Oral Argument Not Yet Scheduled

Nos. 16-2200 & 16-2705

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner - Cross Respondent

v.

ACE MASONRY, INC. DBA ACE UNLIMITED,
BELLA MASONRY, LLC, a single employer and alter egos,
LISA BELLAVIGNA, ROBERT BELLAVIGNA,
HENRY BELLAVIGNA, DOMENICK BELLAVIGNA,
BELLA FURNITURE SOLUTIONS, INC.

Respondents - Cross Petitioners

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT AND
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OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, and cross-petition of the named corporate and individual respondents/cross-petitioners (collectively, "Respondents"), to review, a second supplemental Board Order issued against the

Respondents. The Decision and Order that is before the Court issued on May 3, 2016, and is reported at 363 NLRB No. 181. (SA 63-75.)[1]

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

The Board filed its application for enforcement as against the Respondents on June 28, 2016. The Respondents filed their cross-petition for review on August 4, 2016. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

RELEVANT STATUTES AND REGULATIONS

The relevant statutory and regulatory provisions are contained in the Addendum.

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[1] "SA" refers to the Special Appendix, "JA" refers to the joint appendix, "EA" refers to the volumes of exhibits accompanying the joint appendix, and BSA refers to the Board Supplemental Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Respondents' opening brief to the Court.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary affirmance of uncontested findings of fact and its piercing of the corporate veil as to Lisa Bellavigna ("Lisa") and Henry Bellavigna ("Henry"), and to summary enforcement of its uncontested finding that Henry was personally liable, along with Ace Masonry, Inc. d/b/a Ace Unlimited ("Ace"), owned by Lisa, and Bella Masonry, LLC ("Bella"), owned by Henry, two corporations that constitute alter egos (collectively, "Ace/Bella"), for the backpay and union benefit fund contributions due under the Board's earlier orders.

2. Whether the Board properly found that the New York State Lien Law did not justify Lisa's removal of funds from Ace's accounts.

3. Whether substantial evidence supports the Board's factual findings underlying its decision to pierce the corporate veil as to Robert Bellavigna ("Robert") and find him personally liable, along with Ace/Bella, for the backpay and union benefit fund contributions due under the Board's earlier orders.

4. Whether the Court has jurisdiction to consider the due-process argument of Bella Furniture Solutions ("Bella Furniture") and Domenick Bellavigna ("Domenick") regarding the Board's application of a fraudulent transfer theory of partial liability and whether, in any event, substantial evidence supports the

Board's findings that the basis for liability was fully litigated such that Bella Furniture and Domenick were not prejudiced or denied due process.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. The Underlying Unfair Labor Practice Proceeding

The present case arose following an unfair labor practice proceeding against Ace/Bella. In that proceeding, the Board found that Ace and Bella were alter egos and were jointly and severally liable for the failure to pay contractual wages and benefits. *See Ace Masonry, Inc.*, unpublished Board order (Jan. 23, 2013) (SA 31-32) (adopting administrative law judge decision in the absence of exceptions, 2012 WL 6755106 (Dec. 12, 2012) (SA 1-30)), enforced summarily, Docket No. 13-585 (2d Cir. March 26, 2013) (SA 33-38). Ace, a general contractor in the construction business since 2006 and masonry contractor since 2002, was, at all relevant times, a signatory to collective-bargaining agreements with three unions ("the Unions"), applicable to its employees. (SA 2-3.) As the Board explained, although Bella used Ace's former equipment, employees, and managers, and it completed projects Ace had contracted to perform, Bella did not sign any collective-bargaining agreements or pay contractual wages and benefits to the employees. (SA 7-8, 10.) Ace and Bella also refused to provide information requested by two of the unions about the relationship between the companies. (SA 25-26.)

To remedy the above unlawful conduct, the Board ordered that Ace/Bella make whole the affected employees for the earnings and contractual benefits they had been unlawfully denied. (SA 26-28.) In addition, the Board ordered Ace/Bella to remit unpaid contributions to the union benefit funds and to provide the unions with the requested information.[2] *Id.* This Court granted the Board's application for summary entry of judgment on its order. Docket No. 13-585 (2d Cir. March 26, 2013) (unreported) (SA 33-38.)

B. The Supplemental Proceedings Addressing Backpay

1. The first supplemental proceeding

Following this Court's enforcement of the Board's unfair labor practice order, the Respondents disputed the amount of backpay and benefit fund contributions owed. The Board's Regional Director for Region 3 issued a compliance specification alleging the amount of backpay due each of the named employees and union benefit funds. It also alleged that – due to their company roles and certain conduct including commingling of funds and asset diversion – Lisa, Robert, Henry, and Domenick and Bella Furniture were liable for the remedy. (EA 39-117.) The Respondents objected and the General Counsel moved for partial summary judgment. The Board granted summary judgment as to the

[2] There are no issues before the Court regarding that refusal to provide information or regarding the Board's previously enforced order that the remedial notice be mailed to Ace/Bella's employees.

backpay period and the formulas for calculating the amounts owed. *See* SA 63 n.1; SA 39-42. The Board remanded for a hearing regarding the specific amounts due, as well as the remedial liability of Lisa, Henry, Robert, Domenick, and Bella Furniture. *See id.*

2. The second supplemental proceeding

Following the Board's 2014 remand, a hearing was held before an administrative law judge. At the hearing, the parties stipulated to the amounts owed to each employee and benefit fund, leaving unresolved only "the allocation of liability among the Respondents." (SA 63 n.1, 69.)

On November 25, 2014, the administrative law judge issued a decision finding, based on the parties' stipulations, that Ace/Bella owed specified amounts in backpay to eight named employees and six named union funds. (SA 69-75.) Further, applying established Board law, the judge found that the corporate veil should be pierced as to Lisa, Robert, and Henry, making them jointly and severally liable for the remedial relief due from Ace and Bella. (SA 73-75.) The judge based that conclusion in part on the "continuous and substantial depletion" of Ace's assets through diversion to Lisa and Robert personally and to Bella Masonry, Ace's alter ego. (SA 74.) Likewise, there were "substantial transfers" of Bella's funds to Henry. (*Id.*) The judge rejected the Respondents' contention that Ace was justified in avoiding its obligation to make payments to the unions

because the New York State Lien Law, Article 3-A ("Article 3-A") (SA 78-81), obligated Ace, instead, to make payments to its subcontractors. (SA 70-71.) Regarding Robert, who had no ownership in Ace/Bella, the judge relied primarily on Board law finding personal liability of non-owner family members who "actively participated in the operation of the corporate respondents, including the distribution of corporate assets for non-corporate purposes." (SA 74.) The judge, however, found that (SA 75), unlike Robert, Domenick and Bella Furniture were too far removed from Ace/Bella to warrant piercing the corporate veil and holding them liable.

The Respondents and the General Counsel filed exceptions to the administrative law judge's decision. (SA 63 n.1.) After considering the parties' exceptions, the Board unanimously adopted the judge's findings as to Lisa, Robert, and Henry. The Board, with a partial dissent, reversed the judge and found Domenick and Bella Furniture liable under a theory that Bella fraudulently transferred funds to them. 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; Company Operations and Unfair Labor Practices

Many of the facts relevant to this case were established in earlier stages of its litigation and are no longer in dispute. In short, Ace, a general contractor and

masonry contractor solely owned by Lisa, and Bella, a masonry subcontractor solely owned by Lisa's father-in-law, Henry, are alter egos. (SA 69, 70; SA 3, 7, 24.) Henry created Bella in September 2011, when Ace was suffering financially and Lisa was intending to get out of the construction business. (SA 70; SA 7.) The two companies had close family members as their owners, substantially similar management, and substantially similar – if not identical – operations. (SA 24.) Ace's employees were covered by collective-bargaining agreements that Ace had signed with the Unions. (SA 3-5.) Bella employed many of the same employees as Ace (SA 70), but Bella was formed as a nonunion company and did not pay contractual wages and benefits. (SA 69; SA 24.)

B. Lisa and Robert Commingled Corporate and Personal Funds and Diverted Corporate Assets to Themselves

1. Lisa opened and closed several Ace accounts and withdrew cash and transferred other Ace funds to alter ego Bella and to her joint account with Robert

The Respondents do not contest the Board's findings regarding Lisa's financial transactions. Specifically, Lisa removed more than $242,000 from Ace's bank accounts. (SA 63.) She opened and closed several accounts for Ace and made cash withdrawals. For example, in August 2012, Lisa closed Ace's account at Tompkins Trust Bank, admittedly because the Carpenters were taking some of those funds pursuant to a judgment and restraining notice. Then she opened a new Ace account at Citizens and Northern Bank with a deposit of over $150,000, and

within two weeks, emptied that account via three checks and a cash withdrawal of about $5700. (SA 70, 71, 72; JA 81-83, EA 487-99.) Through those transactions, "a substantial amount of the deposited money was transferred to Bella Masonry," Ace's alter ego. (SA 70.)

