No. 18-2784

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

NEWARK ELECTRIC CORPORATION,
NEWARK ELECTRIC 2.0, INC.,
COLACINO INDUSTRIES, INC.

Respondents

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on the application of the National Labor Relations Board to enforce a Board Order against Newark Electric Corporation ("Newark Electric"), Newark Electric 2.0, Inc. ("NE 2.0"), and Colacino Industries, Inc. ("Colacino Industries") (collectively, "the Companies"). The Board's Decision and Order issued on July 31, 2018, and is reported at 366 NLRB

No. 145. (JA 6-9.)[1] The Order is based on the Board's findings that the Companies, as a single employer and alter egos, violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act") by breaching their statutory duty to bargain with the International Brotherhood of Electrical Workers, Local 840 ("the Union"), and violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by constructively discharging union member Anthony Blondell.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), and its Order is final with respect to all parties. The Court has jurisdiction to review the Board's Order and venue is proper under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Newark, New York. The Board filed its application for enforcement on September 20, 2018. This filing was timely, as the Act sets no deadline for the institution of proceedings to enforce Board orders.

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board's findings that since July 20, 2012, the Companies, as a single employer and alter egos, violated Section

[1] "JA" references are to the Joint Appendix filed by the Companies. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and by repudiating the terms of the February 24, 2011 letter of assent and the June 2012 collective-bargaining agreement and any automatic extensions.

2. Whether substantial evidence, solidly grounded in credibility determinations, supports the Board's finding that the Companies, as a single employer and alter egos, violated Section 8(a)(3) and (1) of the Act by constructively discharging employee Anthony Blondell because he was a union member.

3. Whether the Board, acting on a remand from the D.C. Circuit, properly allowed this case to proceed on a ratified complaint and afforded the Companies an adequate opportunity to be heard.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case first came before the Board on a consolidated complaint issued in May 2013 during the tenure of the Board's Acting General Counsel, Lafe Solomon. (JA 6.) Following a hearing, an administrative law judge issued a recommended decision and order finding that the Companies, as a single employer and alter egos, violated the Act as alleged. (JA 13-26.) The judge also rejected the Companies' contention that Solomon did not lawfully hold office when the complaint issued. (JA 14 n.3.) On March 26, 2015, the Board issued a Decision

and Order affirming the judge's rulings, findings, and conclusions, with minor modifications. (JA 10-13.)

The Companies petitioned for review of the Board's Order in the D.C. Circuit (No. 15-1111), and the Board cross-applied for enforcement (No. 15-1162). Before briefing, the D.C. Circuit issued its decision in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. Aug. 7, 2015), *reh'g en banc denied* (Jan. 20, 2016), holding that Acting General Counsel Solomon was ineligible to serve in his acting capacity under the terms of the Federal Vacancies Reform Act (5 U.S.C. §§ 3345 et seq.) ("FVRA") after the President nominated him to be General Counsel in January 2011. Thereafter, the Board filed a petition for a writ of certiorari to contest that conclusion, and the Supreme Court granted the petition. *NLRB v. SW General, Inc.*, 136 S. Ct. 2489 (Apr. 6, 2016) (No. 15-1251).

Two weeks later, and after briefing had been completed in this case, the D.C. Circuit granted the Board's motion to place the case in abeyance pending the Supreme Court's resolution of the FVRA issue. On March 21, 2017, the Supreme Court issued its decision affirming the D.C. Circuit's conclusion. *NLRB v. SW General, Inc.*, 137 S. Ct. 929. Accordingly, on July 14, 2017, the D.C. Circuit granted the Board's motion to vacate its 2015 Order and "remanded for further proceedings before the Board." Remand Order, D.C. Cir. No. 15-1111, Dkt. # 1684152.

On July 18, 2017, the Board invited the parties to file position statements. (JA 28.) On August 14, 2017, General Counsel Richard F. Griffin, Jr., whose appointment had been confirmed by the Senate, issued a Notice of Ratification, ratifying the complaint and its continued prosecution. (JA 30.) On September 13, 2017, the Companies filed their position statement with the Board. (JA 33-42.) On July 31, 2018, the Board issued a Decision and Order finding that the allegations of the ratified complaint were properly before it. (JA 6.) Reconsidering the earlier proceedings *de novo*, the Board affirmed the judge's rulings, findings, and conclusions, to the extent and for the reasons stated in the 2015 Decision and Order. (JA 6.) The Board adopted a modified version of the judge's recommended order. (JA 6 n.3.)

II. THE BOARD'S FINDINGS OF FACT

A. The Colacino Family and the Formation and Operation of Newark Electric and Colacino Industries

Newark Electric was run by the Colacino family for many years. It was originally known as Colacino Electric Supply, and was created by Richard Colacino's ("R. Colacino's") father. In May 1979, R. Colacino took over Colacino Electric Supply and renamed it "Newark Electric." The company operated as an electrical contractor performing traditional electrical work. James Colacino

("Colacino") worked for his father, R. Colacino, for many years. (JA 14; JA 117-18, 145-46, 447-49.)

In 2000, Colacino purchased Newark Electric's assets, good will, equipment, website, and customer database from his father. Colacino did not purchase his father's business outright because he wanted to avoid assuming his father's outstanding tax liabilities. At the same time he purchased Newark Electric, Colacino incorporated Colacino Industries. Colacino is the 100 percent owner of Colacino Industries, which performs a small portion of traditional electrical work as well as automation and systems integration work. Colacino folded the purchased assets from Newark Electric into Colacino Industries. After Colacino purchased Newark Electric, R. Colacino worked for Colacino as an estimator and project manager. (JA 14-15; JA 116, 118, 120, 135-36, 145, 430-34.)

Both Newark Electric and Colacino Industries were housed at 126 Harrison Street in Newark, New York, in a building owned by Colacino. The entrance doors to 126 Harrison Street displayed the logos of both Newark Electric and Colacino Industries. Colacino, whose business card stated that he was the CEO and President of Newark Electric, made all the personnel decisions in the management, hiring, and retention of employees, many of whom worked for Newark Electric and Colacino Industries. (JA 15-16, 22-23; JA 75, 82, 95-99, 118, 123, 258, 329, 331, 333.)

Both companies were active and shared a customer base in the marketplace. They used interchangeable invoices and purchase orders. For example, invoices show that on August 24, 2011, Colacino Industries performed a job for the Village of Newark. Almost a year later, on July 30, 2012, Newark Electric performed work for this same customer. Regardless of which company performed the work, the customer addressed their orders to Newark Electric, even when the invoices list the jobs as being performed by Colacino Industries. Payments were also addressed to both Newark Electric and Colacino Industries. Employees of both companies filled out job cards and supply requisitions that showed only the Newark Electric logo; however, their timesheets showed both the Colacino Industries and Newark Electric logos. (JA 15, 20; JA 99-100, 119, 123, 125, 127, 335-38, 340, 355, 368, 397-403, 407.)

Colacino used the name Newark Electric interchangeably with Colacino Industries in dealings with the public. Both companies shared the e-mail addresses newarkelectric.com and colacino.com, and used one phone system. Newark Electric and Colacino Industries also used the same facsimile, copier and printer. Company vans used by Colacino Industries advertised and displayed the Newark Electric logo. Colacino also used stationery that had either the Newark Electric logo or both the Newark Electric and Colacino Industries logos on the letterhead. (JA 15; JA 83, 89, 99, 118-19, 124-25, 299, 324, 340, 343-76.)

