

**Nos. 18-1109, 18-1140, 18-1169**

---

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

**COLLECTIVE CONCRETE, INC. AND REMCO CONCRETE, LLC,**

**Petitioners/Cross-Respondents**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**NEW JERSEY BUILDING LABORERS DISTRICT COUNCIL**

**Intervenor**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**USHA DHEENAN**  
*Supervisory Attorney*

**DAVID CASSERLY**  
*Attorney*

**National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570  
(202) 273-2948  
(202) 273-0247**

**PETER B. ROBB**  
*General Counsel*

**JOHN W. KYLE**  
*Deputy General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

### **A. Parties and Amici**

Collective Concrete, Inc., RDM Concrete & Masonry, LLC, and Remco Concrete, LLC were the Respondents before the Board. Collective and Remco are Petitioners/Cross-Respondents before the Court and RDM is a Respondent before the Court. New Jersey Building Laborers District Council was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Petitioner/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *RDM Concrete & Masonry, LLC, Collective Concrete, Inc., and Remco Concrete, LLC, alter egos*, 366 NLRB No. 34 (March 13, 2018).

### **C. Related Cases**

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

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Jurisdictional statement.....	1
Issue presented .....	2
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact.....	4
A. Collective’s formation and unionization.....	4
B. Collective’s poor relationship with the union leads the Ciullos to form RDM; collective winds down .....	5
C. The union organizes RDM’s employees and demands recognition; RDM signs a collective-bargaining agreement.....	7
D. RDM’s rocky relationship with the union leads the Ciullos to form Remco; RDM winds down .....	8
E. Remco refuses the union’s request for recognition.....	10
II. The Board’s conclusion and order .....	11
Summary of argument.....	12
Standard of review .....	14
Argument.....	15
Substantial evidence supports the Board’s finding that Remco is an alter ego of collective and RDM, and the Remco’s refusal to bargain with the union and adhere to collective’s and RDM’s collective-bargaining agreements therefore violated Section 8(a)(5) and (1) .....	15

## TABLE OF CONTENTS

<b>Headings – Cont’d</b>	<b>Page(s)</b>
A. Introduction .....	15
B. An employer violates the Act if it evades its collective-bargaining responsibilities by transferring a portion of its business to an alter ego ...	17
C. Collective and RDM are alter egos and constitute a single employer .....	19
D. Remco is an alter ego of collective and RDM .....	21
1. Management, owernship, and supervision.....	23
2. Business purpose, operations, and equipment .....	24
3. Intent to evade the Act .....	26
E. Collective and RDM have offered no reason to depart from the Board’s established alter-ego standard .....	29
Conclusion .....	36

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alexander Painting, Inc.</i> , 344 NLRB 1346, 1353 (2005) .....	25
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	15
<i>BMD Sportswear Corp.</i> , 283 NLRB 142 (1987) .....	24
<i>Boland v. Thermal Spec.</i> , 950 F.Supp. 146 (D.D.C. 2013).....	30
<i>Care One at Madison Ave., LLC v. NLRB</i> , 832 F.3d 351 (D.C. Cir. 2016).....	14
<i>Cedar Valley Corp.</i> , 302 NLRB 823 <i>enforced</i> , 977 F.2d 1211 (8th Cir. 1992) .....	17
<i>Cowboy Scaffolding, Inc.</i> , 326 NLRB 1050 (1998) .....	17
<i>El Vocero de Puerto Rico</i> , 357 NLRB 1585 (2011) .....	34
<i>Environmental Defense Fund v. Costle</i> , 657 F.2d 275 (D.C. Cir. 1981).....	4
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004).....	17
<i>Flynn v. Interior Finishes, Inc.</i> , 425 F.Supp. 2d 38 (D.D.C. 2006).....	29-33

---

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

**TABLE OF AUTHORITIES**

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979) .....	14
* <i>Fugazy Continental Corp. v. NLRB</i> , 725 F.2d 1416 (D.C. Cir. 1984).....	15, 18, 33
<i>Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.</i> , 417 U.S. 249 (1974) .....	18
* <i>Island Architectural Woodwork, Inc. v. NLRB</i> , 892 F.3d 362 (2018) .....	18, 19, 23, 26-28, 33, 34
<i>J.M. Tanaka Const., Inc. v. NLRB</i> , 675 F.2d 1029 (9th Cir. 1982) .....	18
<i>Kenmore Contracting, Inc.</i> , 289 NLRB 336 (1988) <i>enforced</i> , 88 F.2d 125 (2d Cir. 1989).....	23
<i>Midwest Precision Heating &amp; Cooling, Inc. v. NLRB</i> , 408 F.3d 450 (8th Cir. 2005) .....	18
<i>Newspaper Guild of N.Y., Local No. 3 of Newspaper Guild, AFL-CIO v. NLRB</i> , 261 F.3d 291 (2d Cir. 2001) .....	24
<i>NLRB v. Allcoast Transfer, Inc.</i> , 780 F.2d 576 (6th Cir. 1986) .....	17-18
<i>Nova Southeastern Univ. v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015).....	22
<i>Parsippany Hotel Management Co. v. NLRB</i> , 99 F. 3d 413 (D.C. Cir. 1996).....	22

---

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

## TABLE OF AUTHORITIES

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>Radio &amp; Television Broadcast Technicians Local 1264 v. Broadcast Serv.</i> , 380 U.S. 255 (1965) .....	20
<i>Road Sprinkler Fitters, Local 669 v. Dorn Sprinkler Company</i> , 669 F.3d 790 (6th Cir. 2012) .....	25
<i>Rogers Cleaning Contractors, Inc.</i> , 277 NLRB 482 (1985) <i>enforced</i> , 813 F.2d 795 (6th Cir. 1987) .....	23
<i>Southport Petroleum Co. v. NLRB</i> , 315 U.S. 100 (1942) .....	15, 18
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984) .....	14
<i>UFCW, Local 204 v. NLRB</i> , 506 F.3d 1078 (D.C. Cir. 2007).....	15
<i>United Telegraph Workers v. NLRB</i> , 571 F. 2d 665 (D.C. Cir. 1978).....	20
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) .....	14-15
<i>Wayneview Care Ctr. v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2012).....	14
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982) .....	22