In October 2012, Lisa opened two other accounts on behalf of Ace, at Community Bank and Chemung Canal Trust, and depleted those funds via cash withdrawals or checks made out to cash. (SA 70; EA 500-20, EA 118-230.)

- At Community Bank, Lisa withdrew cash or wrote checks made out to cash, for a total of $23,600, on three dates in the last week of October 2012. (SA 72; EA 518-19.)
- From the Chemung Canal account, Lisa made 6 cash withdrawals totaling almost $41,000 between late July 2012 and late March 2013; three of those withdrawals were on March 27, 28, and 29, 2013, each in an amount just under $10,000. (SA 71; EA 211, 216, 217, 219, 227, 229, BSA 14, 18.)

Also between late July 2012 and late March 2013, $47,750 in cash was deposited into Lisa and Robert's joint personal account at Visions Federal Credit Union. (SA 72; EA 839-43, 949-1068.) Those cash deposits included:

- a deposit of $9600 only 3 days after Lisa withdrew $9800 from Ace's Chemung Canal account (SA 71-72; EA 211, 216, 951-52, 958);
- a deposit of $4500 (plus a deposit of $1500 to Lisa and Robert's personal account at Tompkins Trust) (EA 1000, 1025, 1493-94, 1497-98) on the same day that Lisa wrote a $6000 check to "cash" drawn on Ace's Community Bank account (SA 72; EA 518-19); and
- a deposit of $7900 (plus a cash deposit of $2000 to Lisa and Robert's Tompkins Trust personal account) on the same day that Lisa wrote a

> $9980 check to "cash" drawn on Ace's Chemung Canal account. (SA 71-72; EA 1059, 1063, 1517-20, BSA 14, 18.)

From October 2012 through March 2013, Lisa and Robert's joint personal account at Tompkins Trust received cash deposits totaling $10,400. (SA 72; EA 1487-1520.)

On June 11, 2014, while the compliance hearing was in progress, Lisa opened another Chemung Canal account, depositing a check for $46,500 from Ace's customer Ithaca College. After removing that entire amount, in 5 cash withdrawals of $9300 each on 5 consecutive business days, Lisa closed out the account on June 18, 2012. (SA 71-72; EA 1592-98.) Lisa did not know where that money went or whether any suppliers or vendors were paid from it. (JA 696-701.)

2. Robert's role and financial involvement at Ace and Bella

Robert, Lisa's husband and Henry's son, was not an owner of either Ace or Bella, but served as project coordinator and field supervisor for both companies, as well as serving as vice-president of Bella. (SA 63-64, 70, 71; SA 5, 8 & n.14, EA 1931, 1941.) Robert was authorized to sign checks drawn on at least two of Ace's bank accounts, at Tompkins Trust and Chemung Canal, and to use its credit card. (SA 71; EA 125-126, 836, JA 39-40, 77-78.)

Along with Lisa, Robert personally guaranteed at least two loans to Ace: one by which Lisa bought out Ace's then-co-owner, Dave Traver, and an unlimited continuing guaranty for Ace with Tompkins Trust. (SA 71; EA 479, 837-38, JA

35, 509-17.) Robert also "personally guaranteed for a lot of the notes" on Ace vehicles. (JA 520.) Robert and Lisa jointly owned their home, which they refinanced to pay loans on behalf of Ace (JA 37-38), as well as other real property. (SA 71-72.)

Robert and Lisa also jointly owned personal bank accounts, including accounts at Tompkins Trust and Visions Federal Credit Union, into which, as described above, Lisa and Robert both made large cash deposits after similar cash withdrawals were made from Ace's accounts. (SA 71-72; EA 211, 216, 518-19, 951-52, 958, 1000, 1013, 1018, 1020-21, 1023, 1025, 1035, 1041, 1059, 1063, 1493-94, 1497-98, 1517-20, BSA 14, 18, JA 551-57, 565-69.) Robert also had, in his name alone, a Community Bank personal account, which he "take[s] care of."[3] (EA 1244-93, JA 546.) He made cash deposits totaling $13,000 into that account (SA 72; EA 1252-53, 1255-56, 1260-61, 1263-64, 1269-70, 1283-84, 1290-91, JA 558-65), including a cash deposit of $500 on August 6, 2012, two days after Lisa had withdrawn $700 in cash from Ace's Chemung Canal account (SA 71; EA 217-19, 525-27, 1252-53). On October 31, 2012, eight days after Lisa had withdrawn $9000 in cash from Ace's Community Bank account, Robert deposited the same

[3] Robert denied, however, having any knowledge of, or engaging in any maintenance of, another personal account in his own name, at Visions Federal Credit Union, despite having deposited into it a check made out to him. (JA 597-600.)

amount of cash into his personal account. (SA 72; EA 518-19, 521-23, EA 1255-56, JA 559.) That same day, a $9000 check that he had written to Henry over a month earlier cleared Robert's account. (EA 523, 1255, 1257, JA 66, 68-70, 562-63.) Robert's $9000 check to Henry, plus $3000 in cash, went to purchase a truck and other Bella-owned equipment that Henry sold in a private sale when he closed Bella. (SA 71; EA 524, 530-31, JA 66-67, 559-63.) Robert later sold the truck at a profit. (JA 560-61.) Without the $9000 cash deposit on October 31, Robert's account balance would not have covered his check to Henry. (EA 521, 528, 1254-55, JA 68-70, 559-63.) Robert stated that the cash for this deposit and others came from "my personal monies" (JA 561, 563-64) or "personal stash" (JA 556-57, 559-60).

C. Henry Commingled Personal and Corporate Funds and Diverted Corporate Assets, Including to Bella Furniture and Domenick

In September 2011, while still employed by Ace, Henry started Bella and took over Ace's employees, supervisors, and customers and used much of the equipment that Ace had previously owned. (SA 71.) That month, Bella opened a corporate bank account at Chemung Canal, where Henry also had a personal account. (SA 71, 72; EA 232-34.) During the course of 11 months, Henry withdrew over $100,000 in cash, or in checks payable to cash, from Bella's account. (SA 72; EA 286, 337, 422-23, 435, 438, 439, 441, 443, 445, 446, 465-66,

467, 469.) Bella remained open until August 2012, when Henry decided to close the company because of the Board's and the Unions' litigation alleging that Bella was an alter ego of Ace and therefore shared Ace's liability to its employees and the union benefit funds. (SA 71; JA 282.) Henry then sold Bella's property through a private sale, the proceeds of which disappeared or which Henry pocketed rather than depositing them into Bella's account. (SA 71, 73; EA 530-37, 423-24, 426-34, 452, 454-56, 1706, 1713, 1718, 1724.) In short, Bella received over $126,000 of Ace's funds from Lisa, and Henry pocketed over $150,000 of Bella's funds and failed to account for an additional $45,000 belonging to Bella. (SA 65-66 & n.12.) The Respondents do not dispute that Henry commingled Bella's funds with his own and diverted Bella's funds in a variety of ways. (SA 72-73.)

Among the payments from Bella's account was a check for $34,100, dated August 28, 2012, and deposited on September 10, 2012 into the account of Bella Furniture, owned by Domenick. (SA 64, 73; EA 452-53, 458, 718-19, 727, JA 413, 414.) That check was purportedly in payment for Domenick's provision of two types of services for Bella: the design, hosting, and maintenance of Bella's website and the production, stuffing, and mailing of marketing materials about Bella. (SA 64, 73; EA 452-53, 458, 538, 718-19, 727, JA 252, 414.)