B. Newark Electric Signs a Letter of Assent Agreeing To Be Bound by the Collective-Bargaining Agreement Between the Union and the National Electrical Contractors Association

1. Union Organizer Mike Davis Lobbies Newark Electric To Sign a Letter of Assent Binding Newark Electric to the Union's Master Collective-Bargaining Agreement

From 2005 to July 2011, Mike Davis was an organizer for the Union.[2] Davis' job was to increase union membership and to convert employers from nonunion to union contractors by signing them to the Union's master collective-bargaining agreement with the Finger Lakes NY Chapter of the National Electrical Contractors Association ("NECA").[3] The collective-bargaining agreement between the Union and NECA defines the bargaining unit as all employees performing electrical work in the Union's jurisdiction. It also contains a work-preservation clause stating that a signatory company cannot subcontract to a nonunion company. (JA 10, 15-16; JA 52, 64, 73-74, 159, 164-65, 203, 208-09.)

Beginning in 2006, Davis lobbied Colacino to sign a letter of assent binding Newark Electric to the relevant collective-bargaining agreement. Such a letter of

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[2] In July 2011, Davis became the Union's business manager. (JA 15; JA 72-73.)

[3] Under Section 8(f) of the Act (29 U.S.C. § 158(f)), construction-industry employers, like the Companies, can enter into such a collective-bargaining agreement even if the Union has not shown that it has support from a majority of the unit employees. (JA 10 n.2.) *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 761 (D.C. Cir. 2012).

assent, which applies to employers that have never before been party to a collective-bargaining relationship, is called a "Letter of Assent-C."[4] When an employer, like Newark Electric, signs this type of a letter of assent with the Union, it is bound to the collective-bargaining agreement between the Union and NECA for 180 days (6 months). Thereafter, the employer can terminate the collective-bargaining relationship by giving written notice to both the Union and NECA anytime from the 181st day until 30 days before the one-year anniversary of the signing of the letter of assent. (JA 15-16; JA 73-74, 248, 250-52.)

If the employer fails to terminate the collective-bargaining relationship during that 5-month window, then the employer is bound by the agreement until it expires. If the employer wishes to terminate the relationship at the time the agreement expires, the employer must notify the Union and NECA in writing at least 100 days prior to the agreement's termination. Otherwise, the employer is bound to any successor agreement between the Union and NECA. (JA 16; JA 74, 250.)

[4] Another type of Letter of Assent, a "Letter of Assent-A," is reserved for employers who have previously been union contractors. (JA 16; JA 73.)

2. Colacino Signs a Letter of Assent on Behalf of Newark Electric, Binding Newark Electric to the Master Collective-Bargaining Agreement

On February 24, 2011, Newark Electric signed a Letter of Assent-C with the Union. At that time, Newark Electric had two employees performing what later became bargaining unit work for the Union. The name of the firm on the letter of assent is "Newark Electric," and the address is listed as 126 Harrison Street. The letter of assent includes Newark Electric's individual federal employer identification number. (JA 10 n.1, 17; JA 74-75, 254-56.)

Colacino, R. Colacino, Davis, and former union business manager Clark Culver were present for the signing. Culver signed for the Union. Colacino—not his father—signed for Newark Electric. Colacino signed above the line that had his name and title as CEO. After the signing, all present went out to dinner to celebrate. (JA 17; JA 74-75, 254-55.)

At the time Newark Electric signed the letter of assent, the applicable master collective-bargaining agreement was set to expire on May 31, 2012. Given that Newark Electric signed the letter of assent on February 24, 2011, it was bound to that agreement for at least 6 months, until August 24, 2011. Thereafter, Newark Electric could terminate the relationship anytime from August 25, 2011 to January 24, 2012 (30 days before February 24, 2012). If Newark Electric did not terminate the relationship by January 24, 2012, it would be bound by the collective-

bargaining agreement until it expired on May 31, 2012. In addition, if Newark Electric did not give notice by February 21, 2012 (100 days prior to May 31, 2012), it would be bound to any successor collective-bargaining agreement. (JA 17, 21; JA 159, 254.)

Once Newark Electric signed the letter of assent, it began deducting and forwarding the required union dues and making fringe benefit fund contributions to the Union. (JA 17; JA 266-71, 326.)

C. Colacino Creates NE 2.0

On March 8, 2011, Colacino filed for incorporation of NE 2.0. Colacino is the sole owner and president of NE 2.0. Colacino claimed that he created NE 2.0 in order to perform traditional electrical work that was not Colacino Industries' main business. Once incorporated, NE 2.0 applied the terms of the collective-bargaining agreement, including deducting and forwarding required dues and making welfare fund contributions to the Union. (JA 15; JA 117-18, 266, 268-69, 326, 378-88.)

Colacino operated NE 2.0 out of 126 Harrison with Newark Electric and Colacino Industries. NE 2.0 operated interchangeably with Newark Electric and Colacino Industries, with payroll reports and union deductions and contributions reflecting all three companies. NE 2.0 also used the same phone system, facsimile,

copier and printer as Newark Electric and Colacino Industries. (JA 15, 17, 20; JA 98-100, 123, 266-71, 378-87.)[5]

D. Colacino Signs a Letter of Assent for Colacino Industries Agreeing To Be Bound by the Collective-Bargaining Agreement Between the Union and NECA

In July 2011, Colacino asked Davis if Colacino Industries could sign its own Letter of Assent-C with the Union. Colacino explained that it was difficult to maintain accounting books with two different companies and two different sets of employees. Davis understood Colacino to be referring to Newark Electric and Colacino Industries as the two companies, because he did not know at that time that NE 2.0 existed. Davis told Colacino there should be no problem with having two letters of assent, but he would have to check with the Union. (JA 18; JA 76-77, 120-21.)

On July 20, after Davis secured approval from the Union, he and Colacino signed a Letter of Assent-C for Colacino Industries. Davis signed for the Union and Colacino signed for Colacino Industries. The name of the firm on the letter of assent is "Colacino Industries" and the address is 126 Harrison Street. The letter of assent lists Colacino Industries' distinct federal employer identification number. The letter of assent bound Colacino Industries to the master collective-bargaining

[5] The parties stipulated that NE 2.0 and Colacino Industries are a single employer and alter egos. (JA 15; JA 70-71.)

agreement under the same withdrawal conditions as Newark Electric's letter of assent, running from the date of signing. (JA 18; JA 76-77, 273-75.)

E. Newark Electric Takes No Action To Terminate Its Letter of Assent

Although Newark Electric could have terminated its Letter of Assent anytime between August 25, 2011, and January 24, 2012, it did not do so. Nor did Newark Electric give the requisite 100-day notice prior to May 31, 2012, to avoid being bound to any successor collective-bargaining agreement. (JA 21; 254.)

F. Colacino Industries Timely Terminates Its Letter of Assent; Davis Learns of the Existence of NE 2.0 for the First Time

On April 12, 2012, Colacino sent Davis a letter notifying the Union that Colacino Industries intended to terminate its July 20, 2011 letter of assent as of May 26, 2012.[6] The letter also stated that Colacino would like to schedule a meeting with Davis to "discuss the reasons for this decision and how [the Union] can support [NEC] 2.0, Inc." Davis was taken by surprise by the reference to NE 2.0, as this was the first time he heard of the existence of NE 2.0. Davis then tried to contact Colacino for a meeting, but was not able to reach him. (JA 18; JA 78, 83, 293.)

[6] The April 2012 notice of termination was timely, as it took place more than six months after CI signed the letter of assent on July 20, 2011, and prior to 30 days before July 20, 2012. (JA 21; JA 273-74, 293, 405.)

G. The Parties Enter into a Successor Master Agreement; Union Member Bush Asks About Resigning his Union Membership; Davis Unsuccessfully Attempts to Contact Colacino; Colacino Sends Davis a Letter on Newark Electric Letterhead Purporting to Terminate NE 2.0's Relationship with the Union

Colacino Industries continued to pay benefit fund contributions for April, May, and June, 2012. The parties entered into a successor master agreement with effective dates from June 1, 2012, to May 31, 2015. (JA 18, 21; JA 203-46, 301-14, 316.)

