

Nos. 12-378, 12-1131 & 12-1190

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR SALM

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DOMSEY TRADING CORPORATION,
DOMSEY FIBER CORPORATION,
DOMSEY INTERNATIONAL SALES CORPORATION,
a Single Employer

Respondents

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Arthur Salm (“Salm”) to review, and the cross-application and application of the National Labor Relations Board (“the Board”) to enforce, a supplemental Board Order issued against Salm, an individual, and three corporations that constitute a single employer—Domsey Trading Corporation, Domsey Fiber Corporation, and Domsey International Sales Corporation (collectively, “Domsey”). The Order that is before the Court issued on December 30, 2011, and is reported at 357 NLRB No. 180. (SA 1-6.)¹ In a decision accompanying the Order, the Board found (SA 2-6) Domsey Co-owner Salm personally liable for the backpay due under two prior Board orders against Domsey, making the parties jointly and severally liable for backpay. *See Domsey Trading Corp.*, 353 NLRB 86 (2008), *affirmed in* 355 NLRB No. 89 (2010); 351 NLRB 824 (2007).

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”), 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)

¹ Record references are to the joint appendix (“A”) filed with Salm’s opening brief and the supplemental appendix (“SA”) filed with the Board’s answering brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to Salm’s opening brief.

and (f)), because the unfair labor practices occurred in Brooklyn, New York, and because the Board's Order is final with respect to all parties.

Salm filed his petition for review on January 27, 2012. The Board filed its cross-application for enforcement against Salm on March 20, 2012, and an application for enforcement against Domsey on March 26, 2012. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its supplemental Order against Domsey.
2. Whether the Board properly pierced the corporate veil and found Domsey Co-owner Salm personally liable, along with Domsey, for the backpay due under the Board's earlier supplemental orders.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. The Underlying Unfair Labor Practice Proceeding

The present case has its origin in a 1993 unfair labor practice proceeding against Domsey. *See Domsey Trading Corp.*, 310 NLRB 777 (1993), *enforced*, 16 F.3d 517 (2d Cir. 1994). In that proceeding, Domsey admitted and the Board found that Domsey was a single-employer entity consisting of three corporations

involved in the textile industry. *Id.* at 777, 782. The Board further found that Domsey took numerous unlawful actions against employees at its facility in Brooklyn, New York, in response to their efforts to unionize. *Id.* at 780-81.

The spate of unlawful conduct that forms the basis of Domsey's liability began in 1989, when Domsey unlawfully threatened, interrogated, and discharged several employees who had joined a union organizing committee. *Id.* at 777 & n.3, 785-91. These actions, directed at the most active union proponents among the employees, touched off a nearly 6-month strike, in which 200 employees participated. *Id.* at 777 n.3, 778-79, 791. During the strike, Domsey managers—including one of the sons of Domsey Co-owner Salm—engaged in acts of violence against union representatives in the presence of the strikers. *Id.* at 792-93. The managers also harassed the strikers, most of whom were immigrants of Haitian and Latin American origin, using racial, ethnic, and sexual slurs. *Id.* Notwithstanding this gross mistreatment, the strikers sought to return to their jobs at the conclusion of the strike. *Id.* at 792, 794. Domsey, however, did not make them timely offers of reinstatement, and the Board found that the offers Domsey did eventually make were defective and disingenuous. *Id.* at 777-78 n.3. Thus, several former strikers who returned to work pursuant to Domsey's purported reinstatement offers

suffered unlawful retaliation for their involvement in the strike, including threats, harassment, and discharge. *Id.* at 778 n.3, 801-08.

To remedy the above unlawful conduct, the Board ordered, *inter alia*, that Domsey make whole the 202 affected employees who had been unlawfully deprived of their jobs by virtue of Domsey's failure to make valid reinstatement offers after the strike, or unlawfully discharged. *Id.* at 781, 815. Domsey petitioned for review of the Board's order in this Court, challenging only the Board's finding that it was obligated to reinstate strikers who did not respond to Domsey's reinstatement offers or appear for work as required under the terms of the offers. *Domsey Trading Corp. v. NLRB*, 16 F.3d 517, 519 (2d Cir. 1994). The Court rejected this challenge and enforced the Board's order. The Court explained that "[w]here, as here, an employer does not timely reinstate those who offer to return [to work] and continues to commit unfair labor practices that consciously discourage absent employees from returning," that employer "may not take advantage of an employee's failure to return on a particular date or to respond to disingenuous offers of reinstatement." *Id.*

B. The Supplemental Proceedings Addressing Backpay

Following this Court's enforcement of the Board's unfair labor practice order, a controversy arose concerning the amount of backpay due under its terms. As a result, the Board's Regional Director for Region 29 issued a compliance

specification alleging the amount of backpay due each of the 202 employees named in the Board's order. Domsey objected to the Regional Director's backpay allegations on various grounds. Therefore, an administrative law judge held a hearing to resolve how much backpay Domsey owed under the Board's court-enforced order.