Domenick charged Bella $15,000 for his purported services designing, hosting, and maintaining Bella's website. (SA 64; EA 538.) To design the

website, Domenick "essentially copied and modestly redesigned" Ace's website, which he had not designed, using fewer graphics and less detail. (SA 64, 73; SA 8, JA 373-74, 378-79, 497-98). Domenick admittedly charged "towards the high end" of the range of IT professionals' rates that he found in an internet search, although he had never done such work before. (SA 64; JA 32, 380, 382-83, 411-12.) Domenick had not discussed with Henry, his father, in advance the rates that he would charge Bella. (JA 382-83, 412.) Domenick justified the high charges on the basis that it "[d]idn't hurt to try" and "Henry didn't argue, didn't say anything about it." (SA 64 n.8; JA 412, 421.) As for the website's hosting and maintenance, Domenick charged for a full year of hosting and maintaining the website but kept it online for at most 10-11 months. (SA 64; JA 441.) Melissa Blanchard, Ace's and then Bella's office manager, who knew that maintenance for Ace's website had cost $200 per year, considered $15,000 "a large number." (SA 64; JA 501-02.) And the company that actually hosted the website, Vista Print, charged Domenick only $35 per month (totaling $385 for 11 months) for that service. (SA 64; JA 377-78, 410-11, 441).

As for the production, stuffing, and mailing of marketing materials in February 2012, much of the brochure design was done not by Domenick but by Eman Printing, the British company that printed the brochures. (SA 65, 73; EA 835, 1912-29.) For the design and printing services, Eman charged Domenick

$720 (EA 835), but Domenick charged Bella $13,400 (EA 538). That charge consisted of $3800 for design (25.5 hours at a rate of $150 per hour)[4] and $9600 for printing (600 brochures at $16 each). (EA 538.) Further, the invoice charged for services that were never performed. (SA 73.) First, Domenick billed Bella for printing, stuffing, and mailing 600 trifold brochures, even though both he and Henry knew that only 250 brochures had been printed.[5] (SA 64, 73; EA 538, 835, JA 391-94.) Second, the 250 brochures included additional marketing materials printed and stuffed by Blanchard, not Domenick. (SA 64-65, 73; BSA 1-5, JA 503-04.) For those purported services, Domenick charged Bella $4800. (EA 538.) And Blanchard and Henry took the brochures to the post office and used postage purchased by Henry (SA 65, 73; BSA 3-4, JA 499), a service for which Domenick charged Bella $900 (EA 538).

Although the invoice was dated May 1, 2012, Blanchard received it on August 24, 2012.[6] (SA 64; JA 499-500.) Bella paid the invoice on August 28,

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[4] As was true of his website services, Domenick had never prepared marketing brochures for another customer. (JA 390.)

[5] Although 600 brochures were planned, the other 350 brochures were put on hold when Bella's status as an alter ego of Ace was raised before the Board, according to Domenick. (SA 64; JA 393-95.)

[6] Domenick's claim that he had emailed the invoice to Bella in June was not supported by any documentary evidence. (JA 438-40.)

2012, two weeks after Henry had announced that Bella was going out of business. (SA 64, 73; EA 453, 458, 529, JA 505.)

III. THE BOARD'S CONCLUSIONS AND SECOND SUPPLEMENTAL ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Miscimarra and McFerran) found (SA 63-69) that Lisa, Robert, and Henry are individually, jointly, and severally liable for remedying the unfair labor practices committed by Ace/Bella. The Respondents did not challenge any factual findings regarding Lisa or Henry. They claimed that Lisa was justified in removing money from Ace's accounts by Article 3-A, which required Ace to satisfy its subcontractors' claims. (SA 63.) The Board agreed with the judge in rejecting that defense, giving three reasons: (1) Article 3-A establishes that funds must be reserved for employee benefits and wage supplements along with subcontractors' claims (SA 63, 71); (2) if a conflict between the Act and Article 3-A existed, the latter would be preempted (SA 63 n.2); and (3) Lisa did not show that any of the funds she withdrew from Ace's accounts had even been used to pay subcontractors (SA 63 n.2). In finding Robert personally liable, the Board, in agreement with the judge, relied on precedent allowing the corporate veil of a closely held corporation owned and controlled by members of one family to be pierced if an allegedly liable non-owner played an active role in the corporation's operation and its underlying misconduct. (SA 63 & n.3, 74-75.) In piercing the corporate veil as to Henry and

Bella, the Board agreed with the judge's unchallenged findings that Henry's financial transactions, including acceptance of funds from Ace/Bella's bank accounts, "were undertaken with a motive to evade legal obligations" toward employees. (SA 65, 72-74.)

Regarding Domenick and Bella Furniture, the Board agreed with the judge's finding that they were not liable under piercing-the-corporate-veil doctrine. (SA 64, 75.) But, unlike the judge, the Board (Chairman Pearce and Member McFerran; Member Miscimarra dissenting in part) found a fraudulent-transfer theory applicable and found that Henry and Domenick's transactions regarding the website and brochures were fraudulent transfers of Bella's assets that were undertaken with a motive to shield them from attachment. (SA 64, 65, 75.) Henry paid Domenick's invoice despite knowing that Domenick's charges were grossly inflated. (SA 65-66.) Domenick failed to show that he acted in good faith or provided reasonably equivalent value, and most of the payment he received from Bella and Henry was fraudulently transferred. (*Id.*) Thus, the Board found, Domenick and Bella Furniture jointly and severally liable for up to $32,995 of the remedial obligations.[7] (*Id.*)

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[7] Dissenting Board Member Miscimarra agreed that it was appropriate to apply a fraudulent-transfer theory to Domenick and Bella Furniture, but he would have applied a different burden of proof and consequently would have reached a different outcome. (SA 67-69.)

The Board's Order requires Respondents Ace/Bella, Lisa, Robert, and Henry, jointly and severally, to make whole the employees and union benefit funds for the total of $11,309.11 in backpay due to eight named employees and the total of $128,773.05 due to six named union funds. (SA 66-67.) The Order further requires Respondents Bella Furniture and Domenick, jointly and severally, to make whole the employees and union benefit funds for the amounts above, up to $32,995. (*Id.*)

SUMMARY OF ARGUMENT

1. Many of the issues resolved by the Board below are not challenged by the Respondents before this Court. Thus, the Board is entitled to summary enforcement of its finding that Henry was personally liable for Ace/Bella's joint and several liability for the unfair labor practices. The Board is also entitled to summary affirmance of its finding that Lisa's conduct warranted piercing the corporate veil. Further, the Respondents have conceded all of the Board's factual findings except those relating to Robert's personal liability, and the Board is therefore entitled to summary affirmance of the uncontested factual findings.

2. The only remaining challenge to Lisa's personal liability is her defense that her diversion of funds was justified by Article 3-A. The Board properly found that Article 3-A did not justify Lisa's removal of assets from the reach of the Board for its remedial obligations. Most importantly, the language of

Article 3-A itself establishes that the wages and benefits covered by the Board's remedial order are among the types of expenses that must be prioritized for payment. Further, as the Board observed, there is no record evidence that Lisa used the diverted funds to pay any subcontractors, as the Respondents assert she was obliged to do. The Respondents' identification of one subcontractor to which Ace owed a large payment, and one large customer payment that Lisa removed from Ace's corporate account, simply does not fill the evidentiary gap. Finally, the Board found that even if there were a conflict between Ace/Bella's obligations under the Act and those imposed by Article 3-A, the latter would be preempted by the Board's broad remedial authority under federal law.

3. The Board properly found that Robert, as a close family member of Ace's and Bella's owners and a participant in the companies' operations and their commingling and diversion of funds, is personally liable for Ace/Bella's backpay and union benefit fund obligations. In particular, substantial evidence supports the Board's findings that Robert was involved in Ace and Bella's operations, had participated in committing the underlying unfair labor practices, and had, in conjunction with Lisa, disregarded Ace/Bella's separate identity and interests by diverting thousands of dollars in Ace/Bella funds to himself and Lisa, without any adherence to corporate formalities, to avoid the Board remedy. The record contradicts Robert's argument that his involvement in Ace/Bella's financial

transactions was limited to emergency assistance during Lisa's incapacity and a handful of other actions required by outside parties. Robert was an active participant in Ace's and Bella's operations and in their owners' scheme to divest their alter-ego companies of funds.

4. With regard to Domenick and Bella Furniture, the Respondents have not challenged the Board's general finding that Domenick grossly overcharged Bella for the website and marketing services such that $32,995 of his $34,100 payment from Bella was unsupported. Nor have the Respondents challenged the Board's finding that the doctrine of fraudulent transfer is consistent with established law. Rather, they claim that Domenick and Bella Furniture were denied due process by the Board's theory of liability. Because the Respondents failed to raise that issue before the Board on a motion for reconsideration, or to argue that extraordinary circumstances justified that failure, the Court lacks jurisdiction to consider the argument. But, in any event, the Board properly found, based on substantial evidence, that the Respondents had notice that the General Counsel was relying on a fraudulent transfer doctrine and an opportunity to litigate it. Further, Domenick's extensive testimony and documentary evidence demonstrates that he suffered no prejudice by bearing the burden of proof.

