UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A SINGLE EMPLOYER **Respondents** **ARTHUR SALM, FORTUNA EDERY, individually and as Executrix of the Estate of Albert Edery, deceased** **Additional Respondents** **and** **INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS' UNION**	**Case Nos.** 29-CA-14548 29-CA-14619 29-CA-14681 29-CA-14735 29-CA-14845 29-CA-19853 29-CA-14896 29-CA-14983 29-CA-15012 29-CA-15119 29-CA-15124 29-CA-15137 29-CA-15147 29-CA-15323 29-CA-15324 29-CA-15325 29-CA-15332 29-CA-15393 29-CA-15413 29-CA-15447 29-CA-15685

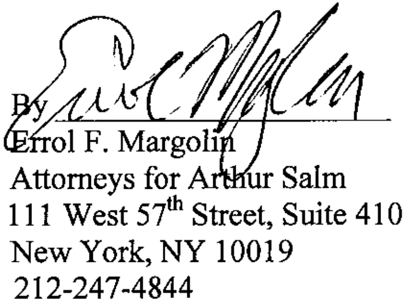
RESPONDENT SALM'S CROSS EXCEPTION

TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent Salm excepts to the Administrative Law Judge's Decision solely to the extent that it failed to find the Board's claims against him barred by the Statue of Limitations contained in Section 3306 (b) of the Federal Debt Collection Procedures Act.

Dated: New York, NY
April 18, 2011

Margolin & Pierce, LLP



By ______________________

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and	29-CA-15119 29-CA-15124
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RESPONDENT SALM'S BRIEF IN ANSWER TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO A.L.J's THIRD SUPPLEMENTAL DECISION AND SALM'S CROSS-EXCEPTION

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PRELIMINARY STATEMENT

This case comes about by virtue of a Supplemental Order issued in 1999 which found that "Domsey" [1] owed back pay to a number of its former employees (the "Discriminatees"). That order was supplemented by the Board in 2007 and a final supplemental decision and order was issued in August, 2010. (R20)[2]

At the time of the trial before A.L.J. Green, the Board's petition for enforcement and Domsey's petition for review were pending undecided before the Court of Appeals for the Second Circuit.

Since that trial, the Second Circuit has issued its decision dated February 18, 2011 granting Domsey's petition for review, denying the Board's application for enforcement and remanding the case to the Board for further proceedings consistent with its opinion. A copy of that opinion is annexed as Appendix A.

Thus, there is no viable judgment in existence at this time for which to seek to hold Salm liable. This proceeding is accordingly premature at best and depending upon what evolves upon remand, there may be no basis for it in the future.

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1. "Domsey" as used in these proceedings refers to three corporations, Domsey Trading Corporation, Domsey Fiber Corporation and Domsey International Sales Corporation" treated by the Board as a "single employer."
2. (R) reference are to pages of the trial record before A.L.J Raymond Green.

COUNSEL'S EXCEPTIONS TO A.L.J. GREEN'S DECISION

It is not possible to reconcile General Counsel's (hereafter "Counsel") exceptions to A.L.J. Green's decision after trial with the actual record of that trial. The only witnesses who testified at that trial were those called by Board Counsel. Their sworn testimony firmly established that counsel's arguments offered as a basis to hold Salm personally liable were false, unsubstantiated or unproven. A.L.J. Green, who observed and listened to those witnesses, was in the best position to judge their credibility. Counsel's argument that he erred in crediting that testimony is simply without basis.

Counsel stated at the hearing that she was asserting personal liability against Salm solely on the basis of White Oak Coal case. A.L.J. Green analyzed the evidence (Decision, page 9) and correctly concluded that counsel had failed to prove the White Oak Coal elements necessary to establish personal liability. She produced no evidence to contradict the testimony of the Respondent's CPA that the corporate entities were adequately funded; that there was no commingling of funds; that the corporations maintained adequate and separate corporate books and records and all filed separate tax returns.

