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11 **UNITED STATES OF AMERICA**
12 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**
13 **WASHINGTON, D.C.**

14 TEAMSTERS LOCAL 70,

Petitioner,

v.

15 STERICYCLE, INC.,

Respondent.

Case No. 32-RC-5603

**PETITIONER'S ELECTION OBJECTION
POST-HEARING BRIEF**

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1 **STATEMENT OF FACTS**

2 The Employer operates a medical waste facility located in San Leandro. It employs route
3 drivers that pick up medical waste from various locations and then return it to the Employer’s facility
4 for processing. On November 14, 2008, the Union filed a petition to represent the Employer’s route
5 drivers. The Employer contested the unit, and on November 24 and 25 and December 1, 2, and 3,
6 2008, the Region conducted a hearing to determine whether the Union sought to represent an
7 appropriate unit of employees. On December 19, 2008, the Regional Director directed an election
8 among substantially the unit sought by the Union. On January 2, 2009, the Employer requested
9 review of the Region’s decision, which was dismissed by the Board.

10 The election was held on January 16, 2009 (the “Election”) in which 23 votes were cast for
11 the Union and 12 against. The Employer filed objections, all of which were dismissed by the
12 Regional Director, except one:

13 Before the election, the Union told members of the voting unit that they
14 were required to file a federal lawsuit against Stericycle and hire the
15 Union’s lawyers, before the Union would file an RC petition with the
16 NLRB. The Union agreed to front the costs and fees of the federal
lawsuit. Using this lawsuit as leverage before the election, the Union
enticed members of the voting unit into supporting them by subsidizing
their legal representation.

17 Supplemental Decision and Notice of Hearing at 4-5. Administrative Law Judge Jay R. Pollack
18 conducted a hearing on March 16, 2009 to determine whether there was evidence to support the
19 objection.

20 Following is a brief description of the facts presented at the hearing. A fuller discussion of
21 the facts is contained in the Argument section, below. At the hearing, the Employer called three
22 managers, five drivers, Union representative Pilar Barton, and the Union’s attorney, Jason
23 Rabinowitz. The Union called two other drivers. The Employer sought to demonstrate that
24 employees were told that the Union had agreed to pay the attorney’s fees for route drivers who had
25 filed a wage and hour case against the Employer. It introduced a document that purported to be a
26 retainer agreement stating that the Union would pay plaintiffs’ fees in the case. (See Er. Exh. 6.)
27 Some drivers testified that they saw the agreement in early fall 2008, some months before the
28 election; others said they had never seen it. Only one driver testified that he understood the

1 agreement to indicate that the Union was paying the plaintiffs’ fees and costs. Instead, they testified
2 that they understood that the case was being taken by the attorneys on a contingency basis. (Tr. 163,
3 164, 171-72, 178, 204, 213.) In any case, each driver testified that the document had no impact on
4 his vote in the Election. (Tr. 116, 137, 211.)

5 Union representative Barton testified under cross-examination that Employer Exhibit 6 was
6 not created by the Union: “I remember being under the clear understanding that this was going to be
7 a—what s the word—contingency. So, [Exhibit 6] saying Local 70, I have no idea why it says
8 Local 70 [would pay the plaintiffs’ fees]. And [the Union] did not write this.” (Tr. 54.) It is
9 acknowledged that the exhibit is incomplete (Tr. 76-77).

10 On or about January 7, 2009, more than a week before the Election, every plaintiff received a
11 letter from their attorneys stating that despite any information to the contrary, the lawsuit was not
12 sponsored by the Union, and that they had taken the case on a contingency basis (the “Rabinowitz
13 Letter”). This letter states:

14 You may have seen a document that mistakenly stated that the
15 Teamsters are advancing legal fees in the lawsuit. To the contrary, our
16 law firm is handling the case on a contingency basis and the Teamsters
17 are not paying the legal fees. The firm is handling the case on the same
18 basis that we regularly handle such law suits. As is common in such
19 cases, our intention is that our fees will be paid by the Company as part
of a settlement or judgment when and if we prevail in the case on your
behalf. Therefore, the Union is conferring no benefit on you or the
other drivers through the lawsuit.

