UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	**Case Numbers:**
MILUM TEXTILE SERVICES COMPANY,	**28-CA-20898**
	28-CA-20896
Respondent,	**28-CA-20973**
	28-CA-21050
And	**28-CA-21203**
UNITE HERE!	
Charging Party.	

BRIEF IN SUPPORT OF RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION FILED BY THE UNION

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This brief is filed in response to the Exceptions Briefs filed by counsel for UNITE HERE! [hereinafter referred to as the "Union"]. The Union states in its brief that it relies primarily on, and incorporates by reference, the General Counsel's Exceptions Brief. The arguments that the Union refers to and incorporates by reference have been responded to in full in the Brief that addressed the General Counsel's Exceptions Brief and will not be restated herein. This Response will address the arguments set forth in the Union's Exceptions Brief regarding the legality of the lawsuit filed by Milum in federal court and whether a *Gissel*[1] bargaining order should be granted in this case.

I. The ALJ Did Not Err in Refusing to find that Milum's Continued Prosecution of the Federal Lawsuit was a Violation of the Act.

The Union erroneously maintains that the ALJ erred in refusing to find that the Lawsuit was objectively baseless. [UEX 15[2]] At the outset it must be noted that the Union seems to have forgotten that the General Counsel had the burden of proving that the lawsuit was objectively baseless. See *BE & K Construction Co*., 351 NLRB No. 29 slip op. at 1 (2007). As the ALJ decided, the General Counsel failed to meet its burden. [ALJD slip op. at 16]

A. The ALJ Did Not Err by Failing to Find that Milum Did Not Show Actual Malice.

The Union argues that the ALJ erred by not requiring that Milum show the existence of actual malice during the NLRB hearing.

The Union's entire argument misses the point set forth in *BE & K Construction Co*., 351 NLRB No. 29 slip op. at 1 (2007). In *BE & K* the Board held that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing

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[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969).

[2] References to the Union's Exceptions Brief are designated "UEX"; references to the transcript are designated "Tr"; references to the General Counsel's exhibits are designated "GC"; and references to the Respondent's Exhibits are designated "R".

or is completed, and regardless of the motive for initiating the lawsuit" -- even if the lawsuit had a retaliatory motive. The Board went on to hold that a reasonably based lawsuit does not lose the protection of the First Amendment even if the plaintiff failed to ultimately prevail in the lawsuit. As the Board stated in *BE & K*, the test is as follows: "a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'" *BE & K* does not require that a respondent in an NLRB proceeding actually litigate its underlying lawsuit during the course of the NLRB hearing. Thus, the only issue at the NLRB hearing is whether a reasonable litigant could realistically expect success on the merits of the lawsuit that was filed by Milum.

The Union basically argues that to the extent that *BE & K, supra*, holds that a reasonably based but retaliatory lawsuit does not constitute a violation of the law, the case should be overturned.[3] The Union also argues that the litigation is a sham, is baseless, and an abuse of process. On this basis the Union argues that the lawsuit is retaliatory and violates the Act.[4] The bottom line, however, is that the issue is not whether the lawsuit was retaliatory, but whether it was reasonably based.

B. The ALJ Did Not Err by Failing to Find that Milum Did Not Prove Actual Damages.

The Union argues that the ALJ erred by not requiring that Milum show the existence of actual damages during the NLRB hearing. The Union's entire argument misses the point: there is not a requirement that a Respondent prove actual damages during the course of an NLRB proceeding in order to show that its lawsuit was reasonably based, and a plaintiff in a federal lawsuit is not required to prove actual damages at the pleading stage of the lawsuit. The Union proceeds to argue that Milum's lawsuit was not reasonably based because of statements reported

[3] UEX at 32-33.
[4] UEX at 34-39.

by the press concerning the impact of the Union's activities on its business. Even if we assume, *arguendo,* that Milum was required to prove actual damages at the NLRB hearing, the General Counsel's own evidence shows the existence of actual damages. As reported in GC 97, a newspaper article that appeared in the Arizona Republic on 21 February 2007:

> "Some of Milum's customers, who have been targeted by Unite Here to try to make them stop using Milum's services, say they are shopping for other textile cleaners…Robert Mancuso, who owns two Valley restaurants serviced by Milum Textile, said the pressure is getting to him. "I'm not a union fan, and I filed a grievance against them. And, they are strong-arming," Mancuso said. "But I'm shopping around and there's a good possibility I may quit Milum. There's only so much negative publicity that I can take."

But, that is not the case. As set forth in *Gertz v. Robert Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d (1974), actual injury is not limited to out-of-pocket loss: "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz* at 350.

The Union also cites *Beverly Health and Rehabilitation Services, Inc*., 336 NLRB 332 (2001), to support its position. *Beverly Health* dealt with a situation where the Board was attempting to enjoin the maintenance of a lawsuit in state court involving a defamation claim. The Board held that it may not order the Respondent to cease and desist from pursuing its defamation lawsuit in state court unless and until it is determined by the Board to be baseless under a Bill Johnson's[5] analysis. The reference to the proof of damages in the case involves the proof of damages during the trial in order to prevail in the action – not to the initial pleadings in the case.

The Union argues that for Milum's lawsuit to be reasonably based, "it had to 'realistically

[5] *Bill Johnson's Restaurants v. National Labor Relations Board*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 *(1983*).

expect' to win its TRO".[6] In examining the lawsuit, *BE & K, supra*, does not break a lawsuit down into parts, i.e., motions and pleadings. The BE & K test is whether "a **lawsuit** lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits.'" *BE & K* does not require that a respondent in an NLRB proceeding actually litigate its underlying lawsuit during the course of the NLRB hearing or in federal court to its conclusion. Furthermore, the fact that temporary injunctive relief is not granted does not negate the validity of the lawsuit itself. The Union admits in its brief that although the plaintiff in *San Antonio Community Hospital*, 125 F.3d 1230 (9th Cir. 1997), was granted a preliminary injunction, it lost on its motion for temporary injunctive relief. The fact that the hospital lost its motion for temporary injunctive relief, however, did not prevent it from obtaining a preliminary injunction after a hearing, nor did it cause the lawsuit to be deemed baseless or dismissed. *Id*. Thus, the only issue at the NLRB hearing is whether a reasonable litigant could realistically expect success on the merits of the lawsuit that was filed by Milum. The Union admits that the "facts necessary to demonstration actual malice are often inaccessible without discovery," and that "discovery process enables a plaintiff to explore the defendant's support for its allegedly defamatory statements."[7] That is the point: a plaintiff in an action is not required to prove actual damages or malice at the initial pleading stage of the case in order to have a meritorious claim. Once the lawsuit is filed the plaintiff can engage in discovery, and it must only prove its case when the matter goes to trial.[8]

