

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

305 WEST END HOLDING, LLC d/b/a	)	
305 WEST END AVENUE OPERATING,	)	
LLC and ULTIMATE CARE	)	
MANAGEMENT ASSISTED LIVING	)	
MANAGEMENT, LLC, a division of the	)	
ENGEL BURMAN GROUP, d/b/a	)	
ULTIMATE CARE MANAGEMENT, LLC)	)	Nos. 20-1522 & 20-1973
	)	
Petitioners/Cross-Respondents	)	
	)	
v.	)	Board Case Nos.
	)	02-CA-188405, et al.
NATIONAL LABOR RELATIONS	)	
BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**THE NATIONAL LABOR RELATIONS BOARD’S RESPONSE IN  
OPPOSITION, IN PART, TO PETITIONERS’ MOTION TO  
SUPPLEMENT THE APPENDIX**

To the Honorable, the Judges of the United States  
Court of Appeals for the Second Circuit:

The National Labor Relations Board (“the Board”), by its Assistant General Counsel, hereby opposes, in part, the motion filed by joint employers 305 West End Holding, LLC d/b/a 305 West End Avenue Operating, LLC and Ultimate Care Management Assisted Living Management, LLC, a division of the Engel Burman Group, d/b/a Ultimate Care Management, LLC (“the Company”) to supplement the

appendix because it improperly seeks to present non-record, irrelevant material to the Court.<sup>1</sup> In support of its opposition, the Board submits the following:

**I. THE MOTION IMPROPERLY SEEKS TO PROVIDE THE COURT WITH NON-RECORD, IRRELEVANT DOCUMENTS CONTAINED IN EXHIBIT 1**

**A. Rule 16 of the Federal Rules of Appellate Procedure, which Governs what Constitutes the Record before the Court, Excludes Exhibit 1 as Non-Record Material**

The Company's filing is a "Motion to Supplement the Appendix" in name only. In substance, the Company asks the Court to exercise its "inherent discretion" and "allow supplementation *of the record*" with "Exhibit 1." (Mot. at 8, emphasis added.) The Company never informs the Court that Exhibit 1 contains *four* separate documents related to a district court proceeding in the Southern District of New York that involves none of the parties in this appeal: a 2011 sealed indictment; a May 17, 2012 verdict form; a September 6, 2012 sentencing memorandum; and a copy of *United States v. Fazio*, 770 F.3d 160 (2d Cir. 2014). The agency record never included any of these four proffered documents.<sup>2</sup> The

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<sup>1</sup> On August 17, 2020, the Court referred the Petitioners' Motion to the merits panel. *See* Docket Entry 78.

<sup>2</sup> During the administrative hearing, the administrative law judge rejected the Company's attempts to admit these documents into the evidentiary record on relevancy grounds. The Board attaches the relevant transcript pages to this opposition. The Company claims (Mot. at 6) to have attached these pages as Exhibit 3, but the Motion contains no such exhibit. *See* Attachment.

Company cannot use a motion to supplement the appendix as subterfuge for a request to supplement the *agency* record.

Under the National Labor Relations Act, a reviewing court determines whether a Board decision is supported by substantial evidence on the record as a whole. 29 U.S.C. §§ 151, 160(e) and (f). Under Federal Rule 16, which governs records on review of administrative agency orders, the record consists only of the order itself, “any findings or report on which it is based,” and “the pleadings, evidence, and other parts of the proceedings before the [Board].” Fed. R. App. P. 16(a); *see* 29 C.F.R. § 102.45(b) (enumerating specific documents constituting the record before the Board in unfair-labor-practice proceedings).<sup>3</sup> As the Advisory Committee noted upon adoption of Rule 16(a), “There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same.” Adv. Comm. Notes to Fed. R. App. P. 16(a) (1967). In turn and to facilitate the Court’s review, the parties develop an appendix, which culls only the record material relevant to the appeal. Fed. R. App. P. 30(a) (appendix contains relevant docket entries in the proceeding below; relevant portions of the

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<sup>3</sup> The Board’s regulations direct that the following documents constitute the record: “The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46 . . . .” 29 C.F.R. § 102.45(b).

pleadings, charge, findings, or opinion; the judgment, order, or decision in question; and other parts of the record to which the parties wish to direct the court's attention); Local R. 30.1(a) ("The contents of an appendix are limited to the materials set forth in FRAP 30(a)(1), except that the appendix must also include the notice of appeal or petition for review.").

Here, regardless of how the Company styles its motion, it must be understood as asking the Court to enlarge the agency record on appeal and to put documents before the Court that the Board never considered or saw. Because the Court evaluates the propriety of the Board's decision in light of the evidence that was in the record before it, the Court must deny the Company's request. Exhibit 1, and the four documents contained therein, having neither been considered nor made part of the record, cannot bear on whether the Board's decision was based on "substantial evidence *on the record*." 29 U.S.C. § 160(f) (emphasis added). Moreover, courts, including this one, generally disfavor attempts to broaden the record on appeal. *See generally Weinstein v. City of New York*, 622 F. App'x. 45, 46 (2d Cir. 2015) ("Absent extraordinary circumstances, this Court will not enlarge the record on appeal to include evidentiary material not presented to the district court."). Thus, if the Company wants to challenge enforcement of the Board's order, it must show that the Board's findings are unsupported by record evidence, not move to expand the scope of the record.