STANDARD OF REVIEW

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).

The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; *accord G & T*, 246 F.3d at 114. Thus, the Board's reasonable factual inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it de novo; as this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). In other words, this Court will reverse the Board based on a factual determination only if it is "left with the

impression that no rational trier of fact could reach the conclusion drawn by the Board." *G & T*, 246 F.3d at 114 (citation omitted); *accord Local 917, Int'l Bhd. of Teamsters v. NLRB*, 577 F.3d 70, 76 (2d Cir. 2009).

This Court "reviews the Board's legal conclusions to ensure that they have a reasonable basis in law [, and] … afford[s] the Board a degree of legal leeway." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *see also Office & Prof'l Emps. Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992) ("Congress charged the Board with the duty of interpreting the Act and delineating its scope."). In its review, this Court "cannot displace the Board's choice between two fairly conflicting views." *Local 917, Int'l Bhd. of Teamsters v. NLRB*, 577 F.3d at 77 (quotation omitted). Accordingly, this Court will reverse the Board's legal determinations only if they are arbitrary and capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008). Indeed, legal conclusions "based upon the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference." *Caval Tool*, 262 F.3d at 188.

Finally, the Court's standard of review does not change where the Board disagrees with the administrative law judge. *See Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 175 (2d Cir. 1998). Indeed, it is "well-settled" that where, as here, the Board and the judge draw different legal conclusions from the same record evidence, the judge's conclusions "are entitled to no special weight." *Id*.

(citing *Local 259, UAW v. NLRB*, 776 F.2d 23, 27 (2d Cir. 1985)). In those circumstances, the Court has held that it is not permitted to draw its own inferences, but rather, must consider whether on the record considered as a whole there is substantial evidence to support the Board's findings. *Bryant & Stratton*, 140 F.3d at 175.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS, INCLUDING THAT HENRY IS PERSONALLY LIABLE FOR THE UNFAIR LABOR PRACTICES, AND TO SUMMARY AFFIRMANCE OF ITS FACTUAL FINDINGS, INCLUDING THAT LISA COMMINGLED FUNDS AND DIVERTED ASSETS

The Board is entitled to summary enforcement of those portions of its Order that are not contested on appeal. *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009); *see also NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir. 1992) (Board is entitled to summary affirmance of aspects of decision and order not contested on appeal). A party waives its right to contest the Board's findings if a particular argument is not raised in the party's opening brief. *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994); *see also Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (arguments unaccompanied by developed argumentation are deemed waived); Fed. R. App. P. 28(a)(8)(A) (party must raise all claims in opening brief).

For example, the Respondents do not contest—or, indeed, even address—the Board's finding that Henry is personally liable for remedying Ace/Bella's unfair labor practices. (SA 66-67.) That finding is supported by substantial evidence demonstrating Henry's pervasive commingling of personal and corporate funds and diversions of corporate funds.[8] (SA 72-74.) The Board is entitled to summary enforcement of the uncontested portions of its Second Supplemental Order, including against Henry.

The Respondents do not contest most of the factual findings and aspects of the Board's Order. They dispute only: Lisa's claimed defense under Article 3-A, the extent of Robert's involvement in Ace/Bella's operations and financial transactions, and whether Domenick and Bella Furniture received due process with the Board's application of a fraudulent-transfer theory of liability. The factual findings that the Respondents do not contest include Lisa's extensive practice of commingling personal and corporate funds and of diverting Ace's assets, and the Board's determination that the corporate veil should be pierced as to Lisa and

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[8] Nor did the Respondents file exceptions, before the Board, to the judge's finding that Henry is personally liable. The Respondents having failed to raise the issue to the Board, the Court is barred from considering any such claims. Under Section 10(e) of the Act, "[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." *See* 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982).

Ace/Bella.[9] (SA 63, 70-72, 73-74.) Those uncontested findings are supported by substantial evidence and entitled to summary affirmance. Thus, Lisa is personally liable if, as the Board found (SA 63) and as discussed next, Article 3-A does not justify her actions.

II. THE BOARD PROPERLY REJECTED THE RESPONDENTS' ARGUMENT THAT ARTICLE 3-A JUSTIFIED LISA'S REMOVAL OF ACE ASSETS, AND IT THUS PROPERLY FOUND HER PERSONALLY LIABLE FOR BACKPAY AND UNION BENEFIT FUND CONTRIBUTIONS

As stated, there are no challenges to any of the factual findings regarding Lisa. The sole issue is whether Article 3-A (SA 78-81) justifies her removal of Ace assets from its accounts. The Board claims no special deference with regard to the interpretation of Article 3-A but properly found that it provides no defense to Lisa's efforts to evade the obligation to remedy violations of the Act.

Article 3-A creates a trust by operation of law for any funds paid to a contractor or received by an owner in connection with an improvement of real property, in order to ensure payment for those who expend labor and materials on construction projects. *Interworks Sys., Inc. v. Merch. Fin. Corp.*, 604 F.3d 692, 695 (2d Cir. 2010). "Until all trust fund beneficiaries have been satisfied, it is an

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[9] The Respondents did not challenge, before the Board, the judge's factual findings regarding Lisa. Thus, the only issue regarding Lisa's personal liability that they have preserved for the Court's review is the significance of Article 3-A. *See* Section 10(e), *supra* n.8.

unlawful diversion of trust fund assets for the contractor or owner to use any of the trust fund assets for any purpose other than satisfying the claims of beneficiaries." *Id.* Specifically, Section 71 of Article 3-A states, in relevant part:

> 2. The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property, including home improvement or public improvement and incurred in the performance of his contract or subcontract, as the case may be:
>
> (a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;
>
> . . .
>
> (d) payment of any benefits or wage supplements, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;

Consol. Laws of New York, Ch. 33, art. 3-A § 71 subdiv. 2 (2017). (SA 78.) Article 3-A's express terms therefore establish that the expenses for which funds must be reserved include "claims of . . . laborers" and "benefits or wage supplements . . . that the trustee, as employer, is obligated to pay or provide . . . by any agreement to which he is a party." As the Board found (SA 63, 71), Section 71 of Article 3-A prioritizes payments owed to employees comparably with payments to other beneficiaries. Those protected expenses are precisely the obligations that Ace/Bella owes to employees and union trust funds to remedy its unfair labor practices. Thus, Article 3-A's language establishes that the statute

does not justify Lisa's removal of Ace assets; indeed, it appears to prohibit that conduct. Moreover, the Board found (SA 71), and it is undisputed before the Court, that a large portion of the payments that Ace made during this period went to Bella, its alter ego. Thus, Ace was effectively paying itself, not engaging in an arm's-length transaction with a separate contractor.[10]

The Board also correctly found that there was no showing that any of the money Lisa removed from Ace's accounts was even used to pay subcontractors, as she had suggested in invoking Article 3-A. (SA 63 n.2; JA 60, 73, 104-05, 106-08.) If anything, the evidence demonstrates the opposite. That is, the withdrawals at issue were primarily for cash or were checks made out to "cash." Lisa testified (JA 41-42, 73), however, that she did not pay subcontractors or suppliers in cash, so her testimony does not support the claim that Ace's funds went to pay subcontractors.

The Respondents' additional claims (Br. 25-26) about Lisa's removal of Ace's funds for project-by-project preservation similarly fail for a lack of evidence

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[10] Although the Board did not perceive any conflict between Article 3-A and the Act, it noted (SA 63 n.2) that to the extent compliance with Article 3-A would conflict with the Board's broad remedial authority, the Respondents' defense would be preempted in this case. *See also NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 431 (2d Cir. 2001) (explaining Board's broad remedial authority). The Respondents' opening brief does not dispute the Board's reasoning on this point and any such challenge is therefore waived. *See NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988).

about *any* project's payments. The Board's finding (SA 72) that Lisa "could not or more likely would not remember what happened to the money, where it went, or what it was used for" is both amply supported by the record and unchallenged by the Respondents. Ace funds simply vanished via cash withdrawals and deposits into personal accounts. There is no evidence that income and expenses were recorded or distributed as the lien law requires. *See Schwadron v. Freund*, 329 N.Y.S. 2d 945, 950 (N.Y. Sup. Ct. 1972) ("Lien Law § 75 [SA 79-80] requires every trustee to keep books or records with respect to each trust and specifies the entries that must be made for each trust with respect to trust assets receivable, trust accounts payable, trust funds received and trust payments made."). Indeed, Lisa's own testimony (JA 57-58, 59, 61-63, 64-65, 71-72, 73-74, 75-77, 79-80, 86-88, 89-91, 103, 104-05, 106-07, 108, 696-97, 698-99, 700-01) that she did not recall what happened to the money she withdrew from Ace's accounts indicates that she was not keeping the required records.