C. The ALJ Did Not Err by Failing to Conclude that the Federal Lawsuit Was Baseless.

The Union further contends that the ALJ erred when she found that Milum did not violate

[6] UEX at 19.
[7] UEX at 20.
[8] The plaintiff would be required to provide some evidence substantiating its claim if the defendant filed a Motion to Dismiss or a Motion for Summary Judgment depending on the nature of the motion.

the Act by continuing to prosecute the federal lawsuit, and "abdicated her responsibility to 'examine the plaintiff's evidence to determine whether it raises any material questions of fact.'"

1. Milum Attempted to Produce Evidence Regarding Its Lawsuit.

The Union erroneously maintains that Milum failed to offer or present evidence to support its lawsuit during the hearing.[9] The Union cites *Geske & Sons v. NLRB*, 103 F.3d 1366 (7th Cir. 1997). The *Geske* case, however, was not only decided prior to *BE & K*, but dealt with a situation where the NLRB was attempting to enforce its ruling that the lawsuit was baseless and retaliatory, and to enjoin the company from continuing to prosecute its lawsuit. In the *Geske* case the company asserted that it had "lots of other evidence" to support its lawsuit, but refused to produce that evidence. During the course of the NLRB hearing in this case, however, Milum in fact offered evidence and testimony to show that there was a reasonable basis for the lawsuit – and it was the General Counsel who vehemently objected to the introduction of such evidence and testimony. The General Counsel objected to the introduction of all evidence and testimony regarding any information that was not set forth in the exhibits attached to the complaint, i.e., GC 8, on the ground that Milum was limited exclusively to the information set forth in the Complaint. [Tr. 2030-2038] Further, despite Milum's argument regarding notice pleading, Judge Gontram ruled during the course of the hearing that the evidence that Milum could present at the hearing regarding the false statements alleged in the Respondent's lawsuit was limited to the four corners of the complaint, i.e., the material attached to the Complaint or referenced in those materials: "It seems to me that you are stuck -- not stuck but you are limited to the material contained in the letters." [Tr. 2030-2039] With respect to exhibits that Milum wanted to introduce substantiating the claims in its lawsuit, Judge Gontram stated, "I am more than happy

[9] Milum maintains that it was not under a legal obligation to produce evidence at trial to substantiate its lawsuit other than to substantiate it position that the lawsuit was not baseless.

to receive them -- and reject them and place them in the same rejected exhibit folder. [Tr. 2038] Ultimately, Judge Gontram invited counsel to "address the matter in your post hearing brief." [Tr. 2037] Thus, Milum was prevented by the General Counsel and Judge Gontram from introducing any documentary and testimonial evidence that would support the reasonable nature of the Complaint. Milum went so far as to make an offer of proof with respect to additional documents that were produced by the Union in 2006 that contained additional false statements and documents that would have shown the clearly false nature of the statements and would have supported Milum's position that the lawsuit was reasonably based. [Tr. 2257-2258] These documents were rejected by Judge Gontram, and Milum was thus prevented from including this evidence in the record. The documents that Milum sought to introduce included the following: Mission Linen contract with the union[10] [R 11], the Sodexho Linen contract with the union[11] [R 12], the Five Diamond Linen contract with the union[12] [R 13], web page from the U.S. Department of Labor regarding Angelica Textile Services [R 17], web site of OSHA or the U.S. Department of Labor web site involving Cintas, Angelica and Milum [R 18], letter from the Arizona Department of Environmental Quality dated February 20, 2007 [R 20], Arizona Republic article dated 26 April 2006 [R 25], Customer Advisory to Bloom [R 26], Unite: Arizona Laundry Workers Organizing for Justice[13] [R 30], Maricopa County Inspections for Bloom [R 31], Oaxaca Customer Advisory [R 32], Bloom Dirty Conditions[14] [R 33], Milum

[10] In the document produced and distributed by the union entitled, "Arizona Laundry Workers Organizing For Justice," that is attached to GC 5, the union alleges that Milum pays "poverty wages". This statement is contradicted by the fact that the wages that Milum pays are higher than the wages paid pursuant to the Union's contracts Mission, Sodexho and Five Diamond, other commercial laundries operating in Phoenix, Arizona. [R 14; GC 38; Tr. 104-107] These contracts were rejected at Tr. 2037-2039

[11] See footnote 33.

[35] See footnote 33.

[13] Although this document was admitted into evidence as part of GC 5, Judge Gontram rejected it when Milum attempted to introduce it and elicit testimony regarding it. [Tr. 2148-2149] Craig Milum had testified that he saw this document prior to filing the lawsuit. [Tr. 2148] It also appears in the record as an attachment to GC 77.

[14] This flier was rejected, but a copy appears in the record attached to GC 77.

Exposed Letter to Laundry Customers [R 50], Dirty Conditions at North[15] [R 51], Dirty Conditions at Bobby's and Mancuso's [R 52], and Dirty Conditions at Sauce Pizza[16] [R 53].[17] And, although Milum was permitted to introduce a document that was referred to in the Complaint and the Exhibits thereto, "Compromising on Quality" [R 29], the General Counsel objected to questioning regarding this document and Judge Gontram sustained the objection. [R 2144-2148] In addition, Milum made an offer of proof with respect to the Complaint and the Judgment that was filed in the Sutter Health case in California where the Defendant was similarly the union. [R 35-36] These documents were also rejected. [Tr. 2161-2164] Since the Union's interests were represented by the General Counsel, the Union should be prohibited from essentially permitting the General Counsel to object to the introduction of evidence at the hearing offered by Milum and then turn around and argue in its exceptions that Milum failed to offer or prove anything. Neither the Union nor the General Counsel can have it both ways.