20 (Un. Exh 1)

21 ARGUMENT

22 I. Introduction

23 The ALJ correctly recommended overruling the Employer’s objection to the election results
24 based on the claim that the Union offered to pay the attorney’s fees of employees in a wage and hour
25 case they brought against the Employer. Under Board law, neither an employer nor a union is
26 permitted to confer a benefit on voting employees in the critical period before the election, *General*
27 *Cable Corp.*, 170 NLRB 1682 (1968), in this case November 14, 2008 through January 16, 2009 (the
28 “Critical Period”). Here, however, whether some employees saw a document that indicated that the

1 Union was paying their fees, in fact, the Union was not paying their fees, and well before the
2 Election, every employee had been explicitly informed that it was not.

3 “It is well settled that representation elections are not lightly set aside. Thus, there is a strong
4 presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of
5 the employees.” *Safeway, Inc.*, 338 NLRB 525, 525 (2002) (citations omitted). As the Board in
6 *Safeway* explained, “the burden of proof on parties seeking to have a Board-supervised election set
7 aside is a heavy one.” *Id.* at 526 (citations omitted). Moreover, where the employees show they
8 strongly support one side over the other, the Board is particularly reluctant to overturn their clear
9 wishes. *E.g., Francis Drake Hotel*, 330 NLRB 638 (2000). In this case, the Union won the election
10 by a count of 23 to 12, an almost 2-1 margin.

11 In all, as set out below, the Employer has failed to carry its burden of establishing that the
12 Union unlawfully conferred a benefit on employees requiring the Board to undo the employees’ vote.
13 First, by the time of the Election, every plaintiff in the wage and hour case was made explicitly
14 aware, by a letter from their attorneys, that the Union was not paying their attorneys’ fees. For that
15 reason alone, the Election cannot be overturned based on the Employer’s objection. Second, even
16 before the letter was sent, the drivers did not think the Union was paying their fees. Only one driver
17 testified that he understood the document introduced as Employer Exhibit 6 to mean that the Union
18 was paying the plaintiffs’ fees. Every other driver understood that the case was taken on a
19 contingency basis. Third, regardless of what they thought of it, the drivers saw Employer Exhibit 6
20 before the Critical Period. It therefore cannot form the basis of an election objection. On the other
21 hand, the letter to the plaintiffs clarifying that the case was taken on a contingency basis was sent
22 during the Critical Period, more than a week before the Election. Fourth, the Employer failed to
23 establish any material connection between the Union and the wage and hour lawsuit. Fifth, the
24 Employer failed to prove that any plaintiff was told that they would receive money for filing the
25 lawsuit. Sixth, at the hearing, the Employer sought to elicit testimony from drivers that they felt
26 pressure to join the lawsuit. Even if the Union did impose pressure, however, it is impossible to see
27 how it could constitute objectionable conduct conferring a benefit on employees. In any case, there is
28 no evidence of any pressure. Finally, the Employer sought to elicit testimony from drivers that the

1 Union tried to settle the lawsuit, without the drivers' consent, in exchange for a neutrality agreement.
2 Once again, this would not be objectionable conduct conferring a benefit on employees. Further, the
3 Employer cannot object to the Election on this ground because the Regional Director specifically
4 dismissed this objection. In any case, again, the Employer failed to establish that the Union sought to
5 settle the case without the drivers' consent.