---

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

<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 15, 17
*Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 11, 15, 17, 35
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 14, 21, 22
Section 10(f) (29 U.S.C. § 160(f)) .....	2

## **GLOSSARY**

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	Collective and Remco's opening brief
Collective	Collective Concrete, Inc.
JA	The parties' deferred joint appendix
RDM	RDM Concrete & Masonry, LLC
Remco	Remco Concrete, LLC
Union	New Jersey Building Laborers District Council

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

---

**Nos. 18-1109, 18-1140, 18-1169**

---

**COLLECTIVE CONCRETE, INC. AND REMCO CONCRETE, LLC,**

**Petitioners/Cross-Respondents**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**NEW JERSEY BUILDING LABORERS DISTRICT COUNCIL**

**Intervenor**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of Collective Concrete, Inc., and Remco Concrete, LLC to review, the cross-application of the National Labor Relations Board to enforce, and the application of the Board to enforce as to RDM

Concrete & Masonry, LLC, a Board Order issued against RDM, Collective, and Remco on March 13, 2018, reported at 366 NLRB No. 34.<sup>1</sup> (JA 627-36.)<sup>2</sup> New Jersey Building Laborers District Council (the Union) has intervened on the Board's behalf.

The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. Collective and Remco's petition, the Board's cross-application, and the Board's application for enforcement against RDM were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

### **ISSUE PRESENTED**

Does substantial evidence support the Board's finding that Remco is an alter ego of Collective and RDM, and that Remco's refusal to bargain with the Union

---

<sup>1</sup> On July 26, this Court denied as moot the Board's motion to add RDM to the case caption.

<sup>2</sup> References preceding a semicolon are to the Board's findings; those following are to supporting evidence. "JA" refers to the deferred joint appendix and "Br." refers to Collective and Remco's opening brief.

and adhere to Collective's and RDM's collective-bargaining agreements therefore violated Section 8(a)(5) and (1) of the Act?

### **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are set forth in Collective and Remco's brief.

### **STATEMENT OF THE CASE**

Collective and RDM are unionized New Jersey concrete and masonry contractors owned by members of the Ciullo family, and the Board found that they are alter egos of each other and a single employer. This case involves the Board's finding that Remco, a third Ciullo-owned concrete and masonry contractor in New Jersey, is also an alter ego of the other two entities and therefore bound by their duty to bargain and to follow extant collective-bargaining agreements. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging alter-ego and single-employer relationships, and that the three entities therefore violated Section 8(a)(5) of the Act when Remco failed to adhere to Collective's and RDM's collective-bargaining agreements with the Union and refused to bargain with the Union. (JA 194-203.) After a hearing, an administrative law judge found that three entities were related, and that Remco's refusal to bargain with the Union and adhere to the other entities' collective-bargaining agreements had violated the Act as alleged. (JA 627, 628-36.) After Collective and Remco filed exceptions to the judge's decision, the Board affirmed

and adopted the judge's recommended remedy and Order with minor modifications.<sup>3</sup> (JA 627-28.)

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Collective's Formation and Unionization**

All three entities involved in this case are owned by members of the Ciullo family, which includes Mark, his wife Deborah, his son Ryan, his daughter Desiree, and Ryan's wife, Jennifer. Until 1998, Ryan worked for Mark's concrete and masonry business. In 1998, the Ciullos formed Collective, which Ryan owned, to do the same type of concrete and masonry work that Mark's business had done. Ryan was 22 years old and lived with his parents. At the time, Mark was on the "downswing" of his career, and Ryan took charge of Collective's job sites as "project manager." (JA 629; 6, 15-16, 25, 156-58.)

The Ciullos initially listed Collective's business address as Mark's house in Toms River, New Jersey, where Ryan also resided. Collective later moved to an address in Jackson, New Jersey. Jennifer helped with Collective's paperwork, and Desiree served as Collective's office manager. Ryan, Mark, and Desiree were all authorized to sign checks on Collective's behalf. Mark folded his previous

---

<sup>3</sup> RDM did not file exceptions before the Board and has not filed a brief before this Court. It has therefore waived any challenge to the Board's application for enforcement against it. *See Environmental Defense Fund v. Costle*, 657 F.2d 275, 284 n.32 (D.C. Cir. 1981) (any arguments not raised in opening brief are ordinarily waived).

concrete business and started working in the office for Collective, where his job was to “coordinate everything,” and his job title was vice-president. (JA 629-30; 15-25, 156-59, 204-11, 280-86.)

In 2001, Mark agreed, on behalf of Collective, to sign a collective-bargaining agreement with the Union. Ryan subsequently signed a short-form agreement, whereby Collective agreed to be bound by the master agreement between the Union and various construction employers in the Union’s jurisdiction. Collective thereafter executed three successor agreements. (JA 629; 21, 75-79, 120-26, 167, 212.) The master agreement, which has remained unchanged in relevant part, states that the Union represents a majority of signatory employers’ employees, and that the agreement applied to all related companies as well as signatory employers. The agreement also has an “evergreen provision” stating that the agreement automatically renews on April 30 of each year unless the signatory employer notifies the Union of termination by March 31. (JA 630; 521-91.)

**B. Collective’s Poor Relationship with the Union Leads the Ciullos To Form RDM; Collective Winds Down**

Collective’s relationship with the Union was rocky from the beginning. Starting in 2002, the Union filed grievances alleging that Collective had violated the contract. Mark appeared on behalf of Collective at an arbitration hearing on those grievances. Ryan took no part in the arbitration proceedings. The Union won two separate arbitration awards, the latter of which required Collective to pay

the Union over \$10,000 for its violations. When the Union petitioned a federal district court to confirm that award, Mark signed an affidavit supporting Collective's opposition to the petition. The court granted the Union's petition on January 8, 2007. (JA 630; 79-84, 213-79.)