Milum maintains the ruling by Judge Gontram was not proper. First, in federal court the plaintiff is not required to present a perfectly drafted complaint. *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002). And, federal practice utilizes the concept of "notice pleading" which requires a complaint to be read liberally in favor of the plaintiff. *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002). Second, limiting a plaintiff to the four corners of the Complaint would only be appropriate if a motion to dismiss was filed. In that case, the court must assume that all factual allegations made in the complaint are true and draw all reasonable inferences in the plaintiff's favor. *Shah v. Meeker,* 435 F. 3d 244, 248 (2d. Cir. 2006); *Rombach v. Chang*, 355 F. 3d 164, 169 (2d. Cir. 2004). That analysis is limited to information contained within the four corners of

[15] This flier, R 51, was rejected, but appears in the record attached to GC 77.
[16] This flier, R 53, was rejected, but appears in the record attached to GC 77.
[17] All of these documents were rejected at Tr. 2149-2164.

the complaint, with "complaint" defined to include any exhibits, any other written statements or documents attached to the complaint or incorporated by reference, and any document that is relied upon to such an extent as to make it "integral" to the complaint. See *Chambers v. Time Warner, Inc.,* 282 F. 3d 147, 152 (2d. Cir. 2002). When "material outside the pleadings is presented in response to a motion to dismiss, the court 'must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and afford all parties the opportunity to present supporting material. *Vollinger v. Merrill Lynch & Co*., 198 F. Supp. 2d 433, 437 (S.D.N.Y. 2002). Third, it cannot be overemphasized that Milum specifically pled in the Complaint that "Commencing on or about 10 March 2006 and continuing to the present Unite commenced a course of conduct specifically designed to cause Milum's customers to cease doing business with Milum." [GC 8 at 2]. Thus, the continuing nature of the course of conduct was plead. Fourth, even if Milum was required to file a Motion to Amend the Complaint to include ongoing behavior on the part of the Union, it is probable that such a motion would have been granted. Under Rule 15(a) of the Federal Rules of Civil Procedure which governs such requests**,** leave to amend a complaint shall be freely given when justice so requires. *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002). The Complaint clearly states in paragraph 4 that on or about 10 March 2006 and continuing to the present the Defendant UNITE HERE! "commenced a course of conduct designed to cause Milum's customers to cease doing business with Milum" and damaging Milum's reputation.

2. <u>The Union Ignores the Main Issue of Whether a Realistic Litigant Could Expect Success on the Merits of the Lawsuit</u>.

The Union got so bogged down in trying to argue federal practice and procedure that they literally ignores the fact that the only issue that must be determined in this NLRB proceeding is

whether a reasonable litigant could realistically expect success on the merits of the lawsuit that was filed by Milum. There could not be any clearer evidence of this than the fact that in November 2006, a lawsuit was decided in California involving a similar UNITE HERE! corporate campaign. [Attachment to GC 69] The jury in that case awarded the plaintiff company $17,000,000.00 in damages:

> Not long ago, Unite Here conducted a corporate smear campaign against a linen company in California and extended it to the customers of the company and to their customers, one of which operated a group of hospitals. Unite Here sent out postcards to thousands of woman who might be choosing a hospital in which to give birth to their babies, and therefore were potential "customers" of the hospital. The postcard stated that the linens supplied by the particular linen company they used were not safe: "**the laundry service utilized by [the hospital], does not ensure that "clean" linens are free of blood, feces, and harmful pathogens**". [Copy of postcard attached hereto] Thus, as set forth on the postcard, if you have your baby at this hospital, "You may be bringing home more than your baby…." The hospital had no alternative but to sue Unite Here for libel, trade libel, wrongful interference with prospective economic relations, and unfair competition. The jury in this California case recently awarded the hospital $17,000,000.00 against Unite Here. [Emphasis added; A copy of the actual postcard that UNITE HERE! used which includes the pivotal language is attached to GC 69]

This is the same type of language that the same Union used in the letter that it sent to Milum's customers on 10 March 2006 – and which was attached to the Complaint filed by Milum in federal court. [GC 8] Thus, it is clear that there was not only a reasonable litigant could realistically expect success on the merits, but that a litigant had in fact obtained success on the merits in a similar case in California based upon the Union's virtually identical behavior.

Furthermore, Daisy Pitkin, the Union person in charge of the campaign at Milum admitted[18] in her testimony at the NLRB hearing stated that she did not have any evidence to support the allegations in the letters attached to the Complaint filed by Milum other than the "hearsay" generated in the midst of a union campaign, and a four-year-old report from the

[18] Daisy Pitkin's testimony appears at Tr. 1693, 2253–2255. It is not disputed that Daisy Pitkin was in charge of the union's organizing campaign at Milum. See GC Exceptions to ALJ Decision at 5-6.

Arizona OSHA. [Tr. 2252-2257] Although Daisy Pitkin, the person who produced all of the documents distributed by the Union involved in this case, did not testify that she based the statements on it, there was an ADEQ report discussed during the hearing that dealt with the waste facility – not the commercial laundry – and was issued by an agency that has nothing to do with determining the safety of linens for restaurant patrons.[19] [Tr. 1692-1693, 2253–2257] Making statements regarding a company based solely on this type of hearsay smacks of "recklessness" and independently substantiates the reasonableness of Milum's lawsuit.

The Union argues that union campaigners can legitimately base their statements made about an employer on the statements made by employees even if the campaigner lacks personal knowledge of the facts. The Union cites *Community Medical Services of Clearfield, Inc. v. Local 2665 AFCME,* 437 A.2d 23 (Pa. Super.Ct. 1981), to support this proposition. *Community Medical Services* dealt with a situation where the union had made statements against the hospital/employer and those statements were based upon the statements of employees and the relatives of the patients. Discovery was conducted and the union moved for summary judgment. The employer failed to provide controverting evidence in response to the motion for summary judgment, and summary judgment was granted in favor of the union. There is no explanation in the case for the hospital's/employer's failure to adequately respond to the motion for summary judgment or its failure to prove up its case. While this case is a clear example of what an attorney should not do during the course of litigation, it does not stand for the principle that reliance on third party statements is sufficient to oppose a libel action.

The Union also argues that the fact that there was an ADEQ is a legitimate basis for the statements that it made regarding Milum. This is a clear example of the validity of Milum's libel claims:

[19] This fact was confirmed by the Union in its exceptions brief, UEX at 25.

