

Nos. 20-0077 & 20-0361

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

NICO ASPHALT PAVING, INC. and its Successor in Interest
and Alter Ego, CITY WIDE PAVING, INC.

Respondents/Cross-Petitioners

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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**ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the application for enforcement of the National Labor Relations Board to enforce, and the cross-petition of Nico Asphalt Paving, Inc. (“Nico”), and its successor in interest and alter ego, City Wide Paving (“City Wide”) (collectively “the Companies”) to review, a Board Order issued

against the Companies on November 6, 2019, and reported at 368 NLRB No. 111. (SA 1-10.)¹

The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(a), as amended (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the unfair labor practices occurred in New York. The petition and application were both timely, as the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence supports the Board’s findings that Nico and City Wide are alter egos and therefore that:

- Nico violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with Local 175 as the exclusive collective-bargaining representative of its employees.

¹ “SA” and “JA” refers respectively to the Special Appendix and Joint Appendix filed by the Companies. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

- City Wide violated Section 8(a)(5) and (1) of the Act by refusing to apply the collective-bargaining agreement between its alter ego Nico and Local 175.
- City Wide violated Section 8(a)(2) of the Act by recognizing Local 1010 as the collective-bargaining representative of its unit employees, while still bound by the agreement with Local 175.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge, the Board's General Counsel issued a complaint alleging that Nico violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing and refusing to bargain with Construction Council 175, Utility Workers Union of America, AFL-CIO ("Local 175") as the exclusive collective-bargaining representative of its employees; that City Wide violated the same section of the Act by refusing to apply the collective-bargaining agreement that its alter ego Nico had with Local 175; and that City Wide violated Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), by recognizing IAM and Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL-CIO ("Local 1010") as the collective-bargaining representative of its unit employees, while still bound by the agreement with Local 175. (SA 2; JA 572-83, 594-95, 908-20.)

Following a hearing, an administrative law judge issued a decision and recommended order finding that Nico and City Wide are alter egos, and that they committed the alleged unfair labor practices. (SA 1-10.) After considering that decision, as well as the record, the Companies' exceptions, and the parties' briefs, the Board issued a Decision and Order affirming the judge's rulings, findings, and conclusions, and adopting the recommended Order. (SA 1.)

I. THE BOARD'S FINDINGS OF FACT

A. The Pietranico Family and the Formation and Operation of Nico

In 1996, Michael Pietranico, Sr. ("Senior") incorporated Nico to perform asphalt paving in the New York City area. (SA 2; JA 79, 162-64, 233-34, 573-74, 589, 896-901.) Senior owns Nico and serves as its president. (SA 2; JA 65, 79, 230-31.) Michael Peitranico, Jr. ("Junior"), Senior's son, serves as Nico's manager/superintendent and manages workers in the field. (SA 2; JA 65-66.) Senior and Junior handle labor relations matters. (SA 2; JA 71, 75.) Dana Marie Pietranico, Senior's daughter, works exclusively in the office, and at different times has held the titles of vice-president, secretary-treasurer, and bookkeeper. (SA 2; JA 74-76, 161, 379-87, 416-17, 1034-45.) John Denegall began working for Nico in 1999, and has held the titles of superintendent, office manager, and vice-president. (SA 2; JA 65-66, 70-71.) Nico's offices are located at 341 Nassau

Avenue in Brooklyn, N.Y., a property owned by Rosal Realty, an entity owned by Senior. (SA 2; JA 77, 186, 231, 572, 589.)

Nico's largest customer is Consolidated Electric ("ConEd"). Since 2013, ConEd has extended an expiring three-year contract with Nico on a yearly basis, thereby making the contract effective until December 31, 2017. (SA 2, 3 and n.6; JA 81-82, 840-93.) Nico also has large contracts with Welsbech and Verizon, which were effective until August 30 and December 31, 2017, respectively. (SA 2; JA 81, 108-12, 114-18, 689-788.) In addition, Nico performs work for several smaller contractors, including Safeway, Danella, Triumph, Westmoreland, and Network Infrastructure. (SA 2; JA 81, 423.) Nico owns a fleet of at least 17 trucks and vehicles, some of which are owned personally by Senior and/or Nico Equipment, a company owned by Senior. (SA 2 and n.5; JA 83-84, 273, 1060-63.) Nico obtains asphalt from Willets Point Asphalt Corporation, which provides a credit line to Nico. (SA 3; JA 159.)

B. Nico's Longstanding Relationship with Local 175

In May 2000, Nico became a member of the New York Independent Contractors Association ("NYICA"), which represents members and administers collective-bargaining agreements. (SA 3; JA 239-41, 631-33.) At the time, NYICA had a collective-bargaining agreement with the predecessor union of Local 175. After Nico joined NYICA, the agreement renewed continuously, with the

current agreement effective July 1, 2014 to June 30, 2017. Senior began serving as a member of NYICA's board of directors around 2004 and was actively involved in its contract negotiations with Local 175, including the 2014-2017 agreement. (SA 3; JA 100-02, 105, 240-52, 636-88, 906-07.)

Initially, Nico was a signatory to successive paving division assumption agreements voluntarily recognizing Local 175 as the representative of its employees under Section 8(f) of the Act, 29 U.S.C. §158(f), and binding Nico to the terms of the NYICA/Local 175 agreements.² (SA 3; JA 634-39.) In 2005, Nico signed an assumption agreement binding Nico to the then-current NYICA-Local 175 collective-bargaining agreement, as well as renewals and extensions, unless Nico provided timely notice as set forth in the collective-bargaining agreement. (JA 636-37.) In 2007, Local 175 won a Board-conducted election and was certified by the Board as the collective-bargaining representative of Nico's

²Section 8(f) of the Act, 29 U.S.C. § 158(f) permits a construction-industry employer and a union to enter into a collective-bargaining contract before the union has established its majority status or before the employer has even hired any employees on the project or projects to be covered by the contract. *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

employees under Section 9(a) of the Act, 29 U.S.C. § 159(a).³ (SA 3; JA 98, 575, 589, 640-88, 942-45.)