6 **II. The ALJ correctly determined that the Union conferred no benefit on the employees,
7 and that any mistaken understanding by employees that the Union was supporting the
8 lawsuit was effectively corrected well before the election, and therefore had no impact
9 on the result.**

9 **A. In the weeks before the Election, during the Critical Period, the attorneys
10 notified every driver involved in the wage and hour lawsuit that the Union was
11 not paying their attorney's fees.**

11 The Employer requests the Board to set aside the Election, alleging the Union conferred a
12 benefit on the drivers by promising to pay the wage and hour plaintiffs' attorney's fees. To do so,
13 however, would be to turn Board law on its head. First, the Union did not in fact confer any benefit
14 on the employees. Union representative Barton testified that the Union did not pay the plaintiffs'
15 fees. No evidence was presented to contradict this testimony and Union Exhibit 1 confirms it. The
16 Board overturns elections where the union in fact confers a benefit on the employees. *E.g., Mailing
17 Services, Inc.*, 293 NLRB 565 (1989) (overturning election because of union's "direct conferral of
18 substantial benefits on [eligible voters] during the critical period").

19 Second, the Employer argues that under *Freund Baking Company*, 165 F.3d 928 (1999), the
20 Election should be overturned because the Union offered to pay the attorney's fees. The ALJ noted
21 that the Board has not adopted the reasoning of *Freund*.¹ However, even applying *Freund* to the
22 present case, the election should not be overturned. Here, unlike in *Freund*, every driver was made
23 aware, in the weeks before the election, that the lawsuit was taken by the attorneys on a contingency
24 basis and that the Union was not paying their fees. In *Freund*, the union filed an overtime lawsuit on
25 behalf of the employees one week before the election. *Id.* at 930. On the day before the election, the

26 _____
27 ¹ The Union agrees with the ALJ that the Board has not adopted *Freund* and that under existing
28 Board law, the Union had the right to support such a lawsuit. *Novtel New York*, 321 NLRB 624
(1996). However, this conclusion is not necessary to a decision to overrule the Objections in this
case. For the reasons set forth herein, the Election should be certified applying the rule in *Freund* as
well.

1 union posted a flyer advertising the lawsuit. In the flyer, the union simultaneously took credit for the
2 lawsuit and urged employees to vote for the union. *Id.* The court relied on the fact that the union
3 “encouraged voters to believe it was [responsible for filing the lawsuit]: The Union announced the
4 suit in a campaign flyer consisting exclusively of pro-Union and anti-Freund commentary and ending
5 with the slogan ‘Union Yes!’ Employees reading this flyer could not have failed to get the message
6 that they had the Union to thank for their legal representation.” *Id.* at 932. The court concluded that
7 this “appearance of support” was sufficient to overturn the election results. *Id.*

8 This case is therefore the factual opposite of *Freund*. Here, during the Critical Period, the
9 drivers were made explicitly aware that the lawsuit was *not* sponsored by the Union. The Rabinowitz
10 Letter states:

11 You may have seen a document that mistakenly stated that the
12 Teamsters are advancing legal fees in the lawsuit. To the contrary, our
13 law firm is handling the case on a contingency basis and the Teamsters
14 are not paying the legal fees. The firm is handling the case on the same
15 basis that we regularly handle such law suits. As is common in such
16 cases, our intention is that our fees will be paid by the Company as part
of a settlement or judgment when and if we prevail in the case on your
behalf. Therefore, the Union is conferring no benefit on you or the
other drivers through the lawsuit.

17 (Un. Exh 1.) On or about January 7, 2009, the Rabinowitz Letter was sent to every plaintiff in the
18 lawsuit. (Tr. 196-97.) Every driver who testified agreed that by about that date, they had received
19 the letter. (*E.g.*, Tr. 116 (Joel Ochoa), 201 (Burns), 210 (Rivera).) And every driver testified that
20 they understood the Rabinowitz Letter for what it said, that the Union was not paying their attorney’s
21 fees. (*Id.*) As Joel Ochoa testified, after he received the letter, he understood that “[t]he attorneys
22 fees would be paid off—this is just my phrasing, they phrased it different but what I understood and
23 grasped from that, that the attorney fees would be paid by their law firm and if there was any reward,
24 I don’t remember the percentage exactly but there would be a certain percentage that would have to
25 go to them if there was a reward found. And if there was no reward found, that we wouldn’t be liable
26 for any legal fees.”² (Tr. 100.)