There was a 2002 "Medical Waste Transporters Inspection Report" by ADEQ[20] that is relied upon by the Union. [GC 139] The Union argues in its brief that this report stated that Milum used "the same bins to transport clean and dirty laundry."[21] If one looks at the ADEQ report, it has absolutely nothing to do with the transport of laundry. In fact, the report on page 11 states that the alleged violation is the "Use of a vehicle to transport biohazardous waste that does not meet the applicable leak-proof construction requirements." Thus, the truth has been distorted. Furthermore, as set forth in the subject on page 11 of the report, the report relates exclusively to the "Medical Waste Transporter Facility." As set forth at the hearing, Milum operates a commercial laundry, and the employees that the Union is organizing work exclusively in the commercial laundry operation. [Tr. 37] Milum also operates a medical waste treatment plant at a separate location,[22] and there are two employees who work at that operation. [Tr. 37] It is not controverted that these two (2) employees are not involved in the operation of the commercial laundry, and are not considered to be part of the Union's organizational efforts. As Milum testified during the hearing, the medical waste treatment facility engages in the following:

> We pick up regulated medical waste materials in our trucks which are licensed by the county, and those materials are taken to our medical waste treatment plant. They are accumulated and then sterilized and then put in a compacter and then on a regular schedule those items are picked up and deposited at a specific cell at a properly authorized, properly engineered license landfill. [Tr. 37]

With these facts, how can the Union legitimately claim that based upon the ADEQ report that its claim that "Medical linens are often contaminated with blood, feces and other bacteria" as set forth in a letter that the Union sent to one of Milum's customers or the claim that "TABLE LINENS AND NAPKINS EXPOSED TO BLOOD AND BACTERIA AT LOCAL LAUNDRY"

[20] Arizona Department of Environmental Quality
[21] UEX at 26.
[22] On page one of the Union's document, "Compromising on Quality" [R 29], the Union sets forth the fact that there is a separate biohazard waster removal service that operates under the name of MTS Medical Waster Management.

as set forth in the Union's press release[23]? [Emphasis is text] And, how does what occurs at the separate medical waste treatment facility have anything to do whatsoever with the quality of the linens at Milum's commercial laundry facility? The answer is that there is no relationship, and reliance on this report does not substantiate the Union's claims. Further, the use of this report as such substantiation is false and misleading.[24]

Similarly, the Union argues that the 2002 Arizona OSHA report substantiates its claims that there are "dirty and dangerous conditions" at Milum.[25] This report cited Milum for violating the OSHA regulation requiring blood borne pathogen training for its employees.[26] The question is how does this report in 2002 provide information regarding Milum's operation in 2006 – four (4) years later? Neither the General Counsel nor the Union presented any evidence at the hearing that there were subsequent violations with respect to blood borne pathogen training. Thus, the record shows that the situation was not totally rectified in 2002. Furthermore, how does the lack of training create "dirty and dangerous conditions" at Milum? The bottom line is that the Union's reliance on the 2002 Arizona ADOSH report to substantiate its claims in 2006 is false and misleading.[27]

The Union proceeds to argue that "Milum Textile's failure to provide training "**implicates** dirty and dangerous conditions – that may produce linens that could be a risk to your business."[28] It is impossible to fathom how the failure to properly train employees in 200<u>2</u> could by any stretch of the imagination cause the linens produced by Milum in 200<u>6</u> to be a risk to anyone's business.

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[23] GC 8 (Exhibit C to the Complaint)
[24] It is important to note that this argument was set forth in the Affidavit of Craig Milum that listed the false statements made by the Union that was filed in the federal court lawsuit. [GC 11]
[25] UEX at 27
[26] UEX at 27-28 referring to GC 61 at 13.
[27] It is important to note that this argument was set forth in the Affidavit of Craig Milum that was filed in the federal court lawsuit. [GC 11]
[28] UEX at 28

But, the most disturbing part of the Union's argument is its reliance upon a 2006 OSHA report as the basis for the claims that it made against the quality of linens produced at Milum.[29] As set forth in the report, all but two (2) of these violations deal with the hospital soil sort area – the only area where blood borne pathogens are even a consideration and protective garments are required to be worn. [GC 138] Thus, these violations have absolutely nothing to do with the production area or with restaurant linens.[30] The only two violations involving the production area where restaurant linens are processed involve training in the "Lockout/Tagout Program" and the level of compressed air used for cleaning dust and lint from the machines. [GC 138] Once again, how do these violations possibly relate to the quality of the restaurant linens, and how do they support the statements that the linens are contaminated with blood and feces?

Despite all of the foregoing, the Union still maintains that Milum mixes hospital and restaurant linens. The record shows that the restaurant linens are sorted in a separate location from where the hospital linens are sorted. [Tr. 1733] The actual time that the restaurant linens are sorted differs from the time that the hospital linens are sorted. [Tr. 1734-1735] And, the hospital linens are not mixed with the restaurant linens in the washing machines. [Tr. 2142] It is common knowledge that hospitals use both patient care linens and dietary linens. Thus, the fact that a hospital dietary linen might appear in the hospital soil sort area is an admission of the obvious. This is not the same thing as saying that restaurant linens are in the hospital soil sort area. It makes no sense to have the various "sorting" areas if the company is going to mix the various types of linens in the washers or any where else. "Sorting" denotes separating the various linens prior to washing. Thus, it is absurd to believe that Milum would mix the hospital linens with the

[29] GC 138

[30] The restaurant linens are sorted in a separate location from where the hospital linens are sorted. [Tr. 1733] The actual time that the restaurant linens are sorted differs from the time that the hospital linens are sorted. [Tr. 1734-1735] The hospital linens are not mixed with the restaurant linens in the washing machines. [Tr. 2142]

restaurant linens. If they are not mixed, then there could not be the alleged contact with blood and feces. But the bottom line is that even if we assume, *arguendo*, that the restaurant linens were mixed with the hospital linens, there is no evidence that they are "contaminated" or unsafe. Craig Milum addressed this issue at the hearing when he was analyzing the Union's statements:

> Q[by Laws] The next statement in this document that you think is untrue or a lie.
> A [by Craig Milum] This study reveals that restaurant customers cannot be assured of the quality of the linen used in these establishments, et cetera, et cetera.
> Q Would you explain why that's untrue?
> A Even if you believed employees' reports that the linens were mixed, obviously, it wouldn't generate an unsafe condition. Hospitals reuse linens every day." [Tr. 2166]

This position is supported by the statement by Don Herrington, Chief of the Office of Environmental Quality for Arizona Department of Health Services as per the Arizona Republic article dated, 28 April 2006 to the effect that "even if they were mixed, the hot water, detergent and bleach used in commercial laundries would rid them of any bacterial contaminates -- make the linens safe. [GC 42; GC 5 attachment] And, as Craig Milum confirmed when he spoke with Lynn Seahaulster, a Ph.D. in Microbiology at the Centers for Disease Control, there has never been a single case documented where a person picked up a disease through transmission by use of linens washed in a commercial laundry. [Tr. 2169] Neither the General Counsel nor the Union has presented any evidence to date contradicting this fact.

