

Nos. 16-1303, 16-1347, 16-1446

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**ISLAND ARCHITECTURAL WOODWORK, INC. AND VERDE
DEMOUNTABLE PARTITIONS, INC., ALTER EGOS,**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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PARTITIONS, INC., ALTER EGOS,)	
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Petitioners/Cross-Respondents)	
)	Nos. 16-1303, 16-1347,
v.)	16-1446
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	29-CA-124027
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Island Architectural Woodwork, Inc. and its alter ego Verde Demountable Partitions, Inc. were the Respondents before the Board and are the Petitioners/Cross-Respondents before the Court. The Board’s General Counsel was a party before the Board, and the Board is the Respondent/Cross-Petitioner before the Court. The Northeast Regional Council of Carpenters, Local 252 was the charging party before the Board, but has not intervened here. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

The ruling under review is a Decision and Order of the Board (then-Chairman Pearce and Members Hirozawa and McFerran) in *Island Architectural Woodwork, Inc. and Verde Demountable Partitions, Inc. Alter Egos*, 364 NLRB No. 73 (Aug. 12, 2016). (JA 1-16.)

C. Related Cases

This case has not previously been before this, or any other, court. Board counsel is not aware of any related cases.

/s/ Linda Dreeben
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Dated at Washington, DC
this 24th day of March, 2017.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

The Act	The National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
The Board	The National Labor Relations Board
I-Br.	Opening brief of Petitioner/Cross- Respondent Island Architectural Woodwork, Inc.
Island	Island Architectural Woodwork, Inc.
JA	Joint Appendix
MOA	Memorandum of Agreement
The Union	Northeast Regional Council of Carpenters, Local 252
V-Br.	Opening brief of Petitioner/Cross- Respondent Verde Demountable Partitions, Inc.
Verde	Verde Demountable Partitions, Inc.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petitions of Island Architectural Woodwork, Inc. (“Island”) and Verde Demountable Partitions, Inc. (“Verde”) for review, and the cross-application of the National Labor Relations Board (“the

Board”) for enforcement, of a final Board Decision and Order issued against Island and Verde on August 12, 2016, and reported at 364 NLRB No. 73.¹

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, 29 U.S.C. § 160(e), which allows the Board to cross-apply for enforcement. The petitions and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that Island and Verde are alter egos and therefore that Island and Verde violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize the Northeast Regional Council of Carpenters, Local 252 (“the Union”) as the collective-bargaining representative of employees in covered classifications at Verde, and by repudiating and failing to apply the collective-bargaining agreement between Island and the Union to unit employees.

¹ Record references in this final brief are to the Joint Appendix (“JA”) filed by Island on March 20, 2017. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “I-Br.” references are to Island’s opening brief, and “V-Br.” references are to Verde’s opening brief.

2. Whether substantial evidence supports the Board’s finding that Island and Verde violated Section 8(a)(5) and (1) of the Act by insisting on a permissive subject of bargaining as a condition of reaching a successor collective-bargaining agreement, specifically that the Union agree to alter the scope of the bargaining unit.

3. Whether, even if Island and Verde are not alter egos, Island violated Section 8(a)(5) and (1) of the Act by insisting, as a condition of reaching a successor collective-bargaining agreement, that the Union agree to alter the scope of the bargaining unit, a permissive subject of bargaining, by constraining the Union’s right to represent Verde’s employees in the future, irrespective of the relationship between the two entities.

APPLICABLE STATUTORY PROVISIONS

Section 7 of the Act, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection

Section 8(a) of the Act, 29 U.S.C. § 158(a):

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.
- (5) to refuse to bargain collectively with the representatives of

his employees

Section 8(d) of the Act, 29 U.S.C. § 158(d):

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case came before the Board on unfair-labor-practice charges filed by the Union against Island and Verde. (JA 348, 349.) After investigation, the Board's General Counsel issued a complaint, alleging that Verde is the alter ego of Island and that Island and Verde violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of their employees. (JA 350-55.) During the two-day hearing, the General Counsel called three witnesses: two from the Union and one Island unit employee. Island called one witness: its president and chief executive officer, Edward Rufrano. No one from Verde testified, and Verde's counsel called no witnesses. Following the hearing, the administrative law judge issued his decision and recommended order. Although the judge noted that the facts were "more ambiguous" than other alter ego cases, he dismissed the complaint. (JA 10-16.) After the General Counsel and the Union filed timely exceptions to the judge's findings and conclusions, the Board issued its Decision

and Order, reversing the judge and finding that Island and Verde are alter egos and that they violated the Act as alleged. (JA 1-10.)

II. THE BOARD'S FINDINGS OF FACT

A. Island's Operations and the Union

Island is a “custom architectural woodworker” that produces wood cabinetry and other products for the interiors of high-end corporate clients, such as banks and investment firms. (JA 1, 11; JA 156, 230-31.) Island builds those projects based on design drawings from architecture firms. (JA 1; JA 231, 234.) Approximately 65 percent of Island’s work comes from projects designed by one particular architecture firm (“the Firm”).² (JA 1, 11; JA 241.) Typically the Firm designs products for a customer and then hires Island to manufacture them. (JA 1; *see* JA 234-35.)

Edward Rufrano and Roger Stevens co-founded Island in 1993. (JA 1; JA 229, 292-93.) At some point, Rufrano bought Stevens’ shares, and now Rufrano, Angelo DeMarco, and Stevens’ sons own Island. (JA 1, 11; JA 229, 292-93.) Rufrano serves as Island’s president and chief executive officer, and DeMarco serves as its vice-president and Rufrano’s second-in-command. (JA 1, 11; JA 56, 228, 461-63.)

² The parties agreed to keep the name of the Firm confidential. (JA 1 n.3; JA 345.)

The Island complex consists of three nearby buildings known as the “front” (or “main”), the “back,” and the “side” buildings. (JA 1; JA 43-44, 91-94, 114-16, *see* JA 402.) Rufrano, DeMarco, and Stevens and his sons own the three buildings, which they lease to Island. (JA 1; JA 254, 278-79.)

For the past twenty years, the Union has represented Island’s employees. (JA 1; JA 41, 364-77.) Specifically, the bargaining unit consists of: “all full time and part-time production employees, and installers employed by the Employer.” (JA 11; JA 366.) Production employees are responsible for, among other things, cutting, assembling, finishing, and veneering Island’s products. (JA 116-121, 124, 131, 156-57, 160-65, 168-69, 171, 280-84.)

B. The Firm Asks Island To Mass-Produce and Market Wood Demountable Office Partitions

Island’s product line has long included custom wood and glass office partitions. (JA 1; JA 232, 236, 238, 293.) Those moveable, floor-to-ceiling partitions are designed to allow high-end companies to reconfigure their office spaces. (JA 11; JA 235-36.) In 2007, Island, working with the Firm, created a particular wood and glass office partition produced with “green” materials; the Firm liked it and wanted to reuse the design for different clients. (JA 1, 11; JA 232-33, 238.) The Firm asked Island to mass-produce and market the product,

dubbed the “Island Verde Green Demountable System” (hereinafter “Green partitions”).³ (JA 1, 11; JA 232-34, 238-42, 392-93.)

Island’s mass-producing and marketing the Green partitions proved impractical and unprofitable due to Island’s high production costs. (JA 1; JA 234, 236-37, 246, 313-15, 339, 444.) Nevertheless, because the Firm is vital to Island’s business, Island continued to try to accommodate the Firm, while producing the Green partitions on a custom basis. (JA 1; JA 53-54, 118-20, 238-42, 250, 293, 320-21, 392-93, *see* JA 445-47.)

For years, the Firm continued to press Island to mass-produce and market the Green partitions. (JA 1; JA 239-40, 320-21.) Between approximately 2009 and 2013, Rufrano negotiated with three companies about selling the Green partitions line to accommodate the Firm and to recoup the money that Island invested in designing and manufacturing the product. (JA 1; JA 239-46.) Although Rufrano received one “not very good” offer, that company was “not in good standing” with the Firm, and Rufrano ultimately rejected it. (JA 1; JA 246.)

Around the same time, Island also began investigating ways to maximize its manufacturing efficiency to better compete with its non-union competitors and

³ Island continues to custom produce other wood partitions, but only the Verde product is at issue in this case. (JA 2; JA 236.) To avoid confusion between Verde the entity and Verde the product, the brief will refer to the Verde product as “Green partitions.”

those that outsourced to non-union shops. (JA 2, 3 n.11; JA 248, 336-39.) Island decided to automate, and in the process consolidated its operations into two of its three buildings: the front building and the side building, leaving the back building underutilized. (JA 2; JA 180-81, 248-49.) By October 2013, only a few of Island's production employees remained in the back building. (JA 2, 12; JA 122, 248, 286-87.) Those unit employees worked in the milling department, which primarily dealt with hardwoods and assembling the Green partitions and doors. (JA 116-21, 159-62, 268, 280.)