C. ConEd Changes the Standard Terms of Its Contract but Continues To Let Nico Perform Work with Local 175-Represented Employees

In October 2014, ConEd amended a portion of its construction contract to require, “unless otherwise agreed,” that contractors performing work for them have a collective-bargaining agreement with a union belonging to the Building & Construction Trades Council of Greater New York (“BCTC”). (SA 3; JA 859.) But even though Local 175 was not a member of the BCTC, Nico continued performing ConEd work unabated, using its Local 175-represented workforce. In early 2015, during negotiations with ConEd for another renewal of Nico’s contract, ConEd advised Senior that it was ready to enforce the BCTC requirement and would not continue giving Nico the work unless it had an agreement with a BCTC union. Nico shared this information with Local 175, which tried unsuccessfully to join the BCTC. Nevertheless, in October 2015 Nico negotiated another bid to

³ Section 9(a) of the Act provides that “a labor organization designated or selected for the purposes of collective bargaining by a majority of the employees in an appropriate unit is the exclusive collective-bargaining representative of all of the unit employees.” 29 U.S.C. § 159(a). A union can attain the status of a majority representative through either Board certification or voluntary recognition by an employer. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 761 (D.C. Cir. 2012).

extend the ConEd contract using its Local 175-represented employees. Nico continued performing the ConEd work with Local 175 labor throughout the remainder of 2015 and into 2016. (SA 3; JA 107, 149-54, 192, 529-32, 840-93.)

D. Without Informing or Bargaining with Local 175, the Pietranico Family Creates and Operates City Wide, an Alter Ego of Nico, To Perform Nico's Work; City Wide Signs a Collective-Bargaining Agreement with Local 1010, Tells Nico's Employees They Must Join Local 1010, and Refuses To Bargain with Local 175 and To Apply Nico's Collective-Bargaining Agreement

On December 15, 2015, around the time Nico was set to begin another year of work for ConEd under the parties' contract, the Pietranico family formed City Wide as a New York corporation to perform asphalt paving, the same work as Nico. City Wide's Certificate of Incorporation, filed by Denegall at Senior's direction, listed Senior as the sole director of the new corporation and 341 Nassau Avenue as its address. (SA 2, 3; JA 164-66, 182, 234-35, 574, 589, 903-05.)

On January 18, 2016, City Wide entered into a collective-bargaining agreement with Local 1010 pursuant to Section 8(f) of the Act. At the time, City Wide had not commenced operations or hired any employees. (SA 3; JA 123-26, 205, 401, 403-04, 795-833.) Dana Marie signed the agreement on behalf of City Wide, without listing her title. (JA 831.) Nico did not inform or bargain with Local 175 over the creation of City Wide. (SA 3; JA 534.)

On February 8, Senior signed, as "Principal" on behalf of City Wide, a Form of Labor and Material Payment Bond for \$32,750,00 that permitted City Wide to

begin working. (SA 4; JA 1054-57.) A notarized statement accompanying the bond identified Senior as City Wide's president. (JA 1057.)

In a February 12 meeting, Junior told Nico's employees that if they "belong[ed] to Local 175" then they "can't work here no more because" Nico does not "allow [Local] 175 to do the work for Con Edison." Junior added that if the employees "want[ed] to continue working here," they would "have to join Local 1010." This was the first time that Local 175 learned of City Wide's existence. (SA 4; JA 291-92, 533.)

On February 15, Senior signed, as "President" of City Wide, a "Notice to Proceed" agreement with ConEd to begin performing what would become City Wide's largest contract. (SA 4; JA 155-58, 175-76, 836.) On February 22, Nico entered into a General Service Agreement with City Wide, subcontracting all of Nico's remaining non-ConEd asphalt paving work to City Wide. (SA 2; JA 82, 111-13, 119-23, 396-98, 422-24, 789-94.) For this agreement, Senior signed as Nico's president and Dana Marie signed as City Wide's president. (SA 4; JA 794.) Neither entity notified or bargained with Local 175 over their signing of the agreement. (SA 4; JA 122-23, 526.)

Without any break in service, City Wide began operations in the last week of February, performing the same work for the same customers as Nico. City Wide began operating at the same address as Nico, using the same phone number and

other office equipment that Nico had used. (SA 3; JA 65, 77-78, 80-83, 107, 110, 190-91, 423-24, 428, 437-38, 510, 573, 584, 946-79.) City Wide also began identifying Dana Marie as its owner, president, and secretary-treasurer (a position she also held at Nico). (SA 3; JA 76, 377.) Meanwhile, Junior served as City Wide's superintendent/engineer, performing the same duties he handled as Nico's manager/superintendent. (SA 3; JA75, 378, 417-18.) As for Denegall, he served as City Wide's vice-president and performed the same work as he did at Nico. (SA 2, 3, 4; JA 65-67, 378.) City Wide also hired Denegall's administrative assistant from Nico to serve as his administrative assistant at City Wide. (SA 3; JA 78-79.) Per month, City Wide paid Senior \$20,000, Junior \$12,480, and Dana Marie \$5,000, approximately the same amount she had earned at Nico. (SA 3; JA 378, 401-03, 1024-53.)

City Wide used Nico's account and credit line with Willets Point to obtain the asphalt needed to perform Nico's paving jobs. There is no evidence that City Wide ever paid Nico for the asphalt. (SA 3, 4; JA 170-71, 183-86, 435-36, 441, 515-16, 894.) Nor is there any record of City Wide paying Nico for the office furniture and equipment it took over from Nico, or for Nico's referral of the ConEd contract and other contracts to City Wide. (SA 4; JA 435-36.) Nico and City Wide also used the same bonding company, attorney, and accountant. (A. 11, 77-78, 188-89, 217, 360-61.)

City Wide does not own any trucks. Although it purports to rent the trucks that Nico had used from the Senior-owned Nico Equipment, Inc., no written agreement exists among those entities. City Wide subsequently moved its operations across the street to 330 Nassau Avenue, another building owned by Senior through Rosal Realty. City Wide did not pay any rent to Senior for using this property, which Nico also used to store its equipment and park its trucks. (JA 3, 4; JA 82-90, 183-87, 272-76, 367-69, 429-30.)