It is important to note that hospital linens are not disposed of after use. To the contrary, they are washed and reused. There is no evidence that the linens are unsafe to be reused in the hospitals where sterile linens are essential. Thus, even if the statements by unknown workers were true regarding the mixing of linens, there is no basis for the Union's claims that the linens are contaminated, among other things.

The Union also argues that the carts are not washed between usages. Craig Milum testified regarding this issue while the video was presented at the hearing:

> Q [by Laws] What are these conveyors in 3512?
> A [by Craig Milum] They are turnaround carts. They contain clean linens. When they go to the customer, the customer empties them and then the customer deposits back soiled linens into those same containers.
>
> We then pick up those containers on the next scheduled delivery date, transport them back to the plant. They are here being lined up to be sorted and then once those carts are emptied, they go to a cart washing station where they are washed and then that process with the cart repeats itself where they again are used for transporting clean linen to subsequent customers and subsequent soiled linens.
>
> Q We are at 35 --
>
> JUDGE GONTRAM: Is there any method by which these carts that go to -- you say they bring linens from the hospital and the linens are taken off to be cleaned and the carts then go to be cleaned. Is there any system by which there is assurance that only hospital carts go to hospital -- use for hospital linens or after they are cleaned, it doesn't matter? Is a cart that transported hospital linens coming in could be used to transport clean restaurant linens going out?
>
> THE WITNESS: That is correct.
>
> JUDGE GONTRAM: All right. Continue. [Tr. 1910]

The fact that the Unioin distributed the materials containing the statements about "blood", "feces" and "bacteria" to restaurants and their customers who are very concerned with at least a modicum of cleanliness serves to elevate the inflammatory nature of the statements. It is only logical to believe that a reasonable person who is looking for a restaurant would surely be put off when he read the press release: "Scottsdale and Phoenix Restaurant Customers Be Aware: Table Linens and Napkins Exposed to **Blood and Bacteria** at Local Laundry…Milum…mixing restaurant linens with medical linens **contaminated with blood and feces**…restaurant customers cannot be assured of the quality of linen used in these establishments." [GC 8]

There is clearly substantial evidence on the record to support a finding that the Complaint raised "factual issues that were genuine and material", that there is a "reasonable basis" in fact and in law, and that Complaint is clearly not "based on intentional falsehoods or on knowingly

frivolous claims." *Bill Johnson's Restaurants v. National Labor Relations Board*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)

Third, Milum (the Respondent) is not required to show actual malice at the pleading stage of a federal lawsuit. The Union mistakenly argues that Milum was required to show actual malice at the outset of the case, i.e., on the face of the complaint. The cases relied upon by the Union all involve situations where there had been a full trial on the issues, and the plaintiffs had in fact presented their evidence regarding their claims during the trial. In this case, there was not a trial on the lawsuit and Milum had not presented its evidence to the Court. In *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), an official of the employer initially filed unfair labor practice charges with the NLRB based upon a violation of §8(b)(1)(A) – like Milum did in this case. [GC 3] And in the *Linn* case, as in this case, the Regional Director refused to issue a complaint. The employer in *Linn* and in this case then filed a lawsuit with the U.S. District Court alleging libel based upon false and defamatory statements circulated during a union organizing campaign. The prayer in the *Linn* complaint was for the recovery of $1 Million – not actual or special damages. The union filed a Motion to Dismiss, and the District Court dismissed the lawsuit on the ground that the NLRB had exclusive jurisdiction over the subject matter. On appeal the U.S. Supreme Court reversed the decision holding that the NLRB does not bar the maintenance of a civil action for libel under state law if the plaintiff pleads and proves that the statements were made with malice and resulted in injury to him. The Court held that the defamed party would have to establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages. The Court not only reinstated the case, but held that since the complaint did not make the specific allegations that the Court finds necessary, but directed the lower court to grant the plaintiff leave

to amend his complaint. The Court went on to state that it that the plaintiff filed charges with the NLRB and then filed a lawsuit was neither unusual nor of any real import to the Court's decision in the case: "it may be expected that the injured party will request both administrative and judicial relief." *Linn* at 66. Thus, the Court in *Linn* delineated what the plaintiff therein must prove in order to obtain relief for libel **during the course of the litigation** – not what it must set forth in its initial pleadings. The Court did not find that the plaintiff had to prove damages at the time it filed the complaint, and the Court directed the lower court to permit the plaintiff to amend his complaint if he so desired.

The Union also cites *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1973). In the *Gertz* case there had been a full trial in the libel suit at which the plaintiff presented its evidence. The jury decided in favor of the plaintiff, but the Judge entered judgment N.O.V. for the defendant. The issue on appeal was whether the plaintiff was a public figure, i.e., what standard should be applied in determining liability in a defamation case. The U.S. Supreme Court held that the trial court erred in entering judgment for the defendant, that the *New York Times* standard is inapplicable in cases involving private individuals, and remanded the case for a new trial. The U.S. Supreme Court held that in order to recover damages in a defamation lawsuit, there must be a showing of knowledge of falsity or reckless disregard for the truth. The Court did not hold that such a showing must be made on the face of the pleadings. Although not dispositive of the issues in the case, the Court did indicate that the existence of injury cannot be presumed from the act of publication without evidence of actual loss.