27 _____
28 ² Joel Ochoa is a particularly credible witness because although he testified that he supported the
Union, by the time of the hearing, he had been promoted out of the unit to supervisor by the
Employer. (Tr. 72.)

1 Ochoa also testified that the attorneys explained at a meeting that they were taking the case on
2 a contingency: “I remember doing it in a group meeting. I believe [the attorneys were] even there in
3 a group meeting where we went and clarified and some of the drivers did have a question as if the
4 Union was going to pay, and also the question that if they had to pay anything, and the fees. And we
5 clarified that by saying the exact thing which I stated earlier, that according to this letter the Union
6 was not going to pay, or the contract that we had signed, the revised contract that I called—that the
7 Union was not going to pay and that another question they had was, were we liable for any legal fees
8 after this was all over, and again the answer to that was no. And I basically translated in that meeting
9 to the group of maybe 16 drivers.” (Tr. 118.)

10 Even where a union intentionally indicates to voting employees during the critical period that
11 it will confer a benefit on them, the Board will not overturn the election where the union later
12 clarifies the communication. *See, e.g., In re Laliq N.A., Inc.*, 339 NLRB 1119 (2003). In *Laliq*,
13 the union sent campaign literature to employees stating that if they voted for the union, they would
14 receive free medical care. The document stated: “Remember when Local 223 is elected on April 19th
15 you will no longer have to pay for you and your families [sic] medical benefits. As a Local 223
16 member you will be entitled to free medical care, free hospitals, free dental care, free optical care and
17 eyeglasses not only for you but for your immediate family members as well. And nothing will be
18 taken out of your paycheck to pay for those benefits.” *Id.* at 1119. Later communications from the
19 union indicated that free medical care was in fact contingent on the results of collective bargaining.

20 The Board reasoned that “in evaluating whether the two campaign statements cited by the
21 Employer constitute objectionable promises of benefits, it is appropriate to consider them in the
22 context of all the other relevant facts of the case, rather than in isolation.” *Id.* at 1120 (citing *Smith*
23 *Co. of California, Inc.*, 215 NLRB 530 (1974)). The Board acknowledged that at least three
24 employees may actually have believed that the union was offering free medical coverage in exchange
25 for votes. The Board nevertheless determined “the record provides no reasonable basis for attributing
26 this misunderstanding to the Union.” *Id.* at 1121. Ultimately, the Board concluded that the
27 subsequent communications clarified the true meaning of the initial communications.
28

1 In this case, similarly, there is no basis for attributing any misunderstanding about the fees to
2 the Union. And in any case, in weeks before the election, the drivers understood clearly that the
3 Union was not paying attorney’s fees for the wage and hour case, and instead, the attorneys were
4 taking the case on a contingency basis. For that reason, *Freund*, which turned on the possibility that
5 employees thought the Union was paying for the lawsuit, is inapposite. As in *Lalique*, because any
6 mistaken belief that the Union conferred a benefit on the electorate was effectively cleared up long
7 before the election, the Board should not overturn the employees’ vote. Even more than *Lalique*,
8 here, any miscommunication was explicitly corrected by the Rabinowitz Letter, and by the time of
9 the Election, no driver maintained any misunderstanding about the fee arrangement.

10 **B. The Drivers Knew That The Union Was Not Conferring A Benefit On Them.**

11 Even before they received the Rabinowitz Letter, before the Critical Period, the Employer’s
12 evidence demonstrated that the drivers did not believe the Union was promising a benefit to them.
13 The Employer called numerous voting employees at the hearing and questioned them extensively
14 about their understanding of the Union’s involvement in the wage and hour case. Only one driver,
15 Joel Ochoa, testified that he understood Employer Exhibit 6 to mean that the Union was paying the
16 attorney’s fees. Aside from this one witness, the Employer’s sole evidence for their objection is
17 Exhibit 6 itself.