Confusingly, in asking the Court to accept these documents as part of the record, the Company relies on (Mot. 7-8) Federal Rule of Appellate Procedure Rule 10, which governs the record on appeal from district court, rather than Rule 16, which, as discussed above, governs the record on review of an agency order. The Company also relies on inapposite precedent; none of the cases cited by the Company (Mot. at 8-9) involves an administrative order where the court's review is statutorily limited to substantial evidence in the record. Moreover, the cited cases are also distinguishable because the circuit courts in those cases allowed a party to supplement the record with *relevant* material. As discussed immediately below, the Company's proffered Exhibit 1 is not relevant to the appeal.

**B. The Court Should Not Take Judicial Notice of Irrelevant Material**

The Company's alternative request that the Court apply Federal Rule of Evidence 201 to take judicial notice of Exhibit 1 is similarly misguided. The Court only takes judicial notice of relevant matters. *See, e.g., Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012). The Company fails to meet this threshold showing of relevancy with respect to all four documents contained in Exhibit 1.

Here, the Board's Order directs the Company to recognize and bargain with the United Food & Commercial Workers Union, Local 2013 ("the Union"), because the Board found that the Company was a successor employer to County Agency Inc., and Esplanade Partners Ltd. d/b/a Esplanade Venture Partnership

d/b/a The Esplanade Hotel. As a successor employer, the Company had an obligation to recognize the Union, which represented the employees of the predecessor employers.

The Company argued to the Board, among other things, that the bargaining order was improper because the Union was a members-only union and did not enjoy a presumption of majority support, an argument the Company revisits in its motion before the Court (Mot. at 9). The Board rejected this assertion, relying on documentary evidence such as the collective-bargaining agreement and payroll records showing uniformity and universal application among employees as to wage increases, holiday pay, and time-and-a-half pay. *See County Agency Inc. & Esplanade Partners Ltd.*, 369 NLRB No. 20, 2020 WL 2112074, at \*7 (Apr. 29, 2020). The Board also relied on the credited testimony of various witnesses. *Id.* All the evidence relied upon by the Board is in the record and available for the Court's review. The Company is free to challenge these factual findings to persuade the Court that the record lacks substantial evidence to support the Board's findings. The Company cannot, however, rely on irrelevant extra-record material.

The Company does not contend that any of the four documents contained in Exhibit 1 is relevant to the issue of successorship. Rather, the Company urges (Mot. at 9) that the four documents are relevant to "provide context" as to the issue

of presumed majority support. It is difficult to understand how the Company can demonstrate relevancy of documents—totaling over 100 pages—that it fails to identify specifically to the Court. That question aside, not only does the Company’s assertion fail to connect the dots between Exhibit 1 and this case, a review of the documents in Exhibit 1 shows that the Company’s position is wildly unmoored to the facts.

These documents, as the Company generally describes them (Mot. at 9), show that ten years ago, three officers and members of United Food and Commercial Workers International Union, Local 348-S (“Local 348-S”)—notably, not the Union involved in this proceeding—engaged in criminal conduct that involved accepting bribes to make “sweetheart deals” with employers. The Company inexplicably asserts (Mot. at 9) that the conduct of Local 348-S officials gives context to the Company’s claims in this case that the Union did not abide by its collective-bargaining agreement. The Company, relying only on conclusory claims and speculative leaps, has failed to show the relevancy of each document to this appeal. Starting with the first document in the exhibit, the Company simply has not shown that a near-decade old criminal indictment in the district court against three officers and members of *an entirely different union* is relevant to whether the record supports the Board’s finding that the Union *in the underlying case* enjoyed a presumption of majority support. Neither Local 348-S nor any of

the indicted officers and members was involved in the underlying proceedings before the Board. Local 348-S was not the incumbent union in the underlying proceedings and had not represented the unit employees since June 2012. Next, the remaining three documents in Exhibit 1 are likewise irrelevant as they are simply additional documents related to the irrelevant indictment and criminal proceeding. For the same reasons that the originating indictment is irrelevant, the related verdict form, sentencing memorandum (which applies to only one of the indicted defendants), and the court decision as to the defendants' appeal from the convictions do not bear on any issues before the Court. In short, because the district court proceedings addressed in Exhibit 1 played no role in the Company's unfair labor practices at issue before the Board and the Court, judicial notice of the inflammatory documents constituting Exhibit 1 is unwarranted.