And, the Union cites *Intercity Maintenance Co. v. Local 254, SEIU*, 241 F. 3d 82 (1st Cir. 2001) cert denied 534 U.S. 818 (2001). In *Intercity*, there was a full trial before a jury during which the plaintiff presented its evidence. The Judge ruled against the plaintiff on certain issues

pursuant to a Rule 50 motion – taking the decision out of the hands of the jury for determination. The Court held that in proving its case at trial the plaintiff was required to show evidence of actual loss. Citing *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), the *Intercity* Court stated that proof of harm may include "general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law. It is interesting to note that in the Intercity case the Court remanded the cause of action against the union for unlawful secondary boycott activity in violation of the LMRA for retrial by the jury.

The Union also claims that the lawsuit was baseless because "Milum filed its lawsuit to block UNITE HERE's April 27 rally."[31] The Union, however, neither provides any evidence to support its claim nor any reference to the record to support this claim. The Union also argues that the timing of the filing of the lawsuit demonstrates that it was filed to stop the rally.[32] Once again the Union does not provide any evidence to substantiate its claim. Further, this argument ignores the fact that Milum had made attempts to obtain relief through the NLRB regarding the Union's conduct prior to filing the lawsuit. [GC 3-4] Therefore, the Union's argument that the lawsuit is baseless is not founded in fact and should be disregarded.

Based upon the foregoing, the ALJ did not err by concluding that the federal lawsuit filed by Milum was not baseless.

II. The ALJ Did Not Err in Failing to Order a Bargaining Order Remedy Pursuant to *NLRB v. Gissel Packing Co*.

The Union[33] requested that a *Gissel* bargaining order be granted as a remedy in this case.

[31] UEX at 15, 22.
[32] UEX at 22.
[33] The Union's interest were represented by the General Counsel at the hearing. Although a representative of the Union was present at the General Counsel's table throughout the hearing, counsel for the Union made only a cameo appearance at the hearing.

The ALJ found that the conduct attributed to Milum can be adequately remedied by the Board's traditional remedies and refused to issue a *Gissel* bargaining order. [ALJD slip op. at 26]

A. The Facts.

The facts essential to a determination regarding the appropriateness of a *Gissel* bargaining order are set forth below.

First, aside from the 4 March 2006 work stoppage, only a small number of the total 80 production employees were allegedly subjected to unfair labor practices. Therefore, the unfair labor practices did not "pervade" the unit. *Cintas Corporation*, 4-CA-34160; JD-65-06; Ira Sandron; 9/20/06 at 37.

Secondly, in this case -- unlike the cases where a Gissel bargaining order has been issued as a remedy -- it is clear from the facts that the Union never intended to petition for an NLRB election for the employees at Milum[34] nor has the Union petitioned for an election to date.[35] The head of the Union's organizing effort at Milum, Daisy Pitkin, testified that the goal of the Union's campaign at Milum was to obtain a card check neutrality agreement. [Tr. 1672] This fact was confirmed in the Union's Exception Brief.[36] An election campaign was never conducted at Milum by either the Union or Milum. In fact, the only petition for an election that was filed, was filed by Milum – not the Union.

The Act was designed to protect the right of the **employees** to select a bargaining representative or to refrain from doing so. *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980). The system that was designed to effectuate this right was the secret ballot election.

[34] Judge Gontram sustained every objection made by the General Counsel to Respondent's questions to head union organizer, Daisy Pitkin, regarding whether the Union had a policy not to petition for an election [Tr. 1665], or whether the Union was seeking an election at Milum. [Tr. 1672]
[35] Milum filed an RM Petition in December 2006 but the election was blocked as a result of this unfair labor practice case. If the Union had given its consent, an election could have been conducted at that time.
[36] UEX at 1.

The concept of a *Gissel* bargaining order was created as remedy in cases where there had either already been an election conducted or where a union had tried to obtain proof of a majority status in order to petition for an election. The essential right that is being protected is "ensuring a fair **election (or a fair rerun)**" **involving the employees** in the bargaining unit, i.e., to protect the **employees'** right to a fair election.

As the United States Supreme Court stated, the Board may enter a bargaining order if "the possibility of erasing the effects of past practices and of **ensuring a fair election (or a fair rerun) by the use of traditional remedies**, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." [Emphasis added] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969)

In its decision in the *Gissel* case, the Court neither discussed nor anticipated the use of the bargaining order as a remedy in situations where a union had neither petitioned for an election nor had any intention of or desire to petition for an election. In addition, there is no reference in *Gissel* [or other case involving *Gissel* bargaining orders] to situations where a union seeks to use unfair labor practices as the sole basis for obtaining a bargaining order where its attempts at forcing the employer to agree to a card check neutrality agreement – its primary objective -- have been unsuccessful[37] i.e., where the Union is doing everything that it can to avoid ever letting the employees vote in an NLRB secret ballot election. While card check neutrality agreements are legal, Milum maintains that situations where a union is seeking a card check neutrality agreement rather than election are neither the same as nor are they entitled to the

[37] This is essentially a stop-gap measure when the union cannot force the employer to sign a card check neutrality agreement. The petition that is signed by the employees is logically only obtained in the event that there is an unfair labor practice hearing in order and the union has to prove majority status in order to obtain a Gissel bargaining order.

same protections as situations involving the employees' right to a vote in a fair election. A union should not be permitted to obtain the protections of the Act while denying the employees their right to an NLRB secret ballot election. The issuance of a *Gissel* bargaining order in this case would only serve to validate a Union's efforts to force an employer to enter into a card check neutrality agreement. It should also be noted that at the time that *Gissel* was decided, the concept of corporate campaigns had not been realized or significantly utilized in labor relations. The issuance of a bargaining order based upon this factual situation would not protect the interests of the employees whatsoever and is outside the scope of protections set forth in and envisioned by *Gissel*.

It is Milum's contention that if it had agreed to the card check neutrality agreement at any time since the 4 March 2006 work stoppage that agreement would itself have been a violation of the Act as it would have constituted unlawful assistance.[38] The Act requires that an employer have a good faith reason to believe that a majority of its employees actually want a specific union to represent them before it engages in negotiations with that union. Obviously, in view of the facts presented in this hearing, many of which were either known or suspected by Craig Milum by the end of the work stoppage on 4 March 2006, or came to be known by Craig Milum since that time, Craig Milum had good reason to believe that a majority of the employees did **not** actually want the union to represent them as their exclusive bargaining agent.[39] The primary

[38] Sections 8(a)(2) and 8(f).