Following the hearing, on October 4, 1999, the administrative law judge issued a supplemental decision finding that Domsey owed a total of \$1,075,614.30 to 187 named employees.² *Domsey Trading Corp.*, 1999 WL 33454669 (1999); *see also Domsey Trading Corp.*, 351 NLRB 824 (2007) (incorporating administrative law judge's 1999 decision). Domsey and the General Counsel filed exceptions to the administrative law judge's decision. *Domsey Trading Corp.*, 351 NLRB at 824. While those exceptions were pending before the Board, the Supreme Court issued its decision in *Hoffman Plastic Compounds v. NLRB*, holding that the Board may not award backpay to undocumented workers because such an award would run "counter to the policies underlying [the Immigration Reform and Control Act of 1986]." 535 U.S. 137, 149 (2002).

² Although 202 employees were entitled to backpay under the Board's order, the judge found that 11 had interim earnings that offset any backpay due, 1 had returned to work for Domsey before the backpay period began, and 3 more had settled their backpay claims with Domsey. *Domsey Trading Corp.*, 351 NLRB at 861.

After considering the Supreme Court's *Hoffman* decision, as well as the parties' exceptions, the Board issued a Supplemental Decision and Order modifying some of the administrative law judge's backpay determinations and remanding additional backpay issues to the judge and to the Regional Director. *Id.* at 824-30. Specifically, in light of *Hoffman*, the Board removed from the list of remaining backpay claimants four employees who had admitted that they were not authorized to work in the United States during the backpay period. *Id.* at 825, 829. For similar reasons, the Board remanded to the judge the backpay claims of six employees whose immigration status was uncertain under the evidence developed at the hearing. *Id.* In addition, the Board remanded the backpay calculations for numerous other employees to the Regional Director, for adjustment consistent with the Board's findings as to specific employee mitigation efforts, interim earnings, and the treatment of strike benefits. *Id.* at 824-28, 830-44. The Board ordered Domsey to provide backpay in certain specified amounts to only 12 named employees whose backpay claims were not subject to any remand. *Id.* at 844-45.

Pursuant to the Board's instructions, the Regional Director recalculated the backpay due 165 employees. *Domsey Trading Corp.*, 353 NLRB 86, 86 (2008), *affirmed in* 355 NLRB No. 89 (2010); *Domsey Trading Corp.*, 351 NLRB at 845-46. The Regional Director then filed motions with the Board for summary acceptance of his recalculations. *Domsey Trading Corp.*, 353 NLRB at 86.

Likewise, the administrative law judge issued a second supplemental decision addressing the immigration status of four of the employees whose backpay claims were remanded to him for reconsideration in light of *Hoffman*.³ *Id.* at 89-90. The judge found that three of the four employees were authorized to work in the United States for at least part of the backpay period. *Id.* at 90. The judge accordingly recommended that Domsey provide backpay to those three employees in certain specified amounts representing what they would have earned from Domsey when lawfully authorized to work, absent the unfair labor practices. *Id.* Because the fourth employee subject to the remand could not be located for questioning regarding his immigration status during the backpay period, the judge recommended that his backpay be placed in escrow. *Id.* Domsey excepted only to the latter escrow recommendation. *Id.* at 87.

The Board thereafter issued a Second Supplemental Decision and Order adopting the Regional Director's recalculations of backpay and affirming the administrative law judge's findings on remand. *Id.* at 86-87. The Second Supplemental Decision and Order required Domsey to provide backpay in certain revised amounts to 169 named employees. *Id.* at 87-89.

³ The General Counsel withdrew his backpay claims on behalf of the two remaining employees identified in the Board's remand. *Id.* at 87.

Following the above Board proceedings, the Board applied to this Court for enforcement of its two supplemental orders, which together obligated Domsey to provide a total of \$914,784.37 in backpay to 181 employees. (A 38.) *See NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 34 (2d Cir. 2011); *Domsey Trading Corp.*, 353 NLRB at 87-89 (setting forth backpay due 169 employees); *Domsey Trading Corp.*, 351 NLRB at 844-45 (setting forth backpay due 12 employees). The Court denied enforcement and remanded the supplemental orders to the Board, finding that the Board had failed to address Domsey's objections to certain immigration-related evidentiary rulings made by the administrative law judge at the underlying backpay hearing. (A 39.) *Domsey Trading Corp.*, 636 F.3d at 38. The Court ordered the Board to revisit the relevant evidentiary rulings—which were based on pre-*Hoffman* law regarding the backpay eligibility of undocumented immigrants—in light of *Hoffman*. (A 45-47.) *Id.* at 38-39. The Board accepted the Court's remand and, in turn, remanded the case to an administrative law judge for further proceedings consistent with the Court's decision. *Domsey Trading Corp.*, 357 NLRB No. 164 (2011).

C. The Instant Supplemental Proceeding Addressing Salm's Derivative Liability for Domsey's Backpay Obligations

On August 11, 2010, while the Board's first two supplemental backpay orders were on appeal before this Court, the Regional Director for Region 29 issued an amended compliance specification alleging that several Domsey owners

and officers, including Co-owner Salm, were personally liable for Domsey's backpay obligations. (SA 16-23.) The Regional Director based this allegation on evidence that Salm and the other named individuals had diverted all of the proceeds from a 2002 sale of Domsey's property in Brooklyn to themselves, and had commingled the proceeds with their personal funds. (*Id.*)

During the ensuing proceedings before an administrative law judge, all of the individuals named in the amended compliance specification, except for Salm, entered into settlement agreements with the Regional Director that eliminated the need for analysis of their individual liability. (A 58-59 nn.2-3, SA 2 n.2.) Salm's liability accordingly became the focus of the case. (SA 2 n.2.)

