

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

STERICYCLE, INC.,

Employer,

and

Case No.: 32-RC-5603

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AUTO TRUCK
DRIVERS, LINE DRIVERS, CAR
HAULERS, AND HELPERS, LOCAL NO. 70
OF ALAMEDA COUNTY, CALIFORNIA,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,**

Petitioner.

**BRIEF IN SUPPORT OF EMPLOYERS' EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS**

Exception 1. THE ALJ ERRED IN APPLYING INCORRECT
STANDARDS OF LAW FOR THE PROHIBITION OF PRE-
ELECTION BENEFITS.

(a) The ALJ found that "the Union offered to pay the costs and litigation expenses of the wage and hour lawsuit" immediately before filing its representation petition, and extended the offer through a majority of the campaign. [Report, pg. 2, ln. 23-25; pg. 3, ln. 32-33.] The ALJ further found that the Attorney-Client representation agreements between the plaintiff-workers and the Union attorney

were returned to *either* the Union or the Attorney's office. [Report, pg. 3, Ins. 7-8] (emphasis added). The ALJ heard evidence that multiple members of the voting unit who signed up to become plaintiffs in the federal litigation knew they did not have to pay one dollar to retain an attorney because Local 70 would pay for their expenses. [Employer's Exhibit, 1, Hearing, pgs. 91-92.] None of the members of the voting unit spent a single dollar to participate in a Federal class action wage & hour lawsuit (*Ochoa v. Stericycle, Inc.*, No. C08-05219 (N.D. Cal.))[hereinafter "the wage & hour lawsuit" or "the lawsuit"]. [*Id.*]

Generally, Federal Appellate Courts and the NLRB prohibit unions from offering pre-election benefits such as free legal services to a voting unit during the critical period before a representation election. For example, according to the Sixth Circuit Court of Appeals, when a union "gratuitously [brings]...a suit on behalf of employees it did not yet represent", the union has "improperly influenced the impending election." *Freund Baking Co. v. NLRB*, 165 F.3d 928, 934 (D.C. Cir. 1999).

The Union's gift of free legal services "imposes a 'sense of obligation' to a union" on a voter and "suffices to invalidate an election." *Nestle, supra* at 584. Additionally, "a feeling of obligation may arise from an employee's wish for continued, postelection enjoyment of a preelection-received benefit." *Id.*

For instance, in *Madisonville Concrete Co.*, the Union was found to have impermissibly granted a pre-election benefit when it provided only one member of the voting unit free legal fees. *Madisonville Concrete Co. v. NLRB*, 552 F.2d 168 (6th Cir. 1977) [hereinafter *Madisonville*]. Prior to the election, the Union had paid a traffic ticket fine, retained and paid for an attorney to appear in court on this individual's behalf, and paid for other costs associated with the traffic ticket. *Id.* at 170.

Likewise, the Union in *Nestle*, prior to the election, granted free legal services to members of the voting unit by hiring attorneys to file a suit for backpay against the employer. *Nestle, supra* at 584. The Sixth Circuit found that free legal services conferred on workers prior to the election "thwarted the employees' fair and free choice" because the free legal services were "sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person's vote", and they had the potential to "purchase or unduly influence votes...without relation to the merits of the election." *Id.* at 583 and 585.

The *Nestle* court's holding was based on the rationale that legal fees are considered a valuable benefit by members of the voting unit, and therefore the gifting of them before the election was improper. *Id.* "Nonmanagement employees especially understand that attorneys often charge fees that lower and middle-income employees cannot afford." *Id.* at 585. "If union jackets, hats, and t-shirts

are sufficiently valuable to influence an employee's (sic) votes, then surely so are the services of a lawyer in drafting and pursuing a federal RICO suit." *Id.* Additionally, "Nestle employees understood that the court costs shouldered by the Unions removed another obstacle to bringing the suit." *Id.*

The appellate court in *Nestle* also found the union's gifting of legal fees to members of the voting unit troublesome, as it "smacked of a 'purchase' of votes" when the union "had no responsibility to provide the services." *Id.* at 584. The free legal fees were particularly troublesome because once suit had been filed on the employees' behalf, "the employees might vote for the Unions because the employees hoped that the attorney would continue to pursue that particular suit, rather than because the Unions' overall representation of the employees...merited election." *Id.* at 585. Furthermore, the union's message to employees of the potential recovery they could receive from the filing of such a lawsuit "made it clear to the employees that they were receiving 'something for nothing', and the 'something' was quite valuable." *Id.*

Similarly, in *Freund*, the appellate court denied enforcement of an order to bargain, finding that the union funded a class action lawsuit against the employer to "argue its case for election." *Freund, supra* at 932. In *Freund*, a week before the election, four members of the voting unit filed a class action lawsuit alleging the employer's failure to pay overtime under California law. *Id.* at 930. These

plaintiffs hired the same attorney who represented the union in the union campaign, and who "has several times before represented employees filing lawsuits against their employers just before a representation election." *Id.* The day before the election, union representatives distributed fliers to members of the voting unit which informed them that a class action lawsuit had been filed against the employer to "recuperate all wages owed" to them. *Id.*

The appellate court found that "the Union improperly influenced the impending election by gratuitously bringing such a suit on behalf of employees it did not yet represent." *Id.* at 934. "[I]t is the appearance of support, not the support itself, that may have interfered with the voters' decisionmaking." *Id.* at 930. It did not distinguish between the union's free gift of legal services, and a union's free samples of health or insurance benefits before an election. "The Union's sponsorship of the employees' lawsuit against the Company clearly violated the rule against providing gratuities to voters in the critical period before a representation election." *Id.* at 934 (emphasis supplied).