Counsel argues that her post-trial, first-time reference to New York law as the alleged basis for personal liability was not an alternative theory to her announced reliance on the White Oak Coal case, but plainly that is exactly what it was. This attempt to substitute a new theory of liability after the trial ended was properly rejected by A.L.J. Green (Decision, page 10), noting that it was not mentioned in the Notice of Hearing and Respondents had never been put on notice that it was being asserted. A.L.J Green further correctly noted that "piercing the corporate veil" according to NLRB cases and reviewing United State Circuit Courts, was a matter of federal law. (Decision, page 10)

Judge Green's view on this subject is borne out by the languages of the Second Circuit in Lindsay v. Association of Professional Flight Attendants, 581 F. 3d47 (2nd Cir 2009, at page 57:

The Supreme Court established the basic tenets of federal preemption in the labor context in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). In *Garmon*, the Court considered whether California could provide damages under state law to an employer based on employee picketing, which the California Supreme Court determined was an unfair trade practice. See *id.* at 238-39, 79 S.Ct. 773. The employer had begun a simultaneous proceeding before the National Labor Relations Board ("NLRB"), over which the Regional Director had declined to exercise jurisdiction "presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.* at 238, 79 S.Ct. 773.

The Court identified the issue as "[t]he extent to which the variegated laws of the several States are displaced by a single, uniform, national rule," namely, the National Labor Relations Act. *Id.* at 241, 79 S.Ct.773. The Court concluded as follows:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id. at 244, 79 S.Ct. 773. Stated differently, "[t]he governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246, 79 S.Ct. 773. This principle, the Court explained, applies regardless of whether the state law at issue was "tort law of general application [or] specialized labor relations statues." Id. At 244 n. 3, 79 S.Ct. 773. Finally, the Court explained that, even if application of state law in a particular situation would not, in fact, conflict with "the active assertion of federal authority," it would nevertheless" involve[] a conflict with federal policy in that it involves allowing two law making sources to govern." Id. At 247, 79 S.Ct. 773.
(*emphasis added*)

Counsel did not prove Salm was an 'alter ego", tries vainly to rely on evidence not admitted at trial or offered after the trial, which were properly rejected and takes other exceptions, all equally spurious.

THE DISTRIBUTION OF THE PROCEEDS OF THE SALE OF THE DOMSEY TRADING CORPORATION'S BUILDING TO ITS SHAREHOLDERS DID NOT RENDER THE DOMSEY CORPORATIONS, A "SINGLE EMPLOYER" INSOLVENT.

The critical element of the Board's claim against Arthur Salm and the other shareholders of Domsey Trading Corp. is that the transfer to them of the proceeds of sale of its property rendered the Domsey corporations insolvent and thus unable to pay the judgment for back pay.[3] As established at the hearing, however, that is not true. Benjamin Weinstock called by the Board, was the attorney who represented the purchaser of the Domsey Trading property. (Record, p. 40). He identified the bank check paid to Domsey Trading Corporation for that purchase, describing it as a "portion" of the balance of the purchase price (Tscpt. pp 42, 43). He also testified to the payment at that time to the Domsey Fiber Corporation member of this 'single employer,' of 2.6 million dollars for its leasehold (Record, pp. 45, 56). No further evidence was introduced as to that 2.6 million dollars. Since one of the three corporations comprising this 'single employer" was possessed of 2.6 million dollars at the time the Domsey Trading Corporation's proceeds were transferred to its shareholders, there is no basis for the Board's contention that such transfer rendered this single employer "insolvent" or unable to pay its debt. 2.6 million dollars was more than adequate to pay the back pay award at that time.

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[3]As noted earlier, there is no final judgment against the Domsey corporation for back pay.

THERE IS NO BASIS FOR THE BOARD'S CONTENTION THAT ARTHUR SALM ACTED AS DOMSEY TRADING CORPORATION'S "ALTER EGO"

One of the board's scattershot allegations of liability in this proceeding is that Arthur Salm, Peter Salm, David Salm and Albert Edery, individually acted as alter egos of Respondent Domsey (Notice of Hearing, par. 13(b)). Apart from the questions of multiple personality presented by such an allegation, the theory of "alter ego" has no bearing on the issues of this proceeding.