On March 23, City Wide signed an agreement with Local 1010 recognizing it as the Section 9(a) representative of its employees. (JA 834.) By then, at least 19 of Nico's 28 unit employees had become City Wide employees. They changed their union books from Local 175 to Local 1010, and kept working as if nothing had changed. Nico employees who remained in Local 175 were no longer permitted to work, however. (SA 4; JA 192-93, 195-96, 438-39, 533, 946-79.)

By letter dated August 17, Local 175 requested that City Wide bargain over its use of employees performing the unit work they had previously done at Nico. By letter dated August 23, City Wide stated that it would not discuss Local 175's demands until Local 175 could demonstrate that it met the requirements of the ConEd contract, including by having membership in the BCTC. (SA 4; JA 935-41.)

On October 6, the parties reached a settlement in a related case (Board Case No. 29-CA-174926), which involved, among other allegations, a claim that Nico acted unlawfully by failing to bargain with Local 175 over layoffs and its decision to stop operating its business. During settlement discussions, and pursuant to a subpoena, Nico provided its Verizon and Welsbach contracts to Local 175 and the Board. The contracts revealed to Local 175, for the first time, that Nico was still in business, and that it was servicing those contracts through City Wide. (SA 4, 8; JA 444, 613.) Prior to receiving those contracts, Nico falsely told Local 175 and the Board's Regional Office that it was out of business. (SA 4, 8; JA 444.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members McFerran, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that Nico and City Wide were alter egos. The Board also found, in agreement with the judge, that Nico violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with Local 175 as the exclusive collective-bargaining representative of its employees; that City Wide violated the same section of the Act by failing and refusing to apply the collective-bargaining agreement between its alter ego and Nico and Local 175; and that City Wide violated Section 8(a)(2) and (1) of the Act by recognizing Local 1010 as the

collective-bargaining representative of its unit employees, while still bound by the agreement with Local 175. (SA 1, 9.)

The Board's Order requires Nico and City Wide to cease and desist from the unfair labor practices found, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights.

Affirmatively, the Order directs Nico and City Wide to honor and abide by the terms of their collective-bargaining agreement with Local 175, and to make whole all bargaining unit employees for any loss of earnings and other benefits. The Order also requires Nico and City Wide to post a remedial notice. (SA 9.)

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).

Whether one company is an alter ego of another is "a question of fact properly to be resolved by the Board." *Southport Petroleum Co. v. NLRB*, 315

U.S. 100, 106 (1942). *Accord Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 747 (2d Cir. 1996). Thus, if substantial evidence supports the Board’s alter ego finding, it must be enforced. *Goodman Piping Prods., Inc. v. NLRB*, 741 F.2d 1, 11 (2d Cir. 1984). *See generally*, 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

Abundant evidence supports the Board's finding that Nico and City Wide are alter egos. Before the Board, the Companies failed to challenge the Board's findings that the two entities share substantially identical management, business purpose, operations, equipment, and ownership, and that they lack an arms-length relationship. The Court is therefore without jurisdiction to consider the Companies' belated challenge to the Board's findings as to those indicia of alter ego status. Moreover, ample evidence, including admissions, from the Pietranico family and Denegall supports the Board's further finding that City Wide was formed with an intent to avoid Nico's bargaining obligations toward Local 175, the incumbent union.

As the Board further found, because City Wide and Nico are alter egos, it follows that Nico violated Section 8(a)(5) and (1) of the Act by transferring its business to City Wide and refusing to bargain with Local 175 as the incumbent collective-bargaining representative of Nico's employees. Likewise, City Wide violated the same section of the Act by refusing to apply the collective-bargaining agreement between its alter ego Nico and Local 175. City Wide also violated Section 8(a)(2) of the Act by recognizing Local 1010 as the representative of its unit employees while still bound by the collective-bargaining agreement with Local 175.

The Companies' efforts to challenge the Board's findings fall flat. Indeed, nearly all the challenges are jurisdictionally barred because they were not raised before the Board in exceptions to the judge's recommended decision. Moreover, the Companies have never disputed key Board findings—including that Nico refused to bargain with Local 175 and City Wide failed to apply the terms of Nico's collective-bargaining agreement with Local 175 to its employees. It is also undisputed that City Wide instead recognized Local 1010 and signed an agreement with that union. Further, as the Board found and the Companies concede, they did not inform or bargain with Local 175 over the creation of City Wide or the transfer of Nico's bargaining-unit work to City Wide. Accordingly, Local 175's collective-bargaining agreement with Nico remained valid and bound City Wide, as Nico's alter ego, to apply that agreement to its employees. Nico and City Wide therefore violated the Act by refusing to bargain with Local 175 and failing to apply the agreement that Nico had and continues to have with Local 175. In addition, because City Wide was obligated to bargain with Local 175 and was bound by Nico's agreement with Local 175, City Wide violated the Act by recognizing Local 1010.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT NICO AND CITY WIDE ARE ALTER EGOS, AND THEREFORE NICO VIOLATED THE ACT BY REFUSING TO BARGAIN WITH LOCAL 175, AND CITY WIDE VIOLATED THE ACT BY REFUSING TO APPLY NICO'S COLLECTIVE-BARGAINING AGREEMENT AND BY RECOGNIZING LOCAL 1010

The Companies do not dispute the Board's finding that during the relevant time period, Nico refused to bargain with Local 175, the incumbent union, and City Wide failed to apply the terms of Nico's collective-bargaining agreement with Local 175 to its employees. It is also undisputed, as the Board found, that City Wide instead recognized Local 1010 and signed an agreement with that union. Further, as the Board also found (SA 3-4, 7) and the Companies concede (Br. 5, 8), they did not inform or bargain with Local 175 over the creation of City Wide or the transfer of Nico's bargaining-unit work to City Wide.

Moreover, as shown below, substantial evidence supports the Board's finding that Nico and City Wide are alter egos. Accordingly, Local 175's collective-bargaining agreement with Nico remained valid and bound City Wide, as Nico's alter ego, to apply that agreement to its employees. Nico therefore violated the Act by refusing to bargain with Local 175, and City Wide violated the Act by refusing to apply the agreement that Nico had and continues to have with

Local 175. City Wide also unlawfully recognized Local 1010 while still bound by Nico's agreement with Local 175.