Just 3 months later, in April 2007, Mark formed RDM as a nonunion concrete and masonry business, with himself and Deborah as the owners. Mark intended for RDM to remain nonunion; as described by Ryan, Mark "realized that a lot of our customers were nonunion and that was important to our business[.]" (JA 630; 20.) Mark and Desiree were both authorized signers for RDM's bank account, as they had been for Collective's, and were employed by both entities at the same time. Mark, Deborah, and Desiree all signed documents on RDM's behalf as late as 2011 that indicate that they remained employees of Collective. (JA 630; 84-86, 94-98, 411-17.) RDM did the same type of work as Collective, and Collective transferred some of its equipment to RDM. Although Ryan had no ownership interest in RDM, he began managing projects for RDM in the field, the same work he had done for Collective. (JA 630; 23, 36, 100-01, 130-31.)

RDM and Collective shared the Jackson, New Jersey office, as well as phone and fax lines. RDM did not pay any rent to Collective for the use of Collective's office space. When it took over the lease for the office from Collective in 2013, RDM paid the same rent, and the two entities did not execute

any written agreement memorializing the lease takeover. Collective continued to list the same office as its operating address through 2016, and never paid rent to RDM for use of the space after RDM took over the lease. (JA 630; 17, 22, 24-25, 89-94, 176-80, 182, 287-356, 416-36.) Both Mark and Ryan received salaries of “upwards of a couple hundred thousand” when business was good and forewent salaries altogether in bad years at both RDM and Collective. (JA 630; 189-93.)

Collective struggled to remain solvent and wound down its operations starting about 2013, with its last job ending in 2014. (JA 630-31; 9-10, 24-26.) In 2013, Collective transferred some equipment to RDM when RDM wanted to extinguish a “loan” to Collective from its books. (JA 631 n.4; 115-16, 394-97.) Although it did not continue to bid jobs after the 2014 job ended, Collective supplied RDM with workers for some projects in 2014 and 2015. RDM did not always pay Collective back for that work. (JA 631; 43-46.) RDM also directly transferred over \$1.6 million to Collective between 2013 and 2015 to help Collective stay afloat. (JA 631, 631 n.4; 287-354.) Collective did not repay that money. (JA 631 n.4; 27-34, 191.)

**C. The Union Organizes RDM’s Employees and Demands Recognition; RDM Signs a Collective-Bargaining Agreement**

RDM remained nonunion until 2014, when the Union organized its workers and obtained authorization cards from a majority of them designating the Union as their representative. The Union filed a representation petition with the Board and

met with Mark to discuss RDM's unionization. Mark acknowledged that the Union represented a majority of RDM's employees but initially refused to recognize the Union due to his negative view of Collective's relationship with the Union. However, he did agree to provide the Union with a list of RDM's current projects. (JA 631; 100, 135, 146-49, 593.)

The Union thereafter set up a picket line at two of RDM's job sites and filed an unfair-labor-practice charge with the Board, alleging that RDM and Collective were alter egos. When Mark agreed to recognize the Union and sign a collective-bargaining agreement, the Union withdrew its charge and stopped picketing. (JA 631; 151-55, 594.) On June 20, 2014, Mark signed a short-form agreement on RDM's behalf, adopting the master collective-bargaining agreement between the Union and various employers within the Union's jurisdiction. (JA 631; 592.)

**D. RDM's Rocky Relationship with the Union Leads the Ciullos To Form Remco; RDM Winds Down**

Shortly after RDM signed the short-form agreement with the Union, the Union filed a grievance alleging that RDM had failed to abide by that agreement. On January 29, 2015, the Union won the arbitration of that grievance. The Union and Collective and RDM agreed to a consent arbitration award, and a United States District Court entered judgment confirming that award on April 13, 2016. (JA 631; 104, 437-97.)

Although Collective's last job ended in 2014, Ryan continued to do both consulting work on Collective's behalf and work for RDM until the end of 2015. The last check Ryan earned on behalf of Collective was dated December 21, 2015. (JA 631; 39-41, 46-49, 357-76.) In 2015 and early 2016, Ryan also worked as a foreman for a company called DY Concrete, and he brought several RDM workers who did not wish to join the Union with him there. (JA 631; 47-48, 598-620.) RDM started winding down its operations around that time and was dormant by early 2017. (JA 631; 94.)

In late 2015, Ryan formed Remco, with himself as the manager and 99 percent owner. Like Collective and RDM, Remco does concrete and masonry work in New Jersey, using the same type of equipment as the other two entities. (JA 631-32; 48-52.) Remco also uses many of the same suppliers as Collective and RDM, and rents RDM's laser screed. (JA 632; 67-69, 112-114, 133.) Ryan intended for Remco to take advantage of the nonunion marketplace after Collective's and RDM's problems with the Union. As he stated, Ryan was not "doing well in union work," so he formed Remco to work with a nonunion workforce, as he had done before Collective (and then RDM) unionized. (JA 632; 168, 190.)

Most of Remco's early employees had recently worked for RDM or Collective and were hired to do the same work at Remco. Ryan's initial hires

through the first quarter of 2016 included his wife Jennifer, three employees who had worked for him at RDM, and three other employees. (JA 632; 50-56, 377, 598-620.) In the second quarter of 2016, Ryan also hired RDM's then-current purchasing and pricing employee and other former RDM employees who had left RDM because they did not want to join the Union, including a former foreman. (JA 632; 56-59, 107-112, 515-20.)