The point is made succinctly by the Court of Appeals in UA Local 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. Nor Cal Plumbing Inc., 48 F. 3d 1465, (9th cir. 1995), (attachment 3) to wit:

> The alter ego doctrine as developed in labor law is analytically different from the traditional veil-piercing doctrine as developed in corporate law. The alter ego doctrine is designed to prevent employers from escaping their collective bargaining obligations by shifting work to non-union firms they also own. This doctrine has nothing to do with the doctrine that allows creditors of corporations to pierce the corporate shell to hold shareholders liable for corporate debts if they abuse the corporate form to defraud creditors.
>
> ...
>
> [However,] appellees' argue that the injustice factor of the veil-piercing inquiry has been satisfied. They contend that not piercing the corporate veil would allow the Pettits to retain the financial rewards of their fraudulent scheme. But this presumes the truth of what is in genuine dispute—that the Pettits misused the corporate form to drain corporate assets. Appellees also claim that it would be unjust not to pierce the veil because they would not be able to recover damages otherwise. But our precedents do not recognize that the "inability to collect... by itself, constitute[s] an inequitable result." Seymour v. Hull & Moreland Eng'g 605 F. 2d 1105, 1113 (9th Cir. 1979). (emphasis added.)

See also: Gartner v. Snyder, 607 F. 2d 582, 586 (2d Cir. 1979) ("Because New York courts disregard corporate form reluctantly, they do so only when the form has been used to achieve fraud, or when the corporation has been so dominated by an individual or another corporation..., and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own and can be called the other's alter ego.")

Based on the evidence in this record, it is clear that each of the corporations here involved observed all corporate formalities and were not "dominated" by anyone. The distribution of the proceeds of the sale of a corporation's sole asset to its four individual shareholders of their proportional interests does not equate with "dominance."

DOMSEY'S FAILURE TO ANSWER

Counsel urges that "based on Domsey's failure to file an Answer, all allegations detailed in the Notice of Hearing with respect to Domsey are admitted."

Lest there be any misperception created by that assertion (apart from the fact that at the time, a judgment had already been entered against Domsey), Salm did provide his Answer to the Notice of Hearing denying the allegations as applied to him. It was served upon counsel on October 5, 2010 and is a part of the record.

SALM'S CROSS-EXCEPTION TO A.L.J. GREEN'S DECISION

Salm excepts to A.L.J. Green's Decision solely to the extent that it failed to apply the Statute of Limitations set forth in the Federal Debt Collections Practices Act ("FDCPA") to the Board's claim.

THE FDCPA APPLIES TO THIS PROCEEDING AND IT'S STATUTE OF LIMITATIONS BARS THE BOARD'S CLAIM AGAINST ARTHUR SALM

A. In the case of National Labor Relations Board v. E.D.P. Medical Computer Systems, Inc., 6 f. 3d 951 (2d Cir. 1993) the Board, as had been done in this case, applied for a pre-judgment writ of garnishment under the FDCPA, of funds owed to the defendant EDP in its effort to collect a back pay award previously rendered against EDP. The Second Circuit, in rendering its decision, had the following to say (at page 954):

B. The FDCPA

> The FDCPA allows the United States to recover a judgment on a debt owed to it or to obtain a remedy in connection with such a claim before judgment on the debt. 28 U.S.C. Sec. 3001(a). A debt under the Act means "an amount that is owing to the United States on account of a direct loan," id. Sec. 3002(3)(A), or on account of a "fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution damages, interest, tax, bail bond, or other source of indebtedness to the United States." Id. Sec. 3002(3)(B). The purpose of the Act was "to create a comprehensive statutory framework for the collection of debts owed to the United States government," in order to "improve the efficiency and speed in collecting those debts. 1-H.R.Rep. No. 736, 101st Cong., 2d Sess. (1990), reprinted in, 1990 U.S.C.C.A.N. 6472, 6630, 6631. Previously the United States collected debts according to the laws of the different states which impeded collection efforts. Id. At 6631-33.
>
> The respondents argue the Board may not use the FDCPA to collect the back pay award because it is not a debt owing to the United States under 26 U.S.C. Sec. 3002(3)(A) & (B). Even though the Board is the only party entitled to enforce the back pay award, the respondents argue that since the money will go to the individual employees, it is not a debt due to the United States.