C. Rufrano Facilitates the Creation of Verde and Transfers the Green Partitions Business to Verde Without Formal Documentation

Jeffrey Brite, a former Firm employee who saw opportunity in the product, had been speaking to Rufrano about becoming personally involved in the business. (JA 1; JA 246-47, 271-73.) Brite, however, had little understanding of the Green partitions business. (JA 247.) Rufrano had the idea of “lending this expertise to him” through his daughter Tracy D’Agata, who had eighteen years’ experience at Island, and, Rufrano thought, would be “a very good face” for the Green partitions business. (JA 1 & n.4; JA 247, 308-09, 313.) Ultimately, Brite agreed and pursued additional investors – including the Firm and Rufrano’s friend, Allan Schatten – to form a separate entity, Verde Demountable Partitions, Inc., to manufacture and sell the Green partitions. (JA 1-2; JA 247-48, 271-73.)

Rufrano's two daughters, D'Agata and Jessica Ondrush (a longtime bookkeeper at Island), Brite, and the Firm each contributed an unspecified amount of financial assistance to start Verde. (JA 2; JA 263.) D'Agata and her sister Ondrush together own 64 percent of Verde, and the other investors own the remaining 36 percent. (JA 2, 12; JA 263, 270-71.) D'Agata, Ondrush, Brite, and Schatten are Verde's directors, with D'Agata serving as president and Ondrush as secretary and treasurer. (JA 2; JA 438, 461-63.) Rufrano was not interested in an ownership stake in Verde. (JA 1; JA 314-15, 317.)

Verde and Island created no formal documentation of the purported sale, or most other aspects of their relationship, until over a year after Verde began operations – after the Union filed unfair-labor-practice charges and after the General Counsel issued the companies an investigatory subpoena.⁴ (JA 2 & n.5; JA 405-38, 448-53.) All but one of the formal documents are dated October 27, 2014 – the day before they were produced pursuant to that subpoena – and all but

⁴ Island and Verde did not sign the agreements until after the General Counsel instituted a subpoena enforcement action in the Eastern District of New York, and the court issued an Order to Show Cause. *See* Order to Show Cause, *NLRB v. Island Architectural Woodwork, Inc. and Respondent Verde*, No. 14-MC-01116 (MKB) (E.D.N.Y. Oct. 7, 2014), ECF No. 7. Thereafter, Island's counsel responded on Island and Verde's behalf, promising that both would produce documents by October 28, 2014. Response to Motion to Compel, *NLRB v. Island Architectural Woodwork, Inc. and Respondent Verde*, No. 14-MC-01116 (MKB) (E.D.N.Y. Oct. 14, 2014), ECF No. 10.

one contain backdating provisions or expressly reference documents that contain backdating provisions.⁵ (JA 2 & n.5; JA 405-38, 448-53.)

The delay in signing those agreements, as well as the agreements themselves, provided lengthy grace periods amounting to hundreds of thousands of dollars in deferrals and savings to Verde. (JA 1-2 & n.6, 5-6; JA 314-15, 317, 405-20, 428-37.) For example, the new Verde entity purchased from Island “all of the intangible assets” specific to the Green partitions for \$750,000. (JA 2 & n.6; JA 405-20.) Island, however, did not engage any experts to determine the value of the Green partitions business. (JA 2 n.6; JA 329.) And Verde paid only \$200,000 at closing, did not sign a promissory note on the remaining balance until over a year later, and deferred monthly payments for six months. (JA 2 n.6, 5-6; JA 405-20.) Further, although Verde began operations in the back building in October 2013, the building lease is dated June 2014, which allowed Verde to use the back building rent-free for approximately eight months. (JA 2 & n.6; JA 428-31.) Island also gave Verde a one-year grace period under the equipment lease, which was not signed until October 2014. (JA 2 n.6; JA 432-37.)

⁵ The lease for the back building is dated June 1, 2014 and does not include a backdating provision. (JA 2 n.5; JA 428-31.)

D. In October 2013, Verde Begins To Produce Green Partitions in the Back Building Without Notifying or Recognizing the Union

Despite the lack of formal documentation of the transaction, in October 2013 Island cleared out the back building for Verde to begin its operations. (JA 2.) Without first informing the Union, Island's foreman told the remaining unit employees that they were being transferred out of the back building and that "no union members were allowed to enter the building again." (JA 2-3, 6; JA 44, 46, 127-28, 184-85, 285.) Soon thereafter, a "Verde" sign appeared on the back building, and Verde began operations. (JA 2-3; JA 44, 94-95, 285-87.)

From Verde's inception, its production employees largely performed the same work, and on the same equipment, that Island's unit employees had performed in the back building. (JA 2-3, 4; JA 87-88, 133-41, 156, 168-69, 242, 280-81.) Specifically, Verde employees performed hardwood milling and assembly of the Green partitions, which Island employees no longer performed, and Island employees were responsible for all veneer work, "an integral part of the partition system."⁶ (JA 4-5; JA 131-34, 140-41, 168-69, 280-84.) Materials

⁶ This collaboration was eventually memorialized in the Mutual Supply Agreement, signed October 2014, in which Island agreed to "manufacture veneer panels, face and press doors, sand panels and doors and provide other machining and services as required for [Verde] upon request" for cost plus 20 percent. (JA 2 & n.7; JA 424-25.) In turn, Verde agreed to "manufacture and prime doors, manufacture moldings and hardwood profiling and manufacture partitions and related manufacturing services for [Island] upon request," for cost plus 20 percent,

continued to flow between the front and the back buildings as they underwent different parts of the production process, performed by production employees of both Island and Verde. (JA 2-5; JA 131-34, 168-69, 280-84.)

For its production work, Verde hired two employees who had performed bargaining-unit work in the back building for Island, as well as several production employees who had never worked for Island. (JA 2, 4; JA 125-30, 153-56, 162, 173, 287-88, 316-17.) Verde also hired several of Island's non-production personnel, including D'Agata, Ondrush, a foreman, and an engineer who had helped design the Green partitions. (JA 2, 4; JA 144-48, 173, 273-75, 287, 315-17, 461-63.) Neither Island nor Verde recognized the Union as the representative of Verde's production employees, nor did either apply the terms of Island's collective-bargaining agreement to them. (JA 3; JA 315.)

E. The Union and Island Attempt to Negotiate a Successor Contract; Island Insists the Union Waive Representation of Verde's Employees

Around the time Verde began operations, the Union and Island began negotiations for a successor agreement to their 2009-2013 contract, which, after two extensions, was again expiring. (JA 3, 13; JA 42, *see* JA 364-79.) Shortly after negotiations began, the Island shop steward, who was one of the employees

and to provide Island with warehousing services for \$3500 per month. (JA 2 & n.8; JA 424-25.)

who had been displaced from the back building, notified the Union that non-union employees were performing bargaining-unit work there. (JA 3, 6; JA 43-46, 184-85.) A union official met with DeMarco and Rufrano to question them about this change, and Rufrano claimed that he had sold D'Agata the building and equipment and that D'Agata now owned the business operating in the back building. (JA 3; JA 46-47.)

At the beginning of December 2013, union representatives met with Rufrano and DeMarco to further discuss Verde's using non-union employees to perform bargaining-unit work. (JA 3; JA 47-49, 185.) Rufrano explained that Verde was a separate business, owned and run by his daughter, and that he would not be involved or "set foot in Verde." (JA 3; JA 48-49, 96-97, 186-87, 211-12, 215.) He further explained that Verde could build wood partitions more cheaply than Island, which would benefit both Island and the Union, because Island would have an exclusive agreement to perform the incidental millwork and cabinetry related to Verde's partition projects. (JA 3; JA 187-88.) The parties did not resolve the issue of non-union employees performing bargaining-unit work in the back building. (JA 3; JA 188.)

In January 2014, the Union met with Rufrano and DeMarco for a bargaining session. (JA 3; JA 50.) At that meeting, the Union and Island tentatively agreed on all contractual issues, except for one pertaining to seniority. (JA 3; JA 50-51.)

Before the meeting concluded, however, Rufrano told the Union that in the new collective-bargaining agreement, it must waive any claims over Verde's work before Rufrano would agree to sign. (JA 3; JA 51-52, 57-58.) The Union refused, and the meeting ended.⁷ (JA 3; JA 52.)