Ryan publicly presented Remco as a continuation of Collective and RDM. When he sought an insurance certificate for a Remco job with a general contractor, he told the insurance company that "RDM used to do work for the same company." (JA 388.) When requesting lines of credit, Ryan told Remco's potential creditors to consider Collective's credit history in determining whether to approve the credit lines. (JA 632; 61-62, 389-91.) In seeking work for his brand-new company, Ryan introduced Remco as "a local concrete subcontractor that has over 20 years of experience with commercial projects like this." (JA 392.) Other construction contractors treated RDM, Collective, and Remco as one entity, as when a general contractor contacted Ryan, not Mark, for a final release on a job that had been performed by RDM. (JA 632; 64-66, 393.)

#### **E. Remco Refuses the Union's Request for Recognition**

The Union initially found out about Remco's existence in June 2016. By letter on December 2, 2016, the Union requested that Remco recognize it, bargain

with it, and apply the applicable agreements signed by Collective and RDM to Remco's workers. Remco denied the Union's request 10 days later. (JA 632; 136-37, 144, 595-96.) Neither RDM nor Collective ever notified the Union that they were terminating the applicable collective-bargaining agreements. RDM and Collective remain bound under the evergreen clauses of those agreements. (JA 632; 127-28, 142-43, 555, 589.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts, the Board (Chairman Kaplan and Members Pearce and McFerran) adopted the administrative law judge's finding that RDM and Collective constitute a single employer and alter egos, due to their shared ownership, management, operations, and business purpose, and their interrelated finances. The Board further adopted the judge's finding that Remco is the alter ego of the other two entities, due to their shared ownership, management, and business purpose, similar and related operations, and Ryan's motive to avoid the Union. Therefore, the Board found that Remco's refusal to bargain with the Union and apply the terms and conditions of the other entities' collective-bargaining agreements, including wage rates and benefit contributions, to its employees violated Section 8(a)(5) of the Act. To remedy those violations, the Board ordered the three entities to cease and desist from failing and refusing to bargain with the Union by refusing to apply the collective-bargaining agreements and from in any

like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. The Board also ordered the entities to honor and abide by the collective-bargaining agreements, make employees and any affected benefit funds whole for lost wages or contributions, and reimburse employees for any expenses ensuing from the failure to make required contributions to the benefit funds. (JA 627.) Finally, the Board's Order requires RDM, Collective, and Remco to post a remedial notice. (JA 627-28.)

### **SUMMARY OF ARGUMENT**

The Board's alter-ego doctrine prevents a unionized employer from forming a separate entity to continue to do the same work in order to evade its collective-responsibilities. In such circumstances, the Board treats both entities as one and the same, and the nonunion entity must bargain with the affected union and apply the unionized entity's collective-bargaining agreements. Here, the Ciullos twice attempted to avoid the Union, first by forming RDM to avoid Collective's responsibilities, and then by forming Remco after the Union organized RDM's employees.

Substantial evidence supports the Board's finding that Collective and RDM are alter egos and a single employer under the Act. Although those alter-ego and single-employer findings are uncontested before the Court, they remain relevant because the Board considered Remco's relationship to those entities collectively in

determining the still-contested issue of whether Remco is their alter ego. Both Collective and RDM were concrete and masonry construction subcontractors in New Jersey owned by the Ciullos. Ryan and Mark managed both, with Ryan in the field and Mark in the office. Their intertwined financial dealings further support the Board's finding that the two be treated as one entity. Moreover, the circumstances of RDM's formation, immediately after Collective had to pay an expensive arbitration award, show that the Ciullos were attempting to avoid their collective-bargaining responsibilities.

Similarly, substantial evidence supports the Board's finding that Remco is an alter-ego of the other two entities, which is the sole contested issue before the Court. Substantial evidence supports the Board's finding that Remco shared most of the factors supporting alter-ego status with the other two entities. This Court is without jurisdiction to consider Collective and Remco's contention to the contrary because before the Board, they did not challenge the judge's application of the alter-ego factors other than contending that the Ciullos did not form Remco in order to avoid their collective-bargaining responsibilities. Even if Collective and Remco had challenged the judge's alter-ego-factor findings, their challenge would fail on the merits; Remco shared ownership, management, business purpose, supervision, and operations with the other two entities. Moreover, like RDM, Remco was formed to avoid the Ciullos' collective-bargaining responsibilities.

Finally, Remco’s contention that a district court case establishing an equitable defense to the alter-ego doctrine controls this case is meritless. That case is factually distinguishable, not binding on the Board or this Court, and arose under ERISA, not the Act. Under the Board’s and this Court’s precedent, the alter-ego doctrine clearly applies to situations where a unionized entity creates a new entity to do the same kind of work it had previously done, and that is exactly what Ryan Ciullo did when he formed Remco.

### **STANDARD OF REVIEW**

The Board’s interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). As the Supreme Court has observed, “Congress made a conscious decision” to delegate to the Board “the primary responsibility of marking out the scope of the statutory language.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see also Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016) (court “will uphold Board’s legal determinations so long as they are neither arbitrary nor inconsistent with established law”) (internal quotation omitted).

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2012). 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 UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). “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).

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

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT REMCO IS AN ALTER EGO OF COLLECTIVE AND RDM, AND THAT REMCO’S REFUSAL TO BARGAIN WITH THE UNION AND ADHERE TO COLLECTIVE’S AND RDM’S COLLECTIVE-BARGAINING AGREEMENTS THEREFORE VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT**

#### **A. Introduction**

This case involves the Ciullos’ repeated attempts to avoid their bargaining obligations. Collective, RDM, and Remco are all New Jersey concrete and

masonry companies owned and managed entirely by the Ciullos. In 1998, Mark Ciullo was on the downswing of his career, and his son Ryan took over supervising the family concrete business' job sites. The Ciullos formed Collective, and Mark moved from the job sites to the office. After Mark, on behalf of Collective, signed a collective-bargaining agreement with the Union, the Ciullos had difficulty adhering to that agreement, culminating in the Union winning an arbitration award against Collective. The Ciullos almost immediately formed a different company, RDM, to avoid the collective-bargaining agreement.