> The Board, however, maintains that the collection of the back pay award is not simply done for the private interests of the individual employees, but rather also for the overall public interest in enforcing the National Labor Relations Act and preventing unfair labor practices. The FDCPA should apply, therefore, to awards being collected by the United States under federal labor law. Specifically, the back pay award should be considered "restitution, damages,...[or] reimbursement" owing the United States.
>
> We agree with the district court that the FDCPA applies in this action because the back pay award constitutes a debt owing to the United States. ...(emphasis added.)

Consistently, Section 3301 of the FDCPA expressly provides that FDCPA is the exclusive civil procedure for the U.S. to recover a judgment on a debt.

B. Section 3306 of the FDCPA (28 U.S.C 3306) provides expressly as follows:

> **§ 3306. Remedies of the United States**
>
> (a) **In General**
>
> In an action or proceeding under this subchapter for relief against a transfer or obligation, the United States, subject to section 3307 and to applicable principles of equity and in accordance with the Federal Rules of Civil Procedure, may obtain-
>
> (1) avoidance of the transfer or obligation to the extent necessary to satisfy the debt to the United. States;
>
> (2) a remedy under this chapter against the asset transferred or other property\l of the transferee; or
>
> (3) any other relief the circumstances may require.
>
> (b) **Limitation**
>
> A claim for relief with respect to a fraudulent transfer or obligation under this subchapter is extinguished unless action is brought-

(1) under section 3304 (b)(1)(A) within 6 years after the transfer was made or the obligation was incurred or, if later, within 2 years after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under subsection (a)(1) or (b)(1)(B) of section 3304 within 6 years after the transfer was made or the obligation was incurred; or

(3) under section 3304 (a)(2) within 2 years after the transfer was made or the obligation was incurred. (emphasis added.)

Section 3304 provides as follows:

§3304. Transfer Fraudulent As to a Debt to the United States

(a) **Debt Arising Before Transfer**

Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States which arises before the transfer is made or the obligation is incurred if-

(1)

(A) the debtor makes the transfer or incurs the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(B) the debtor is insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation; or

(2)

(A) the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time; and

(B) the insider had reasonable cause to believe that the debtor was insolvent.

(b) **Transfers Without Regard to Date of Judgment**

(1) Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or the obligation is incurred, if the debtor makes the transfer or incurs the obligation-

(A) with actual intent to hinder, delay, or defraud a creditor; or

(B) without receiving a reasonably equivalent value in exchange for the transfer or obligation if the debtor-

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

[Section 3307, alluded to in Section §3304 and 3306, provides in substance, that a transfer or obligation taken in good faith and for a reasonably equivalent value, is not voidable.]

C. That the claim against Arthur Salm individually has been extinguished by virtue of the limitation imposed by FDCPA Section 3306 is effectively conceded by Board counsel Kapelman, whose affidavit in support of the Board's ex parte application for pre-judgment garnishment, (attachment 1) at paragraph 5, admitted as follows:

> 5. Shortly after September 30, 2007, when the Board issued its Supplemental Decision and Order (see footnote 5, supra), the Region discovered that the Kent Avenue property had been sold without any notice to the Region. The Region initiated an investigation to determine the specifics of the sale of the Kent Avenue property. The Region discovered that the Kent Avenue property was sold on January 9, 2002; that the owner/seller was Domsey Trading; and that shortly thereafter Domsey vacated the Kent Avenue property and ceased operating...

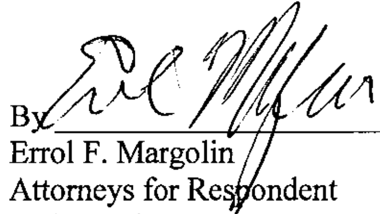
Six years after January 9, 2002 would have been January 9, 2008, and two years from September, 2007 would have been September, 2009. The Notice of Hearing initiating this proceeding is dated August 11, 2010, well beyond the stated limitations period.

A.L.J. GREEN'S DECISION MUST BE SUSTAINED

Counsel is urging this Board to ignore the evidence actually adduced (or not adduced) at the trial before A.L.J. Green and substitute its own findings, based not on the actual record but on counsel's arguments. This is an extension of the kind of thinking that asks that a document not admitted into evidence or not offered until the trial was over, be considered as if it were in evidence. This novel approach to due process and disposition on the merits cannot be allowed to supplant the A.L.J's careful analysis of the evidence, the relevant law and his personal observation of the witnesses. The decision should be affirmed by this Board.