A. An Employer Violates the Act if It Evades Its Collective-Bargaining Responsibilities by Transferring Its Business to an Alter Ego, and the Alter Ego Violates the Act by Refusing To Bargain with the Incumbent Union and Recognizing Another Union While Still Bound by an Agreement with the Incumbent

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5).⁴ It is settled that an employer may not evade this collective-bargaining obligation by transferring its business, or a portion of its business, to what appears to be a different company, but is in fact a “disguised continuance,” or alter ego, of the original employer. *Southport Petroleum Co.*, 315 U.S. at 106. Accordingly, alterations to the corporate form, involving no more than “a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management,” are properly disregarded when assigning responsibility under the Act; an alter ego “is in reality the same employer [as the existing entity] and is

⁴ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. 29 U.S.C. §158(a)(1). A violation of Section 8(a)(5) of the Act therefore results in a “derivative” violation of Section 8(a)(1). *Allied Chem &Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 163 n.6 (1971).

subject to all the legal and contractual obligations of the predecessor.” *Howard Johnson Co. v. Detroit Local Executive Board*, 417 U.S. 249, 259 n.5 (1974). *Accord G&T Terminal Packaging Co., Inc. v. NLRB*, 246 F.3d 103, 118 (2d Cir. 2001) (alter ego required to assume predecessors collective-bargaining agreement); *NLRB v. Amateyus, Ltd.*, 817 F.2d 996, 998-99 (2d Cir. 1987) (same). Thus, an employer and its alter ego violate Section 8(a)(5) and (1) of the Act by refusing to bargain with the incumbent union, and by failing to apply the existing collective-bargaining agreement to the alter ego’s employees.

In addition, an alter ego violates Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), by granting recognition to a different union when it is still bound to recognize the incumbent union.⁵ *Advanced Architectural Metals, Inc.*, 351 NLRB 1208, 1217 (2007); *Citywide Serv. Corp.*, 317 NLRB 861, 861 (1995); *Regional Import & Export Trucking Co.*, 292 NLRB 206, 229 (1988), *enforced*, 914 F.2d 244 (3d Cir.1990).

In determining whether two entities are alter egos, the Board, with court approval, applies a “flexible” standard that considers such factors as “whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership.” *Goodman Piping*,

⁵ Section 8(a)(2) of the Act, 29 U.S.C. §158(a)(2), prohibits an employer from dominating or interfering with the formation of a union.

741 F.2d at 11; *accord G&T Terminal Packaging*, 246 F.3d at 118. The Board may also consider whether the apparent transfer of operations occurs in an “arm’s length” transaction between the two entities, with the absence of an arm’s length relationship supporting an alter-ego finding. *A&P Brush Mfg. Corp v. NLRB*, 140 F.3d 216, 220 (2d Cir. 1998); *Fugazy Continental Corp v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984). The Board may also consider whether “an intent” of creating and operating the alter ego was to evade responsibilities under the Act. *G&T Terminal Packaging*, 246 F.3d at 118; *Amateyus, Ltd.*, 817 F.2d at 998. No one factor is controlling, and not all factors need to be present to support an alter-ego finding. *See A&P Brush Mfg*, 140 F.3d at 219; *Lihli Fashions*, 80 F.3d at 748.

B. The Court Lacks Jurisdiction To Consider All But One of the Companies’ Meritless Challenges to the Board’s Amply Supported Finding that Nico and City Wide Are Alter Egos

Relying on largely undisputed evidence and admissions by the Pietranico family and Denegall, the Board affirmed the judge’s finding that Nico and City Wide are alter egos because they share common control, and substantially identical management, business purpose, operation, equipment, customers, and supervision, and that they lack an arm’s length relationship. (SA 1, 7.) In addition, the Pietranico family and Denegall effectively admitted that City Wide was “formed or used to replace the duly elected collective bargaining representative,” Local 175.

(SA 7.) Thus, the Companies presented “essentially every indicia” of alter-ego status. (SA 7.)

In their opening brief (Br. 25, 27-32), the Companies belatedly attempt to challenge the administrative law judge’s findings, affirmed by the Board, that Nico and City Wide share substantially identical management, business purpose, operations, equipment, and ownership.⁶ The Companies’ exceptions to the judge’s decision, however, only addressed his further finding, which the Board adopted, that City Wide was created with an intent to avoid Nico’s bargaining obligations. Given the Companies’ failure to file exceptions to the judge’s findings regarding the other indicia of alter-ego status, the Court lacks jurisdiction to consider the arguments raised by the Companies for the first time in their opening brief.

Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). Given the Section 10(e) bar, “the Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord NLRB v.*

⁶ The Companies also waste ink in asserting (Br. 17-19, 21-24, 26-27) that Nico and City Wide are not a single employer. The complaint did not allege, and the Board did not find, that they were a single employer. (SA 7 n.10.)

Consolidated Bus Transit, Inc., 577 F.3d 467, 474 n.2 (2d Cir. 2009). The Companies have not acknowledged, much less provided, any “extraordinary circumstances” that would excuse their failure to timely raise objections to the findings regarding all indicia of their alter-ego status save their intent to evade collective-bargaining responsibilities.

In any event, as shown below, overwhelming evidence supports the Board’s finding that all indicia of alter-ego status are present here. Indeed, as the Board found (SA 5), many of its factual findings are based on uncontradicted testimony, documentary evidence, and admissions by Senior and Dana Marie. In addition, to the extent that Senior and Dana Marie attempted to provide exculpatory testimony, the judge (SA 2, 5), affirmed by the Board (SA 1 n.2), discredited their testimony and Denegall’s. Because the Companies do not contest the Board’s credibility determinations in their opening brief, they have waived any challenge to those findings. *See United States v. Marinello*, 839 F.3d 209, 225 (2d Cir. 2016) (arguments not raised in opening brief are waived).

