobsites at issue here—to Carpenters-represented employees. As noted above p. 22, the Supreme Court held in *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964), that the Board's determination of a dispute takes precedence over, and precludes enforcement of, a contrary decision. Accordingly, the Plasterers utterly fail to demonstrate that the Board acted arbitrarily in finding here that the Plasterers violated Section 8(b)(4)(ii)(D) of the Act by pursuing a new grievance and the second Greenberg arbitration award in contravention of *SDI II*.

II. THE COURT LACKS JURISDICTION TO CONSIDER THE PLASTERERS' CHALLENGE TO THE PORTION OF THE BOARD'S ORDER RESTRAINING THEIR ACTIONS AGAINST "ANY OTHER PERSON OR EMPLOYER," AND THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN AWARDING ATTORNEYS' FEES AND COSTS TO THE COMPANY

The Plasterers challenge two aspects of the Board's remedial order. First, they belatedly challenge (Br. 29-33) the Board's cease-and-desist order to the extent that it restrains the Plasterers' actions against "any other person or employer." Next, they challenge (Br. 34-37) the Board's award of attorneys' fees and costs to the Company for defending against the Plasterers' unlawful actions.

Such challenges face an uphill battle from the outset. Indeed, Section 10(c) of the Act (29 U.S.C. §160(c)) authorizes the Board, upon finding an unfair labor practice, to order the violator to cease and desist from the unlawful conduct “and to take such affirmative action . . . as will effectuate the policies of [the] Act” The Board’s power to fashion remedies is “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board’s remedial order is reviewed only for “clear abuse of discretion”). Accordingly, the Board’s choice of remedy must be enforced unless the Plasterers show “that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996).

As shown below, the court lacks jurisdiction to consider the Plasterers’ belated challenge to the “any other person or employer” language in the Board’s Order. Further, with regard to that claim and their challenge to the Board’s award of attorney fees and costs, the Plasterers fail to meet the heavy burden required to overturn the Board’s exercise of its remedial discretion.

A. The Court Lacks Jurisdiction To Consider the Plasterers' Untimely and Meritless Challenge to the Portion of the Board's Order Restraining Their Actions Against "Any Other Person or Employer"

The Plasterers challenge (Br. 29-33) the Board's remedial order by arguing for the first time on review that the Board abused its discretion by requiring the Plasterers to cease and desist, not only from threatening, coercing, or restraining the Company, but also from taking those unlawful actions against "any other person or employer." (ER 15.) When this case was before the Board, however, the Plasterers failed to raise any challenge to this aspect of the remedial Order, which the Board adopted *sua sponte*.¹⁹ Simply put, the Plasterers could have filed a motion for reconsideration before the Board, pursuant to Section 102.48 of the Board's Rules and Regulations (29 C.F.R. § 102.48(d)(1)(&(2))), but did not do so. Because the Plasterers failed to raise their challenge in a motion for reconsideration, the Court lacks jurisdiction to consider their belated claim.

¹⁹ Neither the Company nor the General Counsel asked the Board to issue an order restraining the Plasterers from threatening, coercing, or restraining "any other person or employer." Instead, the Company and General Counsel merely requested, and the Plasterers opposed, a "broad order"—*i.e.*, one requiring the Plasterers "to cease and desist, in any manner or by any means, [from] threatening, coercing, or restraining [the Company] where an object thereof is to force or require [the Company] to assign plastering work in the twelve southern California counties . . . to members [of the Plasterers]." (SER 130, 138, 144.)

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides: “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” As a result, “the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); accord *NLRB v. Sambo’s Rest. Inc.*, 641 F.2d 794, 795-96 (9th Cir. 1981). This provision is intended to provide the Board with an opportunity to utilize its expertise, and to give the court the benefit of the Board’s views on the contested issue. *Id.* at 796.²⁰

Thus, absent extraordinary circumstances not present here, a reviewing court lacks jurisdiction to consider an argument that was not first raised before the Board. *Id.* This rule applies with equal force where, as here, the Board adopts a remedial order *sua sponte* against a party that then fails to object to the order by way of a motion for reconsideration. See *Woelke & Romero*, 456 U.S. at 665 (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party in a motion for reconsideration before the Board); *Int’l Ladies’*

²⁰ See also generally *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

Garment Workers v. Quality Mfg. Co., 420 U.S. 276, 281 n.3 (1975) (same).
Accord Sambo's, 641 F.2d at 796 (“Since the Company failed to file a motion for reconsideration to contest the appropriateness of the additional remedies, it is barred from raising such arguments for the first time in this court.”); *Chevron Mining, Inc. v. NLRB*, ___ F.3d ___, 2012 WL 2548821 at *7 (D.C. Cir. July 3, 2012) (employer obliged to seek reconsideration before the Board if it wished to challenge issue raised by Board *sua sponte*); *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 654 (6th Cir. 1977) (holding Board’s *sua sponte* adoption of remedy does not amount to “extraordinary circumstances” excusing failure to move for reconsideration). Accordingly, the Court lacks jurisdiction to consider the Plasterers’ belated challenge to the portion of the Board’s Order applying to “any other person or employer.”