Dated: New York, NY
April 18, 2011

Respectfully submitted,
Margolin & Pierce, LLP



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APPENDIX
A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: October 20, 2009 Decided: February 18, 2011)

Docket Nos. 10-3356-ag, 08-5165-ag, 08-4845-ag

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

v.

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION and DOMSEY INTERNATIONAL and DOMSEY INTERNATIONAL SALES CORPORATION, a single employer,

Respondent-Cross-Petitioner.

KEARSE, WINTER, and POOLER, *Circuit Judges.*

The National Labor Relations Board ("NLRB" or "Board") seeks enforcement of two Supplemental Decisions and Orders of the Board against Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International and Domsey International Sales Corporation ("Company" or "Domsey"), a single employer, pursuant to Section 10(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(e). *See Domsey Trading Corp.*, 351 NLRB No. 33 (2007); *Domsey Trading Corp.*, 355 NLRB No. 89 (2010). Domsey cross-petitions for review

of the Supplemental Decisions and Orders pursuant to Section 10(e) of the NLRA, 29 U.S.C. § 160(e). We agree that the Board erred when it failed to consider Domsey's objections to the immigration-related evidentiary rulings of the Administrative Law Judge ("ALJ") that were based on pre-*Hoffman* Second Circuit and NLRB case law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). We therefore deny the Board's application for enforcement, grant Domsey's petition for review, and remand to the NLRB for further proceedings consistent with this opinion.

JEFF BARHAM, LINDA DREEBEN, JOHN E. HIGGINS, JR., JOHN H. FERGUSON (ROBERT J. ENGLEHART, on the brief) for RONALD MEISBURG, General Counsel, National Labor Relations Board, Washington, D.C., *for Petitioner-Cross-Respondent.*

PAUL FRIEDMAN (DONALD GAMBURG and ANTHONY A. MINGIONE, on the brief), Blank Rome LLP, New York, New York, *for Respondent-Cross-Petitioner*.

POOLER, *Circuit Judge*:

The National Labor Relations Board ("NLRB" or "Board") seeks enforcement of two Supplemental Decisions and Orders of the Board against Domsey Trading Corporation, Domsey Fiber Corporation, Domsey International and Domsey International Sales Corporation ("Company" or "Domsey"), a single employer, pursuant to Section 10(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(e). *See Domsey Trading Corp.*, 351 NLRB No. 33 (2007); *Domsey Trading Corp.*, 355 NLRB No. 89 (2010).[1] Domsey cross-petitions for review

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[1] This case comes before this Court a second time, as the Board's two-member Second Supplemental Decision and Order, 353 NLRB No. 12 (2008), was initially dismissed pursuant to

of the Supplemental Decisions and Orders pursuant to Section 10(e) of the NLRA, 29 U.S.C. § 160(e).

We agree that the Board erred when it failed to consider Domsey's objections to the immigration-related evidentiary rulings of the Administrative Law Judge ("ALJ") (Michael A. Marcionese) that were based on pre-*Hoffman* Second Circuit and NLRB case law. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). We therefore deny the Board's application for enforcement, grant Domsey's petition for review, and remand to the NLRB for further proceedings consistent with this opinion.

BACKGROUND

On January 30, 1990, approximately 200 of Domsey's workers went on strike, alleging that the Company had committed unfair labor practices, including firing several employees for attending union meetings. The strike ended on August 10, 1990, and the striking workers made an unconditional offer to return to work. Subsequently, the NLRB determined that Domsey had committed unfair labor practices before, during, and after the strike and ordered Domsey to reinstate the striking workers. *See Domsey Trading Corp.*, 310 NLRB No. 127 (1993). In a decision dated February 18, 1994, we granted the NLRB's application for enforcement. *See Domsey Trading Corp. v. NLRB*, 16 F.3d 517 (2d Cir. 1994) (Winter, *J.*).