1. Common ownership, management, and supervision

The evidence amply supports the Board’s finding “that Nico and City Wide had substantially identical ownership, management and supervision, all of which strongly support a finding of alter ego.” (SA 6.) To begin, it is undisputed, as the Board found (SA 5), that Senior solely owns Nico and that he was the one who

incorporated City Wide in December 2015, naming himself as its sole director and president. Moreover, the Board (SA 1 n.2, 2, 5) discredited Senior and Dana Marie's claims that notwithstanding the Certificate of Incorporation, she actually "owns" City Wide. The Board discredited their testimony based on their demeanor (SA 2) and "implausible" and "[un]convincing" explanations "for their allegedly separate business ventures."⁷ (SA 5.) As noted above, the Companies have waived any challenge to the Board's credibility findings by failing to challenge them in their opening brief.

In any event, as the Board noted, "to whatever extent [Nico and City Wide] technically have two different owners," it has regularly found common ownership where the "original entity and the newly formed entity are owned by members of the same family, including as here, parents and children." (SA 5-6.) *See A&P Brush Mfg.*, 140 F.3d at 219; *Kenmore Contracting Co.*, 289 NLRB 336, 337 (1988), *enforced*, 888 F.2d 125 (2d Cir. 1989).

⁷ For example, the Board found that Dana Marie "struggled" and was "evasive" in trying to explain how she obtained the significant amount of money needed to capitalize the business. (SA 5, 6.) Similarly, the Board found that Dana Marie "struggled to explain" why City Wide pays Senior \$20,000 per month for purportedly doing no work there, while she, the supposed owner, gets paid barely more than she earned at Nico, and even less than her brother earns as City Wide's superintendent. (SA 6). The Companies gain no ground by dismissing the disparity as "a family obligation based on tradition." (Br. 30.)

There is also ample evidence to support the Board's finding that "the Pietranico family exercised common control of both entities." (SA 6.) Of particular note, Senior "continued to control important executive functions" for City Wide. (SA 6.) Thus, as the Board found (SA 4) and the Companies acknowledge (Br. 5-7), in addition to City Wide's Certificate of Incorporation listing Senior as its sole director and president, he also signed as "Principal" on behalf of City Wide a bond that permitted City Wide to commence work. He also signed as City Wide's "President" a "Notice to Proceed" agreement with ConEd to begin performing what would become City Wide's largest contract. Moreover, as the Board found, "Senior, not Dana Marie, responded to reports of labor unrest that occurred after Junior informed Nico's employees that City Wide was taking over for Nico." (SA 4, 6; JA 249-56.) Senior's role in City Wide strongly supports the Board's alter-ego finding. *See Amateyus, Ltd.*, 817 F.2d at 998-99 (alter ego found where brother who owned one company was involved with new company); *BMD Sportswear Corp.*, 283 NLRB 142, 155 (1987) (alter ego found where owner of predecessor company was involved in the setting up and running new company).

Equally important, as the Board further found, "[t]he two entities admittedly shared substantially identical day-to-day management." (SA 6.) Thus, Dana Marie served as the bookkeeper/treasurer for Nico and performed those same duties for City Wide even though she nominally held the title of president. In these

circumstances, the Board reasonably inferred that the significant disparity in compensation levels for Senior and Dana Marie at City Wide “further bolsters [its] finding that their roles remained effectively unchanged.” (SA 6.) Similarly, Junior provided the key operational management and supervision of both companies. In addition, as the Companies concede (Br. 2, 6), Dengell performed the same duties for both companies.

Finally, notwithstanding official titles and duties, it is also clear, as the Board found, “that the family members consider themselves as part of one enterprise.” (SA 6.) Indeed, Senior acknowledged that everything he does, including his creation of City Wide, is for the “family.” (JA 268.) Similarly, Dana Marie characterized the Pietranico’s as running a “family business.” (JA 383.)

2. Same business purpose, operations, and equipment

Ample evidence supports the Board’s finding that “the facts of this case conclusively show that Nico and City Wide share the same business purpose, operations and equipment.” (SA 6.) As the Board found (SA 6) and the Companies concede (Br. 3, 29), both companies provide asphalt paving services for the same customers. Moreover, City Wide simply took over Nico’s ConEd work without even bidding for the work and going through the detailed process that Nico had followed to secure the ConEd contract. (SA 6.) Likewise, as the

Board found (SA 4) and the Companies concede (Br. 3), City Wide simply took over all of Nico's other work through its General Service Agreement with Nico.

In addition to sharing the same business purpose and customers, Nico and City Wide also use many of the same suppliers and equipment, and share a common workforce, as the Board found (SA 6) and the Companies acknowledge (Br. 3, 5-6). Thus, City Wide uses Nico's account and credit line with Willets Point to obtain the asphalt needed for its work. Similarly, City Wide uses the same equipment as Nico—equipment that Nico or another Senior-owned entity “purportedly leased to City Wide.” (SA 6.) Further, as the Board found (SA 3) and the Companies acknowledge (Br. 5, 6), City Wide began operating in the same building as Nico before moving across the street to another building owned by Senior, and using Nico's phone number. In addition, there is no dispute that City Wide employs most of Nico's former unit employees.

In sum, as the Board found (SA 6), the “operations, equipment and business purposes of these two entities” were “essentially identical,” which provides strong evidence of alter-ego status. *See A&P Brush*, 140 F.3d at 219-20 (alter ego found where two entities shared same business purpose, had similar operations, and shared some major customers); *Goodman Piping*, 741 F.2d at 11 (alter ego found where entities shared substantially identical business purpose, management, supervisor, and customers).

3. Lack of an arm's length relationship

The record also amply supports the Board's finding that "there is substantial evidence of a lack of an arm's length relationship in the many transactions between the two companies." (SA 6.) Thus, as noted above, the two entities initially had adjacent offices at the same time and in the same building before City Wide moved across the street to another building owned by Senior. In addition, City Wide uses Nico's phone line, furniture, and computers. Moreover, as the Board found (SA 6) and the Companies acknowledge (Br. 6), there is no credible evidence that City Wide paid Nico for any of these benefits.