Applying the test for shareholder liability set forth in *White Oak Coal Co.*, 318 NLRB 732 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996), the judge found (A 66) that Salm's conduct in connection with the sale of the Domsey property reflected only one of the forms of improper conduct enumerated in *White Oak Coal*: commingling of corporate and personal funds. As to the commingling, moreover, the judge opined (A 67) that the "one time liquidation and distribution of corporate assets" evidenced here may not even be "the type of transaction[] that the Board has previously found to constitute commingling." Accordingly, the judge found (A 68) the evidence insufficient to warrant piercing the corporate veil

to reach Salm personally. The Acting General Counsel excepted to this finding. (SA 2.)

On December 30, 2011, the Board issued a Third Supplemental Decision and Order reversing the judge and finding Salm personally liable, with Domsey, for the backpay due under the Board's earlier supplemental orders. (SA 2-6.) Contrary to the judge, the Board found (SA 4-5) that the evidence reflected several of the forms of misconduct enumerated in *White Oak Coal* as potential bases for piercing the corporate veil. The Board further found (*id.*) both prongs of the *White Oak Coal* test satisfied, justifying the imposition of liability on Salm. The facts supporting the Board's decision, as well as the Board's conclusions and Order, are summarized below.

II. THE BOARD'S FINDINGS OF FACT

A. Background; With a Remedial Obligation of Over One Million Dollars Pending, Domsey Liquidates Its Most Valuable Asset

At all relevant times, Domsey was principally owned by two individuals: Arthur Salm and Albert Edery. (SA 2; SA 18, 24.) Salm held a 48% ownership interest in the business, while Edery held a 50% interest. (*Id.*) In addition to his status as an owner of Domsey, Salm served as the President of Domsey Trading Corporation and Domsey Fiber Corporation—two of Domsey's constituent companies. (SA 18, 24.)

As a Domsey officer and shareholder, Salm was well aware of the unfair labor practices committed in 1989 and 1990 by those who were in charge of Domsey's day-to-day operations, including two of his sons. *Domsey Trading Corp.*, 310 NLRB at 784. Indeed, Salm was personally involved in the litigation over those unfair labor practices, which culminated in a court-enforced Board order requiring Domsey to make whole 202 employees for the unfair labor practices they suffered. *Id.*; *see also Domsey Trading Corp.*, 16 F.3d at 518-19. Salm was further aware that Domsey's total liability under the make-whole order was over \$1,000,000 as of 1999, pursuant to an administrative law judge's decision. (SA 5; SA 18, 24.)

At the beginning of January 2002, under Salm's leadership and with the above unfair labor practice liability outstanding, Domsey had \$848.66 in its bank account. (SA 2; SA 36.) However, Domsey also held one valuable asset—namely, its stake in the property from which it operated at 431 Kent Avenue in Brooklyn, New York (“the Kent Avenue property”). (SA 2; SA 29-30.) The Kent Avenue property was owned jointly by Domsey and an entity called Ederly-Salm Associates. (*Id.*)

On January 9, 2002, Domsey and Ederly-Salm Associates sold the Kent Avenue property for over \$12 million. (SA 2; SA 29.) Domsey's share of the

proceeds from the sale was over \$9 million, and that amount was directly deposited in Domsey's bank account following the sale. (SA 2-3; SA 30, 34, 36.)

B. Domsey Co-owner Salm Takes Most of the Proceeds from the Liquidation for Himself and His Business Partner, Edery, Leaving Less than One Thousand Dollars in the Corporate Bank Account

Almost immediately after the sale proceeds were deposited in Domsey's account, Salm wrote a corporate check to himself in the amount of \$3,262,966.21 and deposited it in his personal bank account. (SA 3; SA 37-38.) Days later, he routed \$4,000,000 from that personal account into a personal brokerage account. (SA 3; SA 39, 41, 47.) He then transferred the money to a second personal brokerage account, and from there to a brokerage account held by his wife. (SA 3; SA 50-73.) Eventually, Salm transferred the money back to one of his brokerage accounts. (SA 3; SA 74-85.) Around the same time, Salm made out a second corporate check, to Edery for \$4,555,379.85. (SA 3; SA 42.) Edery, like Salm, deposited his distribution from the Domsey account into a personal brokerage account. (SA 3; SA 86-87.)

By January 22, 2002, following additional transactions on the Domsey corporate account, Domsey was left with \$848.66—that is, the same account balance it had before the sale of the Kent Avenue property. (SA 3; SA 36.) And by June 2002, the Domsey account had a negative balance. (SA 3; SA 43.) None of the proceeds from the sale of the Kent Avenue property remained, and Salm

failed to set aside any money for the satisfaction of Domsey's significant backpay obligations under the court-enforced Board order described above. (SA 3.)