But the Union caught wind of RDM's work, organized RDM's employees, and demanded recognition from the Ciullos. Mark signed another collective-bargaining agreement with the Union, this time on behalf of RDM, and again had trouble complying with the agreement. Immediately after the Union and the Ciullos agreed to a consent arbitration award, and just 1.5 years after RDM first recognized the Union, the Ciullos formed yet another company, Remco, to avoid their collective-bargaining responsibilities. RDM wound down its operations and was dormant by early 2017. Remco has never recognized the Union or applied the operative collective-bargaining agreements that the Ciullos executed on behalf of Collective and RDM.

It is undisputed that Collective and RDM were the same entity under Board and this Court's law, and that those entities are bound by the collective-bargaining

agreements they reached with the Union. In turn, because Remco is an alter ego of Collective and RDM, it was bound by those agreements and obligated to bargain with the Union. The only dispute is Remco's status as alter ego; as shown below, substantial evidence supports the Board's finding and Collective and Remco's contrary arguments are either jurisdictionally barred or incorrect.

**B. 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," 29 U.S.C. § 158(a)(5). "[A]n employer who violates section 8(a)(5) also, derivatively, violates [S]ection 8(a)(1)," which bans employer interference with, coercion, or restraint of employees' rights under the Act. *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004). Under Section 8(a)(5), employers must adhere to any collective-bargaining agreements reached with their employees' representatives, including successor agreements or automatic renewals under the terms of those agreements. *See Cowboy Scaffolding, Inc.*, 326 NLRB 1050, 1050-51 (1998); *Cedar Valley Corp.*, 302 NLRB 823, 823, *enforced*, 977 F.2d 1211 (8th Cir. 1992).

In order "to prevent employers from evading obligations under the Act merely by changing or altering their corporate form," the Board has developed the alter-ego doctrine. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir.

1986). Under that doctrine, an employer that transfers 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 must continue to recognize and bargain with the unions representing its employees. *Southport Petroleum Co.*, 315 U.S. at 106; *see also 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 related employer for purposes of the Act, the alter ego is bound by the collective-bargaining agreement between the related entity and a union, *Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 458 (8th Cir. 2005), and is responsible for the other entity’s unfair labor practices, *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974); *Fugazy*, 725 F.2d at 1419.

When determining whether an entity is an later ego of another, the Board considers several factors, including “substantial identity of management, business purpose, operation, equipment, customers, supervision, and ownership,” and no single factor is dispositive. *Fugazy*, 725 F.2d at 1419-20. The Board also “gives substantial weight to evidence of a company’s motive to evade its obligations under the [Act].” *Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362,

371 (2018). As this Court has stated, “[t]he alter ego test is contextual and requires the Board to consider the circumstances of each case.” *Id.* at 372. Accordingly, two companies may be alter egos “where one entity shuts down and is replaced by another,” or where an entity “spins off a portion of its unionized operations to a non-union entity.” *Id.*

**C. Collective and RDM Are Alter Egos and Constitute a Single Employer**

The Board found, and Collective and Remco do not dispute, that “Collective and RDM were and are [a]lter [e]gos and a [s]ingle [e]mployer.” (JA 633.)

Collective and RDM shared nearly all of the factors the Board typically considers in alter-ego cases, including management, business purpose, operation, equipment, supervision, and ownership. As shown below, the companies were additionally so interrelated as to constitute a single employer under the Act.

The Board considered Remco’s relationship to Collective and RDM collectively in determining whether Remco is their alter ego. (JA 632-33.) Both companies were owned by members of the Ciullos family and managed by Ryan and Mark, who referred to both companies as “we.” (JA 633, 20, 30, 75.) The Ciullos treated the companies as one; they shared office space, Collective did uncompensated work for RDM, and RDM transferred \$1.6 million to Collective with “no credible or documented explanation” for it, and Collective transferred its bank account balance to RDM when it closed the account. (JA 633.)

RDM's formation was the first time the Ciullos created a new entity when they wished to avoid their bargaining obligations. As the Board found, "RDM was formed as a way to avoid Collective's agreements with the Union and thus the Act's bargaining requirements." (JA 633.) RDM was formed shortly after the Union won a court order enforcing a \$10,000 arbitration award against Collective, which upset Mark. (JA 84.) In conversations with the Union's representatives, Mark complained that he was wary of the Union organizing RDM's employees because of Collective's experience with the Union. (JA 633; 149.) The Ciullos' motivation in forming RDM was thus straightforward: their collective-bargaining agreement with the Union had cost them money, and they wanted to be able to operate without adhering to that agreement.

Those same facts also support the Board's undisputed finding that, in addition to being alter egos, Collective and RDM are a single employer. In determining whether two nominally separate enterprises are operated as a single integrated business, the Board considers four factors: "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control." *United Telegraph Workers v. NLRB*, 571 F. 2d 665, 667 (D.C. Cir. 1978) (citing *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv.*, 380 U.S. 255, 256 (1965)). As the Board found, the two entities had "common management and, in view of the

financial transactions between the two companies, an interrelation of operations” sufficient to satisfy the single-employer test. (JA 633.)

**D. Remco Is an Alter Ego of Collective and RDM**

After the Union found out that RDM was operating as Collective’s alter ego and organized RDM’s employees, Ryan formed Remco, another alter ego. As shown below, this Court lacks jurisdiction to review all but one aspect of Collective and Remco’s challenge to the Board’s application of the alter-ego factors as to Remco. As explained below, Collective and Remco challenged only the judge’s finding that Remco was formed with the intent of evading the Union and did not address the judge’s findings as to any of the other alter-ego factors. Even if they had preserved those issues, substantial evidence supports the Board’s findings that Remco’s management, business purpose, operation, equipment, supervision, and ownership overlap entirely with those of the other two entities. Finally, Collective and Remco have given no persuasive reason why the Board should have departed from its long precedent applying the traditional alter-ego factors and adopted an equitable test from the ERISA context here, particularly when that test, by its own terms, does not apply to Remco’s situation.