In late June 2012, it became clear to Davis after a conversation with union member Rick Bush that Colacino was moving away from any relationship with the Union. Specifically, on June 29, Bush came to Davis' office and asked about an honorary withdrawal of his union membership. Davis gleaned from that conversation that Bush, who was not working at the time but whom Davis knew to have been "speaking with people" at Newark Electric, wanted an honorary withdrawal because it was his intention to work for Newark Electric. Davis told Bush that Newark Electric was still a union shop and that if Bush relinquished his union membership, he would not be allowed to work for a union shop. After his conversation with Bush, Davis again unsuccessfully attempted to contact Colacino to determine what was happening. (JA 18; JA 78-79.)

Although Davis was not able to reach Colacino, two Colacino employees visited Davis on the same day he spoke with Bush. They handed Davis a letter on NE letterhead that stated, in part:

> In compliance with the letter of assent dated 7/20/11, [NE 2.0] is terminating the letter of assent and the collective-bargaining agreement effective today, the 29th of June, 2012.

(JA 18; JA 79, 299.)

Following receipt of the letter, Davis attempted once again to contact Colacino. Soon thereafter, union member Scott Barra, whom Davis had referred to work for the Companies, contacted Davis. Barra said that Colacino wanted to set up a meeting. Davis arranged through Barra to meet with Colacino on July 2. (JA 18; JA 79-80.)

H. Colacino Asserts that Colacino Industries' Letter of Assent Superseded Newark Electric's Letter of Assent

At the July 2 meeting, Colacino asserted that he believed the second letter of assent for Colacino Industries superseded the first letter of assent that he signed. Davis replied that he would never have agreed to such an arrangement. Davis told Colacino that the first letter of assent that Colacino signed, on behalf of Newark Electric, was still in effect and that as such, Colacino was still a union contractor bound to the relevant master collective-bargaining agreement that ran from June 1,

2012, to May 31, 2015. The parties agreed to meet again on July 9. (JA 18, 22; JA 80.)

I. Colacino Cancels the Follow-Up Meeting and Indicates He Intends To Operate as a Nonunion Contractor; Employees Barra and Bush Resign their Union Membership

On July 9, Colacino's office manager, Vicky Bliss, called Davis and cancelled the parties' follow-up meeting. Bliss also informed Davis that Colacino intended to operate as a nonunion company, effectively repudiating the master collective-bargaining agreement. That same day, Barra resigned his membership from the Union. On July 16, Bush resigned his union membership. (JA 18 & n.9; JA 80-81, 318, 320.)

J. After Union Member Anthony Blondell Tells Colacino that He Could Not Work for a Nonunion Shop, Colacino Lays Him Off, Purportedly for Lack of Work

Anthony Blondell was a member of the Union for over 28 years. In March 2011, after Colacino signed the February 24, 2011 letter of assent for Newark Electric, Blondell began working for the Companies as a union electrician. (JA 22; JA 95.)

In June 2012, Colacino told Blondell that as of July 20, 2012, he planned on no longer being a union shop. Blondell became concerned because he could not work for Colacino and retain his status as a union member if Colacino was not operating a union shop. Accordingly, on July 17 or 18, Blondell asked Colacino if

he would have be laid off on July 20. Colacino responded that he would lay off Blondell if he did not reach a deal with the Union by then. (JA 22-23; JA 96-98.)

By letter of July 20, Colacino laid off Blondell. The letter stated that Blondell was being laid off "due to a lack of work." However, Blondell was in the middle of a job on July 20, and there was work available to perform. Barra, who had resigned his union membership, was not laid off. Nor was Bush, whom Colacino had recently hired. (JA 23; JA 98, 103, 333.)

K. Colacino Liquidates NE 2.0 and Newark Electric

On September 4, 2012, Colacino filed paperwork to liquidate NE 2.0. On April 3, 2013, he liquidated Newark Electric. Colacino Industries remained. (JA 14, 18; JA 147, 436-45.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Ring and Members McFerran and Kaplan) found that the bargaining unit as set out in the master collective-bargaining agreement was an appropriate unit for bargaining. (JA 6, 10.) The Board further found, in agreement with the administrative law judge, that the three Companies had substantially identical management, operations, equipment, customers, and supervision, as well as common ownership and common control over labor relations. (JA 10.) Accordingly, the Board found that the three Companies were a single employer and alter egos. (JA 6, 21.)

The Board found that, as a single employer and alter egos, all three Companies violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) since July 20, 2012, by failing and refusing to recognize and bargain with the Union within the meaning of Section 8(f) of the Act (29 U.S.C. § 158(f)); and failing and refusing to apply, and repudiating, the terms of the February 24, 2011 Letter of Assent and the June 1, 2012-May 31, 2015 collective-bargaining agreement and any automatic extensions. (JA 10, 20-21.) The Board also found that the Companies failed to make the required payments to the fringe benefit funds. (JA 11, 21.) In addition, the Board found that by constructively discharging Blondell, the Companies discriminated in regard to the hire, tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (JA 24.)

The Board's Order requires the Companies to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their statutory rights. (JA 7.) Affirmatively, the Order requires the Companies to give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union, and any automatic extension or renewal of it. (JA 7.) In addition, the Order requires the Companies to make

employees whole for the Companies' failure to honor the terms of the agreement; remit the fringe benefit payments that have become due; bargain with the Union upon request; offer Blondell full reinstatement to his former job or the equivalent; make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him; reimburse each affected employee, including Blondell, for any adverse income tax consequences of receiving a lump sum backpay award; file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters; and post a remedial notice. (JA 7-8.)

STANDARD OF REVIEW

This Court's review of Board orders is "quite limited," and thus a Board order "cannot be lightly overturned." *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 96 (2d Cir. 1985). The Court reviews the Board's legal conclusions only to ensure that they have a reasonable basis in law, and in doing so the Court affords the Board "a degree of legal leeway" because "decisions based upon the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (internal quotation marks and citations omitted).

Similarly, the Court reviews the Board's findings of fact only to determine whether they are supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is "such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 121 (2d Cir. 2017). Accordingly, "reversal based upon a factual question will only be warranted if, after looking at the record as a whole, [the Court is] left with the impression that no rational trier of fact could reach the conclusion drawn by the Board." *NLRB v. Albany Steel, Inc.*, 17 F.3d 564, 568 (2d Cir.1994) (internal quotation marks and alterations omitted). The Court's review is "even further constricted" where, as here, the Board's factual findings depend on credibility determinations made by an administrative law judge and adopted by the Board, because those determinations "may not be disturbed unless incredible or flatly contradicted by undisputed documentary testimony." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Companies, as a single employer and alter egos, violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union and repudiating the terms of the February 24, 2011 letter of assent and the relevant master collective-bargaining agreement. The Board, applying well-established principles, found that given the substantial overlap in operations, management, labor relations, and ownership, the Companies constitute a single employer. Moreover, given the additional shared factors of

equipment, customers, and supervision among the Companies, the Board reasonably found that the Companies constitute alter egos of each other. The Companies' assertions that Newark Electric did not continue to exist, or was separately owned and controlled by Colacino's father, are contrary to abundant record evidence and the relevant case law.

As a single employer and alter egos, the Companies are responsible for each other's unfair labor practices. Rather than contest the established legal principles, the Companies rely only on discredited testimony in arguing that Colacino Industries' separate, and later, letter of assent "superseded" Newark Electric's earlier one, or that the termination of the Colacino Industries letter of assent somehow operated to terminate the separate letter of assent executed by Newark Electric. The Board's findings that the Companies violated Section 8(a)(5) of the Act therefore should be upheld.