Despite claiming that the Board misinterpreted the lien law (Br. 13), the Respondents' opening brief contains no explanation of why the Board's treatment of that law was wrong. Indeed, it does not address any of the Board's reasoning.[11] The Respondents merely state that Lisa had to hold Ace assets for "trust

[11] The Respondents' failure to challenge those conclusions in their opening brief waives such an argument, and it cannot be raised in their reply brief. *See Star Color*, p. 27 n.10, above.

beneficiaries" (Br. 24-28), ignoring her obligation to pay employee wages and benefits and employees' status as beneficiaries. In doing so, the Respondents suggest, contrary to Section 71's express list of trust beneficiaries, that Lisa's duty under Article 3-A was to pay Ace's subcontractors and no one else. The Respondents' opening brief neither asserts nor cites any authority to show that the remedial wages and benefit fund contributions at issue here, which are trust purposes, have a lower priority than subcontractors' claims, and that such priority justifies wholly disregarding the obligation to pay the remedy owed under the Board's Order.[12] But even if the Respondents had raised that argument, Article 3-A's language contradicts the notion that subcontractors' claims outrank claims, like the Board's, for unpaid wages and benefits. *See* Art. 3-A §77(8) (SA 81) (prioritizing employee wages and benefits and wage supplements ahead of all claims except certain taxes); *see also Titan Indem. Co. v. Triborough Bridge and Tunnel Auth., Inc.*, 135 F.3d 831, 834 (2d Cir. 1998). Consistent with that ranking, this Court has recognized, "the primary purpose of article 3–A" is to ensure payment for "those who have directly expended labor and materials to improve real property…." *Interworks Sys., Inc.*, 604 F.3d at 695 (quoting *LeChase Data/Telecom Servs., LLC v. Goebert*, 844 N.E.2d 771, 776 (N.Y. 2006)).

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[12] Having failed to raise that argument in their opening brief, the Respondents have waived it. *See Star Color*, p. 27 n.10, above.

Ultimately, the Respondents rely only on Lisa's testimony that she was bound by Article 3-A's restrictions (JA 41, 73, 84-85, 92-102) and that Ace, as of the last day of the compliance hearing, owed a particular contractor, E.I. Johnson, about $150,000 (JA 702-03). The Respondents' brief (Br. 12) mentions that unpaid debt in the same paragraph that discusses Ace's then-recent receipt of a $46,500 payment from Ithaca College. But the Respondents do not even argue, let alone demonstrate by testimony or evidence, that unpaid contractor E.I. Johnson performed work on Ace's Ithaca College project. And Lisa removed the Ithaca College funds from Ace's account within a week of their deposit, making 5 consecutive cash withdrawals of $9300 each. (SA 72; EA 1592-98.) Less than two months later, Lisa testified that she did not recall where that money went, and there was nothing that would refresh her memory of it. (EA 1592-98, JA 698-99, 701.) She could not recall if any suppliers or vendors were paid from that money, and she did not have records reflecting that any were. (JA 696-97.) There is simply no support for the Respondents' suggestion that Lisa acted to properly segregate Ace's money for payment of trust obligations owed on either the Ithaca College project or any other.

Accordingly, the Court should find that the Board properly rejected the Respondents' arguments that Lisa acted in accordance with her obligations under Article 3-A. In the absence of any other challenge to her personal liability for

Ace/Bella's remedial obligations, the Court should enforce the Board's finding that she was jointly and severally liable for the unpaid backpay and union benefit fund contributions.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FACTUAL FINDINGS UNDERLYING ITS DECISION TO PIERCE THE CORPORATE VEIL AND FIND ROBERT PERSONALLY LIABLE, ALONG WITH ACE AND BELLA, FOR THE REMEDIAL PAYMENTS DUE

A. The Board's Remedial Authority Allows It To Pierce the Corporate Veil and Impose Personal Liability

The Board's 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). The corporation, after all, "is still a fiction." *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982). 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"—it may be appropriate to "look

past a corporation's formal existence to hold shareholders . . . liable for 'corporate' obligations." *Id*.

Generally, to determine whether the circumstances in a given case warrant piercing the corporate veil, the Board applies a two-prong test drawn from federal common law. *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 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 Estate of Salm v. NLRB*, 509 F. Appx. at 95 (summary order); *Bolivar-Tees*, 551 F.3d at 728.

Where personal liability is alleged against a non-owner or non-shareholder of the corporation, "the issue is somewhat different," as the Board explained with respect to Robert here (SA 74). In that situation, the closeness of the non-owner's or non-shareholder's ties to the company's operations is a consideration in assessing individual liability for the company's actions. Thus, where, as here, closely held corporations are "essentially owned and controlled by members of one

family," the Board found, it may pierce the corporate veil "to reach nonowner family members who play an active role in the corporation's operation and in the underlying misconduct." (SA 63 n.3, citing *D.L. Baker*, 351 NLRB 515, 523-25 (2007); *SRC Painting*, 346 NLRB 707, 708-09 (2006), *enforced by consent judgment* (7th Cir. June 14, 2007); *Bufco Corp.*, 323 NLRB 609, 627-29 (1997), *enforced*, 147 F.3d 964 (D.C. Cir. 1998).) In contrast, "where the individual alleged to be liable plays no active role in the corporation's operations, that individual has not effectively become the business entity" by merely benefitting from asset diversion; accordingly that person is not held liable. *SRC Painting*, 346 NLRB at 708.

Ultimately, 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.

B. Substantial Evidence Supports the Board's Findings that Support Imposing Personal Liability on Robert

The Respondents do not challenge the legal standard the Board applied in piercing the corporate veil with respect to Robert.[13] (Br. 18-21.) Rather, they challenge only the sufficiency of the evidence to meet that standard. Such a challenge to the Board's factual findings is subject to the substantial evidence standard, as the Respondents acknowledge. (Br. 18.)

The Board applied the above-described law to determine whether Robert played an active role in the companies' operations and in the underlying misconduct. It found (SA 63), that both Ace and Bella were solely owned corporations, which is undisputed, and that "Robert, though not an owner of either entity, played an active and even controlling role in the operation of both." Although the Respondents now claim (Br. 21) that Robert was merely an employee of Ace and Bella and had no control over them, his significant role in operating both companies and in their violations under the Act was well documented in the prior adjudication of the merits of the unfair labor practices. Those factual findings were not contested before the Board and this Court in the prior merits phase of the case and are not subject to relitigation now. (SA 63 n.1, 69; SA 1-38.)

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[13] The Respondents' failure, in their opening brief, to challenge the Board's legal standard or application of the disputed facts to the undisputed law precludes them from raising it in their reply brief. *See Star Color*, p. 27 n.10, above.

Robert's high-level involvement in the operations of Ace and Bella is amply demonstrated by the Board's summary, in the unfair-labor-practice phase of the case, of his functions at each company. Thus, at Ace, Robert "communicated with potential customers about new work, issued quotes, placed and supervised Ace's manpower in the field, communicated with and supervised Ace's project managers and superintendents about specific jobs in the field, and recommended employees for hire[;] served as a backup to Lisa Bellavigna in some of Ace's dealings with banks and lenders, and thus had authority to sign checks and (as Lisa's husband) was a guarantor on some of Ace's loans[; and] [b]oth union representatives and Ace's field employees viewed [Robert] as the point of contact for matters related to Ace's projects and field operations." (SA 5.) Similarly, at Bella, Robert "managed Bella's employees working in the field, scheduled manpower, and ordered equipment and materials needed for ongoing projects[;] oversaw ongoing projects, could hire and/or lay off employees after communicating with Henry Bellavigna about Bella's staffing needs, and occasionally assisted Henry Bellavigna with preparing estimates and job quotes." (SA 8-9.)

In addition, in early October 2011, Robert resigned from his position as a member of the board of trustees for one Union's benefit funds "to avoid a conflict of interest" because of Ace's delinquency in its payments to the funds. (SA 10-11, n.21.) Had Robert been an ordinary employee as the Respondents contend, and not

involved in Ace's operations, he would have perceived no conflict of interest. About two weeks later, when Robert and Henry met with several Ace employees, it was Robert who announced Henry's creation of Bella and invited the Ace employees to consider working for Bella. (SA 7-8 & n.13.) By mid-November 2011, Robert was listed on Bella's website as its vice-president, among other roles. (SA 8 n.14.)