Collective and Remco’s failure to challenge the judge’s findings as to the application of the alter-ego factors before the Board forecloses their argument before this Court. Section 10(e) of the Act, 29 U.S.C. § 160(e), bars consideration

of any claim that has not been presented to the Board absent extraordinary circumstances. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). Before the Board, Remco and Collective’s only relevant exception to the judge’s decision states simply that the entities “except to the ALJ’s determination and conclusion that Remco is an alter ego of Collective and RDM.” (JA 621.) Remco and Collective’s brief to the Board likewise fails to set forth in any detail challenges to the judge’s application of the alter ego factors, so as to put the Board on notice of their arguments. This Court has stated that the grounds or theory for the exception must be evident to the Board. *See Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015) (party must “provid[e] the detail required by the Board's rules or otherwise putting the Board on notice of the specific grounds for its objections”); *Parsippany Hotel Management Co. v. NLRB*, 99 F. 3d 413, 418 (D.C. Cir. 1996) (bare exception to violation insufficient to put Board on notice of statute-of-limitations defense). The rest of their exceptions, along with their entire brief in support, were dedicated to advancing equitable reasons for why Remco should not be held liable, regardless of whether the alter-ego factors were met, including the supposed lack of deception and lack of harm to the Union. (JA 621-26.) Indeed, the brief seems to indicate that Collective and Remco *acknowledged* that the factors were met. (JA 625-26.)

Collective and Remco therefore cannot now raise their challenge to the judge's findings that Remco shared management, business purpose, operations, equipment, supervision, and ownership with the other two entities. In any event, even were the issues preserved, substantial evidence supports the Board's findings as to each factor.

**1. Common management, ownership, and supervision**

Common ownership "is generally a significant factor" in alter-ego cases. *Island Architectural*, 892 F.3d at 373. The Board has found substantially identical ownership and an alter ego relationship where the original company and newly formed company are owned by members of the same family. *See Kenmore Contracting, Inc.*, 289 NLRB 336, 337 (1988) (parents and children), *enforced*, 88 F.2d 125 (2d Cir. 1989); *Rogers Cleaning Contractors, Inc.*, 277 NLRB 482, 488 (1985) (same), *enforced*, 813 F.2d 795 (6th Cir. 1987). Ample evidence establishes that Remco shared management, ownership, and supervision with the other two entities. Ryan owned 100% of Collective and 99% of Remco, and his parents collectively owned 100% of RDM. He also managed Collective and Remco, and supervised all job sites for both. Similarly, he acted as a foreman at RDM and supervised that entity's job sites.

**2. Same business purpose, operations, and equipment**

When making alter ego determinations, the Board and courts have found that “two 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). All three entities are concrete and masonry contractors on commercial construction projects in New Jersey, and work with the same general contractors. Remco uses the same type of equipment and vendors as the other entities. There is simply no record evidence that Remco’s work is different in any way from Collective’s and RDM’s.

Similarly, Remco has substantially the same operations as the other two entities. The Board has found, with court approval, that two entities are alter egos when the newly created entity relies on the prior entity’s experience and connections in establishing its supposedly separate business. *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). Ryan did exactly that when starting Remco. He explicitly relied on RDM’s history with a general contractor when seeking a certificate of insurance. When applying for credit and bidding on jobs, Ryan also used his connections from Collective and RDM, representing that Remco had 20 years of industry experience. Other companies

followed suit; one general contractor contacted Ryan at Remco for a release on a job that RDM had performed. In short, as the Board found, “Ryan represented his new company, Remco, as being a continuation of Collective/RDM[.]” (JA 634.)

In determining whether businesses’ operations are similar, the Board also often considers whether a new entity employs former employees of its alter ego. *See, e.g., Alexander Painting, Inc.*, 344 NLRB 1346, 1353 (2005). Here, Remco’s initial complement of employees included mostly former RDM employees at least one of whom came directly from RDM. (JA 632.) Unlike in *Road Sprinkler Fitters, Local 669 v. Dorn Sprinkler Company*, 669 F.3d 790, 794 (6th Cir. 2012), cited by Collective and Remco (Br. 27), all of the employees who came to Remco from RDM had worked at RDM within a year of Remco’s formation, which coincided with when RDM began to wind down its operations. RDM became entirely dormant by early 2017. The timing otherwise supports the Board’s finding; Ryan’s last deposit to Collective’s bank account happened at the same time as he formed Remco. Far from showing a lawful double-breasting operation as claimed (Br. 24-25), the record indicates that Remco replaced the other two entities. In short, the only material difference between Remco’s operations and those of the entities it replaced is the lack of union representation for Remco’s employees.

Finally, Ryan's familiarity with RDM's employees, the concrete and masonry business, suppliers, and insurance carrier cuts in favor, not against (Br. 26-29), finding alter-ego status. Ryan was familiar with RDM's employees because of his key management role in RDM. Similarly, his knowledge of the New Jersey concrete and masonry business, his relationships with suppliers (including his credit history), his insurance carrier, and his experience in the industry all came from his time at Collective and RDM. Thus, that evidence supports the Board's finding that Remco's operations were virtually unchanged from those of the unionized entities.