On February 26, 2014, the Union's president again met with Rufrano, who told him that a few contractual issues, in addition to seniority, remained outstanding. (JA 3; JA 189-90, 213-14, 444.) Following up on previous discussions about non-union employees performing bargaining-unit work in the back building, Rufrano demanded that the Union sign a memorandum of agreement ("MOA"), waiving its right to represent those employees. (JA 3, 13; JA 190-91, 193, 439-41.) Rufrano also mentioned that his role with Verde had changed since his meeting with the Union in December and that he would now be involved, though he did not specify the nature or extent of his involvement. (JA 3; JA 211-12, 216-17.)

In the meeting, Rufrano also described Island's "plight" as a union contractor and emphasized that Island had difficulty securing Green partition contracts for the past 3-4 years because its prices are higher than that of its foreign competitors. (JA 3 & n.11; JA 444, *see* JA 313-15, 339.) He promised that if the

⁷ DeMarco continued to discuss the seniority issue with the Union through at least mid-March. (JA 3; JA 458-60.)

Union and Island could “come to terms,” Verde would sign “exclusive agreements” that Island would receive all of Verde’s outsourced veneer work along with the millwork to match Verde’s Green partitions. (JA 3; JA 444.) He emphasized that Island “only stands to gain if [Verde] succeeds,” as “millions” had been made in the past. (JA 3; JA 444.)

The next day, the Union received the draft MOA by email. (JA 3, 13; JA 191, 439-41.) That document states that in order to resolve the issue of Verde’s employees performing bargaining-unit work and to “finalize” a new collective-bargaining agreement, the parties agree as follows:

1. The parties agree that the employees of Verde do not fall within the bargaining unit definition as set forth in either the expired or successor agreement regardless of Verde’s ownership.
2. The parties agree that any ownership interest in or management of Verde by any principal of the Employer, including, but not limited to, Edward Rufrano and Angelo DeMarco, shall not create a joint employment or alter ego relationship or otherwise constitute an accretion under the expired collective bargaining agreement. The parties agree and understand that Verde and the Employer are distinct, unrelated entities.
3. By executing this Agreement, the parties waive all existing and future grievances and claims involving the work performed by Verde, including, but not limited to, the subcontracting or joint venture provisions of the Agreement.⁸

⁸ The subcontracting provision of the Union’s most recent collective-bargaining agreement provides that no bargaining-unit work “will be subcontracted, transferred, leased or assigned . . . to any other facility, person or non-bargaining unit employee” without the Union’s consent. (JA 4 n.12; JA 375.) And the agreement’s joint venture provision provides that the agreement shall be applicable

(JA 3-4; JA 439-41.)

In March 2014, the Union informed Rufrano, both by telephone and by certified letter, that although it would not sign the MOA, it would like to continue with contract negotiations. (JA 3-4, 13; JA 193-94, 442-43.) Rufrano refused to meet. (JA 4, 13; JA 194, 199-200.)

In March and April 2014, the Union filed unfair-labor-practice charges, alleging that Verde and Island refused to apply the collective-bargaining agreement to the newly created entity and insisted to impasse on a non-mandatory term and condition of employment. (JA 348-49.)

F. As of February 2015, Verde Continues To Rely on Island To Produce the Green Partitions

As of February 2015, on the date of the hearing, Verde was continuing to work with Island to manufacture Green partitions and other wood products (*see* pp. 11-12). (JA 2-3.) At that time, Island was still marketing the Green partitions. (JA 3, 5; JA 268-69, 300-02, 445-47.) In a video posted on Island's website, Ondrush's husband, an Island employee, promoted the product, and D'Agata was listed as the point of contact. (JA 3; JA 275-77, 310-11.)

to any work performed by Island as a single or joint employer with another entity. (JA 4 n.12; JA 375-76.)

Despite her long tenure at Island, D'Agata's experience as a project manager there only familiarized her with the Green partitions from a sales standpoint, and she was not "intimately involved with the product" or its production processes "at all." (JA 1; JA 277, *see* JA 274-76, 310-13.) Rufrano, DeMarco, and an Island foreman, however, are familiar with the Green partitions from a production standpoint, and Island informally agreed to assist Verde with production, and many other aspects, of its operations until at least December 31, 2015. (JA 1; JA 142-44, 166-68, 254-58, 275, 277, 311-13, 421-23, *see* JA 461-63.) At no cost, Island assisted Verde with management, operations, estimating, back office functions, drafting, engineering, and purchasing, and provided Verde with sales training and trucking. (JA 2 & n.7; JA 421-23.) As with most of the other agreements, Island and Verde did not sign a written agreement (the "Transitional Services Agreement") memorializing that understanding until over a year later, again backdating the agreement to October 1, 2013. (JA 1, 2 & n.5; JA 421-23.)

In keeping with their arrangement, Verde management, many of whom used to work for Island, periodically attends Island's weekly meetings regarding "[p]roject coordination, materials, labor, scheduling, and profitability." (JA 3; JA 147-48, 150-51, 324-27.) And Rufrano, in turn, visits Verde two to three times per month. (JA 326.) Island and Verde also share the same law firm for corporate

filings, accounting firm, bank, computer and copier maintenance services, and numerous building-related services. (JA 12; JA 461-63.)

Because of lower-than-expected demand for the Green partitions, Verde also has been producing cheaper metal and glass partitions, a product that Island has never made. (JA 3; JA 262-63, 321.) Approximately 30 percent of its partitions are wood, and 70 percent are metal. (JA 3; JA 263.) The Firm, however, is “spending significant dollars” to promote the Green partitions, and according to Rufrano, the potential for their profitability remains “tremendous.” (JA 3, 13; JA 261-62.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On August 12, 2016, the Board (then-Chairman Pearce and Members Hirozawa and McFerran) disagreed with the administrative law judge and found that Island and Verde are alter egos and that they violated Section 8(a)(5) and (1) of the Act. (JA 1.) Specifically, the Board found that Island and Verde acted unlawfully by refusing to recognize the Union as the collective-bargaining representative of employees in covered classifications at Verde, and by failing to apply the terms of the collective-bargaining agreement covering Island’s bargaining unit to employees performing unit work at Verde. (JA 1, 7, 8.) Further, the Board found that the companies violated Section 8(a)(5) and (1) of the Act by insisting in successor contract negotiations that the Union agree to exclude Verde’s

employees from the unit. (JA 1, 7-8.) Alternatively, the Board found that, even if Island and Verde were not alter egos, Island unlawfully insisted on a permissive subject of bargaining, namely, constraining the Union’s right to represent Verde’s employees in the future and limiting the unit’s scope. (JA 7-8 n.20.)

The Board’s Order directs Island and Verde to cease and desist from the unfair labor practices found and from “[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”⁹ (JA 8-9.) Affirmatively, the Order requires Island and Verde to give full force and effect to the most recent collective-bargaining agreement and any successor agreements and apply them to the employees in the relevant unit at both Island and Verde and to recognize and, on request, bargain in good faith with the Union, without insisting that the Union consent to a non-mandatory bargaining proposal. (JA 8-9.) Additionally, Island and Verde must make unit employees whole for any loss of earnings and other contractual benefits resulting from Island and Verde’s failure to apply the terms of the bargaining agreement in the manner set forth in the Remedy section of the Board’s decision; compensate unit employees for the adverse tax consequences of receiving lump-

⁹ Section 7 of the Act guarantees employees “the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.

sum make-whole awards; file with the Regional Director a report allocating the backpay awards to the appropriate calendar years for each employee; and post a remedial notice. (JA 8-9.)

SUMMARY OF ARGUMENT

Substantial record evidence supports the Board's finding that Island and Verde are alter egos and therefore violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union and failing to apply the terms of the collective-bargaining agreement to Verde employees performing bargaining-unit work. As the Board reasonably found, the two entities share numerous indicia of alter egos, including substantially identical business purposes, operations, premises, and equipment. Indeed, faced with an underperforming product (the Green partitions), Island transferred the union employees who manufactured that product from its back building and told them that "no union members were allowed to enter the building again." Soon thereafter, a new entity, Verde, began producing the Green partitions, using some of Island's former employees, performing the same work, with the same equipment, in the same building, and under the expertise of the same individuals, but without first informing or recognizing the Union.