[39] Craig Milum was forthright in his testimony regarding the Union to the effect that he was watching the pulse of the Union's activities: "I'd been making a continuing -- a continuous effort to have a **feel** for the level of union support and an easy way, in my mind, to sort of gauge that is just the overt obvious activities." [Tr. 376 – 377] Craig Milum went on to testify: "Just knowing in a general way. I think the unfair labor practice charges, we, for example, why; by having kind of a feel for the dynamics of the campaign I had a better shot at knowing what kind of things would be problematic or not. Like a what person if she got a suspension or not, would that be a problem or would it not? On these discrimination cases, EEOC or even the NLRB, it is my opinion that we need to be in a position where it is kind of like we can prove what we did, why we did it and so the burden of proof is on us so any action we take, we need to be sure that we can be at a hearing like this and support what we did and show that it wasn't illegal discrimination. Also, the idea of work stoppage, that the Union might ask for another work stoppage, even like a

purpose of the Act and a matter of the utmost concern to the NLRB is the protection of the right of the employees to choose whether to have a union represent them or not – not the interests of the union or the employer.

Based upon the foregoing, the issuance of a *Gissel* bargaining order in order in this case is not appropriate even if there is a finding of serious and substantial unfair labor practices.

Even if the Board rules that a *Gissel* bargaining order is appropriate in cases that do not involve elections, a bargaining order is inappropriate in this case.

Pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), the Board may enter a bargaining order if:

> (1) the union once represented a majority of the unit employees,
> (2) the employer has committed serious unfair labor practices, and
> (3) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

As set forth in *National Labor Relations Board v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979), elections are the preferred method of ascertaining employee sentiment, and a *Gissel* bargaining order should only issue where "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."

In *Gardner Mechanical Services Inc. v. National Labor Relations Board,* 89 F.3d 586 (9th Cir. 1996), the Board found that the employer violated sections 8(a)(1), (3), and (5) of the

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strike, or something. I just wanted to have a sense of what was going on without crossing that line and getting involved in details, personalities. I didn't want to inhibit the Union but I did want to kind of understand the environment." [Errors in transcript] [Tr. 2060 – 2061]

Act by: (1) asking Adair to poll other employees as to how they planned to vote in the May 4, 1990 election; (2) discouraging employees from voting for Union representation by promising a 50-cent per hour wage increase prior to the election; (3) withdrawing recognition of the Union's representation after the election; (4) changing the working conditions after the election without notice to or bargaining with the Union; (5) barring employee Discussion of Union representation; (6) threatening employees with reductions in benefits if they secured Union representation; and (7) discharging Adair because of his Union activities. The Administrative Law Judge vacated the election results as invalid and issued a bargaining order. The Ninth Circuit, however, held that a re-run election rather than a bargaining order was the appropriate remedy under the circumstances because there was nothing so "severe or pervasive as to make a fair election impossible."

Similarly in *United Steelworkers of America AFL-CIO-CLC v. National Labor Relations Board*, No. 04-76132 (9th Cir. 2007), the Board found that the employer disciplined and fired two employees because of their support of the union-organizing drive, disciplined a third employee because of his union support, threatened a fourth employee with reprisal if he supported the union, and removed union literature from posting areas while permitting non-union notices to remain posted. The bargaining order issued by the ALJ was upheld by the Board. The Ninth Circuit, however, overturned the bargaining order stating that the "Board's traditional cease-and-desist and other affirmative remedies including posting of a notice will sufficiently address [Tower's] misconduct to ensure that a fair rerun election can be held, and that these remedies and the holding of a rerun election will satisfactorily protect and restore employees' Section 7 rights."

Further, in *National Labor Relations Board v. Chatfield-Anderson Co.*, 606 F.2d 266 (9th

Cir. 1979), the union obtained authorization cards and petitioned for an election. During the course of the election campaign the company interrogated employees about their union activities, threatened economic reprisals including closing the plant, imposing stricter work rules, and withholding contemplated raises and bonuses. In addition, the company promised economic benefits, threatened to prolong negotiations with the union while withholding raises and bonuses, and announced an open-door policy to improve communications between employees and management. The union lost the election. The Board confirmed the Administrative Law Judge's decision to impose a *Gissel* bargaining order. The Ninth Circuit overturned the bargaining order stating that the company's behavior was "hardly irreparable in the sense required to justify a bargaining order."

Thus, even if the allegations set forth in the complaint were sustained, and Milum maintains that they should not, a *Gissel* bargaining order is not an appropriate remedy. Traditional remedies including the posting of notices could create an atmosphere in which a free and fair election could be held.

The next issue that must be addressed in determining the appropriateness of a *Gissel* is whether a bargaining order would best serve the interests of the "affected employees" and protect their freedom of choice. *Western Drug, supra*. In determining the best interests of the affected employees, employee **turnover** must be considered as well as whether there was **unusual delay**. *Id*. In *Western Drug*, the Court held that turnover should be considered.

B. A Gissel Bargaining Order Is Not Appropriate Due To The High Rate Of Employee Turnover and Demographic Changes In The Workforce.

The Board is not free to disregard employee turnover when issuing a bargaining order." *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001); see also *Avecor, Inc. v. NLRB*,

931 F.2d 924 (D.C. Cir. 1991)

In the instant case as in *Western Drug, supra*, before this case was tried,[40] the employee turnover was dramatic and created a change in circumstances. Even the Union organizers recognized that there was a high turnover rate. [Tr. 985] It is undisputed that in 2006 the Respondent had a turnover rate of 400%. [Tr. 1999] By July 2006, only 20 of the original 43 individuals whose names appear on the Union's "petition" are still employed at Milum. [Tr. 2191] At the time of the hearing, only thirteen (13) of the original forty-three (43) individuals whose names appear on the Union's "petition" were still employed at Milum. [Tr. 2190] Thus, the workforce had substantially changed.