Other evidence further demonstrates Robert's involvement in Ace's finances. For example:

- Along with Lisa, Robert personally guaranteed at least two loans to Ace: one enabling Lisa to buy out Ace's then-co-owner, Dave Traver, and another for an unlimited continuing guaranty for Ace with Tompkins Trust. (SA 71; EA 479, 837-38, JA 35, 510-16.)
- Robert also "personally guaranteed for a lot of the notes" on Ace vehicles. (JA 520.)
- Robert and Lisa jointly owned their home, which they refinanced to pay loans on behalf of Ace (JA 37-38), as well as other real property. (SA 71-72.)

That evidence amply supports the Board's finding that Robert's role in Ace and Bella's operations warranted piercing the corporate veil under the principles applicable to a non-owner or non-shareholder in a family-owned company.

The Board further found that "[i]n the same capacity, he participated in Lisa's efforts to escape Ace's related liability through misuse of the corporate form by helping to divert more than $74,000 of Ace's assets into his and Lisa's personal

bank accounts." (SA 63-64.) Specifically, the record shows that, between late 2012 and early 2013, Lisa and Robert:

- deposited $47,750 cash into their joint personal account at Visions Federal Credit Union (SA 72; EA 949-1068); and
- deposited $10,400 cash into their joint personal account at Tompkins Trust (SA 72; EA 1487-1520).

Those cash deposits total $58,150. And, significantly, Robert himself deposited $13,000 cash into his individual Community Bank account (SA 72; EA 1252-53, 1255-56, 1260-61, 1263-64, 1269-70, 1283-84, 1290-91), as well as assorted cash deposits into the other personal accounts. (SA 72; EA 1013, 1018, 1020-21, 1023, 1035, 1041, JA 551-57.) The deposits made solely by Robert into his individual account are linked to the diversion of Ace's assets: they include a cash deposit of $500 on August 6, 2012, two days after Lisa had withdrawn $700 in cash from Ace's Chemung Canal account (SA 71; EA 217, 219, 1252-53), plus a $9000 cash deposit on October 31, 2012, eight days after Lisa had withdrawn the same amount in cash from Ace's Community Bank account. (SA 72; EA 518-19, 521-23, 1255-56, JA 559.) Tellingly, as the Board observed, Robert "failed to account for the source of any of the cash deposits he made in the course of that diversion."[14] (SA 64 n.4.)

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[14] This colloquy (JA 556-57) with Robert typifies his testimony:
Q Do you know where this cash came from?

Despite the wealth of documentary evidence that supports the Board's finding, the Respondents claim that Robert had virtually no involvement in Ace's and Bella's finances and asset diversion. The Respondents' factual challenges (Br. 21-23) are, essentially, that: (1) Lisa, not Robert, was responsible for all the diversions; (2) Robert only guaranteed one loan in 2012 because the Bank required him to do so as Lisa's husband and joint owner of the collateral; (3) he was involved in Ace's financial matters only when Lisa was ill in Fall 2011; and (4) he was not involved in Bella's finances because that was solely Henry's responsibility. The record does not support the Respondents' efforts to deflect all of Robert's liability onto Lisa and Henry. They simply cite large blocks of the

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A Out of my personal stash.
Q From your personal stash?
A Yes.
Q Where is your personal stash?
A What is that?
Q Where is your personal stash?
A What do you mean, "Where is it"?
Q You just said the $2,000 came from your personal stash.
A Yes; I have my own fun money, and that's probably where it came from.
Q Okay. And where do you keep your fun money?
A I'm not going to sit here and tell you. In my pocket.
Q Two thousand dollars you carry around in your pocket?
A If I need to; yes.
Q Okay. Do you know --
A I don't like dealing with banks.
Q You don't like dealing with banks?
A No.
Q Okay. Yet you deposited $2,000 in the bank; correct?
A Yes.

transcript including Robert's, Henry's, and other witnesses' testimony, making it impossible to identify their specific supporting evidence. (Br. 21, 23, citing JA 506-71, "Vol. III" [JA 118-371], "Vol. 6" [JA 572-695].) And, as described above (pp. 10-11, 34-37), Robert guaranteed more than one loan, and his involvement in Ace's operations went well beyond Lisa's period of illness. Likewise, as described (pp. 35-36), he had a significant role in Bella's operations and finances, so it is incorrect that Henry alone handled those matters for Bella. Moreover, Robert's improbable testimony does not overcome the weight of the documentary evidence that shows his involvement; for example, Robert testified that he did not even know he had an individual bank account, despite documentation showing a check he had deposited in it (EA 1898-99, JA 597-600), and that he had not heard of IRS Form 1040 (JA 635-36).

The obvious conclusion is that Robert, with Lisa, diverted company funds to their personal account and Robert's individual account in disregard of the corporate form with "the natural, foreseeable, and inevitable consequence of diminishing [Ace/Bella's] ability to satisfy its remedial obligations." *Estate of Salm*, 509 F. Appx. at 96 (quoting *Bufco Corp. v. NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998)). On this evidence, the Board found (SA 74) "a continuous and substantial depletion of [Ace's] corporate assets through diversion to both Lisa and Robert Bellavigna," and Ace's transfer, in August 2012, of "substantial funds to

Bella Masonry, its alter ego." As the Board observed in *Domsey Trading Corp.*, commingling of corporate and personal assets "is one of the most serious forms of abuse of the corporate form." *Domsey Trading Corp.*, 357 NLRB 2161, 2163 (2011), *enforced*, *Estate of Salm v. NLRB*, 509 F. Appx. 94 (2d Cir. 2013) (summary order). *See also 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 veil-piercing case); *D.L. Baker*, 351 NLRB 515, 522 (2007) (same). Here, significantly, the Board found (SA 74) that "the facts in the instant case show an equal or greater degree of commingling than was shown in the Domsey case."[15]

The Respondents' claim (Br. 22-23) that Robert was merely a passive recipient and therefore cannot be held personally liable is incorrect factually and legally. It is at odds with the abundant record evidence outlined above.[16] As the

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[15] The Respondents' failure to challenge this finding in their opening brief waives such an argument, and it cannot be raised in their reply brief. *See Star Color*, p. 27 n.10, above.

[16] Because of Robert's involvement in the diversion of assets, the Respondents' reliance (Br. 24) on *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10th Cir. 1993), to assert that mere receipt of corporate assets does not demonstrate abuse of the corporation, is unavailing. The evidence outlined here and in the Board's decision amply demonstrates Robert's involvement not only in Ace/Bella's operations and unfair labor practices but also in the diversion of assets to avoid liability. The inequity that would result in the employees' and Unions'

Respondents concede (Br. 22), there are at least six deposit slips signed by Robert. And, as described above, he wholly failed to account for the source of cash deposits into his own bank account—a finding (SA 64 n.4) unchallenged in the Respondents' opening brief.[17]

Further, the Respondents cite inapposite cases to support the idea that passive recipients cannot be held personally liable; those cases turned on the non-liable spouse's lack of participation in the corporation's operations. (Br. 23, citing *Smith Barney, Inc. v. Strangie*, 192 F.3d 192, 196 (1st Cir. 1999); *Firstmark Capital Corp. v. Hempel Fin. Corp.*, 859 F.2d 92, 95 (9th Cir. 1988).) Indeed, the Board in *SRC Painting* read those two cases narrowly as holding that mere receipt of corporate funds or assets does not impose liability for corporate obligations on an individual who "plays no active role in the corporation's operations." 346 NLRB at 708. Here, Robert was heavily involved in both Ace's and Bella's operations, as shown above (pp. 34-37), which is key to piercing the corporate veil for non-owners like Robert. Those findings regarding his role in Ace and Bella, from the underlying unfair labor practice decision, were not disputed on Board and

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not receiving the remedy owed to them after this pattern of flouting federal law is equally clear.

[17] The Respondents' failure to challenge this finding in its opening brief waives such an argument, and it cannot be raised in its reply brief. *See Star Color*, p. 27 n.10, above.

Court review and cannot be relitigated. Further, Robert's involvement in the rampant diversion of company assets demonstrates that he was not a "passive recipient" of funds.

By ignoring the wealth of documentary evidence, including prior adjudicated findings, and failing to identify specific contrary evidence, the Respondents have not overcome the standard of review for the Board's factual findings regarding Robert's personal liability. Where, as here, they "simply disagree[] with the Board's findings and ask[] [the Court] to accept [their] characterization of the evidence," the Court will reject those arguments because its function is not "to determine facts" but to "decide whether the Board's findings are supported by substantial evidence …." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 958 (2d Cir. 1988).