Moreover, the Board's alter ego finding is further supported by evidence that the transfer of the Green partitions line from Island to Verde was less than arm's-length. Rufrano's two daughters owned 64 percent of Verde, which initially

operated without any documentation of the purported sale of the Green partitions, any leasing arrangements between the two entities, or their shared services and supplies. Documentation was created after eight months or more of Verde's operation and not until the Union filed unfair-labor-practice charges. The delay in signing the agreements, and their favorable terms, allowed Verde to save and defer approximately half a million dollars in costs and operating expenses. Additionally, Rufrano's claim that Island would be guaranteed "exclusive agreements" with Verde that would amount to future millions demonstrated that Island exercised substantial financial control over Verde.

The Board also reasonably found that Verde was created to evade Island's bargaining obligations to the Union. Rufrano sought to conceal Island's relationship with Verde until the Union demanded information. Then Rufrano repeatedly communicated his intent that Verde employees not be unionized, ultimately demanding that the Union sign an MOA waiving all rights to the Verde bargaining-unit work to avoid the "plight" of "every union contractor" and financially benefit Island.

Substantial evidence also supports the Board's finding that Island's insistence that the Union sign the MOA as a condition of reaching a successor collective-bargaining agreement violated Section 8(a)(5) and (1) of the Act. The Board properly treated Rufrano's repeated demands that the Union sign the MOA,

disavowing Verde's bargaining-unit work, as a proposal to alter the scope of the unit, a permissive subject of bargaining. And it is well-settled that an employer's conditioning agreement on acceptance of a permissive subject is not good-faith bargaining and violates the Act. Verde, as Island's alter ego, is also liable for this violation.

Finally, substantial evidence supports the Board's alternative finding that even if the two entities are not alter egos, Island's demand that the Union sign the MOA constrained the Union's right to represent Verde's employees in the future. Again, such a demand is a proposal to alter the bargaining unit, a permissive subjective of bargaining. And Island, in demanding that the Union agree to that proposal as a condition of reaching a successor agreement, violated Section 8(a)(5) and (1) of the Act.

STANDARD OF REVIEW

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 Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been

before it *de novo*.” *Id.* at 488. *Accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation and internal quotation marks omitted).

The question of whether one company is an alter ego of another is “a question of fact properly to be resolved by the Board.” *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). The Board’s findings with regard to alter ego status must therefore be upheld if supported by substantial evidence. *See Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1420 (D.C. Cir. 1984).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ISLAND AND VERDE ARE ALTER EGOS

A. An Employer Violates the Act if It Evades Its Collective-Bargaining Responsibilities by Transferring a Portion of Its Business to an Alter Ego

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees”¹⁰

¹⁰ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. 29 U.S.C. §158(a)(1). A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

29 U.S.C. § 158(a)(5). An employer may not evade its collective-bargaining obligations by transferring its business, or a portion of its business, to what appears to be a different company, but is in fact a “disguised continuance” or alter ego of the original employer. *Southport Petroleum Co.*, 315 U.S. at 106. *See Fugazy*, 725 F.2d at 1419; *J.M. Tanaka Const., Inc. v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982) (citing cases) (finding that an unlawful alter ego relationship may exist when an employer transfers only a portion of its enterprise to a new owner). Because an alter ego is considered the same enterprise as the predecessor employer for purposes of the Act, the alter ego is bound by the collective-bargaining agreement between its predecessor and a union, *Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 458 (8th Cir. 2005), and is responsible for the unfair labor practices of its predecessor, *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974); *Fugazy*, 725 F.2d at 1419.

In determining whether two employers are alter egos, the Board and the Court consider a variety of factors, including whether they share “substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership.” *Fugazy*, 725 F.2d at 1419. *See also Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO, Local 576 v. NLRB*, 663 F.2d 223, 226-27 (D.C. Cir. 1980). Evidence that a new employer was formed with the intent to evade statutory or contractual obligations is also relevant, but not

essential, to an alter ego finding. *Fugazy*, 725 F.2d at 1419; *Howard Johnson Co.*, 417 U.S. at 259 n.5 (alter ego “cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws”). No single factor is controlling in determining alter ego status, and not all factors must be present; rather, the determination depends upon “all the circumstances of each case . . . since . . . the alter ego analysis should be flexible.” *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986). See also *Fugazy*, 725 F.2d at 1420 (finding alter egos where there was no common ownership between the two employers). Significantly, when making an alter ego determination, “each case must turn on its own facts.” *Amalgamated Meat Cutters*, 663 F.2d at 226-27 (quoting *Crawford Door Sales Co.*, 226 NLRB 1144, 1144 (1976)); *APF Carting, Inc.*, 336 NLRB 73, 77 (2001), *enforced*, 60 F. App’x 832 (D.C. Cir. 2003).

B. Island and Verde Are Alter Egos

The Board reasonably found that “the record as a whole establishes that [Island and Verde] are alter egos.” (JA 4.) As shown below, not only do they share substantially identical business purposes and operations, but Island exercises substantial financial control over Verde evidenced by a “significant lack of an arms-length relationship.” (JA 5.) Indeed, Verde operates as the “disguised continuance” of Island’s Green partitions business, using some of the same

employees, who perform the same work, on the same equipment, in the same space, and under the expertise of the same individuals. Although Island's President Rufrano initially claimed to the Union that he would not be involved in Verde's business, his explanations "continued to evolve," culminating in an effort to force the Union to agree to an MOA that "any ownership interest in or management of Verde by any principal of [Island], including . . . Edward Rufrano . . . , shall not create a joint employment or alter ego relationship or otherwise constitute an accretion under the expired collective bargaining agreement." (JA 3-4; JA 439-41.) The MOA attempted to have the Union waive all rights to the Verde bargaining-unit work as Rufrano sought to avoid the "plight" of "the union contractor" and to financially benefit Island's operations. (JA 439-41, 444.) The record evidence amply rebuts Island and Verde's argument that these are two separate businesses. (JA 4-7.)

1. Business purpose

Substantial evidence supports the Board's finding, in agreement with the judge (JA 4, 13), that Verde and Island "operate in the same sphere of business." "[T]wo entities have the same 'business purpose' if they deal in the same product or service." *Newspaper Guild of N.Y., Local No. 3 of Newspaper Guild, AFL-CIO v. NLRB*, 261 F.3d 291, 299 (2d Cir. 2001) (collecting cases). The Board reasonably found that "Verde was created for the purpose of manufacturing a

specific line of demountable partitions that Island had been producing.” (JA 4.)

And Island concedes that Verde “specialize[s] in the production of a former Island product,” and that Verde was, in fact, “founded in part for this purpose.” (I-Br. 25-26.)

Additional indicia of common business purposes (JA 5) are reflected in the collaboration between the two businesses on the Green partitions and on other aspects of their businesses. Indeed, substantial record evidence supports the Board’s finding, more fully discussed below in the “operations” section (pp. 30-37), that the two companies “collaborat[e] on a broad range of [] activities.” (JA 5.)

Island and Verde’s contention (I-Br. 25-31, V-Br. 9-12) that each entity has a different business purpose is meritless. To start, the companies misleadingly cite (I-Br. 25-26, V-Br. 9-10) their respective business purposes *after* Verde’s creation, claiming that because Island does not produce the Green partitions now, and Verde does, the two cannot share a similar business purpose.¹¹ First, that argument

¹¹ In making this argument, and elsewhere in their briefs (*e.g.*, I-Br. 28-30, V-Br. 12), the companies appear to confuse the alter ego doctrine with the single employer doctrine. The single employer doctrine generally applies to situations where two entities concurrently perform the same function and one entity recognizes the union and the other does not. *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 152 (3d Cir. 1994) (citing cases). The alter ego doctrine, by contrast, comes into play when a new legal entity has replaced the predecessor or a portion of its business. *Id.* (citation omitted).

ignores the substantial record evidence of the two companies' continuing collaboration and the clear terms of the MOA that contemplate robust ties between Island and Verde, including Island's potential future ownership interest of Verde and subcontracting of bargaining-unit work to Verde. (JA 4-5; JA 439-41.)

Second, and more significantly, the appropriate comparator is Island's business *before* Verde's creation, not after. *See Stardyne, Inc.*, 313 NLRB 170, 170 (1993) (finding shared business purpose where steel company spun off specialized portion of its business (laser operations) to alter ego), *enforced in relevant part*, 41 F.3d 141 (3d Cir. 1994); *Precision Builders*, 296 NLRB 105, 110 (1989) (finding common business purpose where old company ceased building foundations and new company started doing so). And it is uncontested (*see* I-Br. 12-13) that Island produced and attempted to market the Green partitions for several years before turning that portion of the business over to Verde.