Here, similar to the unions' actions in *Madisonville*, *Nestle*, and *Freund*, Local 70 served as the sole instigator in filing the federal lawsuit against Stericycle. Local 70 granted free legal services to members of the voting unit before they had the opportunity to vote on whether they wanted to be represented by Local 70. (Employer's Exh. 6, Notice of Election, Attachment 4.) Members of

the voting unit knew about the existence of this lawsuit prior to the election, as the lawsuit was filed in November 2008, months in advance of the election. (Employer's Exh. 8.) In other words, Local 70 was letting potential members get a free sample of the benefits Local 70 could offer once it was voted in. This is clearly improper according to the rationale of *Savair*, *Madisonville*, *Nestle*, *Freund*, and a slew of other well-established cases.

Moreover, Local 70 recommended to the members of the voting unit the attorneys they could hire in order to file a lawsuit. (Hearing, pgs. 46-47, 50, 112.) Local 70 agreed – in writing – to pay for all expenses associated with the lawsuit. (Employer's Exh. 6.) The members of the voting unit who signed up to be plaintiffs in the federal litigation understood they would not be out of pocket at all because Local 70 would take care of the financial burdens in bringing a lawsuit. (Employer's Exh. 6, Hearing, pgs. 91-92.) The lawsuit was indeed filed prior to the election such that the sixteen (16) named plaintiffs enjoyed Local 70's valuable gift prior to the election. (Employer's Exh. 8, Hearings, pgs. 91-92.) However, the ALJ asserted that the NLRB had not yet adopted this reasoning.

(b) Contrary to the ALJ's ruling, the NLRB has not rejected the logic found in the *Freund* decision. For example, in *Superior Truss & Panel, Inc. and Chicago & Northeast Illinois District Council of Carpenters, AFL-CIO, Local Union 1027*, 334 NLRB 916 (2001) [hereinafter *Superior Truss*] the Board merely

distinguished the facts of the case from *Freund*, instead of rejecting its holding as the ALJ suggests. *Superior Truss supra* at 916. In *Superior Truss*, unlike *Freund*, a Union attorney advised Union supporters that they should record particular complaints that he would then file as a legal action after the election. *Id.* Far from rejecting the holding in *Freund*, the Board properly distinguished that a legal document, "sent *after* the election, cannot serve as ground for a valid [election] objection" that the Union provided an improper pre-election benefit. *Superior Truss supra* at 916. Instead of contradicting the holding in *Freund*, *Nestle*, *Savair*, etc., the Board acknowledged the appellate court's reasoning and properly distinguished the facts in *Superior Truss*.

The ALJ, on the other hand, acknowledged a portion of this precedent in his decision, but inexplicably ignored its guiding principles by claiming "the Board has not yet accepted this reasoning" without providing any additional analysis. [Report pg. 4, ln. 9]

(c) In previous decisions, the Board tested whether a Union's provision of a pre-election benefit is appropriate by hypothetically ascribing the Union's behavior to the Employer to see if their "benefit" would taint the election. *See e.g. In re Mailing Services*, 293 NLRB 565 (1989). The following Employer's behavior would surely be admonished by the Board:

- Employer gathers his employees together to discuss a lawsuit against the Union with the Employer's lawyer.
- Employer's lawyers are made available at Employer's expense for the employees to sue the Union.
- Employer distributes their lawyer's engagement letter which states that the Employer will pay for the legal fees in their quest to recover damages against the Union.
- The engagement letter also infers that if you pull-out of the you may be responsible for the costs incurred to date.
- The employer and the employer's attorney, meet with those employees and confirm this promise.
- All this is done during a union campaign.

Certainly this behavior eliminates the possibility of a the laboratory perfect conditions that the NLRB requires during a Union campaign. If the NLRB approves the Union's actions, is the NLRB endorsing similar behavior by the Employer?

In that scenario, would that destroy the laboratory perfect conditions when they walked into vote? This is a real thing of value. If the NLRB approves the Union's doing this, then is the NLRB saying that it is ok for the employer to do this?

2. THE ALJ ERRED AS A MATTER OF LAW IN RECOMMENDING THAT THE EMPLOYER'S OBJECTION TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION BE OVERRULED.