C. Seven Years Later, As Litigation Continues Over the Specific Amount of Backpay Due, Domsey is Dissolved

Shortly after the transactions described above, on January 31, 2002, Domsey ceased operating. (A 62 n.9, SA 3; SA 18, 24.) Domsey Trading Corporation, which held the title to the Kent Avenue property and owned the corporate bank account discussed above, was dissolved as a corporate entity in 2009. (SA 3; SA 18, 24, 88.)

Between 2002, when Domsey and Edery-Salm Associates sold the Kent Avenue property, and 2009, when Domsey Trading Corporation was dissolved, Domsey was litigating the precise amount of backpay it owed under the terms of the Board's court-enforced order. (SA 2-3.) Specifically, Domsey had challenged the administrative law judge's 1999 determination that it owed over \$1,000,000 to 187 named employees, and its challenges were pending before the Board as of 2002. (*Id.*) The Board ultimately addressed the challenges in 2007, ordering Domsey to provide backpay to 12 named employees, and remanding the remaining backpay claims to either the judge or the Regional Director for re-examination. *Domsey Trading Corp.*, 351 NLRB at 844-46. As of 2009, the judge and the Regional Director had completed their consideration of the matters remanded to them and had submitted adjusted backpay calculations to the Board. *Domsey*

Trading Corp., 353 NLRB at 86. Under those calculations, which the Board adopted in 2010, Domsey owed \$914,784.37 in backpay, plus interest, to 181 named employees. (SA 3.)

Notwithstanding the Board proceedings that were pending at the time of the asset-liquidation and distributions at issue, Domsey never notified the Board of any changes in its financial or operating status that might impact its ability to meet its remedial obligations under the Board's court-enforced unfair labor practice order. (*Id.*) In particular, neither Domsey nor Salm informed the Board that Domsey had sold its Kent Avenue property and ceased operations, that Salm had distributed the sale proceeds, or that Domsey had insufficient funds in its corporate bank account to meet its potential backpay obligations to nearly 200 employees. (*Id.*)

III. THE BOARD'S CONCLUSIONS AND THIRD SUPPLEMENTAL ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Becker, Member Hayes dissenting) found (SA 2-6) Domsey Co-owner Salm personally liable for the backpay owed by Domsey.⁴ The Board's Third Supplemental Order

⁴ As the Board noted (SA 2 n.2), although the Acting General Counsel alleged in his amended compliance specification that three other individuals were also personally liable for the backpay due, those individuals—Fortuna Edery (Albert Edery's widow and executrix), Peter Salm, and David Salm—have since entered into agreements with the Acting General Counsel to make contributions toward the backpay due in the event that Salm is found personally liable in this case.

requires Salm and Domsey to jointly and severally make whole the employees named in the Board's earlier supplemental orders reported at 351 NLRB 824 (2007), and 353 NLRB 86 (2008), *affirmed in* 355 NLRB No. 89 (2010). (SA 6.)

The Third Supplemental Order further requires that Salm and Domsey place in escrow, for a period of 1 year, the amounts due under the Board's earlier supplemental orders, as those amounts are subject to adjustment, pursuant to a remand from this Court, in a related proceeding that is currently before an administrative law judge. (*Id.*) *See* above p. 9.

SUMMARY OF ARGUMENT

The three corporations that comprise Domsey did not file the required answer to the Board's application for enforcement against them, nor have they filed a brief with the Court. The Board is therefore entitled to summary enforcement of its supplemental Order as against those corporate entities.

Moreover, the Board properly found that Salm, an individual Domsey owner, is personally liable for Domsey's backpay obligations, along with the various Domsey corporations. Applying the two-prong test for piercing the corporate veil set forth in *White Oak Coal Co.*, 318 NLRB 732, 735 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996), the Board found that Salm disregarded

Accordingly, the Board's Third Supplemental Decision and Order concerns only Arthur Salm's liability. (*Id.*)

Domsey's separate identity and interests by diverting millions of dollars in Domsey funds to himself and fellow Domsey owner Edery, without any adherence to corporate formalities, at a time when Salm knew that Domsey had substantial backpay obligations under a court-enforced Board order and an administrative law judge's preliminary compliance decision. Because Salm's conduct effectively stripped Domsey of the funds necessary to meet its remedial obligations, the Board found it appropriate, under the *White Oak Coal* test, to impose personal liability on Salm.

Although Salm here argues that the Board's "claim" against him is barred by the statute of limitations set forth in the Federal Debt Collection Procedure Act, that argument misses the mark. The Board has not invoked the FDCPA against Salm in this case, and accordingly any statute of limitations applicable to FDCPA claims is irrelevant.