Similarly, there is no evidence that the purported equipment-leasing arrangement between Nico and City Wide, and City Wide's use of Nico's credit line to purchase asphalt, "were the product of arm's length dealings." (SA 6.) Rather, as the Board found (SA 3, 6) and the Companies acknowledge (Br. 6-7), there is no evidence of any agreements between the two entities, and no evidence that City Wide ever paid Nico for the equipment and asphalt. Likewise, as the Board further found (SA 6) and the Companies concede (Br. 7), there is no evidence that City Wide "compensated Nico in any way for the assistance in securing the Con Ed contract." (SA 6.) Instead, as the Companies concede (Br. 7), City Wide simply began performing the ConEd contract. Finally, as shown above,

there is a lack of credible, documented evidence as to the amount and source of the capitalization that funded City Wide.

In sum, the absence of evidence of any genuine business transactions between Nico and City Wide, and the lack of evidence regarding the source of City Wide's funding, provide ample evidence of a "lack of arm's length dealings between the two entities," as the Board found. (SA 6.)

4. Intent to evade the Act

a. The Companies effectively admitted their intent to evade Nico's statutory bargaining obligations

Ample and largely undisputed evidence supports the Board's finding that City Wide was "formed as a way to avoid Nico's agreements with [Local 175] and thus the Act's bargaining requirements." (SA 6.) Thus, as the Board found (SA 3) and the Companies concede (Br. 5), they did not notify or bargain with Local 175 over the creation of City Wide. As the Companies also concede (Br. 7), City Wide, without Local 175's knowledge, proceeded to enter into a collective-bargaining agreement with Local 1010 before starting operations and hiring employees. Similarly, City Wide thereafter not only took over Nico's ConEd contract, it also assumed all of Nico's other work without informing or bargaining with Local 175, as the Companies concede (Br. 8). These actions clearly demonstrate an intent by the Companies to avoid their bargaining obligations with Local 175.

Furthermore, as the Board explained, “[e]ven accepting as true” the Companies’ assertion (Br. 11, 20, 28) that City Wide was formed to comply with ConEd’s requirement of union membership in the BCTC, that claim “by definition means City Wide was formed to avoid dealing with the [Local 175] and to avoid bargaining obligations under the Act.”⁸ (SA 6-7.) *See Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362, 374 (D.C. Cir. 2018) (intent to evade bargaining obligation supported by testimony that second company was created for economic and competitive reasons).

b. The Companies fail to rebut the Board’s finding that they intended to evade Nico’s bargaining obligations

Overlooking these virtual admissions that City Wide was created with an intent to evade Nico’s bargaining obligations to Local 175, the Companies make several baseless arguments. Thus, they claim (Br. 11, 20, 28) that they created City Wide in order to comply with ConEd’s BCTC requirement, not for the purpose of evading their bargaining obligations under the Act. As shown above, however, the Companies’ assertion that they based their actions on ConEd’s BCTC

⁸ In any event, as the Board noted, the Companies’ claim that they created City Wide to establish a business entity with BCTC-represented employees cannot be squared with Dana Marie’s assertion, discredited by the judge but repeated in the Companies’ opening brief (Br. 28), that she formed City Wide because she “wanted to start a woman-owned business.” (SA 7 n.8; JA 428.)

requirement by definition means that they formed City Wide to avoid dealing with Local 175.

Moreover, even if, as the Companies claim, Nico stood to lose ConEd work if its employees were not represented by a BCTC-affiliated union, that possibility did not privilege Nico to disregard its bargaining obligation. Rather, as the Board explained, “to whatever extent [Nico’s] motivation was instead seeking to avoid economic losses that might result from a potential inability to perform ConEd work, it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with Local 175 over that in advance.” (SA 6-7.) Simply put, the Board “does not permit an employer to avoid its obligations under the Act even if facing a potential loss of customers.” (SA 6-7.) *See Island Architectural Woodwork*, 892 F.3d at 374. That is particularly true where, as here, there is no dispute that “ConEd was not Nico’s only customer.” (SA 8.)

Next, the Companies assert (Br. 19-20, 27, 36-42) that they could not have intended to evade their statutory bargaining obligations because conversations with Local 175 regarding ConEd’s BCTC requirement in effect put Local 175 on notice of their plans, and they did not attempt to conceal or disguise their creation of City Wide. That claim is fatally undermined by the Companies’ acknowledgement (Br. 5, 8) that they did not inform Local 175, let alone bargain with it, over the creation

of City Wide and the contracting out to City Wide of Nico's work. In short, as the Board found, the Companies' claims are "not true in multiple respects." (SA 7.)

The conversations mentioned by the Companies merely reflect that at most Nico had briefly discussed the BCTC requirement with Local 175. There is simply no evidence, however, that Nico gave any indication of an imminent change in the nature of its business. Rather, the record shows that in early 2015, when Denegall first informed Local 175 of ConEd's BCTC requirement, he assured Local 175 that Nico had a contract in effect with ConEd and would not be making any changes. (JA 528-30.) Similarly, when Denegall mentioned the BCTC requirement to Local 175 in August and October 2015, he gave no notice of any intended changes to the terms and conditions of Nico's unit employees. (SA 529-31.) Moreover, Denegall acknowledged that as of November 2015, Nico had not decided to form a new company because ConEd had granted an extension that allowed Nico to continue using Local 175-represented employees. (SA 529-31.)

In sum, Denegall's conversations with Local 175 simply confirm, as the Board found (SA 3) and the Companies concede (Br. 2-3), that notwithstanding ConEd's statements in early 2015 that it would start enforcing the BCTC provision, Nico continued to perform ConEd work with its Local 175-represented employees, and in October 2015 even successfully negotiated another extension of its ConEd contract using those employees. The conversations further confirm the

absence of any evidence that Nico ever informed Local 175 of a deadline to meet the BCTC requirement or its plans to create City Wide. To the contrary, it is undisputed that the Companies formed City Wide without any notice to Local 175. It is also undisputed that Local 175 did not even learn about City Wide until February 2016, after the entity was already in existence and had signed a collective-bargaining agreement with Local 1010.⁹ The Companies' failure to inform Local 175 about City Wide until February demonstrates clear "intent[] both to disguise and conceal it from [Local 175]," as the Board found. (SA 7-8 n. 11.)