18 One after another, the Employer’s witnesses testified that they were never told the Union was
19 paying their attorney’s fees, and instead understood that the case was being taken by the attorneys on
20 a contingency basis, which in fact it was. (*See Un. Exh. 1.*) Under questioning from the Employer’s
21 counsel, driver Hernandez stated that he understood that the wage and hour case was taken on a
22 contingency (Tr. 163), and stated he never believed that the Union was paying the fees. (Tr. 164.)
23 Also under questioning from the Employer’s counsel, driver Gonzalez stated he was not told the
24 Union was paying the fees: “Q And [Barton] told you that the Union was going to pay for this
25 lawsuit, correct? A No, she did not.” (Tr. 171-72.) Later, the Employer’s counsel again
26 questioned Gonzalez on the payment of fees: “Q And when you signed [the retainer agreement],
27 did Pilar tell you that the Union was going to pay for the lawsuit? A No.” (Tr. 178.) Under cross
28 examination, driver Burns testified that he read Exhibit 6, but stated “I’m being honest with you, I’m

1 familiar with attorneys and fees, I've always known about the contingency fee basis, so I never really
2 looked for the Union to cover any costs for me.” (Tr. 204.) Similarly, driver Rivera testified that
3 after seeing Exhibit 6, “[w]ell, I didn’t understand it, that Local 70 was paying for it [the lawsuit].”
4 (Tr. 213.)

5 Under subpoena and examination from the Employer’s counsel, Union representative Barton
6 testified that the Union was not, in fact, paying the wage and hour fees, and that it did not represent to
7 the drivers in any way that it would do so. (Tr. 52.) Instead, only one driver, Joel Ochoa, testified
8 that he understood from reading the retainer agreement that the Union would be paying plaintiffs’
9 attorney’s fees.³ However, he stated that no Union representative or any other person told him it was.
10 (Tr. 93.) In sum, then, the Employer’s entire case rests on Exhibit 6.

11 Exhibit 6 was not created by the Union. As Barton testified under cross-examination, “I
12 remember being under the clear understanding that this was going to be a—what’s the word—
13 contingency. So, [Exhibit 6] saying Local 70, I have no idea why it says Local 70 [would pay the
14 plaintiffs’ fees]. And [the Union] did not write this.” (Tr. 54.) Moreover, it is acknowledged that the
15 exhibit is incomplete (Tr. 76-77), and, as manager Stalberger testified, when he received Exhibit 6
16 from supervisor Escobar, “I first asked him why it looked so odd, that it looked like it had been torn
17 up or ripped. So, I asked him how he received it. Did he rip it up or was it given to him in pieces,
18 that’s what I asked him, and by who.” (Tr. 35.) In fact, driver Jose Ochoa testified that when he
19 gave a document to Escobar that appears to have been Exhibit 6, Escobar “ripped it or tore it.”
20 (Tr. 128.)

21 In any case, not a single driver testified that Exhibit 6 had any impact on his vote in the
22 Election. To the contrary, they testified that it had no effect. (*See, e.g.*, Tr. 116 (Joel Ochoa), 137
23 (Jose Ochoa), 211 (Rivera).) Joel Ochoa and Rivera both testified that they supported the Union
24 before the lawsuit was filed. Jose Ochoa testified that he did not support the Union before the lawsuit
25 was filed and its existence did not change his position.

27 ³ By the same token, the Employer presented no evidence that the Union sought to recoup its
28 expenses from the lawsuit: The Employer’s counsel asked Barton, “did you ever communicate to any
Stericycle drivers that if they withdrew, they did not vote yes for the Union, that Local 70 would go
back and seek to get reimbursement for any fees, costs and -- A Heavens no.” (Tr. 69.)