Contrary to the companies' claims (I-Br. 26-28, V-Br. 9-10), substantial record evidence also supports the Board's finding that Verde's slight deviation from its original purpose – producing more metal partitions than wood partitions – “appears to be the result of a temporary lag in market demand for wood partitions.” (JA 5.) Rufrano testified that Verde was losing money because it, like Island, lacked the resources to market and mass-produce the wood product, and his testimony suggested that, as a result, Verde had turned to metal until Verde could

realize the wood product's "tremendous" potential. (See JA 12-13; JA 261-63, 321, see JA 234.) The record does not support Island's claim (I-Br. 27) that Verde always contemplated manufacturing metal partitions or that it modified Island's production equipment to do so.

Island's argument (I-Br. 27-28) that Verde's business purpose is different because it was formed to eventually mass-produce, rather than custom produce, the Green partitions is refuted by evidence that Island simply transferred a portion of its business to Verde.¹² At that point, Verde simply took over the attempt to accommodate the Firm's request to mass-produce the Green partitions where Island left off, and Rufrano concedes that the Green partitions are now "being manufactured in one of [his] other buildings" (JA 242), unburdened by the Union contract. As the Board reasonably found, even if Verde eventually succeeded in mass-producing the Green partitions, that change would be "only an insubstantial deviation in the production process that it inherited from Island." (JA 5.)

¹² The Board's decision in *Deer Creek Elec., Inc.*, 362 NLRB No. 171, 2015 WL 4882662 (Aug. 17, 2015), does not support Island's assertion (I-Br. 28) that it and Verde lack a similar business purpose. In that case, the Board did not address the administrative law judge's finding that the two companies shared substantially identical business purposes. *Id.* at *3. Instead, relying on other factors, it agreed with the judge that the two electrical contractors were not alter egos. *Id.* at *1-3. Accordingly, the case demonstrates the fact-specific nature of the alter ego determination.

2. Operations

Verde's operations are substantially similar to Island's operations before it transferred the Green partitions business. As the Board reasonably found, the "seamless" transition in production of the Green partitions from Island to Verde (JA 4) provides strong evidence that the two companies are alter egos. *See A.D. Conner, Inc.*, 357 NLRB 1770, 1787 n.44 (2011) (stating that "the lack of 'any hiatus in operations' between alleged alter ego companies is probative evidence of unlawful motivation" (citation omitted)); *Advance Elec.*, 268 NLRB 1001, 1002 (1984) (finding two companies were alter egos where union company closed on Friday and reopened as non-union company on Monday).

In October 2013, Island transferred its remaining unit members from the back building, told them that "no union members were allowed to enter the building again," and installed a "Verde" sign on that building, all in quick succession. (JA 2-3.) Despite the purported restructuring, because Verde does not yet mass-produce the Green partitions, production in the back building continued largely unchanged, except Verde's non-unit employees were now performing bargaining-unit work. (JA 2-5; JA 88, 242, 280-84, 320-21.) *See Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994) (finding alter egos where "day-to-day operation . . . remained nearly unchanged after the transition). Materials continue to travel between the back and front buildings, now purportedly inhabited by the

separate corporate entities, as those materials undergo different parts of the production process. (JA 2-5.) And specifically, Verde employees now perform hardwood milling and assembly of the Green partitions, tasks that Island bargaining-unit members used to perform in the back building, while Island employees continue to perform veneer work for Verde – work that Rufrano admitted is an “integral part of the [wood] partition system” – in the front building. (JA 5; JA 281.) Over a year after Verde purportedly took over production of the Green partitions, Island continued to advertise the product on its website and on YouTube,¹³ while Verde’s website simply said “coming soon.” (JA 3, 5; JA 306-10, 445-47.) This ample record evidence of Island and Verde’s “interrelated operations” (JA 5) shows that the two companies are, for all practical purposes, functionally indistinguishable.

Notably, in performing these operations, it is uncontested that Verde leases the same building and the same equipment from Island that Island used to manufacture the Green partitions. Island and Verde’s substantial identity in equipment and premises provides further support for the Board’s alter ego finding. (JA 4-5.) *See A & P Brush Mfg. Corp. v. NLRB*, 140 F.3d 216, 220 (2d Cir. 1998) (similar equipment and supplies); *Stardyne*, 41 F.3d at 151; (“mostly the same

¹³ The video is still accessible on YouTube. *See* <https://www.youtube.com/watch?v=zkdYDTva0U> (last visited Feb. 23, 2017).

equipment” and same facility); *Allcoast Transfer, Inc.*, 780 F.2d at 582 (substantially identical equipment); *Tanaka*, 675 F.2d at 1034 (same office, plant, and quarry and almost all the same equipment).

The Board also reasonably found (JA 5) evidence of the companies’ substantially similar operations in Verde’s use of, and need for, Island’s “expertise and engineering” pertaining to the Green partitions (JA 258). Although Rufrano’s daughter may have been “a very good face of Verde” (JA 1 & n.4; JA 313), she could not produce the Green partitions without Island’s help because she lacked the requisite production knowledge. Accordingly, in the Transitional Services Agreement, Island agreed to provide a number of essential production (and non-production) related services to Verde, including assistance with management, operations, purchasing, and drafting and engineering.¹⁴ (JA 1, 5; JA 421-23, *see*

¹⁴ Island and Verde share a number of services, further suggesting that their operations are interrelated and that the two companies are functionally indistinguishable. (JA 5, 12; JA 461-63.) Contrary to Verde’s suggestion (V-Br. 11-12), those shared services are not primarily a function of Island’s being Verde’s landlord. In particular, the shared professional services (attorney, accountant, and bank) suggest an alter ego relationship and lack of arm’s-length dealing in the transfer of the Green partitions business (see also pp. 39-42). *See Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 459 (8th Cir. 2005) (same accountant and lawyer); *Sobeck Corp.*, 321 NLRB 259, 267 (1996) (same accounting and law firms); *BMD Sportswear Corp.*, 283 NLRB 142, 152 (1987) (same corporate attorney, accountant, and bank), *enforced*, 847 F.2d 835 (2d Cir. 1988); *Advance Electric, Inc.*, 268 NLRB 1001, 1002 (1984) (accounts at same bank).

JA 461-63.) *See BMD Sportswear Corp.*, 283 NLRB 142, 155 (1987) (finding alter egos where owner of new company “lacked the management experience and expertise in the industry” and relied on brother, owner of alter ego, “to supply the expertise in setting up and running” new company), *enforced*, 847 F.2d 835 (2d Cir. 1988); *Rogers Cleaning Contractors*, 277 NLRB 482, 488 (1985) (finding that “[f]or [new company] to succeed in business on the short notice with which it was set up, it is obvious that [owner of alter ego] had to supply and continue to supply the management knowledge and business experience which his daughters lacked”), *enforced*, 813 F.2d 795 (6th Cir. 1987). Crucially, in sharing this expertise, key Island personnel (such as Rufrano, DeMarco, and the Island foreman most knowledgeable about the Green partitions) help coordinate Verde’s operations and labor and meet periodically with Verde management to discuss “[p]roject coordination, materials, labor, scheduling, and profitability.” (JA 3, 5; JA 324-26.) *Cf. Tanaka*, 675 F.2d at 1034 (stating that “actual and not merely potential control” helps determine alter ego status); *NLRB v. Omnitest Inspection Servs., Inc.*, 937 F.2d 112, 120 (3d Cir. 1991) (similar). Thus, Island management’s ability to exert “[t]heir influence over the operations of both Island and Verde . . .” (JA 5), further supports the Board’s alter ego finding.

Island and Verde seemingly do not dispute their interrelated operations (I-Br. 30-31, V-Br. 11-12); instead, they maintain that the interrelation is “innocuous”

and “not unlike” a typical vendor relationship. The Board, however, reasonably rejected (JA 5) any notion that the two were simply vendor and vendee. First, the absence of an arm’s-length transaction defining their relationship (discussed pp. 39-42) suggests that it differs from that of a traditional vendor relationship. Island and Verde’s “umbilical relationship” (*Fugazy*, 725 F.2d at 1420) continued informally for over a year before the companies, faced with a subpoena from the General Counsel, executed formal agreements documenting that relationship. (JA 1, 2 & n.5.)