**II. THE BOARD DOES NOT OPPOSE THE MOTION TO ADD EXHIBIT 2 TO THE MATERIALS BEFORE THE COURT ON APPEAL**

The Company also proffers Exhibit 2, which is the General Counsel's brief in support of his exceptions filed with the Board. The Board indicated to counsel for the Company that it would not oppose a motion to lodge the non-record material with the Court and include it in a supplemental appendix clearly delineated as non-record material. The Board reiterates that position here and does

not oppose having Exhibit 2 included in a separate Supplemental Appendix if it is clearly delineated as non-record material.

WHEREFORE, the Board respectfully requests that Petitioners' Motion to Supplement the Appendix be denied with respect to Exhibit 1.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570

Dated at Washington, DC  
this 20th day of August 2020

1 MR. HERLANDS: No, it can --

2 MR. STOKES: Your Honor, we'd like in the record  
3 supporting what we've said the documents -- that we've emailed  
4 to everybody, and we've given copies, I think, to everybody  
5 thus far of the General -- the government's sentencing  
6 memorandum in the case, as well as the indictment, as well as  
7 the Second Circuit Court of Appeal affirmance of that. And we  
8 would like all those in the record, and we have copies of  
9 that --

10 MR. HERLANDS: Your Honor --

11 MR. STOKES: -- attached in the record.

12 MR. HERLANDS: -- I haven't seen it, but even if I did see  
13 it --

14 MR. STOKES: We've emailed it to everybody.

15 MR. HERLANDS: You emailed it as we were in court today?  
16 I haven't seen it, but regardless, we would object to the  
17 relevancy of this; it's totally irrelevant.

18 MR. STOKES: I can do it right now.

19 JUDGE GREEN: Okay, when you have some time, why don't you  
20 mark those as R-2 through whatever they are, and we'll deal  
21 with those formally after counsel for the Union and counsel for  
22 the General Counsel --

23 MR. STOKES: Very well, Your Honor.

24 JUDGE GREEN: -- have an opportunity to look at them.

25 So without further ado, would you like to call a witness,

P R O C E E D I N G S

1  
2 JUDGE GREEN: Okay, so just to confirm, there were six  
3 exhibits that they had provided by email. Could you just  
4 describe what the exhibits were?

5 MR. WAGNER: Yes, the exhibits are the verdict -- these  
6 are all documents, Your Honor, from the Southern District of  
7 New York criminal prosecution and sentencing of the Fazio  
8 individuals, family members, that were involved in the  
9 leadership of UFCW 348(s). Respondent's 2 is a verdict form.  
10 Respondent's 3 is a government sentencing memo. Respondent's 4  
11 is a loss calculation, which includes information regarding the  
12 bribes paid by Ali Scharf and Esplanade. Respondent's Exhibit  
13 5 is the Second Circuit decision, which affirms the criminal  
14 convictions and sentences -- plural -- of the Fazios. And then  
15 finally, Respondent's Exhibit 6 is the indictment. We  
16 submitted those by email. I believe they were marked. We'd be  
17 happy to submit marked copies to the extent you need it for  
18 your ruling, but we would -- because they are a public record,  
19 if we -- because the record isn't complete in this case, and we  
20 intend to offer additional evidence on that subject, we would  
21 ask that you at least receive them for that purpose so that an  
22 appropriate factual record can be made. We understand your  
23 pre-ruling that you don't find it relevant and -- or regardless  
24 of what comes after in evidence, you will not find it  
25 relevant --

1 JUDGE GREEN: Right, so --

2 MR. WAGNER: But we just like it for evidentiary purposes  
3 in our record.

4 JUDGE GREEN: Okay. So the General Counsel needed a vote  
5 objected to the entry of these -- or I guess the taking of  
6 administrative notice of these documents. I agree. I don't  
7 see them -- see that they are relevant, and I'm not going to  
8 take administrative notice of them at this time. They don't  
9 have to go into a rejected exhibit file, because the Board can  
10 take administrative notice of those documents just as well as I  
11 can, and the Board, if they disagree, they can rely on them.

12 MR. WAGNER: Very well, Your Honor.

13 JUDGE GREEN: Okay, so --

14 MR. WAGNER: I have one other housekeeping matter to bring  
15 up. Your Honor mentioned on the call yesterday that  
16 Respondents were welcome to submit the motion to exclude CG --  
17 GC-60 with the exhibits as an exhibit. We would like to do  
18 that. I apologize that I did not make extra copies. Everyone  
19 has it because we filed it and we gave courtesy copies by  
20 email. It would be --

21 MR. HERLANDS: Are you -- what are you going to label it?  
22 It would be like R-11 or something?

23 MR. WAGNER: No, because we've got a bunch of pre-marked  
24 exhibits. If we add an exhibit, what's our next number? We  
25 don't have this in there.



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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that the foregoing contains 1962 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016, and the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 20th day of August 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit  
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Dated at Washington, DC  
this 20th day of August 2020