Even if the ALJ's myopic reliance on *Novotel*, *New York*, 321 NLRB 624 (1996) [hereinafter *Novotel*] is correct, his recommendations in this case are not consistent with the *Novotel* holding and the NLRB's subsequent case law.

In *Novotel*, the Union held an organizing meeting with the petitioned-for-employees before ever discussing a wage & hour lawsuit. *See Novotel* at 624-625. Weeks later, business cards were distributed to unit and non-unit employees that invited them to a separate meeting with the Union's attorney at which the "sole issue discussed ... was the FLSA lawsuit." *Id.* at 625. At this meeting, the attorneys told the employees that the lawsuit would be supported by the Union without regard for the results of the election, the employees union support, or whether the employee was part of the voting unit. *Id.* The Board cited these facts in finding that "the legal services provided were integral to the ... workers' employment-related concerns." *Id.* at 635. In *Novotel*, the Board found that purpose of the free legal representation was the employees employment concerns, not the global organizational motives of the Union itself. *See generally Novotel supra.*

The Board reinforced this principle in *United Erecting of Wisconsin, and Bridge, Structural, Ornamental, Reinforcing Ironworkers and Machinery Movers, Local No. 8, AFL-CIO & International Union of Operating, Engineers, Local No. 139, AFL-CIO*, 2002 NLRB Lexis 43 (2002) [hereinafter *United Erecting*], where they determined that when a Union representative negotiated a pension for a potential Union member with his former employer as a recruiting effort, he was granting that worker an unlawful pre-election benefit. *United Erecting supra* at 44. The Board distinguished this from *Novotel* by finding the intent of the pre-election benefit was to “purchase” a vote by offering the worker a service that was not an “employment-related” concern. *Id.*

The Board has also found that even if a Union is providing a benefit that is traditionally provided to Union members, that benefit may be improper if it appears to be provided with an improper ulterior motive. *See e.g. In re Mailing Services, Inc.*, 293 N.L.R.B. 565 (1989) (election in favor of the union was overturned because the union offered workers free medical screenings during the campaign); *In re Wagner Electric Corp.*, 167 N.L.R.B. 532 (1967) (election in favor of the union was overturned because the union offered workers life insurance benefits starting almost two months before the election).

Unlike *Novotel*, Local 70 went to great lengths to inextricably intertwine the Union campaign with the wage & hour lawsuit. Drivers were first recruited to the

Union Hall to discuss the wage & hour problem. [Hearing pgs. 100-109]. There, Union leaders discussed Union campaign while the attorneys, at the same time, discussed recruiting other drivers for the wage & hour lawsuit. [*Id.*] The motive of filing the lawsuit was not for "employment-related concerns," but "leverage." [Hearing pgs. 105-106].

The Union's attempt to use this "leverage" was on display when they attempted to negotiate away the lawsuit in exchange for a statewide neutrality agreement without informing the workers they were supposedly dedicated to represent. [Hearing pgs. 23, 87-88.] How could a lawsuit be filed for "employment-related concerns" when the Union was willing to dismiss the lawsuit in exchange for an expanded membership drive? The wage & hour lawsuit was not filed for employment-related concerns, but as leverage to be negotiated away without taking the rights of the workers into account. Therefore, it is an improper pre-election benefit provided by the Union.

3. THE ALJ ERRED IN RULING THAT "THE UNION HAD A STATUTORY RIGHT TO FILE THE WAGE AND HOUR LAWSUIT."

(a) The Union has not filed a wage & hour lawsuit against Stericycle, Inc. as the ALJ's ruling suggests. Instead, sixteen (16) individuals, using money provided by the Union during a campaign, filed a lawsuit against Stericycle, Inc..

(b) This is not a captious argument. In fact, it is the very fact that Local 70 is not party to the wage & hour lawsuit that makes their behavior so objectionable. The Union gave workers the financial backing to file and maintain a lawsuit against Stericycle during a representation campaign as a tangible gift to gain their support and to give the Union "leverage" against Stericycle. [Hearing pgs. 105-106.]

(c) A union does not have standing to file a lawsuit under the Fair Labor Standards Act on behalf of individuals, let alone individuals for whom they have not yet been certified to represent in collective bargaining negotiations. Section 5 of the Portal-to-Portal Act bars Unions from bringing representative actions under the FLSA. Pub. L. No. 80-49, § 5 (May 19, 1947); 29 CFR § 790.20 (representative actions for back wages barred by § 8); *Nevada Employees' Ass'n v. Bryan*, 916 F.2d 1384; 1392 (9th Cir. 1990).

The Union gave these drivers the financial backing to file and maintain this lawsuit against Stericycle during a representation campaign as a tangible gift to encourage these individuals to support the union and, as an 'alter-ego' to have "leverage" with Stericycle.

4. THE ALJ ERRED IN GIVING WEIGHT TO THE UNION ATTORNEY'S JANUARY 7, 2009 CLIENT LETTER.

(a) The ALJ wrongly considered the Union attorney's January 7, 2009, unilateral letter to its worker-clients to have a curing effect on the election taint caused by the Union's commitment to pay for the wage & hour lawsuit. [Report, pg. 4, lns. 15-17.]