Second, as described above, the companies’ relationship goes far beyond the two companies’ simply providing services for each other for a fee and periodic update meetings between vendor and supplier. (*See* JA 326-27 (describing typical vendor relationship).) Rather, as the Board found, the arrangement here, communicated to the Union and confirmed by the MOA, was “to have Island jointly produce wood products with Verde without adhering to the collective-bargaining agreement.” (JA 5; JA 439-41, 444, *see* JA 315, 339.) According to Rufrano, he sought to benefit not only from using Verde’s non-union labor to produce a product that Island formerly made unprofitably, but also to secure the additional millwork matching that product for Island. Indeed, as the Board found, the MOA in “clear terms contemplates robust ties between [Island and Verde],”

including Island's future ownership interest of Verde, and subcontracting of bargaining-unit work, all to the exclusion of the Union. (JA 5; JA 439-41.)

These ties are strengthened, as the Board found, by the fact that the Firm continued to supply both Island and Verde with business and customers. (JA 5; JA 240-41, 261, 308.) In collaborating with Verde on the Green partitions and related millwork, Island clearly contemplates sharing additional customers with Verde. *See Fugazy Cont'l Corp.*, 265 NLRB 1301, 1301-02 (1982) (internal quotation marks and citation omitted) (noting that, in considering whether two entities share "common customers," the Board looks to "whether the employers constitute the same business in the same market"), *enforced*, 725 F.2d 1416 (D.C. Cir. 1984).

Island and Verde also argue (I-Br. 28-29, V-Br. 10-11) that the Board's decision is infirm because it lacks a detailed finding regarding centralized control of labor relations. But as both Island and Verde concede (I-Br. 24, V-Br. 9), no single factor is controlling and not all factors must be present to find an alter ego relationship.¹⁵ *See Allcoast Transfer, Inc.*, 780 F.2d at 581. Moreover, although

¹⁵ *Elec-Comm, Inc.*, 298 NLRB 705, 706 (1990), cited by Island and Verde (I-Br. 29, V-Br. 10), does not hold otherwise. In that case, the Board noted the companies' separate management despite their common ownership; however, the Board also found no evidence of several alter ego indicia present here, such as substantial financial control, interrelated operations, similar business purpose, and shared equipment.

the record contains some evidence that Verde does not instruct Island's employees in their day-to-day tasks (JA 151) and vice versa (JA 259-60), the Board's finding (JA 5) that Island management exerts control over Verde's operations and labor force on a broader level through the Transitional Services Agreement is amply supported, as discussed above. Additionally, Rufrano's demand that the Union disavow any present and future claims over Verde's bargaining-unit work as a condition of reaching a successor agreement is powerful evidence that he is indeed "coordinat[ing] Verde's operations and labor" behind the scenes by ensuring that it operates with a non-union workforce. (JA 5.)

Island and Verde also argue (I-Br. 29-30, V-Br. 12) that the Board, in concluding that the two entities are alter egos, improperly relied on Verde's hiring a number of former Island employees. But the Board often considers whether a new entity employs former employees of its alter ego, though the issue is not essential to an alter ego finding. *See, e.g., Alexander Painting, Inc.*, 344 NLRB 1346, 1353 (2005). Here, the Board reasonably noted (JA 1-2, 4-5) that not only does Verde rely on the expertise of *current* Island employees, but Verde also relies on the expertise of a number of *former* Island employees, including those from Island's management, engineering, and production. Significantly, two of Verde's six or seven production employees are former Island employees, and those employees "perform the same [bargaining-unit] work on the same equipment that

Island employees performed before Verde was founded.”¹⁶ (JA 4; *see* JA 87-88, 136-40, 156, 260.) Contrary to Island and Verde’s suggestion (I-Br. 30, V-Br. 12), the Board’s consideration of this issue does not require the employees to be on both companies’ payrolls at the same time or to have no gap in employment in transferring from one entity to the other.¹⁷

3. Substantial financial control and lack of arm’s-length dealing

Substantial evidence supports the Board’s findings (JA 5-6) that Island both exercises substantial financial control over Verde and demonstrated less than arm’s-length dealing in its relationship with Verde. Both findings militate in favor of alter ego status.

¹⁶ Although Island and Verde may argue that only one of those two production employees was a union member, the other employee was an Island new hire who was trained to perform bargaining-unit work and submitted his union paperwork, but Human Resources never processed it. (JA 125-26, 152-56.) When confronted by the union steward, the Human Resources employee stated that “she was told to sit on it.” (JA 155.) Although the employee performed bargaining-unit work at Island, he was transferred to Verde before becoming a union member. (JA 125-26, 155-56.)

¹⁷ Island and Verde claim (I-Br. 30, V-Br. 12) that three employees (Irek Slonina, Christian Cuesta, and Ed Claudio) had a gap in employment between working for Island and working for Verde. The record, however, is not clear that Cuesta and Claudio had such a gap. (*See* JA 128, 156, 174-75, 287, 316 (testimony that Cuesta “remained” in the back building after Island employees were transferred), JA 174-75 (testimony that Cuesta was fired by Claudio on an unspecified date), JA 455 (showing Cuesta’s date of hire at Verde as October 24, 2013), JA 146 (testimony that Claudio stopped supervising union steward Paul Horstmann in early 2013 and now runs Verde).)

For purposes of an alter ego analysis, “substantial control” can be evidenced by one company’s financial control of another. Here, “Island derived, and expected to derive, financial gain from Verde.” (JA 6.) *Fugazy*, 725 F.2d at 1420. Rufrano consistently maintained, both in pushing the Union to accept the MOA and in his testimony at hearing, that transferring the Green partitions business to Verde would be lucrative for Island because, without the Union’s cost structures, Verde could build the product more cheaply than Island. (JA 6; JA 187, 315, 444, *see* JA 339.) In turn, Rufrano told the Union that Verde would sign “exclusive agreements” to send its veneer work and the incidental millwork and cabinetry matching the Green partitions to Island, which were opportunities that “wouldn’t exist if there were no Verde.” (JA 6; JA 187-88, 444.) *See A & P Brush Mfg. Corp.*, 140 F.3d at 220 (stating that “ownership by members of the same family can constitute substantially identical ownership,” particularly where one party retains an interest in the success of the alter ego); *Sobeck Corp.*, 321 NLRB 259, 267 (1996) (noting that transfer of operations to alter ego “resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations” (citation omitted)). As the Board reasonably found (JA 6), Rufrano could not guarantee such collaboration and exclusivity with Verde without exerting “substantial de facto control” over Verde’s business decisions.

In addition to substantial financial control, the Board also finds evidence of alter egos where “an apparent transfer of operations is not an ‘arms length’ transaction between distinct entities.” *Fugazy*, 725 F.2d at 1419 (citation omitted). Here, the Board reasonably found (JA 5-6) that “there was a significant lack of an arm’s-length relationship” in the Verde transaction. Despite Verde’s commencement of operations in October 2013, the companies executed all but one of the formal documents pertaining to the purported sale over one year later, and then only when faced with the General Counsel’s subpoena. (JA 5-6; JA 405-27, 432-38, 448-53.) Indeed, Island transferred the Green partitions business to Verde, collaborated extensively with Verde, provided essential services to Verde, and allowed Verde to use its equipment and building, all without written agreement for approximately eight months to a year, and all with prices that Rufrano alone was responsible for setting. (JA 2 & n.5 & n.6 & n.7 & n.8, 5-6, 12; JA 327-32, 405-37.) *See Fugazy*, 725 F.2d at 1419 (finding lack of arm’s-length transaction where no formal purchase agreement was prepared until two months after purported sale and only after institution of unfair-labor-practice charges); *Midwest Precision Heating & Cooling*, 408 F.3d at 459 (asset purchase was not arm’s length where new company had no separate legal or accounting representation in drafting agreement or valuing business); *Trafford Distribution Ctr. v. NLRB*, 478 F.3d 172,

180 (3d Cir. 2007) (noting that alter ego did not pay for equipment or pay rent for several months after purported sale).

Not only did Verde conduct the Green partitions business informally for over one year, but Verde also derived significant financial benefit both from the delay in executing the signed agreements and from payment deferrals written into the agreements themselves. (JA 5-6.) Verde paid only \$200,000 at closing, deferred monthly payments on the remaining balance for six months, and used Island's building rent-free for eight months and its equipment without payment for one year. (JA 2 n.6, 5-6; JA 405-20, 428-37.) In total, Verde saved and deferred nearly half a million dollars in operating costs and expenses. (JA 5-6.) As the Board found, "it does not appear that Verde could have existed without this support." (JA 5.)