### **3. Intent to evade the Act**

Collective and Remco's only challenge to the judge's application of the alter-ego factors was to the finding that Ryan formed Remco to evade the collective-bargaining responsibilities of RDM and Collective. But contrary to their contention (Br. 25), the record strongly supports the Board's finding. Ryan's own testimony confirms it; he stated that he founded Remco because he needed "non-union work to fulfill what I was doing previous[ly]." (JA 632; 168.) What Ryan meant was that he wanted to be relieved of "the burdens of operating under a union contract." (JA 634.) Accordingly, he would be able to unilaterally pay his employees less and remove their benefits so that he could submit lower bids for jobs. Similarly, in *Island Architectural Woodwork*, a unionized company spun off

part of its operations into a nonunion enterprise, admittedly because it “could not compete” with unionized employees. 892 F.3d at 374. This Court agreed with the Board that such an admission evidenced an intention to evade the Act. *Id.*

In addition to Ryan’s testimony, the timing of Remco’s formation and start-up confirm that Remco was formed to evade the Union. In November 2015, RDM and the Union agreed to a consent arbitration award of over \$58,000 to remedy RDM’s contractual breaches. RDM never recovered, wound down its operations, and became dormant. Ryan did his last consulting work in Collective’s name the following month. During that time, Ryan started Remco, and he hired its first employees and bid for its first jobs in early 2016. Thus, Ryan formed Remco “as a continuation of Collective/RDM” rather than as a new entity that would separately coexist with them. (JA 634.)

The record does not support Collective and Remco’s claim (Br. 25) that Ryan wished to continue operating a unionized company at the same time as he operated Remco. There is no evidence that Ryan submitted any bids for work on behalf of Collective after 2014. The Board discredited Ryan’s self-serving testimony that he hypothetically would have been willing to operate a unionized enterprise at the same time as Remco, and Collective and Remco do not contend that this Court should overturn the Board’s credibility findings. (JA 632.) Moreover, the record evidences Ryan’s significant hostility toward the Union;

according to Ryan, he specifically targeted former RDM employees who did not want to join the Union when he hired for Remco. (JA 57-58.)

Although the Ciullos were experiencing financial difficulties with Collective and RDM, Ryan's desire to operate Remco with lower costs was "related to avoiding the costs of operating under a union contract." (JA 634.) Thus, that desire does not excuse his attempt to lower costs "through unlawful means: by establishing a non-unionized alter ego." *Island Architectural*, 892 F.3d at 375. Collective and Remco have pointed to nothing else in the record that detracts from the Board's reasonable conclusion that Ryan had no intention of operating any unionized company when he formed Remco.

Where a non-union entity was formed with the intent of evading the Act, this Court has found two entities to be alter egos when those entities were far less interrelated. In *Island Architectural*, the nonunion entity at issue did not share ownership or management with the union entity, its employees were separately supervised, and both entities coexisted at the same time. *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73, slip op. at 13-14 (2015). This Court nevertheless agreed that the entities were alter egos due to their similar business purpose and operations, significant control exercised by the unionized entity over the nonunion entity, and the anti-union motive underlying the nonunion entity's creation. *Island Architectural*, 892 F.3d at 372-75. Here, by contrast, Remco

shared those factors, plus common ownership and management, with Collective and RDM. The Board's finding therefore fits comfortably within this Court's alter-ego precedent.

**E. Collective and RDM Have Offered No Reason To Depart from the Board's Established Alter-Ego Standard**

Collective and Remco contend (Br. 29-37) that even if the alter ego factors are met, “[i]mposition of the alter ego doctrine to Remco would be improper” because its formation did not result in any inequity. But as demonstrated below, no such equitable defense is available under the Board's or this Court's law. Even if it were, Collective and Remco have not demonstrated that the Union and employees were not harmed by Remco's formation as a nonunion entity.

Neither the Board nor this Court have held that a lack of harm to the affected party is an equitable defense to an alter-ego allegation. Indeed, Collective and Remco have cited no cases where any court has applied such a doctrine where a union and the employees are the parties harmed by the alter-ego relationship. Instead, they point to a single district court case in the ERISA context, wherein a district court found that an entity was not liable for its putative alter-ego's fund contributions because, in the unusual circumstances of that case, the funds at issue suffered no harm from the entity's creation and operation. *Flynn v. Interior Finishes, Inc.*, 425 F.Supp. 2d 38, 51-56 (D.D.C. 2006). But even if *Interior Finishes* bound the Board or this Court, which it does not, its unusual

circumstances bear little relation to this case and its legal basis is completely unpersuasive in this context.<sup>4</sup>

*Interior Finishes* involved a nonunion entity and a unionized entity that shared many of the alter-ego factors, including ownership and operations. That is where the similarities between *Interior Finishes* and this case end. The non-union entity in that case, RHI, was a general contractor that existed for a long time before the unionized entity. It created the unionized entity, Interior Finishes, to do flooring work for a single customer who required union labor. Interior Finishes initially signed a pre-hire collective-bargaining agreement with the Carpenters union concerning that labor, then later signed a collective-bargaining agreement with the Bricklayers union, who specifically agreed that their agreement covered only Interior Finishes and not RHI. The Bricklayers' agreement required Interior Finishes to contribute to a multiemployer pension fund. At all times, RHI kept both unions and all affected funds apprised of the nature of the double-breasting arrangement. *Id.* at 40-41.

---

<sup>4</sup> *Boland v. Thermal Spec.*, 950 F.Supp. 146 (D.D.C. 2013) on which Collective and Remco also rely (Br. 29), does not support the existence of an equitable defense to an alter-ego finding. In *Boland*, the district court applied the traditional alter-ego factors to find no alter-ego relationship mostly due to lack common of ownership. *Id.* at 153-55 (noting no common ownership, an arms-length sale, and no evidence of “any flim-flammery”).

The customer who required unionized flooring work ultimately ended its relationship with Interior Finishes and selected other unionized contractors to do the same work. Notably, those contractors also had collective-bargaining agreements with the Bricklayers and contributed to the same pension fund. When the Bricklayers' pension fund sought to collect unpaid contributions from RHI under the theory that RHI was Interior Finishes' alter ego, the court found that doing so would give the funds a double recovery. They would be paid twice for the work required by that one unionized customer. *Id.* at 54-55.