(b) First, the Union attorney claims the documents appearing to commit Local 70 to subsidize the lawsuit against Stericycle were simply "a mistake." [Exhibit 2.] This claim has little credibility because workers testified that as of the March 16th hearing they had not spent one dollar of their own money to initiate or maintain a federal class action wage & hour lawsuit against their employer. [See e.g., Hearing pgs. 101, 164.] The workers continued to receive the Union's pre-election benefit long after the letters were sent. *Id.* Circumstantial evidence that workers continued to receive a promised benefit is persuasive in finding that the Union promised an improper pre-evaluation benefit. See *King Electric, Inc., v. NLRB*, 440 F.3d 471 (DC Cir. 2006) [hereinafter *King Electric*].

In *King Electric*, the Union was accused of improperly promising job placement services to members of the voting unit immediately after the election. *King Electric supra at 474-475.* The day after the Union won the election, more than 50% of the employees quit their job with employer to take jobs with the Union's placement service. *Id.* At 476. The D.C. Circuit Court of Appeals found

that the employee's post-election conduct was circumstantial evidence that tended to prove the truth of the Employer's objection. *King Electric supra* at 475. In the same way, evidence that the drivers continued to receive free-legal services during and after the campaign is circumstantial evidence that the employees received an improper pre-election benefit.

(c) Second, the workers signed a bi-lateral contract with the Union attorneys. [Exhibit 1.] The Union attorneys however, asked the NLRB to believe that a unilateral letter to their clients somehow eliminated the Union's contractual obligation to subsidize the litigation. The fact that a bilateral agreement between two parties may only be amended through a bilateral amendment between the same parties in interest is axiomatic.

(d) Third, even if the letter credibly informed the workers of the Union's financial commitment, the damage had already been done. *See Comcast v. NLRB*, 232 F.3d 490 (6th Cir. 2000) [hereinafter *Comcast*]; *See also NLRB v. River City Elevator Company, Inc.*, 289 F.3d 1029 (7th Cir. 2002). For example, in *Comcast*, the Sixth Circuit Court of Appeals found that even though an all-expense paid weekend in Chicago was given to members of the voting-unit independent of their support for the Union, the gift still imposed upon voters an implicit "constraint to vote for the donor Union." *Comcast supra* at 498, quoting *In re Mailing Services*, 293 NLRB 565 (1989) [hereinafter *Mailing Services*]. In fact, the Board has held

that "[a]lthough a Union may promise an existing benefit to new members...it is, like an employer, barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled." *Mailing Services supra* at 565.

The wage & hour lawsuit was filed on November, 19, 2008, but the attorney's disclaimer letter was not sent until January 7, 2009, almost two months later. However, none of the plaintiff-workers spent a single dollar on legal representation in that matter. [*See e.g.* Hearing pgs. 101, 164.] The plaintiff-workers paid no mandatory filing fees, postage fees, preparation of initial disclosures as required under the Federal Rules of Civil Procedure 26(a)1. [*Id.*] Such a gift results in the "enhancement of the employees' economic position" and is not "merely an avoidance of possible future liability." *In re Wagner Electric Corp.*, 167 NLRB 532, 533 (1982).

5. THE ALJ ERRED IN FAILING TO RECEIVE EVIDENCE ON THE UNION'S DECEMBER 22, 2009 OFFER TO "DROP" THE LAWSUIT IN EXCHANGE FOR A STATEWIDE NEUTRALITY AGREEMENT.

The ALJ improperly excluded evidence of the Union's December 22, 2008 negotiation offer at the hearing. Though the Employer offered the testimony of six (6) eye witnesses, the ALJ only permitted one, limited examination of one witness

as an offer of proof. [Hearing pgs. 25, 26] and refused to acknowledge these facts in his report. This was clearly a mistake.

The ALJ is charged with ensuring a complete record. NLRB Casehandling Manual §§1180. The Regional Director must ensure that "a full hearing be held upon proper notice to all parties, so that an adequate record can be developed for appropriate review." *In re Angelica Healthcare Services Group*, 315 N.L.R.B. 1320 (N.L.R.B. 1995). As part of a full hearing, the Employer must be allowed to present evidence that is relevant to the issues before the ALJ. *See In re Mariah*, 322 N.L.R.B. 586 (N.L.R.B. 1996). Relevance is, of course, defined best in the Federal Rules of Evidence as:

evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Fed. R. Evid. 401.

In this case, the issue before the ALJ was whether the free-legal services provided by the Union were an improper pre-election benefit. According to *Novotel* and *Superior Truss*, one of the key elements in determining whether a union's grant of legal services was a prohibited pre-election gift is the purpose for which those services were provided. *See Novotel supra* at 635; *Superior Truss*

supra at 916. At the hearing, the Employer offered evidence of a December 22, 2008, meeting in which the Union offered to negotiate away the lawsuit for which they were providing the free legal services in exchange for a statewide neutrality agreement. [Hearing pgs. 23-28.] This is evidence that the purpose of the Union's lawsuit was not for "employment-related purposes" as is authorized by the Board, but for statewide negotiating leverage; the employment-related interests of the San Leandro workers were expendable. *See Novotel supra* at 635.