Because Island exercised substantial financial control over Verde, the two companies are alter egos, notwithstanding their formal separate ownership. *See El Vocero de Puerto Rico, Inc.*, 357 NLRB 1585, 1585 n.3 (2011). Indeed, the Board and the Court maintain that "common ownership is *not* an absolute prerequisite to a finding of alter ego status." *Fugazy*, 725 F.2d at 1420 (emphasis in original) (citations omitted). *See Tanaka*, 675 F.2d at 1035 ("Common ownership . . . is but one, and not always an important factor to be considered in determining the existence of an alter ego relationship.") And the Board will find an "alter ego

relationship in the absence of common ownership where both companies were either wholly owned by members of the same family or nearly entirely owned by the same individual, or where the older company maintained substantial control over the new company.” *El Vocero*, 357 NLRB at 1585 n.3.

Contrary to Island and Verde’s suggestion (I-Br. 31-35, V-Br. 13-14), the Board did not rely primarily on Rufrano’s familial relationship with his daughters in reaching its alter ego finding. Although Rufrano’s relationship with his daughters may help color the control dynamic and lack of arm’s-length dealing between the two companies, as is true in many alter ego cases, the familial relationship was not determinative here. *See, e.g., Sobeck Corp.*, 321 NLRB at 267 (stating that a focus on actual common control versus change in ownership is particularly apt “where the change takes place within a family, and even more so . . . between a parent and child”). Rather, the Board made clear that, in the absence of common ownership, the two companies were nevertheless alter egos based on Island’s substantial financial control over and lack of arm’s-length dealing with Verde. (*See* JA 5-6.) The Board’s citation to *El Vocero*, 357 NLRB 1585 (2011), does not suggest otherwise. There, as here, the Board relied on one employer’s “substantial control” over its alter ego, *id.* at 1585 n.3, and not on familial ties.

Island and Verde unpersuasively claim (I-Br. 34, V-Br. 15) that because Rufrano gave his daughters no direct start-up funds, he provided them with no

preferential treatment or financial assistance. That claim, however, is belied by the nearly half a million dollars in deferrals and savings built into the transaction.

Although Island claims (I-Br. 34) that the transaction was for fair market value, aside from the building lease, the record does not support that claim. (JA 2 n.6.)

Indeed, Rufrano engaged no outside experts to value the business or equipment he transferred to Verde and determined the fair market value of the building lease himself. (JA 327-32.)

Island and Verde (I-Br. 31-38, V-Br. 13-15) cite to a number of cases in which business transactions between family members did not create alter ego relationships. Those cases, however, provide little guidance because their alter ego analysis is heavily fact-specific and depends on the totality of the circumstances in each case. For example, Island and Verde's reliance on cases (I-Br. 34-37, V-Br. 13-15) where the Board has found legitimate, fair-market-value business deals between family members, is inapplicable here, as those cases differed in the amount of documentation and financial assistance at issue, as well as the additional alter ego indicia present, including the interrelationship of operations. *See, e.g., L & J Equip. Co.*, 274 NLRB 20, 28-29 (1985) (entities were not alter egos despite father's "financial and material assistance" because "in every aspect but financial obligation the two companies were physically and administratively apart"); *Friederich Truck Serv., Inc.*, 259 NLRB 1294, 1300 (1982) (transaction was arm's

length because father's \$5000 loan to son was secured with promissory notes and leases were reasonable). Indeed, the Board specifically distinguished one such case, *Deer Creek Electric*, 362 NLRB No. 171, 2015 WL 4882662 (2015), noting that in that case, unlike here, "the owner of the second company had never worked for the first and [] there was no evidence of financial control or improper motive." (JA 7 n.16.)

Similarly, Board cases cited by Island and Verde do not support their assertion (I-Br. 32-34, V-Br. 13-15) that the Board's decision here unduly restricts D'Agata from entering the family business. In almost all of the cited cases, the family members were independently motivated to start a new entity in the family business, and in all of those cases the Board found no evidence of unlawful motive in their creating the new entities. *See Kenton Transfer Co.*, 298 NLRB 487, 488 (1990); *Oklahoma City E. Exp.*, 281 NLRB 921, 924-25 (1986); *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292, 1297 (1983); *Pinter Bros., Inc.*, 263 NLRB 723, 741 (1982). If anything, those cases demonstrate that the Board is careful to avoid limiting children from *legitimately* opening new businesses in the same field as their parents. Here, there is no evidence regarding D'Agata's motivation. There is, however, Rufrano's testimony that D'Agata lacked experience with the production aspects of the business and evidence that Rufrano yearned to permanently remove an underperforming portion of his business from

the “plight” of unionization with the hope of obtaining “millions” in exclusive business arrangements with Verde.

4. Improper motivation

Although not essential to an alter ego finding, “the Board will give substantial weight to evidence that the motive for the transaction was to evade statutory and contractual duties” under the Act. *Fugazy*, 725 F.2d at 1419. Here, substantial record evidence supports the Board’s finding that “Verde was created to evade Island’s bargaining obligation under the Act.” (JA 6-7.)

To start, Island’s concealment of the Verde transaction from the Union, and Rufrano’s evolving statements to union officials when they questioned him about bargaining-unit work being performed by non-unit members in the back building, suggests unlawful intent. *See, e.g., Local 57, Int’l Ladies’ Garment Workers’ Union, AFL-CIO v. NLRB*, 374 F.2d 295, 299 (D.C. Cir. 1967) (inferring discriminatory motive where employer concealed plans to move operations to new entity); *Sobeck Corp.*, 321 NLRB at 266-67 (inferring discriminatory motive where employer concealed from union its intent to form new company). Contrary to Island’s claim (I-Br. 39) that Rufrano was “forthright” about the impending changes, it was the Union’s shop steward, and not Island management, who initially informed the Union that Island had transferred all of its members from the back building, forbidden them from entering, and replaced them with non-union

Verde employees, who were performing what previously was bargaining-unit work. (JA 2-3, 6.) Further, when the Union confronted Rufrano about the loss of unit work in the back building, he “misleadingly” claimed that he had sold the back building and the equipment to his daughter, only later admitting that he was leasing the building and equipment to her. So too, he initially asserted that he would not be involved with Verde’s operations, but his explanation evolved, and he later stated that would be involved with Verde’s operations. (JA 3, 6; JA 47-49, 96-97, 186-87, 211-12, 215-18.)

In addition, the timing of the companies’ attempt to formalize their less than arm’s-length transaction into a purportedly legitimate business deal further suggests unlawful motive. As discussed, most of the documents structuring the transaction were not executed until over a year after Verde began operations, and then only when faced with an investigation of possible unfair-labor-practice violations. (JA 6; JA 405-27, 432-38, 448-53.) *See Fugazy*, 265 NLRB at 1302 (noting “that the parties to the transaction did not choose to bind themselves to it with their signatures until proceedings had been initiated against them and the issue of *alter ego* was raised by the General Counsel”).

Finally, Rufrano made clear his intention that Verde operate without the Union and did everything in his power to pressure the Union to formally disavow both present and future claims over bargaining-unit work in the back building.

(JA 6.) *See Kenmore Contracting Co.*, 289 NLRB 336, 339 (1988). Rufrano refused to sign a successor agreement unless the Union agreed to the “sweeping, forward-looking terms” in Island’s proposed MOA, which effectively “sought to preclude Verde employees of their right to representation by the Union, even if Island became more formally involved with Verde at a later date.” (JA 6; JA 439-41.) And Rufrano pressured the Union to sign the MOA by suggesting that Verde’s success was dependent on its ability to produce the Green partitions more cheaply, bluntly communicating his intention that Verde would not be unionized. As the Board found, Rufrano suggested that “the creation of Verde was a way for Island to avoid the Union’s labor costs – costs that Rufrano described as the “plight of “every union contractor.” (JA 6; JA 187, 313-15, 339, 444.) Rufrano suggested that without the strictures of a Union contract, Island stood to gain “millions” from the additional business that it would do with Verde. (JA 6; JA 187, 313-15, 339, 444.) *See Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 452 (5th Cir. 2003) (employer admitted his intention to start new corporation specifically to avoid paying union wages); *NLRB v. Tricor Prod., Inc.*, 636 F.2d 266, 270-71 & n.5 (10th Cir. 1980) (employer indicated to employees that new business would be non-union and offered employees stock in return for their abandonment of the union).

Ignoring the MOA completely, Island argues (I-Br. 39-40) that Rufrano had lawful motivations for transferring the Green partitions business to his daughters. But substantial record evidence suggests otherwise, demonstrating that Rufrano was motivated by his desire to free that partition business from “the plight” of a union contract while hoping to secure a profitable stream to both companies. *See, e.g., A.D. Conner, Inc.*, 357 NLRB at 1787 (“The fact that there were additional legitimate motives for management’s actions does not lessen the significance of the strong antiunion component underlying those acts.”).