As Salm's remaining defenses to the Board's finding of personal liability likewise fail, the Board respectfully requests full enforcement of its supplemental Order against Salm.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS SUPPLEMENTAL ORDER AGAINST DOMSEY

None of the three corporate entities constituting Domsey filed an answer to the Board's application for enforcement as required under the Federal Rules of

Appellate Procedure. *See* Fed. R. App. P. 15(b). Moreover, none of the Domsey corporations has filed a brief in this appeal. Accordingly, the Board is entitled to summary enforcement of its order as against the three Domsey corporations. *See NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008) (granting summary enforcement of Board order against single-employer corporations in shareholder liability case, where corporations failed to challenge order as against them). *See also NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009) (Board is entitled to summary affirmance of aspects of decision and order not contested on appeal); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir. 1992) (same).

Enforcement of the Board's Third Supplemental Order as against these corporate respondents would affirm the Board's determination that they are, as a single employer, jointly and severally liable for backpay in the amounts specified in the Board's earlier supplemental orders reported at 351 NLRB 824 (2007), and 353 NLRB 86 (2008), *affirmed in* 355 NLRB No. 89 (2010). Moreover, enforcement would affirm the corporate respondents' obligation to jointly and severally place in escrow, for a period of 1 year, the amounts due under the existing backpay orders.

II. THE BOARD PROPERLY PIERCED THE CORPORATE VEIL AND FOUND DOMSEY CO-OWNER SALM PERSONALLY LIABLE, ALONG WITH DOMSEY, FOR THE BACKPAY DUE UNDER THE BOARD'S EARLIER SUPPLEMENTAL ORDERS

A. Federal Law Allows the Board To Pierce the Corporate Veil and Impose Personal Liability on a Shareholder Who Has Failed to Respect the Corporation's Separate Identity and Has Thereby Created a Condition of Inequity or Injustice

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to devise remedies to undo the effects of violations of the Act. *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953). In exercising this power, the Board “draw[s] on enlightenment gained from experience.” *Id.* The Supreme Court has accordingly described the Board’s remedial power as “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

This remedial power is not confined to issuing orders against the actual perpetrator of an unfair labor practice. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176 (1973). An order may issue against “those identified with [the perpetrators] in interest, in ‘privity’ with them, represented by them or subject to their control.” *Id.* at 179 (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)). Consistent with this principle, the Board expressly makes its orders binding not only on the named party that committed the unfair labor practices, but

also on that party's "officers, agents, successors and assigns." *See Bolivar-Tees, Inc.*, 349 NLRB 720, 728 (2007), *enforced*, 551 F.3d 722 (8th Cir. 2008).

Where the Board seeks to go further and impose derivative liability on the owners of a corporate wrongdoer, it must confront the fact that "[t]he insulation of [] stockholder[s] from the debts and obligations of [their] corporation is the norm, not the exception." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960). Nevertheless, individual corporate owners are not immune from liability for corporate unfair labor practices. *See NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 728 (8th Cir. 2008) (noting that "federal courts have pierced the corporate veil to hold shareholders liable for violations of federal statutes, including the NLRA"). The corporation, after all, "is still a fiction." *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1992). Thus, when particular circumstances merit—for example, when the "value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation"—the Board and the courts "may look past a corporation's formal existence to hold shareholders . . . liable for 'corporate' obligations." *Id.*

The Board applies a two-prong test drawn from federal common law to determine whether the circumstances in a given case warrant piercing the corporate veil. *See White Oak Coal Co.*, 318 NLRB 732, 734-35 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996) (adopting test articulated in *NLRB v. Greater Kan. City*

Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993)). Under this test, the Board may impose personal liability on corporate shareholders if (1) “there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct” and (2) “adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.” *White Oak Coal*, 318 NLRB at 735; accord *Bolivar-Tees*, 551 F.3d at 728; *NLRB v. West Dixie Enters., Inc.*, 190 F.3d 1191, 1194 (11th Cir. 1999); *Bufco Corp. v. NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998).

In determining whether the first prong of the test is satisfied, the Board generally considers the degree to which corporate legal formalities have been observed, and the degree to which individual and corporate funds, other assets, and affairs have been commingled. *White Oak Coal*, 318 NLRB at 735. See also *Bolivar-Tees*, 551 F.3d at 728 (affirming and applying the Board’s *White Oak* test).

The Board also takes into account a number of specific factors:

(1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation’s ownership and control; (5) the availability and use of corporate assets, the absence of same, or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintain an arm’s-length relationship among entities; (8) diversion of the corporate funds or assets to

noncorporate purposes; and, in addition, (9) transfer or disposal of corporate assets without fair consideration.

White Oak Coal, 318 NLRB at 735; accord *Bolivar-Tees*, 551 F.3d at 728.

However, “[n]o one factor is determinative, and not all of these factors must be present.” *Bolivar-Tees, Inc.*, 551 F.3d at 729.

If the first prong of the *White Oak Coal* test is satisfied, the Board turns to the second prong of the test and considers whether the shareholder’s disregard of the corporation’s separate identity caused an injustice or inequity—for example, by depriving the corporation of funds needed to satisfy a backpay award. *Greater Kan. City Roofing*, 2 F.3d at 1053; accord *White Oak Coal*, 318 NLRB at 735. See also *Bolivar-Tees*, 551 F.3d at 731-32 (finding second prong of test satisfied where corporate owner removed corporate assets “that could have been available to satisfy the entire backpay award against [the corporation],” or at least some portion of the award). Absent the necessary showing of causation, “the mere fact that a corporation is incapable of paying all its debts is insufficient for a finding of injustice.” *Greater Kan. City Roofing*, 2 F.3d at 1053.