In addition to the rapid turnover in the workforce at Milum, the ethnic demographics of the workforce have changed substantially. As set forth on R 40, the demographics of the Respondent's workforce changed dramatically from 9 March 2005 through 9 March 2007. On 9 March 2005, the workforce was 8% Native American, 85% Hispanic, and 8% Middle Eastern. By 9 March 2006, the complexion of the workforce had changed to 4% Anglo, 6% Native American, 59% Hispanic, 11% Asian, and 20% Middle Eastern. The demographics continued to change at Milum, and on 9 March 2007, the workforce was comprised of 1% Anglo, 3% Native American, 34% Hispanic, 31% Asian, 29% Middle Eastern, and 1% Russian. In March 2006, the employees spoke English, Spanish, Burmese, Somali and Arab. [Tr. 2023–2024; R 40] As a result in the change in demographics, the number of languages spoken by the employees in March 2007 included English, Spanish, Burmese, Javanese (phonetic), Arab, Somali, and Russian. [Tr. 2024] In addition, it is reasonable to believe that the interests of different ethnic groups are different in fact. Thus, the interests of the workforce in March 2006 are different from the interests of the workforce in 2007.

[40] There is not an allegation that Milum did anything that created the turnover.

With the tremendous turnover rate and the ever changing demographics of the work force at Milum's operation, there is no evidence that Milum's alleged acts, if proven, would "continue to repress employee sentiment long after most, or even all, original participants have departed." *Western Drug, supra*.

C. A Gissel Bargaining Order Is Not Appropriate Due To The Time Period Between the Alleged Unfair Labor Practices And An Election, If Ordered.

As a matter of common sense and in light of the case law, time is a factor that should be considered by the Board -- in addition to employee turnover -- in determining the appropriateness of a *Gissel* bargaining order. As the Court stated in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), "With the passage of time, any coercive effects of an unfair labor practice may dissipate, employee turnover may result in a work force with no interest in the Union, and a fair election might be held which accurately reflects uncoerced employee wishes as of the present time."

In this case any delay is the direct result of the Union's inaction: the Union obtained signatures on a petition and then did absolutely nothing. If the Union obtained the signatures of a majority of the employees on 4 March 2006 as it claims, then it was free to go to the NLRB and petition for an election. The fact that the Union did not do that led to a situation where over a year has passed since that date. The record in this case is clear that the only unfair labor practice that is alleged to have occurred even near 4 March 2006 was the one that involved the alleged statements made by Craig Milum at the work stoppage. Any impact that these alleged statements might have had on an election is *de minimus* at best. This is another reason militating against a bargaining order, and since the Union is responsible for any delay, it cannot be said that Milum is benefiting from its behavior if any of the allegations are proven. In the same token, the Union

should not benefit from its behavior.

D. There Is No Evidence That The Employees Have Been Impacted By The Alleged Conduct Of Milum.

As set forth above, this case involves a handful of employees out of a workforce of eighty (80) employees. The General Counsel did not introduce evidence to support a finding that the employees generally were impacted by the alleged unfair labor practices other than the opinions of the union organizers. And, in this case only four (4) employees were involved in the alleged unfair labor practices. The case of *Cintas Corporation*, 4-CA-34160; JD-65-06; Ira Sandron; 9/20/06, involved a situation where (aside from the incident involving the union fliers) only five (5) production employees out of approximately ninety (90) were "subjected to" unfair labor practices. The Administrative Law Judge held that the unfair labor practices did not, therefore, "pervade" the unit. As a result the unfair labor practices are not so "numerous, pervasive, and outrageous" as to require the imposition of extraordinary remedies, and none were granted.

Thus, the General Counsel has not presented sufficient evidence to support a finding that even if the alleged unfair practices were upheld, that a fair election could not be conducted.

Based upon the foregoing, even if all of the alleged unfair labor practices were upheld, a Gissel bargaining is unwarranted and inappropriate. The Union has failed to show that in that event a fair election could not be conducted in conjunction with traditional remedies.

III. References to Information and Documents Outside the Record Should Be Striken.

Milum takes special exception to the Union's[41] last ditch effort to taint the record in this case. In the Union's Exceptions Brief, it not only makes reference to the unfair labor practice charge involving the discharge of Guzman which allegedly occurred on the day that the hearing

[41] The General Counsel also made references to materials outside the scope of the record and attached a copy of a charge that was filed after the record was closed in this case.

in this case began but was not filed until 29 August 2007 – but includes two (2) additional unfair labor practice charges that were filed on 14 September 2007 and 5 November 2007 – more than five (5) months **after** the hearing ended.[42] The Union essentially argues that a *Gissel* bargaining order is appropriate based on "additional violations, committed during and after the hearing, including discharging Guzman", and opines that the "Union expects the Region to find meritorious the Guzman discharge and other violations."[43] The Union does not provide any authority for its inclusion of these references and documents, but since the Union incorporated the General Counsel's Exceptions Brief by reference, counsel can only assume that it is relying on the same authorities as did the General Counsel. The General Counsel's alleged justification for this action is impertinent citing two (2) Board cases where the NLRB took administrative notice of its own files, i.e., *Lord Jim's*, 264 NLRB 1098 n.1 (1982) and *Dura Art Stone, Inc*., 340 NLRB 977 n.3 (2003). These cases involve situations where the Board took administrative notice of its own files in order to set forth the facts regarding the filing of documents that were not only relevant to the hearing, but were filed prior to the date of the hearing – not charges that were filed **after** the hearing ended as in this case and charges that were neither plead nor litigated in this case.

As set forth above, these are references to conduct that was not even mentioned during the course of the hearing, and it clearly was neither litigated in this hearing nor litigated in fact to date. This constitutes an unwarranted and unprecedented attack and is a denial of due process. Milum hereby moves the Board to strike the documents and all references to the documents from the briefs and the record.

[42] One of the charges has since been withdrawn by the Union. The documents are attached to UEX at 3, and three (3) attachments thereto.
[43] UEX at 3, 44

IV. Conclusion

This was a hard-fought case at the hearing and the initial brief level. The ALJ Parke reviewed the transcript of the hearing, applied the law, and rendered her decision. As set forth herein, the ALJ's findings were consistent with the facts and the law, and should be upheld by the Board.

Respectfully submitted this 16th day of January 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2008 a copy of the foregoing RESPONDENT'S BRIEF IN SUPPORT OF RESPONDENT'S RESPONSE TO THE EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION FILED BY THE UNION was e-filed with the NLRB and served as follows:

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