The evidence of the December 22, 2008 negotiation offer is clearly relevant to the issue that was before the ALJ, and was improperly excluded from the hearing.

6. THE ALJ ERRED IN ALLOWING THE UNION ATTORNEY TO ASSERT THE ATTORNEY-CLIENT PRIVILEGE ON HIS CLIENTS' BEHALF AS A SHIELD FOR THE UNION'S MISCONDUCT.

The ALJ incorrectly allowed conversations between the Union attorneys and workers regarding the wage & hour lawsuit to be protected by the attorney-client privilege because (a) those conversations were made in the presence of a non-privileged third party, and (b) the attorney's voluntary disclosure of attorney-client communications to a Federal agency waives the attorney-client privilege to any other undisclosed communications that ought, in fairness, be considered together. Fed.R.Evid. 502(a). The hearing on election objections should be re-opened to

take vital sworn testimony on the content of those un-privileged conversations regarding the nature and purpose of the free-legal services the Union provided to the workers during the campaign.

(a) Federal Rule of Evidence 501 provides in part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.

According to the United States Supreme Court, an asserted privilege must "serve public ends." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

The Board has clearly held that Union representatives do not possess the authority or the relationship that would protect their communications under the privilege. *See e.g. In re King Soopers*, 344 N.L.R.B. 838, 840 (N.L.R.B. 2005). A

breach of confidentiality effectively, and voluntarily, waives the attorney-client privilege in those conversations when the non-privileged third-party was present. *See e.g. United States v. El Paso Co*, 682 F.2d 530, 539-41 (5th Cir. 1982). Furthermore, the breach of confidentiality that waives the attorney-client privilege may be made by providing information to someone giving nonlegal assistance to the client, in this case, Pilar Barton, the Union organizer. [Hearing pgs. 12, 109, 220.]

In this case, Ms. Barton, an unprivileged party, was allowed to be present during attorney-client communications regarding the wage & hour lawsuit. [*Id.*] Her position as Union organizer may have been appropriate to inform the workers of their rights and even coordinate for their legal representation, but certainly she is considered a third party for the purposes of asserting the attorney-client privilege. [Hearing pg. 97.] Therefore, the ALJ wrongfully ruled that the conversations regarding the wage & hour lawsuit in which Ms. Barton was present were protected by the attorney-client privilege.

(b) At the hearing, the Union voluntarily submitted letters from the Union attorney to his clients in the wage & hour lawsuit as exhibits. [Hearing pg. 114.] The Union attorney did not request any sort of protective order for these exhibits or request that they be handled under seal. [*Id.*] The ALJ accepted them into evidence. [Hearing pg. 197.] These attorney-client letters described the attorney-

client agreements, signed by each of the Plaintiff's to the wage & hour lawsuit by disingenuously saying, "you may have seen a document that mistakenly stated the Teamsters are advancing legal fees in the lawsuit."

The ALJ wrongfully found that these letters were persuasive disclaimers of the signed attorney-client agreements [Report pg. 4, lns. 15-17], but refused to allow the Employer to probe the initial meetings between the Union attorneys and the workers where this very attorney-client agreement were initially discussed [Hearing pg. 12]. This is in violation of Federal Rule of Evidence 502(a).

Federal Rule of Evidence 502(a) says:

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

Clearly the Union attorney's waiver of the attorney-client privilege regarding the subject matter of the letters was intentional. The Union attorney was not

compelled to submit the letters, nor did he make any requests that the letters be protected as attorney-client communications. [Hearing pgs. 113-114]

(c) The Union attorney's waiver of the attorney-client privilege without written permission of his clients is a violation of Cal. R. Prof. Conduct 3-100.

7. THE ALJ ERRED IN DIS-CREDITING AN EMPLOYEES TESTIMONY THAT HE EXPECTED TO RECEIVED BETWEEN \$10,000 AND \$12,000 FROM THE LAWSUIT.

Mr. Jose Ochoa testified that he had been told he could recover between \$10,000 and \$12,000 for signing up for the lawsuit and that he was told the purpose of signing up for the Union was to get the money from the lawsuit. [Hearing pgs. 124-131.] The ALJ simply dismissed his testimony as "un-credible without examining under the test provided in *NLRB v. Walton Manufacturing Co.* 369 U.S. 404, 408 (1962), that he himself off-handedly referenced in his own decision. [Report pg. 3, lns. 9-11.] Had the ALJ done so, and provided his analysis he would not have been able to automatically discredit the testimony of Mr. Ochoa that is to be considered alongside the consistency and probability of his testimony. *Id.* at 408. Mr. Ochoa's testimony was both consistent and probable given the organizing environment then Union had encouraged in promoting the wage & hour lawsuit.