Equally important, the Companies do not dispute the Board's finding (SA 8) that after creating City Wide without notice to Local 175, they proceeded for months to conceal Nico's continued operations. In this regard, although the Companies repeatedly assert (Br. 23, 26, 29) that Nico went out of business after City Wide was created, the Board (SA 8) reasonably found otherwise. Thus, uncontested, credited testimony establishes that Nico was still conducting business through its General Services Agreement with City Wide that covered all of Nico's non-ConEd work. Nevertheless, as the Board found (SA 4, 8; JA 444) and the Companies concede (Br. 8), Local 175 did not even learn of the services agreement

⁹ Absent any clear notice of the intended change, any implicit suggestion that Local 175 waived an opportunity to bargain over City Wide's creation is baseless. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983) (waiver to the statutory right to bargain must be clear and unmistakable); *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989) (same).

until October 2016 because prior to that date the Companies had repeatedly misinformed Local 175 that Nico had gone out of business.

C. Because Nico and City Wide Are Alter Egos, Nico Violated the Act by Refusing To Bargain with Local 175, and City Wide Violated the Act by Refusing To Apply Nico’s Collective-Bargaining Agreement and by Recognizing Local 1010

As shown above, the record and settled law fully support the Board’s finding that the Companies are alter egos. It is “clear that Nico and City Wide share substantially identical management, business purpose, operation, equipment, customers and supervision—essentially every indicia of an alter ego,” as well as “common control, lack of arm’s length dealings . . . [,] and what amounts to an admission that one entity was formed or used to replace the duly elected collective bargaining representative with a different union in violation of the Act.” (SA 7.)

Because the Companies are alter egos, it necessarily follows that Nico violated Section 8(a)(5) and (1) of the Act by transferring its work to City Wide and refusing to bargain with Local 175, the incumbent union. Likewise, City Wide violated the same section of the Act by failing to apply the terms of Nico’s collective-bargaining agreement with Local 175 to its employees. *G&T Terminal Packaging*, 246 F.3d at 118; *Amateyus Ltd.*, 817 F.2d at 998-99.

It also necessarily follows that City Wide, as Nico’s alter ego, violated Section 8(a)(2) of the Act by recognizing Local 1010 when it was still bound by the collective-bargaining agreement that Nico had and continues to have with

Local 175. *Advanced Architectural Metals*, 351 NLRB at 1217; *Citywide Serv. Corp.*, 317 NLRB at 861; *Regional Import*, 292 NLRB at 229.

D. The Board Reasonably Found that Nico Failed To Give Timely Notice of Contract Termination

There is no merit to the Companies' apparent suggestion (Br. 32-36) that they were not obligated to bargain with Local 175 because Nico gave timely notice that it was withdrawing from its membership in NYICA and thereby terminating its assent to be bound by the NYICA-negotiated collective-bargaining agreement and its assumption agreement with Local 175. Contrary to the Companies' contention, the purported notifications were untimely.

An employer-member of a multiemployer association that has negotiated a collective-bargaining agreement on its behalf is bound by the agreement and cannot withdraw from multiemployer bargaining in the middle of the agreement's term. *See, e.g., Purity Stores, LTD*, 93 NLRB 199, 201 (1951); *Engineering Metal Products Corp.*, 92 NLRB 823, 824 (1950). The employer-member also remains bound by the association's successor agreement with the union unless, among other actions, the employer timely withdraws from the association *before* negotiations for a new agreement begin. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 408, 410-11, 419 (1982); *Sheet Metal Workers Int'l Ass'n Local 19 v. Herre Bros.*, 201 F.3d 231, 244 (3d Cir. 1999).

Here, the Companies do not dispute that that Nico was a member of NYICA, a multiemployer association that continuously renewed collective-bargaining agreements with Local 175, the most recent of which was effective from July 1, 2014 to June 30, 2017. Nor do the Companies dispute that pursuant to its membership in NYICA, Nico agreed to be bound by the terms of the collective-bargaining agreements with Local 175 that NYICA negotiated on its members' behalf. Moreover, as the Board found (SA 3), “[i]t is undisputed that Nico had acknowledged [Local 175’s] representation of its employees and had been honoring the terms” of those agreements “until the events of this case”—that is, until February 2016. (SA 3, 7; JA 645, 671.)

Contrary to the Companies’ suggestion (Br. 32-36), there is no record evidence that Nico gave timely notice of withdrawing its membership in NYICA. Simply put, Nico failed to provide any timely notice that would have terminated Nico’s obligation to abide by the terms of NYICA’s most recent collective-bargaining agreement with Local 175. (SA 3.) *See James Luterbach Const. Co., Inc.*, 315 NLRB 976, 978 (2015) (employer failed to timely withdraw from the multiemployer bargaining arrangement that bound it to a successor contract reached through multiemployer negotiations.)

The Companies gain no ground by citing (Br. 32-36) a November 2015 letter merely requesting Senior’s resignation from the NYICA board, or a December

2015 letter purporting to deauthorize NYICA from negotiating any collective-bargaining agreements on Nico's behalf. (SA 566-67.) The first letter did not even attempt to terminate Nico's membership in NYICA. Moreover, neither of the 2015 letters could relieve Nico from being bound by the 2014-2017 collective-bargaining agreement then in effect. (SA 3, 7; JA 645, 671.)

As the Board explained (SA 3, 7), for Nico to have had any potentially viable argument regarding timely withdrawal from the multi-employer bargaining agreement, it would have needed to provide notice pursuant to the agreement's automatic renewal clause during the window period before the previous collective-bargaining agreement expired in 2014. (JA 637, 645.) *See generally Long Island Head Start Child Development Services v. NLRB*, 460 F.3d 254, 256 (2d Cir. 2006) (a renewal clause, known as an evergreen clause, automatically renews the collective-bargaining agreement absent timely written notice). Here, as the Board found (SA 3), it is undisputed that "Nico did not give the required notice to terminate its NYICA agreement prior to the most recent Local 175 [collective] bargaining-agreement."¹⁰

¹⁰ In any event, even if Nico had timely withdrawn from NYICA, it would still have been obligated to bargain separately with Local 175 because Local 175 was the Section 9(a) representative of Nico's employees. *See Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 239 (3d Cir. 1999); *James Luterbach Constr. Co., Inc.*, 315 NLRB 976, 980 (1994).