On August 20, 1997, the NLRB issued a Compliance Specification and Notice of Hearing

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the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2010 WL 2400089 (2010). *NLRB v. Domsey Trading Corp.*, 08-4845-ag, 08-5165-ag (Jun. 30, 2010). Following this Court's order, a three-member panel of the Board issued a Second Supplemental Decision and Order on August 16, 2010, incorporating the two-member Decision of September 25, 2008. There is no substantive difference between the two Supplemental Decisions, and the parties re-submitted the case based upon their previously filed briefs and the oral argument held on October 20, 2009.

before an ALJ to determine the backpay owed by Domsey to the striking workers. In its Answer to the Compliance Specification,[2] and again during the compliance hearing, Domsey raised the issue of immigration status, arguing that undocumented immigrants were ineligible for backpay under the NLRA pursuant to *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). ALJ Marcionese, following then-current NLRB and Second Circuit case law interpreting *Sure-Tan*, denied Domsey's request to ask discriminatees questions about their immigration status during the backpay period. Instead, the ALJ limited Domsey to asking whether the discriminatees' immigration status affected their ability to find work during the backpay period, which he found relevant to mitigation of damages. Later, concerned that Domsey was engaging in a "fishing expedition," the ALJ limited this line of questioning to pre-IRCA[3] hires and post-IRCA hires who Domsey had reason to believe did not have lawful immigration status. He reasoned that Domsey should know the discriminatees' immigration status if they were hired post-IRCA because the company was required by law to verify the information.

Later in the course of the compliance hearing, Domsey submitted a proffer of an immigration expert the Company intended to call to rebut the testimony of some discriminatees who had testified that they had work authorization during the backpay period and to cast doubt on

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[2] In addition to raising immigration-related affirmative defenses for several specific discriminatees, Domsey raised this general affirmative defense in its Answer:

> [I]n the event that it is determined that any of the employees affected are undocumented aliens, the Answer is intended to include that such employee is not entitled to receive backpay for any period of time that they were not authorized to work in the United States.

[3] The Immigration Reform and Control Act of 1986 ("IRCA") made it illegal to knowingly hire undocumented immigrants and required employers to verify the immigration status of newly-hired employees. *See* 8 U.S.C. § 1324a.

the immigration status of other discriminatees who had not testified about their immigration status. The expert was prepared to testify that anomalies in some discriminatees' social security numbers and work authorization documents indicated that they had submitted fraudulent documents and did not have work authorization during the backpay period. Consistent with his previous immigration-related rulings, the ALJ rejected the proffer and prohibited the expert from testifying on the grounds that such testimony was irrelevant.

After fifty-three days of hearings conducted between October 27, 1997, and January 29, 1999, the ALJ issued a Supplemental Decision on October 4, 1999, awarding $1,075,614.30 in backpay to 202 discriminatees. In the decision, the ALJ reaffirmed his ruling that Domsey was not permitted to inquire into the discriminatees' immigration status during the backpay period. The Company filed its objections to the Supplemental Decision with the Board on December 15, 1999. Specifically, the Company objected to the ALJ's immigration-related evidentiary rulings "wherein [ALJ] Marcionese precluded [Domsey] from questioning the claimants about their ability to obtain work in this country legally." Domsey also objected to the ALJ's ruling excluding the testimony of its immigration expert.

After the ALJ issued his Supplemental Decision but before the NLRB had issued its decision, the Supreme Court decided *Hoffman*, 535 U.S. 137, which held that undocumented aliens are not entitled to backpay under the NLRA. In *Hoffman*, an employee who was fired because of his union activities admitted during the subsequent compliance hearing that he was undocumented and that he had provided fraudulent documents to his employer. While acknowledging that the Board enjoys broad discretion in fashioning remedies under the NLRA, the Supreme Court concluded that "allowing the Board to award backpay to illegal aliens would

unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA" by "encourag[ing] the successful evasion of apprehension by immigration authorities, condon[ing] prior violations of the immigration laws, and encourag[ing] future violations." *Id.* at 151. Thus, "[h]owever broad the Board's discretion to fashion remedies when dealing only with the NLRA," the Court concluded, "it is not so unbounded as to authorize this sort of an award." *Id.* at 151-52.