In addition, the Board reasonably concluded that the Companies, as a single employer and alter egos, violated Section 8(a)(3) and (1) of the Act by constructively discharging Blondell because he was a union member. Credited evidence demonstrates that Colacino told Blondell he would lay off Blondell if the Companies repudiated the letter of assent and collective-bargaining agreement. Shortly thereafter, that is exactly what happened. Colacino laid off Blondell, claiming it was due to the lack of work. Once again, the Companies' defense, that

it laid off Blondell because he asked them to do so, was discredited. Moreover, credited evidence demonstrates that there was work for Blondell to perform. Indeed, the two employees who had resigned their union membership continued working for the Companies. In these circumstances, the Board reasonably found that the Companies violated the Act by constructively discharging Blondell because of his union membership.

The Companies' attempt to capitalize on a defect in the complaint originally issued against them falls flat. As the Board explained on remand from the D.C. Circuit, its validly appointed General Counsel, Richard F. Griffin, Jr., properly ratified the complaint. Although the Companies question whether he adequately examined matters before ratifying the complaint, their unsupported suggestions do not overcome the strong presumption of regularity that applies to his administrative action. Likewise, the Companies gain nothing by attempting to re-litigate the propriety of the D.C. Circuit's remand order, which allowed the General Counsel to consider ratification among other appropriate actions. Thus, the propriety of the remand has already been determined by a coordinate court whose determination is now the law of the case. Nor is there any merit to the Companies' objections to the process they received on remand. At bottom, the record shows that although the Board gave the Companies ample opportunity to be heard on remand, the

Companies simply squandered that opportunity. Accordingly, the Board's Order should be enforced in full.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT SINCE JULY 20, 2012, THE COMPANIES, AS A SINGLE EMPLOYER AND ALTER EGOS, VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION, AND BY REPUDIATING THE FEBRUARY 24, 2011 LETTER OF ASSENT AND THE JUNE 2012 COLLECTIVE-BARGAINING AGREEMENT AND ANY AUTOMATIC EXTENSIONS

The record amply supports the Board's findings that since July 20, 2012, the Companies violated the Act by unlawfully repudiating their obligations under the February 24, 2011 letter of assent, the corresponding Section 8(f) collective-bargaining agreement, and any automatic extensions of the agreement. Further, ample evidence supports the Board's findings that the Companies constitute a single employer and alter egos. As such, the Companies are jointly and severally liable for these unfair labor practices. The Companies' challenges to the single employer and alter ego findings ignore the credited evidence, which establishes the obvious reality that the three entities were closely intertwined and virtually indistinguishable from each other. Likewise, the Companies' claims that Colacino Industries' July 20, 2011 letter of assent superseded Newark Electric's February 24, 2011 letter of assent, or that the termination of the Colacino Industries letter of

assent somehow operated to terminate Newark Electric's separate letter of assent, are contrary to the credited testimony and devoid of legal support.

A. Applicable Principles

Construction industry collective-bargaining agreements entered pursuant to Section 8(f) of the Act (29 U.S.C. § 158(f)) are fully enforceable during their term, and an employer that refuses to give effect to an existing 8(f) agreement violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).[7] *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1377-78, 1389 (1987), *enf'd sub nom. Int'l Assoc. of Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 779-80 (3d Cir. 1988). Moreover, a construction-industry employer can also sign a "letter of assent," as the Companies did here, authorizing a multiemployer bargaining group to represent the employer in negotiations with the union, and binding the employer to any Section 8(f) collective-bargaining agreement into which the multiemployer group enters. *Cox Corp. v. NLRB*, 593 F.2d 261, 262 (6th Cir. 1979); *NLRB v. Black*, 709 F.2d 939, 940-41 & n.1 (5th Cir. 1983). Under *Deklewa*, 282 NLRB at 1377-78, 1389, an employer violates the Act if it repudiates or refuses to give effect to the

[7] A Section 8(a)(5) violation produces a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. *See Allied Chem. & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

agreement during its term. *See Int'l Union of Painters and Allied Trades, Local Unions 970 and 1144, AFL-CIO-CLC v. NLRB*, 309 F.3d 1, 3-4 (D.C. Cir. 2002); *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1215-16 (8th Cir. 1992). The Board will also enforce an employer's commitment to be bound to successor agreements or automatic renewals, notwithstanding the original agreement's expiration date. *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 addition, if the Board finds that two or more nominally separate entities are a single employer for purposes of the Act, all are jointly and severally liable for remedying unfair labor practices committed by any of them. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1288-87 (7th Cir. 1989). The Board also may treat separate entities as one under the Act if they constitute alter egos of one another. *See NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 118 (2d Cir. 2001). Once an alter ego relationship is established, each party to that relationship is "subject to all the legal and contractual obligations" of the other parties. *Howard Johnson Co. v. Detroit Local Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974). *Accord G&T Terminal Packaging Co.*, 246 F.3d at 118 (citing cases). Although the alter ego doctrine is most typically applied "in the context of successor employers, where the new employer is 'merely a disguised continuance of the old employer,'" it is also applicable in the case of

coexisting employers. *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990) (quoting *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106 (1942)). "The [Board's] determinations of both single employer and alter ego status are questions of fact," and therefore must be upheld if supported by substantial record evidence. *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996).

B. The Companies Are a Single Employer and Alter Egos

The Companies stipulated at the hearing that Colacino Industries and NE 2.0 are a single employer and alter egos. (JA 15, 19; JA 70-71.) Moreover, as shown below, substantial evidence supports the Board's finding that Newark Electric, Colacino Industries, and NE 2.0, constitute a single employer and are alter egos of each other. Accordingly, all three companies are jointly and severally liable for one another's unfair labor practices.

1. The Companies are a single employer

As the Companies recognize (Br. 28-29), in determining whether single-employer status exists, the Board considers four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership. *IBEW Local 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Lihli Fashions Corp.*, 80 F.3d at 747. Not all of these factors need to be present for the Board to find single-employer status, and no one factor is

controlling. *Lihli Fashions*, 80 F.3d at 747; *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 752 (7th Cir. 2001); *NLRB v. Carson Cable TV*, 795 F.2d 879, 881-82 (9th Cir. 1986). Single employer status "ultimately depends upon 'all circumstances of the case' and is characterized by the absence of an 'arms-length relationship' found among unintegrated companies." *Hahn Motors*, 283 NLRB 901, 901 (1987).

The record amply demonstrates that at all relevant times, the operations of all three Companies were closely interrelated. (JA 15, 20.) In 2000, Colacino bought all of the assets of Newark Electric and funneled them to Colacino Industries, which, like Newark Electric, performed traditional electrical work in addition to automation and integration systems. Moreover, contrary to the Companies' claim that Newark Electric was dormant (*see* below pp. 32-33), the Board relied on credited testimony and uncontradicted documentary evidence to find that "Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012." (JA 15.) Indeed, until dissolving Newark Electric in April 2013, Colacino operated Newark Electric and Colacino Industries interchangeably, "us[ing] the name of Newark Electric in his commercial and business dealings with his customers and the general public." (JA 20.) Thus, invoices and customer purchase orders were "used interchangeably" between Newark Electric and Colacino Industries. (JA 20.) Newark Electric,

Colacino Industries, and NE 2.0 also used the same office. Logos for both Newark Electric and Colacino Industries were displayed on the shared office door and shared stationery. Both the Newark Electric and Colacino Industries logos appeared on employee timesheets and job cards. The Newark Electric logo appeared on vans used by Colacino Industries. All three Companies used the same phone system, copiers, and facsimile machine, and communicated by email with the public on interchangeable addresses (newarkelectric.com or colacino.com). In addition, employees of all three companies serviced the same customers and used the same warehouse for supplies. Finally, all three Companies contributed to the employee benefits funds. (JA 17.) *See Wyandanch Engine Rebuilders, Inc*., 328 NLRB 866, 873 (1999) (joint fund contributions indicated interrelated operations). In these circumstances, the record amply establishes that the Companies' operations were interrelated. *See Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1287-88 (7th Cir. 1989) (companies' functional overlap and financial integration showed interrelated operations).