E. The Court Lacks Jurisdiction To Consider the Companies’ Remaining Claims

In their opening brief, the Companies raise other baseless arguments that they failed to present to the Board in the first instance. Accordingly, the Court lacks jurisdiction to consider those claims. *See* pp. 21-22 above. In any event, the Companies fail to explain how they have any bearing on the violations found by the Board. Thus, the Companies suggest (Br. 14-15) that Verizon and Welsbach perform work within Local 1010’s jurisdiction, and they note (Br. 11-13) that a district court judge rejected an antitrust claim involving ConEd’s requirement that paving contractors employ BCTC-represented workers. The Companies also note (Br. 12-13) that the Board’s General Counsel dismissed a complaint allegation that ConEd acted unlawfully by amending its contract to require BCTC membership. But the legal and factual issues in the instant proceeding are wholly distinct from any alleged antitrust issues. Likewise, the investigation of the separate unfair-labor-practice charges alleging that ConEd violated Section 8(e) of the Act, 29 U.S.C. § 158(e), in its dealings with Local 1010 involved legal and factual issues has no application here.¹¹

¹¹ Just as importantly, a regional director’s investigation and dismissal of unfair-labor-practice charge allegations is not a decision of the Board and does “not constitute evidence . . . nor are they binding . . . in any other respect.” *G.M. Masonry Co.*, 245 NLRB 267, 269 n.7 (1979). *Accord Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1100 n.2 (1983) (“a prior charge which is dismissed

The Court also lacks jurisdiction to consider the Companies' reliance (Br. 39-42) on "impossibility" as a defense to their breach of the collective-bargaining agreement between Nico and Local 175. The Section 10(e) bar applies because the Companies failed to raise their baseless claim before the Board. In any event, as shown above, in Nico's brief discussions with Local 175 about BCTC, it never bargained over the creation of City Wide, or even indicated that it would create an alter ego to handle its work if Local 175 did not join BCTC. Accordingly, the Companies' claim that a successful resolution through negotiations was impossible amounts to complete speculation.

Finally, the Court lacks jurisdiction to consider the Companies' cursory assertion (Br. 2, 15-16) that the Board erred in affirming the judge's rejection of their affirmative defense that the unfair-labor-practice charge underlying the complaint was time-barred under Section 10(b) of the Act, 29 U.S.C. § 160(b).¹²

does not constitute an adjudication on the merits and no res judicata effect can be given to the action"). After all, as the Supreme Court explained in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975), the General Counsel, to whom regional directors report, has "unreviewable authority to determine whether a complaint shall be filed," and when "he decides not to issue a complaint, no proceeding before the Board occurs at all." Thus, the extra-record investigatory material cited by the Companies is irrelevant to the inquiry here.

¹² Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Under that provision, actions occurring more than six months prior to the filing and service of a charge may not be alleged as unfair labor practices. *See*

Once again, the Companies failed to file an exception to the judge's rejection of that defense. (SA 3, 8.)

But even if the Companies had filed an exception below, waiver principles would preclude consideration of the Companies' cursory challenge because their opening brief fails to address substantively the judge's specific findings and reasoning on the Section 10(b) defense. Instead, the Companies simply mention the issue in their statement (Br. 1) and offer a vague, conclusory assertion (Br. 15-16) that the complaint was untimely, without explaining why. Thus, even aside from the jurisdictional bar, the Companies, by failing to adequately brief the issue, waived any challenge before the Court. *See United States v. Kirsh*, 903 F.3d 213, 221 n.9 (2d Cir. 2018); Fed. R. App. P. 28(a)(8)(A) (argument must contain party's contentions with citations to authorities and record).

In any event, the judge, affirmed by the Board, properly rejected the Companies' Section 10(b) defense. As the judge found (SA 8), the Companies concealed their creation of City Wide and Nico's ongoing business operations.¹³

Machinists Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 416, 424-25 (1960). Because a Section 10(b) allegation is an affirmative defense, the party relying on it has the burden of establishing that notice of the violation outside the limitations period was clear and unequivocal. *See Positive Elec. Enters., Inc.*, 345 NLRB 915, 918 (2005).

¹³ An exception exists to Section 10(b)'s six-month limitations period where the respondent fraudulently conceals the operative facts underlying a potential unfair

Indeed, it was not until settlement discussions took place on October 6, 2016 that Local 175 learned Nico was still conducting business through City Wide; Local 175 then promptly filed a new unfair-labor-practice charge alleging, among other violations, that Nico unlawfully subcontracted work to City Wide. (SA 8.) As the judge also found (SA 8), the new unfair-labor-practice charge that formed the basis of the complaint was closely related to the charge that Local 175 originally filed but later withdrew. On that alternative basis, the judge again concluded that the complaint allegations were timely under Section 10(b) of the Act.¹⁴

labor practice charge. In those circumstances, the period does not begin to run until the charging party knows or should have known of the concealed facts. *Herbert Indus. Insulation Corp.*, 319 NLRB 510, 525 (1995), *enforced mem.*, 141 F.3d 1152 (2d Cir. 1998).

¹⁴ An otherwise untimely allegation is not barred by Section 10(b) if the allegedly unlawful conduct occurred within six months of a timely filed charge and is “closely related” to the allegations in that charge. *NLRB v. American Medical Response, Inc.*, 438 F.3d 188, 195 (2d Cir. 2006). To make that determination, the Board considers three factors: (1) whether the new allegations involve the same legal theory or are of the same class as the original allegations; (2) whether they arise from the same factual situation or sequence of events; and (3) whether they are subject to the same or similar defenses. *Redd-I, Inc.*, 290 NLRB 115, 1118 (1988). The Board affirmed the judge’s finding that all three factors are present here. (SA 8.)

CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board
October 2020

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

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner/Cross-Respondent)	Nos. 20-0077 & 20-0361
)	
v.)	Board Case No.
)	29-CA-186692
NICO ASPHALT PAVING, INC. and its)	
Successor in Interest and Alter Ego,)	
CITY WIDE PAVING, INC.)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28(d)(1), the Board certifies that this brief contains 9,511 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365.

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Dated at Washington, DC
this 26th day of October 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, 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, DC
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