8. THE ALJ ERRED BY FAILING TO FIND THAT THE UNION ATTORNEYS VIOLATED NUMEROUS PROVISIONS OF THE CALIFORNIA CODE OF PROFESSIONAL CONDUCT, INCLUDING, BUT NOT LIMITED TO THOSE REGARDING, CHAMPERTY, BARRATRY, MAINTENANCE, CONFIDENTIALITY, AND CONFLICTS OF INTEREST.

Though there is no uniform Federal law on ethics, and the Northern District of California has adopted to follow the California Rules of Professional Conduct. *Decaview Distribution Co. v. Decaview Asia Corp., et al.*, 2000 U.S. Dist. LEXIS 16534, 36 (2000). A third party has standing "if the litigation will be so infected by the presence of the opposing counsel so as to impact the moving party's interest in a just and lawful determination of its claims." *Id.* at 28-29.

- a. Rule 1-320: Financial Arrangements with Non-Lawyers

Cal. R. Prof. Conduct 1-320 states that "[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer." Cal. R. Prof. Conduct 1-320(A). Additionally, "[a] member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law." Cal. R. Prof. Conduct 1-310.

Furthermore, a member of the California State Bar "shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm

by a client." Cal. R. Prof. Conduct 1-320(B). "A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future." Cal. R. Prof. Conduct 1-320(B).

Generally, the public policy concerns behind this rule center around "interference with the attorney's professional judgment, the creation of conflicts of interest, and the unwholesome spectre of attorneys soliciting professional liaisons with laypersons." *McIntosh v. Mills*, 121 Cal. App. 4th 333, 345 (2004). This rule against such fee splitting was also enacted to "avoid instances of control over litigation by a layperson more interested in his or her own profit than the client's fate." *Gafcon v. Ponsor & Associates, et al.*, 98 Cal. App. 4th 1388, 1418 (2002). "Another is to avoid facilitating a layperson's intermediary's tendency to select attorneys who will compensate him and not the most competent attorney for the client." *Id.*

Here, the Attorney-Client agreement does not explicitly state that the Union will be receiving attorneys' fees. Regardless, the attorney-client agreement still consists of a financial arrangement between the Union attorney and the Union,

which is not permitted under the rules. *See* Cal. State Bar Formal Opinion No. 1997-148. Also, the financial arrangement set forth under the Agreement is one where the Union will indirectly receive a portion of whatever recovery is had by the plaintiffs. If the worker-plaintiffs recover any monetary amount, the fees they pay to the Union attorney may be 33⅓% of this recovery. [Exhibit 1.] Out of this amount, the plaintiffs are also obligated to reimburse the Union for their advancement of this fee. [*Id.*]

Such an arrangement for the payment of fees – even if indirect – is improper, as the recovery still flows from the plaintiffs to the Union attorney and the Union. Courts disapprove of such "subterfuges to attempt to get away from the inhibition" codified in Rule 1-320. *See, e.g., Cain v. Burns*, 131 Cal. App. 2d 439, 442 (1955) (decided under predecessor to Rule 1-320). "[A] mere change in payment arrangements cannot provide a subterfuge to avoid ethical rules that otherwise apply." Cal. State Bar Formal Op. No. 1997-148, ft. 14. On the other hand, it has also been opined that if the "legal fees generated by the Attorney's legal services were paid solely to the Attorney, and the [third party] did not profit from these legal fees – then there would be no violation of Rule 1-320." Los Angeles County Bar Association Formal Op. No. 510, p. 7 (arrangement where attorney collects fees from a third party for services provided to the third party's customers improper and violates 1-320).

b. Rule 1-600: Legal Service Programs

Cal. R. Prof. Conduct 1-600 prohibits an attorney from participating:

in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services, which allows any third person or organization to interfere with the member's independence of professional judgment, or with the client-lawyer relationship, or allows unlicensed persons to practice law, or allows any third person or organization to receive directly or indirectly any part of the consideration paid to the member except as permitted by these rules, or otherwise violates the State Bar Act or these rules. Cal. R. Prof. Conduct 1-600(A).

In Hildebrand v. State Bar of Cal., 36 Cal. 2d 504 (1950), the California Supreme Court found that the predecessor to this rule had been violated when a set of attorneys and a union created a joint venture whereby the Union recommended the attorneys' services to its members, the Union received part of the profits from its referrals to the attorneys, the Union's goal was to profit from an increased membership, and the firm gained business through the Union's recommendations.

First, the California Supreme Court found fault with the amount of pressure the Union exercised on its members to retain these attorneys. The Union recommended the attorneys to its members through its publications, circulars, and

personal visits. *Id.* at 509. The Union members were not compelled to hire the attorneys, but the court thought it improper that the members were "subject to continuous and strong recommendation from the Brotherhood to do so." *Id.* The court also found fault with the attorneys' connection to the union, where the union's offering of the attorneys' services could "reasonably constitute an inducing cause of attracting membership into the Brotherhood and the payment of dues thereto." *Id.* at 510. In sum, the Court found a "common course of action arranged with the Brotherhood" and "participation in the basic plan of the Brotherhood as a general scheme for the solicitation of professional employment among members of the Brotherhood", which violated the predecessor to Rule 1-600. *Id.* at 510 and 514.