Additionally, Colacino commonly managed and centrally controlled the labor relations of all three companies. He made all personnel decisions in the management of all three companies and in the hiring and retention of employees, many of whom worked for both Newark Electric and Colacino Industries. Indeed, as noted above, employees submitted timesheets that displayed the logos of both

Newark Electric and Colacino Industries. Significantly, Colacino signed for Newark Electric on the February 24, 2011 Letter of Assent binding Newark Electric to the master collective-bargaining agreement with the Union; and he also signed for Colacino Industries on its July 20, 2011 letter of assent.[8] *See Am. Stores Packing Co.*, 277 NLRB 1656, 1657 (1986) (role in collective bargaining is strong evidence of centralized control of labor relations). Moreover, although the Companies insist (Br. 32) that Colacino did not control Newark Electric, the documentary evidence plainly shows he not only signed for Newark Electric on the February 24 letter of assent, but his business card indicated his controlling management role as "President and CEO" of Newark Electric. (JA 16, 20.) Thus, the Board reasonably found that the Companies shared common management and that Colacino centrally controlled their labor relations. (JA 20.) *See Lihli Fashions*, 80 F.3d at 747 (discussing common management and centralized control of labor relations).

[8] Contrary to the Companies' claim (Br. 30-31), the Board's unassailable finding that Colacino played a pivotal role in both letters of assent is not undermined by the administrative law judge alternatively describing the short timeframe between the signing of the two letters as two months (JA 17) or five months (JA 18 & n.8). The salient point firmly established by the documentary evidence is that Colacino, within a period of months, signed two letters of assent—one on behalf of Newark Electric, and the other on behalf of Colacino Industries—concretely demonstrating his control over collective bargaining for both companies.

The Companies also shared common, if not identical, ownership. Colacino owned 100 percent of Colacino Industries and NE 2.0. Since 2000, while R. Colacino retained ownership over Newark Electric's prior debt, Colacino owned all of Newark Electric's assets, its customer base, and its logo. *See Goodman Piping Prods., Inc. v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984) (common ownership and control established through familial relationships). Further, as the Board found, and contrary to the Companies (Br. 31), even assuming that formal ownership of Newark Electric was with R. Colacino during the relevant period, "the active control of both companies was in the hands of [James] Colacino," and this "satisfied the element of common ownership." (JA 20 n.11, citing, e.g., *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1998)). The totality of the circumstances, thus, amply supports the Board's finding that the Companies constitute a single employer under well-settled law.

2. The Companies are alter egos

As the Companies recognize (Br. 29), in determining whether business entities are alter egos, the Board and the courts consider factors in addition to those used to determine single employer status. Among the additional factors considered are whether the entities have "substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership." *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 117 (2d Cir. 2001); *accord*

Crawford Door Sales, 226 NLRB 1144, 1144 (1976). No single one of these factors is decisive or indispensable. *A & P Brush Mfg. Corp. v. NLRB*, 140 F.3d 216, 219 (2d Cir. 1998); *NLRB v. O'Neill*, 965 F.2d 1522, 1529-30 (9th Cir. 1992); *Liberty Source W, LLC*, 344 NLRB 1127, 1127 n.1 (2005), *enf'd sub nom. Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172, 182 (3d Cir. 2007). And while the Board may consider whether one entity was created in an attempt to enable another to avoid its obligations under the Act, the Board has consistently held that such a motive is not necessary for finding alter ego status. *Liberty Source W*, 344 NLRB at 1127; *Crawford Door Sales*, 226 NLRB at 1144. *Accord G & T Terminal Packaging*, 246 F.3d at 118 (recognizing that "a finding of anti-union motivation is not necessary" in order to conclude that nominally separate entities are alter egos) (internal quotation marks and alteration omitted).

Applying these settled principles, the Board reasonably determined that the Companies are alter egos. (JA 10, 20.) As discussed above, the Companies have closely interrelated operations, share management and labor policy, and have virtually identical ownership. Likewise, as discussed, the Companies share the same warehouse and supplies, use the same vans and other equipment, service the same customers, and Colacino supervises all the operations of the three companies. Accordingly, the record fully supports the Board's finding under well-settled law that the Companies are alter egos of each other because at all relevant times they

had "substantially identical management, operations, equipment, customers, and supervision, as well as common ownership and common control over labor relations." (JA 10.)

3. The Companies' challenges to the Board's single employer and alter ego findings are without record support

The Companies assert (Br. 31-32) that they are neither a single employer nor alter egos because Newark Electric did not continue to exist, or was separately owned and controlled by Colacino's father, R. Colacino. These arguments ignore abundant record evidence and relevant case law.

As the evidence discussed above pp. 6-7, 27-28 shows, the Companies' assertion that Newark Electric was "completely dormant since 2000" flies in the face of overwhelming record evidence. (Br. 31-32.) The Board found that "Newark Electric was holding itself out to the public as an active operating company from the years 2000 to 2012, even after selling all its assets to [ ] Colacino Industries." (JA 15.) And Colacino was not just using Newark Electric's assets for Colacino Industries, as the Companies urge. (Br. 31.) He was also "us[ing] the name of Newark Electric in his commercial and business dealings with his customers and the general public" for over ten years after Newark Electric purportedly went out of business. (JA 20.) Moreover, Newark Electric "continued to operate and generate business," as evidenced by invoices

and customer purchase orders that reflected the Newark Electric logo, and by payments that were addressed to both Newark Electric and Colacino Industries. (JA 20.) In addition, employees worked for both Newark Electric and Colacino Industries on jobs for interchangeable customers, filled out timesheets with the logo for both companies, and used some forms that only showed the Newark Electric logo. Thus, Newark Electric was active and operational when Colacino signed the letter of assent in Newark Electric's name on February 24, 2011.[9] Indeed, his very signing of the letter of assent on behalf of Newark Electric itself demonstrates that Newark Electric was an active, ongoing concern. Moreover, after the letter of assent was signed, Newark Electric made its own contributions to the union funds in the name of Newark Electric. Because Newark Electric, thus, remained active until it was admittedly dissolved in April 2013, the Board reasonably found that it "was not a dormant company after 2000 when the assets were sold to Colacino." (JA 20.)

[9] The Companies err in suggesting that the Board found Newark Electric "had no employees at all" when Colacino signed the Newark Electric letter of assent. (Br. 30.) The Board merely corrected the administrative law judge's finding that Newark Electric had several "union members" on its payroll at that time. (JA 10 n.1, 17.) As the Board explained, although there were no *union members* working for Newark Electric at the time, there were two employees performing "what later became bargaining unit work." (JA10 n.1.)

There is also no merit to the Companies' alternative claim that "even if Colacino Industries and [Newark Electric] had been operational at the same time" they still would not qualify as a single employer or alter egos because "each entity was 100% owned and controlled by different individuals." (Br. 31.) The Companies base their claim (Br. 31) that neither Colacino nor his father "had any ownership or management role in each other's company" on Colacino's self-serving and discredited testimony, which is controverted by the rest of the record. (JA 15, 20.) As shown above, the record establishes that Colacino not only held himself out as the president and CEO of Newark Electric, he also signed legal papers on behalf of Newark Electric and was responsible for managing and hiring the personnel of Newark Electric, Colacino Industries, and NE 2.0. Moreover, as the Board specifically found, even if Colacino lacked ownership of Newark Electric in some formalistic sense, that would not prevent a finding of common ownership where, as here, the evidence abundantly shows that he actively controlled and ran Newark Electric as an ongoing business between 2000 and 2012. (JA 20 n.11, citing cases).