Ultimately, the question whether to pierce the corporate veil and impose personal liability on an individual shareholder “is a question of federal law when it arises in the context of a federal labor dispute.” *NLRB v. Fullerton Transfer & Storage, Ltd.*, 910 F.2d 331, 335 (6th Cir. 1990); accord *White Oak Coal*, 318 NLRB at 734. The Board’s factual findings bearing on this question are

“conclusive if supported by substantial evidence on the record as a whole.” 29 U.S.C. § 160(e); *Bolivar-Tees*, 551 F.3d at 727; *Bufco Corp.*, 147 F.3d at 969; *Greater Kan. City Roofing*, 2 F.3d at 1051. Substantial evidence means “such relevant evidence as a reasonable mind might accept to support a conclusion.” *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 188 (2d Cir. 2001). Similarly, the Board’s legal conclusions will stand so long as they have a reasonable basis in law. *Int’l Union, United Automobile, Aerospace & Agricultural Implement Workers of Am., AFL-CIO v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008). Thus, the Court will “defer to the Board’s decision when there appears to be more than one reasonable resolution and the Board has adopted one of these.” *Id.* (internal quotation marks and citation omitted). This deferential standard applies even where, as here, the Board disagreed with an administrative law judge regarding the legal conclusions to be drawn from the record evidence. *See Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 175 (2d Cir. 1998).

B. The Board Properly Found that Salm’s Massive Diversion of Domsey Assets to Himself and Edery in January 2002, in Blatant Disregard of Domsey’s Backpay Obligations, Justifies the Imposition of Personal Liability on Salm

The Board found (SA 4-5) both prongs of the *White Oak Coal* test for piercing the corporate veil satisfied, based on Domsey Co-owner Salm’s conduct in liquidating Domsey’s most significant asset—a property worth millions of dollars—and distributing most of the proceeds to himself and Co-owner Edery,

without making any provision for Domsey's documented backpay liability. As shown below, the Board's findings under *White Oak Coal* are fully supported by the record and relevant law.

1. Salm disregarded Domsey's separate identity and interests by liquidating its only valuable asset for the benefit of himself and Co-owner Edery, leaving Domsey without sufficient funds to satisfy its creditors

Applying the first prong of the *White Oak Coal* test, the Board reasonably found (SA 4) that the sale of Domsey's Kent Avenue property in early January 2002 was followed by a series of transactions that "evidence[d] a lack of separation between [Domsey] and its principals." Specifically, the record shows that Salm and Edery used their controlling (98%) interest in Domsey to cause the sale of Domsey's Kent Avenue property. Soon thereafter, with over \$9 million in sale proceeds in Domsey's corporate account, Salm wrote a corporate check to himself for \$3,262,966. He then deposited that sum in a personal bank account and proceeded to transfer the money between various personal accounts. Salm further wrote a second corporate check, this one to Edery, in the amount of \$4,555,379.85. Like Salm, Edery deposited the Domsey funds in a personal account.

On this evidence, the Board found (SA 4) that "Salm clearly regarded the proceeds [of the sale of the Kent Avenue property] as being freely available for the taking, notwithstanding that they belonged to [Domsey]." Indeed, Salm commingled millions of dollars of Domsey's money with his own—in several

personal bank accounts—as if there was no distinction between what was his and what was Domsey’s. In so doing, as the Board observed (*id.*), Salm committed “one of the most serious forms of abuse of the corporate form.” *See NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 341 (6th Cir. 1990) (noting “intermingling of assets” as one of the most important factors in a piercing case); *D.L. Baker, Inc.*, 351 NLRB 515, 522 (2007) (same).

Further indicative of abuse of the corporate form is the fact that Salm’s payments to himself and Edery had no legitimate corporate purpose, so far as the record shows. Thus, “there is no evidence that the disbursements to Salm and Edery . . . represented fair consideration for services” provided to the corporation. (SA 4.) *See NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 730 (8th Cir. 2008) (noting as a basis for piercing corporate veil fact that shareholder disposed of corporate assets without fair consideration). Nor is there evidence that the disbursements were part of a formal dissolution or wind-down of the corporation, in which Salm and Edery might be entitled to recover their investments. *See Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 811 (D.C. Cir. 2007) (finding distributions to shareholders not part of bona fide dissolution or wind-down where evidence failed to show “that the owners made a decision to close the company before they began distributing its assets”). In fact, Domsey Trading Corporation, which had held the title to the liquidated Kent Avenue property, was

not dissolved until 2009, seven years after Salm made the self-dealing payments at issue. In these circumstances, the Board reasonably found (SA 4-5 & n.17) that the payments to Salm and Edery “did not involve adherence to normal legal formalities or arm’s-length dealings,” but were transparently diversions of corporate funds to noncorporate uses. *See IMCO/Int’l Measurement & Control Co.*, 304 NLRB 738, 740, 744-45 (1991), *enforced*, 978 F.2d 334 (7th Cir. 1992) (finding impermissible owners’ taking of proceeds from liquidation of corporate assets).