Here, the Union attorney could be implicated in a violation of this rule as well, given that there is strong evidence of a similar sort of collective scheme.

What implicates the Union attorney the most is the fact that it has shown its "independence of professional judgment" and "client-lawyer relationship" with the plaintiffs in the federal litigation have been interfered with. The Union's December 22, 2008, offer to Stericycle management to settle the federal litigation is indicative of such an interference, given that the Union would have no authority to settle a case on behalf of individuals it does not represent. The Union was adamant that it had the means to make such a settlement happen, indicating that they were the decisionmakers in the federal case, and not the Union attorney or the plaintiffs.

It is unclear the extent to which the Union attorney has compromised its relationship with the plaintiffs of the federal suit.

Also, as set forth in the Agreement, the Union attorney has a financial arrangement with the Union whereby the Union, as a third party to the federal litigation, would indirectly receive a portion of whatever the plaintiffs would recover should they be successful in their federal case. Such an arrangement directly violates the prohibition codified in Rule 1-600.

c. Rules 3-300 and 3-310: Conflicts of Interest in General

California has set rules over potential conflicts of interest and actual conflicts of interest. Depending on the severity of the conflict, either written disclosure or informed written consent is required. *See* Cal. R. Prof. Conduct 3-300 and 3-310.

Generally, an attorney cannot obtain interests adverse to a client. "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to the client." Cal. R. Prof. Conduct 3-300. However, the exception to the rule is if:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition. Cal. R. Prof. Conduct 3-300.

California Rules of Professional Conduct also govern relationships between attorneys and clients. Rule 3-310 prevents an attorney from representing or continuing to represent a client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that: (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation. Cal. R. Prof. Conduct 3-310(B).

The exception to this rule is if written disclosure is given to the client. [*Id.*] In other words, if there is the presence of any of the above-referenced relationships, then the attorney must provide a written disclosure to the client before accepting representation or continuing representation of that client. [*Id.*] "Disclosure" means "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." Cal. R. Prof. Conduct 3-310(A)(1).

Additionally, when a potential or actual conflict of interest arises, the attorney must take one step further and obtain the "informed written consent" from each client that he or she represents. Cal. R. Prof. Conduct 3-310(C). A conflict of interest arises when the "attorney is in a position to acquire confidential information from a non-client which may be useful in the attorney's representation of a client, and when an attorney puts himself in a position, without client consent, where he may be required to choose between or reconcile his interests with a client's conflicting interests." *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, et al.*, 216 Cal. App. 3d 1139, 1151 (1989). The California Rules of Professional Conduct have dictated three such circumstances where the

attorney cannot proceed with representation unless informed written consent is obtained:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. Cal. R. Prof. Conduct 3-310(C).

Obtaining informed written consent is absolutely necessary in these three circumstances, as the "fiduciary nature of the attorney-client relationship requires the application of strict standards." *Civil Service Commission of San Diego County v. Sup. Ct.*, 163 Cal. App. 3d 70, 79 (1984). "The client must have no fear that information disclosed to or obtained by the attorney in the course of the representation will in some way later be used against the client." *Id.*

Informed written consent constitutes "the client's or former client's written agreement to the representation following disclosure." Cal. R. Prof. Conduct 3-310(A)(2). More specifically, it means the "attorney must make a full disclosure of all facts and circumstances relevant to the conflict, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice."

Civil Service Commission of San Diego County v. Sup. Ct., 163 Cal. App. 3d 70, 82 (1984). The burden is heavy on the attorney who claims his client provided informed written consent. "The attorney who claims his client consented to a conflicting representation bears a heavy burden of demonstrating that all relevant facts relating to the conflict were disclosed and explained to the client. *Id.* at 83.

However, "[n]o matter what disclosure is made, a client cannot waive a conflict that makes it unlikely that the lawyer can represent the client competently." Los Angeles County Bar Association Formal Opinion No. 471, p. 3 (discussing predecessor to 3-310). Thus, if the attorney cannot maintain confidentiality, then the conflict is one which cannot be waived. *See* California Business and Professions Code §6068(e)(1) (duty of attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").

Here, the Union and the plaintiffs in the federal suit have conflicting interests. The Union's goal is to strongarm Stericycle and/or its employees into representation. The goal of the plaintiffs in the federal lawsuit is presumably to obtain allegedly owed back wages from Stericycle. There was a potential conflict of interest from the time the Union attorney decided to represent the plaintiffs, as the fees to fund this lawsuit were to be paid by the Union. At the very least, the Union attorney should have made a written disclosure to the plaintiffs of this

potential conflict of interest, and also should have obtained the written informed consent of both the Union and the plaintiffs. This did not happen.