Here, unlike in *Interior Finishes*, the Union did not receive the full benefit of the collective-bargaining agreements. None of the unusual circumstances present in *Interior Finishes* exist here. Remco did not form Collective or RDM to do work for a particular client; indeed, Remco was formed after the two unionized entities. There is no record evidence that the work Collective and RDM had done was still performed by employees represented by the Union after Remco's formation. Another union could be representing the workers at issue. Or those workers could be unrepresented.

Moreover, unlike in *Interior Finishes*, Collective did not continue to operate after Remco's formation. Nor did Ryan even attempt to continue its operation. In that regard, the record does not support Collective and Remco's claim (Br. 35) that Collective and RDM would have continued to perform work with a unionized

workforce if they could have. There is no evidence that Collective submitted any bids for work from 2015 through 2017. The Board discredited the purportedly contrary testimony Collective and Remco cite (Br. 35) and they do not challenge the credibility finding. (JA 632.) That testimony does not even support their claim; Ryan was asked directly if he would start submitting bids on Collective's behalf again in the future, and he stated that he would not "have a problem with it," but only if the "marketplace would support it." (JA 170.) That answer is a far cry from a commitment to restart Collective's operations. Similarly, the Board discredited Mark's testimony that he would have liked to submit bids on RDM's behalf, once RDM's financial situation improved. That credibility finding is also unchallenged. It is difficult to see how RDM's financial situation could improve if it was not submitting bids to do any work.

Furthermore, the court in *Interior Finishes* described the equitable defense as defeating an alter-ego finding when "[the] unionized counterpart discloses the relationship between the two entities *prior to* entering into a collective-bargaining agreement with the union and the union receives the full benefit of that agreement." 425 F.Supp. 2d at 53-54 (emphasis added). Collective and Remco's brief ignores that timing requirement. Remco formed long after Collective signed its first agreement with the Union. Collective did not inform the Union of Remco's formation at any time. The Union found out about Remco only after

Remco began performing jobs and the Union happened to recognize an employee at one of Remco's job sites. Ryan admitted the double-breasting to the Union only after the Union confronted him at a different site. (JA 135-39.) Collective and Remco (Br. 36-37) do not address the timing requirement, contending only that Ryan did not deceive the Union. But Ryan's belated admission of something the Union had already figured out does not constitute good-faith notice of a double-breasting operation.

Even if *Interior Finishes* were factually applicable here, it is an ERISA case, not a case under the Act. The Board's alter-ego doctrine is well-established and has been applied by this Court without reference to any possible equitable defenses. See *Island Architectural*, 892 F.3d at 370-71; *Fugazy*, 725 F.2d at 1419-20. Although Collective and Remco contend that such an analysis should apply here, they take no account of the different context of cases under the Act. The pension fund at issue in *Interior Finishes* was suing for loss of contributions; thus, it makes sense that an equitable defense could apply if the fund did not actually lose any contributions. Here, the Union lost not only dues from Remco's employees, but also its ability to negotiate on their behalf. Those employees lost their collective voice in the workplace, including the benefits the Union had bargained for on their behalves. Accordingly, regardless of whether the work

Collective and RDM used to perform continued to be performed by unionized labor, the bargaining unit at issue here suffered harm due to Remco's formation.

Finally, contrary to Collective and Remco's contention (Br. 34-35), Collective's financial woes do not justify ignoring the collective-bargaining agreements and forming a new entity, Remco, to avoid the Union. A unionized business is not relieved of its bargaining duties simply because of financial difficulties. *See El Vocero de Puerto Rico*, 357 NLRB 1585, 1603-04 (2011) (mere business downturn insufficient to relieve newspaper and its alter ego of their bargaining obligation). If mere claims of financial woes were sufficient to allow a company to simply start again under a different name while bypassing the union, no floundering company would ever run afoul of the alter-ego doctrine. Indeed, the companies at issue in *Island Architectural Woodwork* unsuccessfully made the same claim. 892 F.3d at 374.

In short, Remco was far from a double-breasting relationship that uniquely did not harm the Union. It was a typical disguised continuance of Collective and RDM. Collective and RDM had serious financial difficulties and Ryan decided to cut costs by forming a new company and bypassing the Union. At no time did he notify the Union of his plans to double-breast or attempt to negotiate a new collective-bargaining agreement. In such circumstances, substantial evidence supports the Board's finding that Remco was Collective and RDM's alter ego and

that Remco violated Section 8(a)(5) by refusing to apply the collective-bargaining agreements or negotiate with the Union.

## CONCLUSION

The Board's alter-ego doctrine prevents employers from doing exactly what the Ciullos have done here: close their unionized businesses and reopen under a different name, with virtually no changes other than removing the Union. The Board therefore respectfully requests that the Court deny Collective and Remco's petition for review and enforce the Board's Order in full.

Respectfully submitted,

/s/ Usha Dheenan

USHA DHEENAN

*Supervisory Attorney*

/s/ David Casserly

DAVID CASSERLY

*Attorney*

National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001  
(202) 273-2948  
(202) 273-0247

PETER B. ROBB

*General Counsel*

JOHN W. KYLE

*Deputy General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

National Labor Relations Board  
November 2018

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

COLLECTIVE CONCRETE, INC. AND	)	
REMCO CONCRETE, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1109, 18-1140
	)	18-1169
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	22-CA-181515
	)	
and	)	
	)	
NEW JERSEY BUILDING LABORERS	)	
DISTRICT COUNCIL	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 7,998 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 2nd day of November, 2018

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

COLLECTIVE CONCRETE, INC. AND	)	
REMCO CONCRETE, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1109, 18-1140
	)	18-1169
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	22-CA-181515
	)	
and	)	
	)	
NEW JERSEY BUILDING LABORERS	)	
DISTRICT COUNCIL	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I certify that on November 2, 2018, I electronically filed the foregoing 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 certify the foregoing document was served on all parties' counsel of record through the CM/ECF system.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960