IV. THE COURT LACKS JURISDICTION TO ADDRESS DOMENICK AND BELLA FURNITURE'S DUE PROCESS CHALLENGE; THEY WERE NOT DENIED DUE PROCESS BECAUSE SUBSTANTIAL EVIDENCE SHOWS THAT THE BASIS FOR LIABILITY WAS FULLY LITIGATED AND THAT DOMENICK AND BELLA FURNITURE SUFFERED NO PREJUDICE

The Respondents do not challenge the Board's initial finding that Henry acted with fraudulent intent when he transferred Bella's assets to Bella Furniture, purportedly in payment of its invoice for Domenick's claimed services regarding Bella's website and marketing materials. (SA 65-66.) Rather, the Respondents

protest (Br. 14-17) on due-process grounds Domenick's and Bella Furniture's liability.

The Board agreed with the administrative law judge's finding that Domenick and Bella Furniture could not be held liable under piercing-the-corporate-veil doctrine. (SA 64, 75.) But, unlike the judge, the Board found that a fraudulent-transfer doctrine is applicable to find liability where an individual controlling a liable corporation improperly transfers corporate assets to a family member and the family member participates by improperly receiving the assets. (SA 64, 65, 75.) *See Las Villas Produce*, 279 NLRB 883, 883 (1986) (holding that "the General Counsel may, without proving alter ego status, seek to impose limited liability on corporate officers or shareholders to the extent of specific corporate assets wrongfully distributed to them in avoidance of backpay liability") (cited at SA 65 n.10). Finding that the General Counsel had, throughout the proceedings, argued that Henry transferred Bella's assets to Domenick to shield them from attachment, the Board applied an "actual fraud" theory.[18] (SA 65 & n.11 (citing references before and during the hearing).) Under that theory, the Board found, the General

[18] The Board noted two categories of fraudulent transfer: actual fraud and constructive fraud. (SA 65.) The actual-fraud theory applies "where it is alleged that the transferor intended to hinder, delay, or defraud creditors." (*Id.*) Constructive fraud, in contrast, applies where the party challenging the transfer asserts that the transferee did not provide fair consideration. (*Id.*)

Counsel bears the initial burden to show that the transfer at issue is voidable because the transferor acted with fraudulent intent. (*Id.*) Then "the burden shifts to the transferee to show that he acted in good faith and provided reasonably equivalent value in exchange for the transfer." (*Id.*) The Board found that Henry and Domenick's actions establish that most of their transactions regarding the website and brochures were fraudulent transfers of Bella's assets. (*Id.*)

A. Section 10(e) Bars the Court's Consideration of the Respondents' Contention that Domenick and Bella Furniture Were Denied Due Process

The Respondents failed to raise their due-process issue before the Board by filing a motion for reconsideration concerning the issue after the Board issued its decision. The Court, therefore, is without jurisdiction to consider this belated challenge.

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), "[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."[19] *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *accord Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001).

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[19] In their opening brief, the Respondents have asserted no extraordinary circumstances to excuse their failure to follow Board procedures. Any such argument is therefore waived and cannot be raised in a reply brief. *See Star Color*, p. 27 n.10, above.

Section 10(e) accords with the general principle that "'[s]imple 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.'" *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Section 10(e)'s bar extends to arguments grounded in due process. *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *see also NLRB v. Snell Island SNF LLC*, 451 F. Appx. 49, 52 (2d Cir. 2011) (summary order) (no extraordinary circumstances excusing failure to raise due-process issue exist where company failed to move for Board rehearing) (citing *Woelke & Romero*, 456 U.S. at 666).

When the Board's decision departs from the analysis of the administrative law judge, a party seeking to challenge the issue on appeal must first bring its argument to the Board's attention via a motion for reconsideration or reopening of the record. *See Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1101-02 (D.C. Cir. 2001) (where party could not challenge findings until after issuance of Board decision, it can file motion for reconsideration and failure to do so "prevents consideration of the question by courts"); *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435 (2d Cir. 2001); *Snell Island SNF*, 451 F. Appx. at 52; *see also* NLRB Rules and Regulations, 29 C.F.R. § 102.48(d). The Respondents failed to file a

motion for reconsideration to assert and preserve its claim that the Board's decision deprived Domenick and Bella Furniture of due process, and the Court therefore cannot consider that issue.[20] *See Woelke*, 456 U.S. at 665-66 (issue barred by party's failure to file a motion for reconsideration). Under similar circumstances as here, the Supreme Court did not consider an employer's "objection that it was denied procedural due process because the Board based its order upon a theory of liability . . . allegedly not charged or litigated before the Board," because the employer "failed to file a petition for reconsideration." *Int'l Ladies' Garment Workers' Union*, 420 U.S. at 281 n.3.

The requirement that a motion for reconsideration be filed with the Board to preserve challenges serves practical and important purposes. Here, had the Respondents filed such a motion, they could have put the Board on notice of their due-process claim as a basis to reconsider the decision. Specifically, they could have asserted any prejudice that Domenick and Bella Furniture suffered because the Board imposed the burden of proof on them. Only they were in a position to show how they would have litigated the case differently if, as they contend, they

[20] The Respondents' obligation to raise its challenge in a motion for reconsideration is not excused by the discussion of the issue in Board Member Miscimarra's dissent and the Board majority's response. As the D.C. Circuit recently explained, "section 10(e) bars review of any issue not *presented* to the Board, even where the Board has discussed and decided the issue." *HealthBridge Mgmt. v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (quoting, with added emphasis, *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999)).

were not aware that the burden was on them and to demonstrate to the Board that it should have taken a different approach.

B. The Board Properly Found That Domenick and Bella Furniture Had Notice That an Actual Fraud Theory of Fraudulent Transfer Was at Issue, and They Were Not Prejudiced by Its Application

In any event, even if the Court were to reach the jurisdictionally barred due-process issue, the Respondents' arguments fail. A party asserting a due-process violation must show either "that it was specifically prejudiced" or that the Board failed to follow its established procedures. *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1244 (2d Cir. 1990); *see NLRB v. Coca Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82, 88 (2d Cir. 1987). The Respondents have not satisfied that burden, and, as explained below, there is substantial evidence to support the Board's finding that the Respondents had adequate notice of the allegation that Bella's payment of Domenick's invoice was a fraudulent transfer, and they had an opportunity to – and actually did – present their case. The Court has explained, in the somewhat different context of the General Counsel's amendment to an unfair labor practice complaint, that constitutional due-process requires (1) that a respondent before the Board have "fair notice of the acts alleged to constitute the unfair labor practice," and (2) that "the conduct implicated in the alleged violation has been fully and fairly litigated." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2d Cir. 1990). As the

Court observed, "whether a charge has been fully and fairly litigated is so peculiarly fact-bound as to make each case unique; a determination of whether there has been full and fair litigation must therefore be made on the record in each case." *Id.* at 136.

The Board reasonably found, on the record here, that there is evidence of notice to the Respondents throughout this proceeding of the General Counsel's "actual fraud" theory. First, the compliance specification itself alleged that "Henry . . . in concert with Bella Furniture and Domenick . . . has diverted the assets of Respondent Bella Masonry in an effort to render Respondent Bella Masonry insolvent and make it incapable of fulfilling its obligations.[21] (SA 65 n.11; EA 44-45.) Further, in a prehearing ruling regarding the Respondents' motion to quash the General Counsel's subpoenas, the judge articulated the allegation at issue as a "fraudulent conveyance" and relied on that theory in denying relevant portions of the motion. (SA 65 n.11; EA 1908-10.) And the General Counsel articulated the theory at the beginning of the hearing (SA 65 n.11;

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[21] Even if the compliance specification had not described the transaction as a fraudulent transfer that would not matter, as "[t]he due process clause does not require a precise statement of the theory upon which the General Counsel intends to proceed." *Pergament*, 920 F.2d at 136; *accord R&S Waste Servs. LLC v. NLRB*, 651 F. Appx. 34 (2d Cir. 2016) (summary order). And, in any event, the Board is not limited to the General Counsel's theory of the case. *See George Banta Co. v. NLRB*, 686 F.2d 10, 22 (D.C. Cir. 1982) (noting that "the legal theories . . . of NLRB counsel are not binding on the Board").

JA 31) and continued to pursue it. Thus, the Board reasonably found (SA 65 n.11) that the Respondents were on notice of the General Counsel's "actual fraud" theory where he "made abundantly clear his allegation that the Respondents fraudulently conveyed payments to Domenick in order to render the Respondents judgment proof."