Salm’s diversion of Domsey assets to himself and Edery rendered Domsey unable to meet its significant backpay obligations. As indicated above, at the time of the funds-transfers at issue, Domsey was under a court-enforced Board order to make whole nearly 200 employees who had been unlawfully denied reinstatement to their jobs at Domsey following an unfair labor practice strike. Based on an initial backpay hearing, an administrative law judge determined in 1999 that Domsey’s liability under the court-enforced order was over \$1,000,000. Domsey had insufficient funds to meet an obligation of this magnitude as of the beginning of January 2002. Thus, the liquidation of the Kent Avenue property later in January “was an opportunity to replenish [Domsey’s] account and ensure [Domsey’s] ability to satisfy its creditors.” (SA 5.) Instead of using the

liquidation as an opportunity to provide for Domsey's backpay liability, however, Salm distributed most of the sale proceeds to himself and Edery.

Contrary to Salm (Br. 20), even assuming that Domsey was winding down or dissolving at the time—a fact which has not been proved by Salm or Domsey—the Board properly found (SA 5 & nn. 22, 27) that the principals of a corporation “cannot in the process [of dissolution] turn their backs on corporate liabilities, including, in this case, the backpay owed to employees as a result of [Domsey’s] violations of the law.” *See Pierce v. United States*, 255 U.S. 398, 402-03 (1921) (“The corporation cannot disable itself from responding [to creditors] by distributing its property among its stockholders and leaving remediless those having valid claims”); *F&W Oldsmobile*, 272 NLRB 1150, 1151(1984) (piercing corporate veil where shareholders dissolved corporation and distributed assets while on notice of a pending backpay claim). Accordingly, Salm’s decision to “enrich himself and Edery, at the expense of the backpay claimants and any other remaining creditors” only reveals his lack of respect for the separate identity and obligations of Domsey.⁵ (SA 5.)

⁵ Although Salm’s conduct in this regard could have been litigated under the law of fraudulent conveyances, as suggested by the dissenting Board member below (SA 8), the Board majority’s application of a veil-piercing analysis to the same conduct was entirely permissible. *See, e.g., Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 419 F.3d 594, 597 (7th Cir. 2005) (treating transfer of corporate assets to shareholders, in the face of judgment creditor’s claim against corporation, as both

Given all of Salm's conduct, the Board properly concluded that several of the specific factors enumerated in *White Oak Coal* favor finding the first prong of the test for piercing the corporate veil satisfied here. First, as the Board found (SA 4), although Domsey was "historically operated as a separate entity from its principal owners," that "changed in January 2002 . . . when Salm and Edery used their virtually complete control over [Domsey] to cause it to sell its most valuable asset," the Kent Avenue property. *See White Oak Coal*, 318 NLRB at 735 (factors 1 and 4). Immediately after the sale, Salm inexplicably distributed most of the sale proceeds to himself and Edery, and then proceeded to commingle the millions of dollars he diverted to himself with his own personal funds in several accounts. *See id.* (factors 2 and 8). He took these steps without even the pretense of regular corporate action, for example in payment for services provided. *See id.* (factors 7 and 9). And while distributing millions of dollars in Domsey money to himself and Edery, Salm made no provision for Domsey's satisfaction of its backpay liability to over 150 employees under a court-enforced Board order. *See id.* (factor 5). In these circumstances, the Board was amply justified in finding that

fraudulent conveyance and basis for piercing corporate veil). *See also Ren-Cris Litho, Inc. v. Vantage Graphics, Inc.*, 107 F.3d 4, 1997 WL 76860, at *4 (2d Cir. 1997) (table) (noting that fraudulent-conveyance and veil-piercing theories are "equally permissible and plausible grounds" for judgment creditor to obtain relief in state-court proceedings).

Salm failed to respect the separate identity of Domsey, satisfying the first prong of the *White Oak Coal* test for piercing the corporate veil.

2. Salm’s conduct caused an injustice, as it stripped Domsey of funds needed to remedy its unfair labor practices toward 181 former employees; it is accordingly appropriate to hold Salm liable

Applying the second prong of the *White Oak Coal* test, the Board reasonably found (SA 5) that “[a]dherence to the corporate form here would promote injustice and lead to the evasion of legal obligations.” As of early January 2002, before the sale of the Kent Avenue property, the balance in Domsey’s corporate account was \$848.66. Following the sale and Salm’s withdrawals of nearly \$8,000,000 in sale proceeds, the account was once again left with only \$848.66—nowhere near the roughly \$1,000,000 amount necessary to meet Domsey’s backpay liability, excluding interest, to 181 employees for unfair labor practices committed between 1989 and 1990. Thus, by his withdrawals from the Domsey account, Salm played a direct and substantial role in “return[ing] [Domsey] to a state of being undercapitalized relative to its obligations.” (SA 5.)