On September 30, 2007, more than five years after *Hoffman* was decided, the Board issued its Supplemental Decision and Order, 351 NLRB No. 33, affirming in part and reversing in part the ALJ's proposed decision. The Board held that *Hoffman* precluded an award of backpay to the four discriminatees who admitted to being undocumented during the backpay period. The Board also remanded with respect to six additional discriminatees because "issues ha[d] been raised" about their immigration status during the compliance hearing. However, the Board did not address Domsey's objection to the ALJ's ruling that it was not permitted to ask most discriminatees about their immigration status.[4]

On remand, the ALJ awarded backpay to two of the six individuals and made partial awards to two others. The General Counsel was unable to verify the immigration status of the remaining two individuals and withdrew their claims. Domsey then filed its objections to the proposed Second Supplemental Decision with the Board, "retain[ing] and restat[ing] its objections and exceptions to the ALJ's original . . . denial of Respondent's attempts to inquire as

[4] The Board did state in a footnote that "[t]he Respondent inquired not only to ascertain whether such status affected the search for work, but also to determine whether it affected eligibility for backpay. This was true for all discriminatees discussed in this section." This footnote did not, however, address Domsey's argument that for the vast majority of discriminatees, it was improperly prohibited from asking about immigration status.

to the [discriminatees'] immigration status and ability to work legally in the United States during the backpay period." On September 25, 2008, the Board adopted the ALJ's decision, failing again to address Domsey's objection to the ALJ's immigration-related evidentiary rulings. These petitions for enforcement and petition for review followed.

DISCUSSION

The central issue in this case is an evidentiary one – namely, what limits the Board may place on the introduction and discovery of evidence that is relevant to one of an employer's affirmative defenses, in this case, immigration status. Congress has entrusted the NLRB with "wide discretion" to manage its internal processes, including the fashioning of evidentiary rules. *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 66 (2d Cir. 1979). We therefore review the Board's evidentiary rulings for abuse of discretion. *See id.*; *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1168 (8th Cir. 2000); *NLRB v. Kolkka*, 170 F.3d 937, 942 (9th Cir. 1999). As in other contexts, the Board "has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the range of permissible decisions." *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 424 (2d Cir. 2009) (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008), *vacated on other grounds*, 130 S.Ct. 3498 (2010)).

I.

As an initial matter, the Board argues on appeal that this Court lacks jurisdiction to consider Domsey's objections to the ALJ's immigration-related rulings because Domsey failed to preserve these objections before the Board. *See* 29 U.S.C. § 160(e); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 123 (2d Cir. 2001). According to the Board, Domsey made specific

objections to the immigration status of only 12 discriminatees and the Board properly considered these objections. The Board contends that Domsey's "general" objection to the ALJ's immigration-related rulings is insufficient to preserve Domsey's arguments with respect to the other discriminatees' immigration status.

The Board misunderstands the nature of Domsey's objection. Domsey does not argue on appeal that each of the discriminatees was undocumented during the backpay period. Indeed, Domsey would be hard-pressed to make such an argument given that, in most cases, there is no direct evidence in the record concerning the discriminatees' immigration status. Instead, Domsey argues that it was prohibited from eliciting relevant testimony from discriminatees and was therefore unable to prove its affirmative defense; it seeks a remand so that it may be permitted to question discriminatees about their immigration status during the backpay period and to introduce the testimony of its immigration expert. In short, Domsey's "general" objection is actually a very specific objection to the ALJ's immigration-related evidentiary rulings. Thus defined, there is no question that Domsey preserved its objection. It reiterated this objection after the ALJ issued his proposed Second Supplemental Decision. The Board's argument that Domsey somehow waived this objection is without merit.[5]

II.

Having concluded that Domsey has preserved its objection to the ALJ's immigration-related rulings, we further conclude that the Board abused its discretion by failing to remand the

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[5] Similarly, the Board's argument that Domsey has waived any objection with respect to discriminatees not mentioned in Domsey's brief is unavailing. Domsey's reference to the questionable immigration status of certain discriminatees was intended to bolster Domsey's argument that it should have been permitted to ask about immigration status, and was not a direct challenge to the discriminatees' backpay awards.

case to the ALJ for further proceedings consistent with *Hoffman*. The ruling that Domsey could not ask discriminatees questions concerning their immigration status was premised on pre-*Hoffman* Second Circuit and NLRB case law that had concluded that immigration status was irrelevant to backpay eligibility under the NLRA. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997); *Hoffman Plastic Compounds, Inc.*, 326 NLRB No. 86 (1998); *see also Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137 (2002) (abrogating both cases).[6] When Domsey later renewed its objection to the ruling, the ALJ again emphasized that he was following current NLRB law and that he was not going to "revise [his] ruling based on speculation that the Supreme Court may find that there is a split in the Circuits and that the issue needs to be addressed at that level."