Moreover, the judge recognized that the General Counsel was relying on fraudulent transfer. Demonstrating that recognition, the judge stated, "[i]n this respect, the General Counsel contends that this [Domenick's receipt of money "for services that he rendered to Bella Masonry at a rate greatly in excess of market value"] was just another way of transferring corporate funds to a family member in order to evade Respondents' legal responsibilities to make contractually owed payments. . . ." (SA 69.) Thus, even if fraudulent transfer was not the General Counsel's sole theory of liability, the Board properly found that the Respondents were on notice that it was among the asserted theories of liability. For this reason, the Respondents have not shown that the Board failed to follow established procedures by "chang[ing] theories in midstream without giving respondents reasonable notice of the change," as they contend (Br. 15), because the fraudulent transfer theory was neither newly raised (EA 44-45) nor relied on without notice (SA 65 n.11).

Nor, as the Board found (SA 66 n.13), was Domenick prejudiced by the Board's reliance on the actual fraud theory or by that theory's placement of the burden of proof on him after Henry's fraudulent intent was established.[22] The appropriateness of Bella's payment of the $34,100 invoice was unambiguously at issue during the compliance hearing and in the briefs to the Board, as was the issue of whether Domenick could justify the invoice's components. As the Board explained, Domenick was questioned extensively, for over 4 hours, "about whether his charges for this work were inflated and whether he could substantiate them." (SA 66 n.13.) Domenick testified in detail about the actions he purportedly took to design, maintain, and host Bella's website and to produce, stuff, and mail marketing materials, as well as about the basis for the invoice charges. (JA 382-83, 384, 385-94, 395-402, 403-04, 405-13, 415-38, 440-49, 450-54, 477-95.) As the Board further found, the Respondents' attorney introduced into evidence all of the documents that Domenick possessed regarding his work on Bella's website and marketing materials. (SA 66 n.13; JA 411, 426-29, 439-40, 455-76, 488, 491.)

The Respondents cannot plausibly contend that the issues of Domenick's good faith and provision of reasonably equivalent value were not fully litigated.

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[22] The Board's finding that Henry's financial transactions at relevant times "were undertaken with a motive to evade legal obligations" toward employees is unchallenged and well-supported. (SA 65, 72-73.) Further, Henry paid Domenick's invoice in full, despite knowing that the charges were grossly inflated. (SA 65-66.)

Domenick's improper motive and lack of good faith were amply demonstrated by his admitted knowledge of the alter ego allegations on whatever date he prepared and sent Bella the $34,100 invoice, his obvious overcharges for services provided, his fabricated charges for services not provided and costs not incurred, and his withdrawal of $34,400 in cash from Bella Furniture's account within a week after depositing Bella's $34,100 check. (SA 65-66.) Further, having established legitimate charges of only $720 for the brochures and $385 in website-hosting fees, Domenick failed to show that he provided reasonably equivalent value.[23] The Respondents identify no additional evidence they would have introduced. And, having presented all of the evidence available on this issue, the Respondents cannot demonstrate that they were prejudiced by their asserted lack of notice that they would bear the burden of proof. Here, as in *Pergament*, the Respondents "proceeded in exactly the same way [they] would have been expected to proceed" had the General Counsel even more explicitly stated his fraudulent transfer theory and they failed to show that they "would have presented a *different* case." *Pergament*, 920 F.2d at 136-37.

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[23] The Respondents' Facts section (Br. 11-12) asserts that "the General Counsel offered no expert testimony or proof of the going rate" for the website and brochure services Domenick purportedly provided. They do not, however, dispute the evidence relied upon by the Board to show the fraudulent transfer; nor do they develop the point in the Argument.

CONCLUSION

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

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March 2017

ADDENDUM

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

. . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act . . . .

. . .

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

New York State Lien Law, Consolidated Laws of New York, Ch. 33, art. 3-A § 71 subdiv. 2 provides in relevant part:

2. The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property, including home improvement or public improvement and incurred in the performance of his contract or subcontract, as the case may be:

   (a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;

   . . .

   (d) payment of any benefits or wage supplements, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;

New York State Lien Law, Consolidated Laws of New York, Ch. 33, art. 3-A § 75 provides in relevant part:

. . .

2. Every trustee shall keep books or records with respect to each trust of which he is trustee and, if funds of separate trusts are deposited in the same bank account, shall keep a record of such account showing the allocation to each trust of the deposits therein and withdrawals therefrom.

3. The books or records with respect to each trust shall contain the following entries:

A. Trust assets receivable. . . .

B. Trust accounts payable. . . .

C. Trust funds received. . . .

D. Trust payments made with trust assets. (1) The name and address of each person to whom a payment for the purposes of the trust has been made, with moneys or other assets constituting trust assets, including payments made directly to such person on behalf of the trustee by a person from whom trust assets are receivable; (2) the date when and place where each payment was made; (3) the amount paid on each of such dates and a statement whether the payment was made in cash or by check and the manner of payment if made by some other person on behalf of the trustee; (4) with respect to each such payment a statement of the nature of the trust claim of if the owner is trustee the nature of the expenditure other than payment of a trust claim, for which the payment is made, sufficient in any case to identify the payment as a payment for a trust purpose and to show whether it is for labor, materials, taxes, insurance, performance under contract or subcontract, interest charges on mortgages, or other particular trust claim or item of cost of improvement; (5) if any such payment was made pursuant to contract between the trustee and the recipient of the payment, the date when such contract was made, whether it was oral or in writing, and the agreed price named therein; (6) if any such payment upon a contract or subcontract relates to a particular item or items of the improvement, of if any such payment for materials or

services relates to materials furnished, or services, other than daily or weekly labor, rendered for or upon a particular item or items of the improvement, a description of such item or items; (7) if any such payment was made with funds received under an assignment of funds due or earned or to become due or earned under the contract or subcontract, a statement of the amount of such funds so used together with the name and address of the assignee and the date of the assignment.

E. Transfers in repayment of or to secure advances made pursuant to a "Notice of Lending." . . .

4. Failure of the trustee to keep the books or records required by this section shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him as money or an instrument for the payment of money for purposes other than a purpose of the trust as specified in section seventy-one of this chapter.

New York State Lien Law, Consolidated Laws of New York, Ch. 33, art. 3-A § 77(8) provides in relevant part:

8. Subject to subdivisions three and four of this section, in any distribution of trust assets pursuant to order or judgment in an action to enforce a trust, the following classes of trust claims shall have preference, in the order named: (a) trust claims for taxes and for unemployment insurance and other contributions, due by reason of employments, and for amounts of taxes withheld or required to be withheld; (b) trust claims of laborers for daily or weekly wages; (c) trust claims for benefits and wage supplements; (d) claims for any amounts of wages of laborers for daily or weekly wages (other than claims for amounts of taxes deducted and withheld, constituting trust claims for such amounts) actually deducted from payments thereof, pursuant to law or agreement, for remittance to any person on behalf of the laborer or in satisfaction of his obligation, to the extent that such person is entitled to assert, as a trust claim, the claim the laborer would otherwise have for such amount.

Except as provided in this subdivision, trust claims entitled to share in any distribution of trust assets pursuant to order of the court shall share pro rata.

29 C.F.R. § 102.48(d) provides in relevant part:

(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.

. . .

Federal Rule of Appellate Procedure 28(a)(8)(A) provides in relevant part:

(a) Appellant's Brief.

The appellant's brief must contain, under appropriate headings and in the order indicated:

. . .

(8) 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; . . .

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner – Cross Respondent	)	
	)	Nos. 16-2200 & 16-2705
v.	)	
	)	Board Case No.
ACE MASONRY, INC. d/b/a ACE UNLIMITED,	)	03-CA-073540 et al.
BELLA MASONRY, LLC, a single employer	)	
and alter egos, LISA BELLAVIGNA, ROBERT	)	
BELLAVIGNA, HENRY BELLAVIGNA,	)	
DOMENICK BELLAVIGNA, BELLA	)	
FURNITURE SOLUTIONS, INC.	)	
	)	
Respondents – Cross Petitioners	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,408 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 20th day of March, 2017

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DOMENICK BELLAVIGNA, BELLA	)	
FURNITURE SOLUTIONS, INC.	)	
	)	
Respondents – Cross Petitioners	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2017, I electronically filed the foregoing document 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 certify that the foregoing document was served on all those 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 addresses listed below:

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National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 20th day of March, 2017