Although Salm may not have acted with specific intent to deprive the victims of Domsey’s unfair labor practices of a remedy, the Board reasonably found (SA 5) that his improper stripping of funds from Domsey’s account “had the natural, foreseeable, and inevitable consequence of diminishing [Domsey’s] ability to satisfy [its] remedial obligation.” *See Bufco Corp. v. NLRB*, 147 F.3d 964, 969

(D.C. Cir. 1998). Moreover, because this unjust state of affairs flowed from Salm's conduct, the Board properly found (SA 5) the element of causation necessary to meet the second prong of the *White Oak Coal* test. *White Oak Coal*, 318 NLRB at 735 (inequity that warrants piercing must flow from misuse of the corporate form in which shareholder personally participated). The Board accordingly pierced the corporate veil of Domsey and held Salm jointly and severally liable, along with Domsey, for any backpay due based on Domsey's unfair labor practices.

Contrary to Salm's suggestion (Br. 21-22), he is not relieved of personal liability simply because his conduct may not have rendered Domsey absolutely "insolvent." As indicated above, Salm, at the very least, took inappropriate actions that deprived Domsey of funds that could have been used toward its backpay liability and thus diminished Domsey's ability to meet its remedial obligations. This wrongful deprivation of funds is sufficient to support a Board finding of personal liability. *See Bufco Corp.*, 147 F.3d at 969 (upholding Board's decision to pierce the corporate veil, notwithstanding lack of evidence concerning corporation's solvency or insolvency as a result of shareholder abuse of corporate form).

Similarly, Salm cannot be relieved of personal liability based on the conjecture that one of Domsey's constituent companies (Domsey Fiber

Corporation) has funds to satisfy a backpay award. Although the record reflects that approximately \$2,600,000 of the total proceeds from the sale of the Kent Avenue property was paid to a law firm for the benefit of Domsey Fiber Corporation, the Board correctly noted (SA 3 n.5, 6) that “the whereabouts of that money is unknown.” Moreover, Salm admits (Br. 22) that beyond the fact of the payment to a law firm, “[n]o further evidence was introduced as to th[e] 2.6 million dollars.” Given the absence of evidence that the latter funds are actually available to satisfy Domsey’s remedial obligations, the Board found it appropriate to pierce the corporate veil and impose personal liability on Salm, who had unquestionably diverted millions of dollars in Domsey money to his own bank accounts. This does not mean, however, that Salm cannot discharge his individual liability by using funds that may be in the possession of Domsey Fiber. On the contrary, as the Board noted (SA 6), if such funds exist, “Salm remains free to satisfy [his] liability solely with those funds.”

C. Salm’s Remaining Defenses Lack Merit

Salm argues (Br. 9-14) that the Board’s “claim” against him is barred by the statute of limitations set forth in Section 3306(b) of the Federal Debt Collection Procedure Act (28 U.S.C. § 3306(b)) (“FDCPA”). In so arguing, Salm misconceives the nature of this case and confuses it with other litigation in which

Salm and the Board have been involved.⁶ This case concerns the Board's finding that Salm is personally liable for Domsey's backpay obligations, under the federal common-law doctrine of piercing the corporate veil. The Board has made no claim under the FDCPA, and certainly could not have made any finding under that statute, in the context of the Supplemental Decision and Order on review here. *See* 28 U.S.C. §§ 3004, 3008 (FDCPA claims are to be addressed in the first instance by federal district courts or magistrate judges assigned by those courts). There is accordingly no FDCPA issue before the Court in this case, and any statute of limitations applicable to FDCPA claims is therefore irrelevant.

Equally misdirected is Salm's objection (Br. 22-24) to the Board's "contention" that Salm "acted as an alter ego" of Domsey. The Board's findings against Salm are not predicated on an alter-ego theory of liability. *See NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 335-36 (6th Cir. 1990) (noting that "alter ego" has a distinct meaning in labor disputes). Moreover, to the extent that the Acting General Counsel made an alter-ego allegation below, the allegations made in pleadings submitted to the Board have no bearing here. The

⁶ In 2010, the Board initiated an action in federal district court (*NLRB v. Domsey Trading Corp. et al.*, E.D.N.Y Case No. MISC 10-0543) for a pre-judgment writ of garnishment against Salm under Section 3001(a)(2) of the FDCPA (28 U.S.C. 3001(a)(2)), pending resolution of the personal liability issue presented in this case. The court initially issued the writ requested by the Board, but later dissolved it in light of Salm's agreement to sequester funds for use in the event that he is found liable for backpay. (SA 89-93.)

parties have submitted this case to the Court for review of the Board's findings, and as indicated above the relevant findings against Salm are predicated solely on the equitable doctrine of piercing the corporate veil.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying Salm's petition for review and enforcing the Board's Order in full.

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October 2012

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**UNITED STATES COURT OF APPEALS
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)	12-1131
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DOMSEY FIBER CORPORATION, AND)	
DOMSEY INTERNATIONAL SALES)	
CORPORATION, A SINGLE EMPLOYER)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,549 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board’s brief, is identical to the hard copy of the

Board's brief filed with the Court and served on the petitioner/cross-respondent.

The Board counsel further certifies that the CD-ROM has been scanned for viruses.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 9th day of October, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address of counsel listed below:

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Dated at Washington, D.C.
this 9th day of October 2012