

**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,

Petitioners-Cross-Respondents,

v.

National Labor Relations Board,

Respondent-Cross-Petitioner.

Docket Nos. 20-1522(L), 20-1973(XAP)

Board Case Nos.
02-CA-188405, *et al.*

**PETITIONERS' OPPOSITION TO
MOTION OF THE NATIONAL LABOR RELATIONS
BOARD TO STRIKE PORTIONS OF OPENING AND REPLY BRIEFS**

Throughout these proceedings, the Board consistently has attempted to prevent Petitioners from describing certain behavior of the Union's predecessor. First, an Administrative Law Judge of the NLRB refused to allow the evidence, then the Board in Washington ignored it, and now before this Court, the Board has repeatedly opposed its consideration. The Board's obstinance on this issue brings to mind the Shakespearean phrase, "the lady doth protest too much, methinks." *Hamlet*, Act III, Scene 2. It is hard to understand why the Board is so determined to stop the Court from learning about the information contained in the proffered documents.

The Request for Judicial Notice is Appropriate. The statement by the Board that the Court's denial of Petitioners' Motion to Supplement "constituted a rejection of the Company's arguments that the Court should consider the Exhibit 1 documents and the information contained therein, including its argument for judicial notice," assumes too much. Doc. 153 at p. 6. The Court's Order simply denied the Petitioners' Motion as to Exhibit 1 without opinion, and did not state that the denial also constituted a ruling on the question of judicial notice. It is entirely plausible that the Court did not think it was necessary to supplement the record with documents that could just as easily be the subject of judicial notice. The Court might have decided to grant the portion of the Motion that was unopposed and deny the portion that was not. The Board has no more insight into the Court's reasoning than do the Petitioners.

The cases cited by the Board have no application here. In *Natofsky v. City of New York*, 921 F.3d 337, (2d Cir. 2019), the materials at issue were not the subject of a request to take judicial notice, and the plaintiff's motion to supplement lacked a legal basis. Petitioners here are asking the Court to consider judicial notice as an alternative to supplementing the record.

In any event, there is no basis to strike those portions of the Brief that request the Court to take judicial notice. See *In the Matter of Lisse*, 905 F.3d 495, 496 (7th Cir. 2018) ("The right place to propose judicial notice, once a case is in a court of

appeals, is in a brief.”). It is entirely up to the Court to decide whether or not to do so. The case cited by the Board regarding law of the case, *Shomo v. City of New York*, 579 F.3d 176 (2d Cir. 2009), holds that that although the law of the case doctrine provides that an appellate court’s decision “should generally be adhered to by that court in subsequent stages in the same case,” the court likewise noted that the law of the case “does not deprive an appellate court of discretion to reconsider its own prior rulings.” *Id.* at 186 (citation omitted). The law-of-the-case doctrine “is a discretionary rule of practice and generally does not limit a court’s power to reconsider an issue.” *In re PCH Assocs.*, 949 F.2d 585, 592 (2d Cir. 1991). It certainly does not preclude this Court from determining an issue it has not yet ruled on – in this case, whether to take judicial notice of the documents proffered here. *Id.*, 949 F.2d at 593. The Court ruled only that the Motion to Supplement would be denied – it made no ruling about taking judicial notice. For similar reasons, the cases referring to reconsideration are inapposite. Petitioners are not seeking reconsideration of the Court’s denial of their Motion to Supplement; they simply are asking the Court to take judicial notice instead.

The Proffered Documents Are Relevant. In its Motion, the Board referred to the Petitioner’s argument based on the documents as “tortured and illogical,” but Petitioner’s position is really quite straightforward. The Union’s predecessor was thoroughly corrupt, as the proffered documents demonstrate and no one disputes.

The Esplanade (the company that ran the building before Petitioner 305 West End took it over) was one of the many employers that paid bribes to the corrupt union in exchange for favorable terms, as shown by the proffered documents. Among other things, while the Esplanade owned the property, the corrupt union did not enforce its union security clause, because numerous employees who were theoretically encompassed by the definition of the bargaining unit did not pay dues, and the union did not even pretend to represent certain employees who came within that definition (the recreation employees). As this Court stated in its opinion affirming the convictions of the corrupt union's principals, the union had a reputation as a "sweetheart union." *U.S. v. Fazio*, 770 F.3d 160, 163 (2d Cir. 2014)

With this as the background, it is important for the Court to understand that 1) the collective bargaining agreement negotiated by the current Union was nearly identical to the last one negotiated by the corrupt union, and 2) again, many of the employees continued not to pay Union dues and did not consider themselves to be members of the Union. (This information is proved by documents and testimony in the record.) Moreover, statutory supervisors did pay dues and considered themselves members of the current Union. Even the Union's shop steward implicitly acknowledged the situation by trying to recruit employees to join the current Union, as testimony at the hearing revealed. All of these circumstances existed under the current Union, as the record in the case shows.

The proffered documents are relevant because they explain *how* the current Union came to operate as a members-only union, which is unusual in modern times. Petitioners do not allege that the current Union is corrupt, merely that it failed to root out the improper practices of its predecessor. The history of the Union, its predecessor, and their relationship with the Esplanade helps to explain how this Union came to operate as a members-only Union at the Esplanade. This is important, because a members-only union is not entitled to a presumption of majority status and may not be the beneficiary of a bargaining order. *See, e.g., Arthur Sarnow Candy Co., Inc.*, 306 NLRB 213, 217 (1992); *In Re Makins Hats, Ltd.*, 332 NLRB 19, 19-20 (2000).

Making the Request in a Reply Brief Was Not Improper. The Board's second argument, that it was improper for the Petitioners to raise the issue of judicial notice in its Reply brief, is inexplicable. At the time that the Petitioners' initial brief was filed, the Court had not yet ruled on their Motion to Supplement the Record. There was no reason for the Petitioners to assume the Court would deny their Motion. The Board's strident assertion that it was improper to raise the issue of judicial notice in the Petitioners' Reply brief takes no account of the fact that the issue of judicial notice did not arise until after the Court denied supplementation – had the Motion to Supplement been granted, it would not have been a relevant argument. This Court has the discretion to consider an argument raised for the first

time in a Reply brief, especially as the Board has now had an opportunity to respond to that argument in its Motion to Strike. *See, e.g., Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005); *In re Various Grand Jury Subpoenas*, 235 F. Supp. 3d 472, 485 (S.D.N.Y. 2017), *modified*, 2017 WL 564676 (S.D.N.Y. Feb. 13, 2017).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that the Court deny the Board's Motion to Strike portions of the Petitioners' Opening and Reply briefs.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), counsel certifies that the foregoing was created using Microsoft Word for Mac and contains 1,245 words in proportionally-spaced, 14-point type, excluding certificate of service and this certificate of compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2021, I electronically filed the forgoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that the participant in the case is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

Respectfully submitted this 22nd day of February, 2020.

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