In any event, the Plasterers fail to demonstrate that the Board abused its discretion by directing them to cease and desist, not only from “threatening, coercing, or restraining” the Company, but also from taking those actions against “any other person or employer.” Citing its precedent authorizing broad remedial relief when a party has repeatedly violated the Act, the Board reasonably enjoined the Plasterers’ coercive actions against the Company, as well as against other persons or employers, given the Plasterers’ numerous violations of Section 8(b)(4)(ii)(D) of the Act in two separate cases, and after two Section 10(k)

Decisions and Determinations of Dispute. (SER 4, 4 n.13, citing *Five Star Mfg.*, 348 NLRB 1301 (2006); *Hickmott Foods*, 242 NLRB 1357 (1979).) Indeed, the Board's cease-and-desist order appropriately responds to the Plasterers' demonstrated proclivity to flout the Congressionally-approved process for resolving work assignment disputes. The Plasterers' as-yet-unchecked disregard of Section 10(k) of the Act makes the instant case fundamentally different from the cases they cite (Br. 30-31).

In sum, Section 10(e) of the Act bars judicial review of the Plasterers' untimely challenge to the Board's cease-and-desist Order. In any event, there is no merit to the Plasterers' argument.

B. The Board Acted Well Within Its Broad Remedial Discretion in Directing the Plasterers To Reimburse the Company for Attorneys' Fees and Costs Associated with Defending Against Their Unlawful Actions

The Board also ordered (ER 31-32) the Plasterers to reimburse the Company for reasonable legal expenses and fees associated with the defense against the second Greenberg award and counterclaim in federal district court, which sought enforcement of the arbitration award. As shown above, the Plasterers violated the Act by pursuing those legal actions.

Under such circumstances, reimbursement of legal fees and costs is a reasonable remedy entitled to deference from this Court. *See Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 35 (D.C. Cir. 2001) (award of attorneys'

fees appropriate where filing of lawsuit was an illegal act). *Greske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1379 (7th Cir. 1997) (court enforced the Board’s award of attorneys’ fees where an employer unlawfully sued a union in retaliation for picketing, finding it appropriate to “compensate [a party] for expenses that it would not have incurred in the absence of the baseless state lawsuit”). *Accord Diamond Walnut Growers, Inc.*, 312 NLRB 61, 71 (1993), *enforced*, 53 F.3d 1085 (9th Cir. 1995).

These “underlying principles are equally applicable when a union files an unlawful lawsuit.” *Quick v. NLRB*, 245 F.3d 231, 256 (3d Cir. 2001) (enforcing Board order requiring union to reimburse employee for expenses actually incurred in defending against union’s unlawful collections lawsuit). Thus, contrary to the Plasterers’ contention (Br. 34-35), the Board’s Order, which is “aimed at ‘restoring the economic status quo’” that would have obtained but for the unfair labor practices, is not punitive or otherwise an abuse of discretion. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188-89 (1973).²¹

²¹ The cases cited by the Plasterers (Br. 35) do not support their argument that the Board abused its discretion in awarding attorneys’ fees and expenses in the instant case. Indeed, in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), the court recognized that the Board may order a party “to reimburse [individuals] whom he had wrongfully sued for their attorney’s fees and other expenses.” In that case, the court disagreed with the Board that the underlying litigation—criminal trespass charges filed by an employer against union organizers—constituted an unfair labor practice in the first place. Here, by contrast, as shown above, the

Finally, there is no merit to the Plasterers' remaining argument (Br. 35-36) that they should be excused from reimbursing the Company for its attorneys' fees and costs because they reasonably believed they could resolve the work dispute through the Plan's grievance and arbitration procedure. As shown above, the Plasterers invoked the PSA and the Plan after the Board issued its broad Section 10(k) award in *SDI II*—an award that plainly encompassed the two jobsites at issue here. In these circumstances, the Plasterers cannot seriously claim a right to proceed under the PSA and the Plan. Simply put, the Plan cannot save the Plasterers from the Board's Order directing them to restore the status quo by reimbursing the Company for attorneys' fees and costs incurred in defending against the Plasterers' unlawful pursuit of a grievance and arbitration award issued pursuant to that very Plan.

underlying lawsuits constituted unfair labor practices. The Plasterers likewise err in relying (Br. 57) on *Teamsters Local 917 v. NLRB*, 577 F.3d 70, 78-79 (2d Cir. 2009), a factually distinguishable case in which the court reversed an award of attorneys' fees because the sued party had prolonged the litigation in defiance of a discovery order.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that this Court should enter judgment enforcing the Board's Order in full and denying the Plasterers' petition for review.

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July 2012

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(b), the Operative Plasterers & Cement Masons Int'l and Local 200 have stated the related cases pending in this Court.

ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the brief or addendum of Operative Plasterers & Cement Masons Int'l and Local 200:

Federal Rule of Appellate Procedure 28(a)(9):

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

29 C.F.R. § 102.48

➡§ 102.48 Action of the Board upon expiration of time to file exceptions to the administrative law judge's decision; decisions by the Board; extraordinary postdecisional motions.

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion for leave to adduce additional

evidence shall be filed promptly on discovery of such evidence. Copies of any request for an extension of time shall be served promptly on the other parties.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STANDARD DRYWALL, INC.)	
)	Case Nos. 12-70086,
)	12-70151
)	12-70384
Petitioner)	
)	Board Case No.
v.)	21-CD-00673
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent)	
_____)	
)	
OPERATIVE PLASTERS & CEMENT)	
MASONS INT'L AND LOCAL 200)	
)	
Petitioners/Cross-Respondents))	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
STANDARD DRYWALL, INC)	
Intervenor)	
)	
and)	
)	
SOUTHWEST REGIONAL COUNCIL OF)	
CARPENTERS)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,768 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben
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Dated at Washington, DC
this 11th day of July, 2012

9th Circuit Case Number(s)

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