In sum, contrary to the Companies' hyperbolic claim, there is nothing "nonsensical" about the Board's findings that the Companies—all under the common control of Colacino—constitute a single employer and alter egos for purposes of liability under the Act. (Br. 31.) As shown above, those findings are

supported by substantial documentary evidence. In any event, the Companies have provided no reason why the objective evidence on which the Board relied should be rejected in favor of Colacino's discredited account of the Companies and his role in them. As this Court recognizes, the Board's credibility findings "will not be overturned unless they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony." *See NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir.1982) (internal quotation marks omitted). Given the Companies' complete failure to make such a showing, the Board's determination to discredit Colacino should not be disturbed, and the Court should affirm the Board's finding that the Companies are a single employer and alter egos.

C. The Companies Unlawfully Failed To Recognize and Bargain with the Union and Repudiated Their Obligations Under the February 24, 2011 Letter of Assent and the June 1, 2012-May 31, 2015 Collective-Bargaining Agreement, and Any Automatic Extensions of That Agreement

The Board reasonably found that the Companies violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union and repudiating the terms of the collective-bargaining agreement and any automatic extensions of it. (JA 21.) Under the terms of its February 24, 2011 letter of assent, Newark Electric was bound to the original collective-bargaining agreement until August 24, 2011, and had a window of time to give notice of termination of that agreement or any extensions of that agreement. Newark Electric did not do so. The Companies do

not contest the well-settled principles, discussed above at pp. 24-25, that if they failed to timely terminate the February 24, 2011 letter of assent, they are bound by the terms of the collective-bargaining agreement and any automatic extensions of that agreement. Instead, they only argue (Br. 32-33) that Colacino Industries' timely termination of its letter of assent somehow terminated Newark Electric's letter of assent—either because Colacino Industries' letter "superseded" Newark Electric's, or because the two entities are a single employer and alter egos. The Companies' arguments must be rejected because they are based on an alternate version of the facts—one that is founded on discredited testimony.

Relying on the credited testimony and documentary evidence, the administrative law judge found that the parties did not agree that Colacino Industries' separate letter of assent with the Union would supersede Newark Electric's earlier letter of assent. The judge explicitly based his credibility determinations on "a review of the entire testimonial record and exhibits" as well as "the demeanor of the witnesses," and he expressly credited Union Organizer Davis over Colacino. (JA 11 n.4, 21-22.) Thus, the judge found "Davis' testimony more worthy of belief than Colacino's" when Davis "denied agreeing to dissolve the Letter of Assent C with Newark Electric." (JA 22.) The judge likewise credited Davis's testimony over Colacino's to find that Davis did not "redate" the Newark Electric letter of assent to run from the same date as the later letter of

assent with Colacino Industries. (JA 22.) As the judge explained, Davis credibly testified that he "never had a conversation about redating the first letter of assent or that it would be superseded with the signing of the Letter of Assent C with Colacino Industries." (JA 22). In addition to crediting Davis's testimony on these points, the judge also specifically *discredited* Colacino's contrary testimony "that the first letter of assent was dissolved, superseded, or redated with the Letter of Assent C for Colacino Industries." (JA 22.) The judge found Colacino's testimony that Davis agreed to such an unusual arrangement "not worthy of belief" in light of the evidence that Davis lacked authority to dissolve the first letter of assent, Colacino never received a copy of the purportedly redated letter of assent, and there were no notes memorializing a conversation in which such an arrangement was allegedly made. (JA 22.) The Companies ignore these credibility findings and fail to offer any reason to contradict them. *See Am. Geri-Care, Inc.*, 697 F.2d at 60 (credibility findings not overturned unless hopelessly incredible or directly contrary to the law of nature or undisputed documentary evidence).

There is likewise no merit to the Companies' claim that if, as the Board found, Newark Electric and Colacino Industries are a single employer and alter egos, then Colacino Industries' termination of its letter of assent must have extinguished Newark Electric's separate contractual obligations under its earlier

letter of assent. This unsupported claim should not be countenanced, particularly given the overwhelming credited evidence of the parties' contrary intent.

Put simply, under the credited evidence, Colacino entered into two separate and therefore separately enforceable contracts with the Union—one on behalf of Newark Electric and the other on behalf of Colacino Industries—with each contract specifying its own termination timeframe. The Companies cannot nullify one of those contracts, or abrogate its express termination timeframe, by pointing to the contracting entities' subsequently determined single-employer and alter-ego status. In arguing for such a result, the Companies conflate principles of derivative liability with Section 8(f) contract principles.

Here, as shown above, the credited evidence establishes that the February 2011 letter of assent was freely entered into and never superseded or properly terminated.[10] Accordingly, that agreement remains a valid, enforceable contract.

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[10] Although the Companies suggest, in their fact statement, that Newark Electric did not freely enter into the February 2011 letter of assent, they rely on discredited evidence to make that suggestion. Thus, the Companies assert (Br. 7-10) that Colacino signed the first letter of assent on behalf of NE 2.0 rather than Newark Electric, and refer to Davis "pressur[ing]," "stalk[ing]," "barg[ing past," "blackmailing," "inundating" and "corner[ing]" Colacino to get him to sign the letter of assent. But the Board specifically rejected those assertions. *See* JA 21-22 (discrediting Colacino's testimony that he signed the first letter of assent for NE 2.0 and observing that NE 2.0 had not even been incorporated at the time Colacino signed the first letter of assent); and JA 22 (finding that "Davis never forced Colacino to sign the letter in February 2011" but rather, that "Davis was friendly but persuasive"). In any event, given the Companies' failure to present argument

By its terms, moreover, it binds Newark Electric to the applicable master collective-bargaining agreement (the June 2012 collective-bargaining agreement) and any automatic extensions. Therefore, the Board reasonably found that the Companies, as a single employer and alter egos, violated Section 8(a)(5) and (1) of the Act by failing to honor those still-binding collective-bargaining commitments with the Union.

II. SUBSTANTIAL EVIDENCE, SOLIDLY GROUNDED IN CREDIBILITY DETERMINATIONS, SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY CONSTRUCTIVELY DISCHARGING EMPLOYEE ANTHONY BLONDELL BECAUSE HE WAS A UNION MEMBER

A. An Employer May Not Discriminate Against Its Employees Based on Their Union Activities or Affiliation, Nor May It Condition Its Employee's Continued Employment on Rejection of Their Collective-Bargaining Representative

Section 7 of the Act guarantees employees "the right to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer

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based on these purported facts, they have waived any claim that might be based on such "facts." *United States v. Berrio-Callejas*, 219 F.3d 1, 3 (1st Cir. 2000) (finding "embryonic" claims made only in facts section and not developed in argument section waived). *See also United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013) (noting the "oft-cited rule that contentions not raised in the argument section of the opening brief are abandoned" (internal quotation marks omitted)).

"by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3).[11] An employer therefore violates Section 8(a)(3) of the Act by discharging an employee because of his union activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983) (approving *Wright Line, Inc.,* 251 NLRB 1083, 1089 (1980), *enforced on other grounds,* 662 F.2d 899 (1st Cir. 1981)). *Accord Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 756 (D.C. Cir. 2000). An employer also violates Section 8(a)(3) and (1) of the Act when it constructively discharges an employee by conditioning his continued employment on his rejection of the bargaining representative. *See Hoerner Waldorf Corp*., 227 NLRB 612, 613 (1976); *Borden, Inc. v. NLRB*, 19 F.3d 502, 513-14 (10th Cir. 1994); *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972); *Three Sisters Sportswear Co.*, 312 NLRB 853, 872 (1993).