An actual conflict of interest arose when the Union attempted to settle the plaintiffs' suit with Stericycle, without the plaintiffs' permission, and purportedly with the Union attorney's permission. [Hearings pgs. 24-27.] This actual conflict between the two clients necessitates that the Union attorney obtain a second written informed consent from both its clients. Additionally, since the Union made the offer to Stericycle, the Union attorney is on notice that its potential conflict has turned into an actual one. [*Id.*]

Moreover, this appears to have become an actual conflict which cannot be waived by informed written consent. Based on the Union's offer, and the Union attorney's lack of denial that such an offer was made by the Union, it appears that the Union attorney's duty to the plaintiffs in the federal litigation have been compromised such that not even informed written consent could remedy this breach.

d. Rule 3-310(F): Payment of Fees by a Non-Client

Rule 3-310 governs the payment of a client's fees by a non-client. Generally, "[a] member shall not accept compensation for representing a client from one other than the client." Cal. R. Prof. Conduct 3-310(F). However, California does not consider all situations where third party pays the fees of a

client as unlawful, provided that the correct steps are taken to disclose this conflict of interest. The attorney must meet the following criteria:

(1) [t]here is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) [i]nformation relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) [t]he member obtains the client's informed written consent. Cal. R. Prof. Conduct 3-310(F); *Frye v. Tenderloin Housing Clinic*, 38 Cal. 4th 23, 52 (2006).)

"The general purpose of this restriction is to ensure that no one other than the client has influence or control that would in any way impair the attorney's loyalty to the client." (Los Angeles County Bar Association Formal Opinion No. 510, p. 10.) The attorney still has to upkeep the client's confidentiality, as the "issues respecting interference with either the independent exercise of professional judgment or the attorney-client relationship are the same as with Rule 1-600." (Los Angeles County Bar Association Formal Opinion No. 500.) In a case with substantially similar facts to the one at hand, the court found that conflict waiver forms which acknowledged that the union would be paying the fees of the

plaintiffs was sufficient. *Sharp, et al. v. Next Entertainment, et al.*, 163 Cal. App. 4th 410, 431 (2008).

This is different from New York law, which has found it improper for unions as third parties to pay the fees of class action plaintiffs, as the "holder of the purse strings" would "enjoy considerable, inappropriate control over this litigation simply because it is capable of withdrawing financing at any time." *Kamean v. Local 363, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.*, 109 F.R.D. 391, 396 (S.D.N.Y. 1986). "To permit an unrelated third party to promote and finance this litigation would also require this Court to condone Maintenance, a practice that has been decried because it permits intermeddling by non-parties, and encourages litigants to advance speculative claims at no financial risk to themselves." *Id.* The court felt that the possibility of this threat meant that the attorneys could be improperly influenced at any time. *Id.*

Here, although the Union is paying for the fees of the plaintiffs in the federal litigation, which is proper if it were disclosed and the plaintiffs' informed written consent is obtained, evidence has already come to light that the Union attorney's loyalty to the plaintiffs has been compromised. The Union attorney has already breached its duty of confidentiality to the client which is mandated under California Business and Professions Code §6068(e)(1). Therefore, no informed written consent can remedy the situation at hand. Had the Union attorney

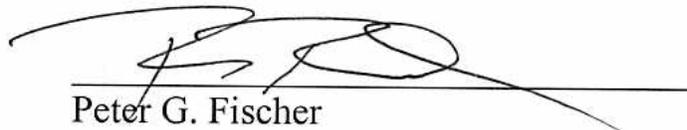
exercised loyalty and upheld its duty to the plaintiffs in the federal litigation, the Union would have never made its December 22, 2008 offer.

e. Rule 4-200: Unconscionable and/or Illegal Fees

Cal. R. Prof. Conduct 4-200 dictates that a member of the bar "shall not enter into an agreement for, charge, or collect an illegal...fee." Cal. R. Prof. Conduct 4-200(A). Improper financial arrangements constitute the collection of an illegal fee. Thus, a viable argument can be made that since the Union attorney violated Cal. R. Prof. Conduct 1-320 and 1-600, then this, in turn, implicates the Union attorney in a violation of 4-200.

Respectfully submitted this 22nd day of May, 2009.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

STERICYCLE, INC.,

Employer,

and

Case No.: 32-RC-5603

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AUTO TRUCK
DRIVERS, LINE DRIVERS, CAR
HAULERS, AND HELPERS, LOCAL NO. 70
OF ALAMEDA COUNTY, CALIFORNIA,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA,**

Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Support of Employers' Exceptions to Administrative Law Judge's Report on Objections, was filed with the NLRB in Washington, D.C. via electronic filing through the NLRB website and an identical copy was sent to Regional Director, NLRB Region 32 via overnight delivery. An identical copy of this filing was also sent to the following by overnight delivery:

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This 22nd day of May, 2009.

A handwritten signature in black ink, consisting of stylized, overlapping letters, positioned above a horizontal line.

Peter G. Fischer