After *Hoffman*, it is now clear that undocumented immigrants are ineligible for backpay under the NLRA and, therefore, that immigration status is relevant to the question of backpay eligibility. While relevance is certainly not the only consideration when deciding what evidence is admissible, an affirmative defense would be illusory if all evidence that could be used to prove it were categorically excluded. Of course, the ALJ did not have the benefit of *Hoffman* when he made his immigration-related rulings. The Board's decision, however, was issued five years after *Hoffman*, and we are perplexed as to why the Board chose to ignore Domsey's objection to the

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[6] The ALJ explained his ruling as follows:

> [R]ather than burden the record with questioning of all of these witnesses for some potential future decision that may come down from the Court of Appeals or the Supreme Court, . . . I'm going to follow the Board's decision and essentially I'm going to rule that any questions with respect to whether or not they had documents to allow them to work during the back pay period is irrelevant under the Board's current view of the law in terms of alien's rights to back pay during that period of time.

ALJ's evidentiary rulings, even after acknowledging that *Hoffman* precludes a backpay award to undocumented immigrants. **[SPA-181]** This omission ratified the ALJ's ruling, which was based on an outdated and erroneous view of the law. We conclude that this was an abuse of discretion.

III.

The Board makes one further argument in support of its application for enforcement that we must consider – that, *Hoffman* notwithstanding, the Board may place some limits on immigration-related questioning in compliance proceedings. The only limits the Board may place on cross-examination are the usual limits the presider may place on cross-examination. Such a limit may, for instance, require an employer, before embarking on a cross-examination of a substantial number of claimants, to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable, or in error.

While *Hoffman* was not an evidentiary decision, post-*Hoffman*, the immigration status of discriminatees has become relevant to the issue of whether backpay may be awarded. Although it is by no means a simple issue, we find that employers may question discriminatees about their immigration status, while also underscoring the Board's legitimate interest in fashioning rules that preserve the integrity of its proceedings.

In sum, we find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with *Hoffman*. We also conclude that the ALJ erred in not permitting Domsey to ask discriminatees direct questions about their immigration status during the backpay period. Moreover, the ALJ should have permitted Domsey to introduce the testimony of its immigration expert in order to meet its burden. We remand to the Board so that it may correct these errors, and trust that this case, which

concerns unfair labor practices committed almost twenty years ago, can be brought to its well-deserved conclusion.

CONCLUSION

We have considered all of the parties' contentions in support of their respective petitions and, except as indicated above, have found them to be without merit. For the foregoing reasons, we GRANT Domsey's petition for review, DENY the Board's application for enforcement, and REMAND to the Board for further proceedings consistent with this opinion.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

DOMSEY TRADING CORPORATION, DOMSEY FIBER CORPORATION AND DOMSEY INTERNATIONAL SALES CORPORATION, A SINGLE EMPLOYER **Respondents**	**Case Nos.**
ARTHUR SALM, FORTUNA EDERY, individually and as Executrix of the Estate of Albert Edery, deceased Additional Respondents	29-CA-14548 29-CA-14619 29-CA-14681 29-CA-14735 29-CA-14845 29-CA-19853 29-CA-14896 29-CA-14983 29-CA-15012 29-CA-15119 29-CA-15124 29-CA-15137 29-CA-15147 29-CA-15323 29-CA-15324 29-CA-15325 29-CA-15332 29-CA-15393 29-CA-15413 29-CA-15447 29-CA-15685
and	
INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO LOCAL 99, INTERNATIONAL LADIES' GARMENT WORKERS' UNION	

CERTIFICATE OF SERVICE

I hereby certify that I forwarded a true and correct copy of Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Third Supplemental Decision and Brief in Support of Exceptions to the Administrative Law Judge's Third Supplemental Decision, this 18th day of April, 2011, by electronic mail to:

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