In determining whether an employer has taken an adverse employment action against an employee because of the employee's union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management*, 462 U.S. 393, 404

[11] Conduct that violates Section 8(a)(3) of the Act derivatively violates Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

(1983). *Accord NLRB v. G & T Terminal Packaging*, 246 F.3d 103, 115-16 (2d Cir. 2001). Consistent with that test, if substantial evidence supports the Board's finding that union activity was a "motivating factor" in the employer's adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected activity. *Transp. Mgmgt.*, 462 U.S. at 397, 401-03; *accord G & T Terminal Packaging*, 246 F.3d at 115-16. If the employer's proffered reasons for its actions are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to establish its affirmative defense. *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579, 582 (2d Cir. 1988); *see also Wright Line*, 251 NLRB at 1084.

Because direct evidence of employer motivation is seldom available, it is "perfectly proper," as this Court has noted, for the Board to establish motivation based on "circumstantial evidence and inferences of probability drawn from the totality of other facts." *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972) (internal quotation marks and citation omitted); *see also Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 139 (2d Cir. 1990) ("Intent is subjective and in many cases can be proved only by the use of circumstantial evidence."). Such circumstantial evidence that the Board relies upon in finding unlawful motivation includes the employer's knowledge of and

hostility toward protected activity, the timing of its adverse action, and "'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer." *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB 1083, 1088 n.12 (1980)). Ultimately, because motive is a question of fact that implicates the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013); *accord NLRB v. Bridgeport Ambulance Serv.*, 966 F.2d 725, 730 (2d Cir. 1992).

B. The Companies Constructively Discharged Blondell in Violation of the Act

Substantial evidence supports the Board's finding (JA 24) that the Companies violated Section 8(a)(3) and (1) by constructively discharging Blondell because he was a union member. Overwhelming credited evidence demonstrates that Blondell's union membership was a motivating factor in his discharge. As shown at pp. 16-17, Colacino told Blondell that as of July 20, 2012, Colacino no longer planned on being a union shop. Shortly thereafter, Blondell asked Colacino if he would be laid off if Colacino terminated the letter of assent and collective-bargaining agreement with the Union. Colacino stated that if he did not work out a deal with the Union by then, he would have to lay off Blondell. True to his word, Colacino laid off Blondell for an alleged lack of work on July 20, 2012, the date

that Colacino unlawfully repudiated the collective-bargaining agreement. Based on these credited facts, the Board reasonably found that "Colacino was intent in going with a nonunion shop and did not want to continue employing Blondell." (JA 23.)

As the Board further found, the Companies utterly failed to demonstrate that "regardless of Blondell's union affiliation or activities, he would have been laid off." (JA 23-24.) Colacino's ostensible reason for laying off Blondell—a "lack of work"— is belied by the record evidence. (JA 23.) To the contrary, Blondell was in the middle of a job. Moreover, two other employees who had resigned their union membership to continue working for the Companies were not laid off. Accordingly, the Board reasonably found that the Companies "failed to satisfy their *Wright Line* rebuttal burden." (JA 24.) *See Fluor Daniel. Inc*., 304 NLRB 970, 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) ("when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.").

The Companies' sole challenge to this finding is based on the discredited testimony of Colacino and employee Barra that Blondell asked to be laid off "so that [he] could escape the Union tug-of-war with his pension and good standing intact." (Br. 34-35.) Contrary to the Companies' claim (Br. 35), the judge

explained his reason for crediting Blondell over Colacino and Barra, evaluating, among other factors, the "demeanor of the witnesses" and the "probability" of the testimony in concluding that he could not "reasonably believe" that Blondell agreed to be laid off when he was "in the middle of completing a project and there was work available for him to perform." (JA 14 n.4, 23.) The Companies provide no reason to overturn the judge's credibility findings. *See Am. Geri-Care, Inc.*, 697 F.2d at 60. Accordingly, the Board's finding that the Companies constructively discharged Blondell in violation of the Act should be upheld.

III. THE COMPANIES' CHALLENGES TO THE PROCESSING OF THIS CASE LACK MERIT

In a last-ditch effort to avoid their unfair-labor-practice liability, the Companies advance a series of meritless challenges to actions taken by the Board's General Counsel, the Board itself, and the D.C. Circuit at prior stages in this case. Contrary to their assertion (Br. 20), and as shown below, the Companies have presented the Court with no basis to disturb the Board's Decision and Order.

A. The Board Proceeded on a Properly Ratified Complaint

At the outset, the Companies mistakenly rely on an admitted defect in the unfair-labor-practice complaint originally issued under Acting General Counsel Lafe Solomon in 2013, arguing that the complaint remains "unauthorized" because of that defect, despite the complaint's subsequent ratification by General Counsel

Richard F. Griffin, Jr. in 2017. (Br. 17-25.) The Companies' attempts to muddy the waters are unavailing. Simply put, they have no basis for questioning the validity of the currently operative ratified complaint.

As noted (pp. 3-5), this case was previously before the D.C. Circuit, which remanded the case to the Board after the Supreme Court issued *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015). Remand Order, D.C. Cir. No. 15-1111, Dkt. # 1684152. Exercising his statutory prerogative, General Counsel Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice of ratification stating that, "[a]fter appropriate review and consultation with [] staff," he had "decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." (JA 6; JA 30.)[12]

The General Counsel's ratification is consistent with precedent upholding ratification as valid where "a properly appointed official has the power to conduct

[12] As the Companies concede (Br. 20-21), and as the D.C. Circuit recognized in its *SW General* decision, the Board's General Counsel is one of only several officers expressly exempted from the FVRA's "void-ab-initio" and "no-ratification" provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e), and assuming that Sec. 3348(e) "renders the actions of an improperly serving Acting General Counsel voidable, not void") (original emphasis)). On appeal in *SW General*, the Supreme Court acknowledged that proposition, but took no position on it because the issue was not presented, 137 S. Ct. at 938 n.2.

an independent evaluation of the merits and does so." *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015), which in turn cites, among other cases, *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998)); *see also Hendrickson Trucking Co. v. NLRB*, __ F. App'x __, 2019 WL 1752612 (D.C. Cir. Apr. 12, 2019) (upholding administrative law judge's ratification of unfair-labor-practice decision). That is exactly the case here. And the Companies have not shown, as would be required, that the General Counsel "'failed to make a detached and considered judgment,'" or that they "suffered any 'continuing prejudice' from the violation." *Id.* at 372 (quoting *FEC v. Legi-Tech*, 75 F.3d 704, 708-09 (D.C. Cir. 1996)).

Instead, the Companies merely point to the General Counsel's use of so-called boilerplate language to describe the steps he took in considering and ratifying the earlier complaint and its continued prosecution. (Br. 24.) But under well-settled law, it is presumed that the General Counsel's statements—whether characterized as "boilerplate" or not—truthfully and accurately represent the actions he took. As the Supreme Court has explained, "[a] presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their

official duties." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (internal quotation marks and citation omitted). *Accord NLRB v. County Waste of Ulster, LLC*, 455 F. App'x 32, 35-36 (2d Cir. 2012) (rejecting argument that the Board did not undertake adequate review before deciding to adopt prior order entered when Board lacked a quorum). Applying the presumption of regularity to an argument similar to that made by the Companies here, the Third Circuit recently held that "boilerplate language . . . do[es] not amount to 'clear evidence' that the [General Counsel] was disingenuous when he asserted that he conducted 'appropriate review and consultation with his staff.'" *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 F. App'x 129, 137 (3d Cir. 2017).