Finally, Island also suggests (I-Br. 39) that because it did not discharge any Island employees upon Verde’s creation, the Board erred in finding improper motive. Harm to the bargaining unit, however, is not a prerequisite for finding improper motive. Moreover, here the Board explicitly found (JA 6-7) harm to the unit: two former Island production employees now working for Verde lost the benefits of the Union contract, and the existing unit suffered diminished bargaining power.

II. ISLAND AND VERDE UNLAWFULLY INSISTED, AS A CONDITION OF REACHING A SUCCESSOR AGREEMENT, THAT THE UNION AGREE TO ALTER THE SCOPE OF THE UNIT

Substantial evidence supports the Board’s finding (JA 7) that Island and Verde violated their statutory duty to bargain in good faith when Island insisted on a permissive subject of bargaining, namely, altering the scope of the bargaining

unit, as a condition of reaching a successor collective-bargaining agreement. Specifically, the Board found that Island refused to agree to a successor agreement unless the Union signed its proposed MOA, which declared that the Verde employees “do not fall within the bargaining unit definition” in the parties’ collective-bargaining agreement; that the parties agree that Island and Verde are not joint employers or alter egos or otherwise related so as to constitute an accretion under the expired agreement; and that the parties waive all existing and future grievances and claims regarding work performed by Verde including subcontracting of bargaining-unit work. (JA 7; JA 439-41.)

Section 8(d) of the Act, 29 U.S.C. § 158(d), requires the parties to meet and “confer in good faith with respect to wages, hours, and other terms and conditions of employment,” which constitute “mandatory subjects of bargaining.” *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971); *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400-01 (D.C. Cir. 1988). On such matters, “neither party is legally obligated to yield.” *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). *Accord Idaho Statesman*, 836 F.2d at 1400. The parties to a collective-bargaining relationship also are free to bargain over any other lawful subject and reach agreement on these, the “permissive” subjects of bargaining. *See Borg-Warner Corp.*, 356 U.S. at 349; *Idaho Statesman*, 836 F.2d at 1400. An employer’s conditioning agreement regarding mandatory

subjects on acceptance of a non-mandatory proposal, however, is not good-faith bargaining and violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). *See Borg-Warner Corp.*, 356 U.S. at 349; *Smurfit-Stone Container Enters.*, 357 NLRB 1732, 1735–36 (2011) (“a party *precludes* good-faith impasse when it insists on such a proposal as the price of an agreement” (emphasis in original)), *enforced sub. nom., Rock-Tenn Servs. v. NLRB*, 594 F. App’x 897 (9th Cir. 2014).

The scope of the bargaining unit represented by a union is a permissive subject of bargaining. *See Idaho Statesman*, 836 F.2d at 1400-01. “If it were a mandatory subject, an employer could use its bargaining power to restrict (or extend) the scope of union representation in derogation of employees’ guaranteed right to representatives of their own choosing.” *Idaho Statesman*, 836 F.2d at 1400-01. The scope of a bargaining unit, in this context, has been defined as “what employees the unit represents,” *Boise Cascade Corp. v. NLRB*, 860 F.2d 471, 474 (D.C. Cir. 1998), or “the identity of the employees over whose wages, hours, and other conditions of employment [an employer is] prepared to bargain with the [u]nion,” *Idaho Statesman*, 836 F.2d at 1405.

Substantial evidence supports the Board’s finding that Rufrano, quite clearly, refused to sign a successor agreement with the Union unless and until the Union agreed to the MOA severing the employees performing bargaining-unit

work with Verde in the back building and thereby altering the unit's scope.¹⁸

(JA 7; JA 439-41.) Indeed, Union President Eustace Eggie and Union Representative Jeff Murray both unequivocally testified that Rufrano repeatedly told them that the Union must waive any claim to employees in the back building “before we would be able to close or [] before [Rufrano] would sign a new agreement.” (JA 193 (Eggie), *see also* JA 51-52, 57-58, 67 (Murray).) Because the terms of the MOA “confirm Island’s unyielding demand that Verde employees remain outside the unit,” Island was not privileged to insist on the Union’s acceptance of the proposal as a condition precedent to agreeing to a successor contract. (JA 7.)

Island’s sole challenge (I-Br. 42-45) to this violation boils down to a claim that it could not have conditioned agreement on altering the unit’s scope because other outstanding issues remained on the bargaining table. Even assuming, as the Board did, that Island attempted to bargain on those other issues after the Union rejected the MOA, Island’s argument is squarely foreclosed by the Supreme Court’s decision in *Borg-Warner*, 356 U.S. 342 (1958).¹⁹ (JA 7.) In *Borg-Warner*,

¹⁸ The Board found that the MOA sought to alter the scope of the unit “regardless of whether the bargaining unit here is defined in terms of job classification or . . . the nature of the work performed.” (JA 7 n.18.)

¹⁹ Island attempts (I-Br. 20 n.2, 43-44) to discredit Murray based on his testimony that he did not recall receiving a number of emails from DeMarco requesting

the Court found that an employer's insistence that the union agree to two non-mandatory subjects of bargaining as a condition of reaching an agreement violated the Act, notwithstanding the parties' continued bargaining on other contractual issues.²⁰ *Id.* at 347-50. There, as here, the employer's "good faith [bargaining as to mandatory subjects did] not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining." *Id.* at 349. Here, the evidence established that Rufrano repeatedly insisted that the Union would have to agree to the MOA before he would agree to the collective-bargaining agreement. In these circumstances, the Board reasonably found that Island violated the Act.

further bargaining. These emails, which were identified only, but not received, are a distraction. (JA 100.) Murray had limited involvement with the Island negotiations after he was promoted in February 2014. (JA 80-82.) And the Board assumed *arguendo* (JA 4 n.13, 7) that Island had made an effort to continue negotiations.

²⁰ The Board's decision in *Reading Rock, Inc.*, 330 NLRB 856 (2000), cited by Island (I-Br. 43), is readily distinguishable. There, the Board found that the parties had not reached impasse on a permissive subject of bargaining because the employer continued to bargain over, and tweak the language of, its proposal to alter the scope of the unit. *Id.* at 861-62. Here, Rufrano insisted that the Union accept the language of the MOA.

III. EVEN IF ISLAND AND VERDE ARE NOT ALTER EGOS, ISLAND'S DEMAND THAT THE UNION SIGN THE MOA VIOLATED THE ACT BY CONSTRAINING THE UNION'S RIGHT TO REPRESENT VERDE'S EMPLOYEES IN THE FUTURE

Given the breadth of the MOA, substantial evidence supports the Board's alternative finding that "even absent an alter ego relationship, Island unlawfully insisted on limiting the unit's scope." (JA 7-8 n.20.) As the Board reasonably found (JA 7-8 n.20), the MOA "fundamentally constrained" the Union's ability to represent Verde's employees in the future, specifically under circumstances that would otherwise warrant their inclusion in the unit.

Indeed, the MOA required the Union to disavow any claim over the employees of Verde "regardless of Verde's ownership," and even if Island's future ownership interest in or management of Verde created a joint employer, alter ego, or other relationship that would warrant an accretion of Verde's employees. (JA 7-8 n.20; JA 439-41, *see also* JA 375-76 (subcontractors and joint venture provisions).) Thus, even assuming *arguendo* that Island and Verde are legitimately separate entities, the MOA went far beyond preserving that status quo and sought to limit the unit's scope in the future under circumstances where the two companies might be found to have even closer ties or interconnection. *See Jewish Ctr. for the Aged*, 220 NLRB 98, 102 (1975) (finding that employer unlawfully insisted to impasse on proposed contract revisions that would deprive employees of continued union representation upon plant relocation). *Cf. Antelope Valley Press*,

311 NLRB 459, 462 (1993) (suggesting that proposal that union would be precluded from claiming that individuals “should henceforth be included in the unit” would be proposal to alter unit’s scope). The Board reasonably found that Island, in demanding that the Union agree to the broad terms of the MOA, further violated the Act.

CONCLUSION

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

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March 2017

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ISLAND ARCHITECTURAL WOODWORK,)	
INC. AND VERDE DEMOUNTABLE)	
PARTITIONS, INC., ALTER EGOS,)	
)	
Petitioners/Cross-Respondents)	
)	Nos. 16-1303, 16-1347,
v.)	16-1446
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	29-CA-124027
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,469 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 24th day of March, 2017

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	29-CA-124027
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further 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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Dated at Washington, DC
this 24th day of March, 2017