Accordingly, the Court should, as other courts have, "take [the General Counsel's] ratification 'at face value and treat it as an adequate remedy.'" *Wilkes-Barre*, 857 F.3d at 372 (quoting *Legi-Tech*, 75 F.3d at 709) (holding that the Board's ratification of the appointment of a regional director, who was appointed when the Board lacked a quorum, "remedied any defect arising from the quorum violation"). Indeed, based on these principles, the Third Circuit rejected a

challenge to General Counsel Griffin's ratification of a complaint issued initially by Acting General Counsel Solomon. *See 1621 Route 22*, 725 F. App'x at 137.[13]

B. The Court Should Reject the Companies' Effort To Re-Litigate the Propriety of the D.C. Circuit's Remand to the Board

Lacking any viable basis to impugn the General Counsel's ratification, and looking back to matters well settled at earlier stages of the case, the Companies take aim (Br. 17-22) at the D.C. Circuit's order remanding the case to the Board.[14] Remand Order, D.C. Cir. No. 15-1111, Dkt. # 1684152. In so doing, the Companies retread arguments they have repeatedly made without success at prior stages of this case, including their claim that the Supreme Court's *SW General* decision mandated vacatur of the 2015 Board decision without remand from the D.C. Circuit. *See* Opposition to Motion for Remand, D.C. Cir. No. 15-1111, Dkt. # 1669793 (Apr. 6, 2017); Motion to Recall Mandate, D.C. Cir. No. 15-1111, Dkt. # 1686310 (Jul. 28, 2017); Petition for Rehearing and Rehearing En Banc, D.C. Cir. No. 15-1111, Dkt. # 1690289 (Aug. 25, 2017); Petition for Writ of Certiorari,

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[13] A similar complaint-ratification challenge is also pending in the D.C. Circuit in *Midwest Terminals of Toledo International, Inc. v. NLRB*, Nos. 18-1017 & 18-1049 (argued Nov. 16, 2018).

[14] The D.C. Circuit granted the Board's motion requesting a remand in part to "enable the current General Counsel to consider ratification or other appropriate action under the FVRA, and the Board to consider the effect of any action taken by the General Counsel." Motion for Remand, D.C. Cir. No. 15-1111, Dkt. # 1668164 (Mar. 28, 2017).

No. 17-932 (Dec. 27, 2017). The D.C. Circuit, however, definitively rejected the Companies' arguments when it granted the Board's remand request and denied the Companies' subsequent requests for relief from that outcome. *See* Remand Order, No. 15-1111, 2017 WL 5662145 (D.C. Cir. July 14, 2017); Order Denying Mot. to Recall Mandate, No. 15-1111, Dkt. # 1686310-2 (Sept. 28, 2017); Order Denying Pet. for Reh'g, No. 15-1111, Dkt. # 1690289-2 (Sept. 28, 2017). The Supreme Court likewise rejected the Companies' entreaties. *See Newark Elec. Corp., et al. v. NLRB*, 138 S. Ct. 1181 (Feb. 26, 2018) (denying cert.).

Contrary to the Companies' suggestion that the Court is free to redecide those matters (Br. 17), the D.C. Circuit's determinations are binding as law of the case. Under the law-of-the-case doctrine, when a court has ruled on a legal issue, that ruling "should continue to govern the same issues in subsequent stages in the same case." *DiLaura v. Power Auth. of State of New York*, 982 F.2d 73, 76 (2d Cir. 1992). Further, as the Supreme Court has explained, the doctrine applies whether the case remains before the same court at subsequent stages or, as here, it comes before a coordinate court. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

The law-of-the-case doctrine follows from the common-sense principle that "where litigants have once battled for [a] court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *See Zdanok v.*

Glidden Company-Dunkee Famous Foods Div., 327 F.2d 944, 953 (2d Cir. 1964). The doctrine promotes finality and efficiency in the judicial process by preventing agitation of settled issues. *See Christianson*, 486 U.S. at 816; *accord McGee v. Dunn*, 940 F.Supp.2d 93, 100 (S.D.N.Y. 2013) (the doctrine is aimed at "avoiding endless litigation by allowing each stage of the litigation to build on the last and not afford an opportunity to reargue every previous ruling") (internal quotation marks and citations omitted). Accordingly, the Supreme Court has stated that "as a rule courts should be loathe to [revisit a prior legal ruling] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson*, 486 U.S. at 817 (internal quotation marks and citation omitted); *accord Johnson v. Holder*, 564 F.3d 95, 99-100 (2d Cir. 2009).

Here, notwithstanding their lengthy regurgitation of past arguments, the Companies have failed to show that the D.C. Circuit's considered view regarding the propriety of its own remand order was "clearly erroneous." *See id*. Similarly, the Companies have not pointed to any "manifest injustice" worked by the already-completed remand. *See id*. In sum, the Companies have provided no justification for the Court to take the extraordinary step of revisiting and countermanding the D.C. Circuit's remand order, and effectively disregarding the lawful proceedings on remand.

C. The Board's Handling of the Case on Remand Did Not Violate the Terms of the Remand Order or Due Process

There is also no merit to the Companies' claim (Br. 25-27) that the Board's process on remand failed to comply with the D.C. Circuit's remand order, or fell short of the basic requirements of due process. In remanding the case, the D.C. Circuit provided that the Companies "may raise their laches argument on remand and seek judicial review if unsatisfied with the result." Remand Order, D.C. Cir. No. 15-1111, Dkt. # 1684152. Consistent with this statement, on July 18, 2017, the Board issued a letter to the parties inviting them to file, "if they so desire[d] . . . statements of position with respect to the issues raised by the remand." (JA 28.) The Board's letter also noted that statements of position would be subject to Section 102.46(h) of the Board's Rules and Regulations—the provision governing the page limit and filing requirements for principal briefs before the Board. Thus, the Board did not, as the Companies claim, constrain the parties on remand to file a cursory "summary of arguments" somehow different from a full brief. (Br. 27.) On the contrary, the Board gave the parties latitude to file a document as long as any brief to the Board.

Further, the Board granted the Companies' request for a 30-day extension of time to file their position statements. Accordingly, the Companies had nearly two months to prepare the equivalent of a full brief on any issues they deemed relevant,

including the laches defense specifically identified in the D.C. Circuit's remand order. They therefore had much *more* time to prepare their position statements than ordinarily allowed for principal briefs. *See* 29 C.F.R. § 102.46(a) (imposing 28-day deadline for filing briefs, unless Board grants further time).

Despite this substantial opportunity to thoroughly cover any areas of concern on remand, the Companies merely filed a single, eight-page position statement containing little substantive argument as to why laches should apply.[15] (JA 34-41.) Their failure to avail themselves of the opportunity to be heard on remand cannot establish a due process violation. *See NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938) ("The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."). Nor does their dereliction establish a failure, by the Board, to honor the terms of the D.C. Circuit's remand order. Consistent with that order, the Board gave the Companies a full opportunity to raise and substantively argue anything they deemed relevant on remand—an opportunity they squandered.

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[15] The Board acknowledged the Companies' assertion of laches but held it "does not bar action by the Board, as a federal government agency, to vindicate public rights." (JA 6 n.2, citing cases.) Notably, in their opening brief, the Companies do not argue that the Board was incorrect in this determination. Accordingly, the Companies have forfeited their laches defense and any challenge to the Board's finding that such a defense is inapplicable. *See* above pp. 38-39 n.10; Fed. R. App. P. 28(a)(8)(A) (argument in brief before the Court must contain party's contention with citations to authorities and record).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying the Companies' petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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	)	
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	)	
v.	)	Board Case No.
	)	03-CA-088127
NEWARK ELECTRIC CORPORATION,	)	
NEWARK ELECTRIC 2.0, INC.,	)	
COLACINO INDUSTRIES, INC.	)	
	)	
Respondents	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 12,256 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, D.C.
this 30th day of April 2019

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	)	
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, D.C.
this 30th day of April 2019