1 And as set out above, even if Exhibit 6 is an actual retainer agreement provided to employees,
2 every driver except one understood the case to be taken on a contingency basis. With respect to that
3 one driver, as in *Lalique*, “the record provides no reasonable basis for attributing this
4 misunderstanding to the Union.” *Lalique, supra*, 339 NLRB at 1121. For these reasons, the Election
5 cannot be overturned based on Exhibit 6.⁴

6 **C. Exhibit 6 was received by the drivers several months before the Election, before**
7 **the Petition was filed, while the Rabinowitz Letter was received during the**
8 **Critical Period.**

9 Every driver that testified that they saw the Employer Exhibit 6 said they saw it in early to
10 mid-fall 2008, months before the Election, and even before the Petition was filed. The Board has
11 consistently held that it is concerned with conduct during the Critical Period, which begins with the
12 date the petition is filed. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). Accordingly, “[i]t is
13 incumbent on the Employer to establish that the alleged objectionable conduct occurred within the
14 critical period” *Gibraltar Steel Corp. of Tennessee*, 323 NLRB 601, 603 (1997) Where “no
15 objectionable conduct occurred within the critical period or if the prepetition conduct did not affect or
16 give meaning to actions taken in the critical period then the prepetition conduct presented here is
17 irrelevant.” *National League of Professional Baseball Clubs*, 330 NLRB 670, 676 (2000). Similarly,
18 in *Freund*, the Board emphasized that “the Union first publicized the lawsuit on the day before the
19 election, which greatly increased the likelihood that it would interfere with the employees’ free
20 choice.” *Freund, supra*, 165 F.3d at 932.

21 In this case, to the contrary, the only communications in evidence regarding the lawsuit
22 during the Critical Period consists of the Rabinowitz Letter, which made clear to the drivers that the
23 wage and hour lawsuit was taken on a contingency basis, and that the Union was not paying the
24 plaintiffs’ fees. The Petition was filed on November 14, 2008. The Election took place on
25 January 16, 2009. The drivers who saw Exhibit 6 testified that they did before this period. Joel
26 Ochoa testified that he saw Exhibit 6 in October or November. (Tr. 73.) Jose Ochoa testified that he

27 ⁴ The Employer illogically argues that since no employee testified they paid legal fees for the lawsuit,
28 the ALJ should have concluded the Union supported it. This argument ignores the commonplace fact
that plaintiff’s lawyers regularly take such cases on a contingent fee basis, charging no out-of-pocket
fees to the clients. Such an argument is clearly evidenced by the Rabinowitz Letter to plaintiffs.

1 saw it in October, when Joel Ochoa gave it to him.⁵ (Tr. 126.) Burns saw it in September or
2 October. (Tr. 203.) On the other hand, as set out above, the parties stipulated that the Rabinowitz
3 Letter was sent to the drivers on or about January 7, 2009. (Un. Exh. 1; Tr. 196-97.) Every driver
4 who testified stated that by then, they understood that the case was taken by the attorneys on a
5 contingent fee basis, as the letter explains. (E.g., Tr. 116 (Joel Ochoa), 201 (Burns), 210 (Rivera).)
6 Accordingly, any harm that may have been caused by Exhibit 6 before the Critical Period was
7 entirely corrected during the Critical Period, and therefore is not grounds for overturning the
8 Election.

9 **D. There was no material connection between the Union and the wage and hour**
10 **lawsuit.**

11 Not only did the Union not offer to pay the wage and hour plaintiffs' attorney's fees, no
12 evidence shows that they had any material involvement in the lawsuit at all. At most, the Union
13 referred employees to attorneys and collected some signed retainer agreements from them. Again,
14 unlike in *Freund*, 165 F.3d at 932, there is no evidence that the Union sought to link itself to the
15 lawsuit. As Union representative Barton testified, "I gave workers [the attorneys'] name and number,
16 because they had not been paid [by the Employer]. They had said they had not been paid for breaks
17 and meal periods. I have several lawyers that when that comes up, which it typically does, I refer
18 workers to. . . . [T]hey're one of three firms I would refer them to, including one who is just an
19 independent person." (Tr. 47.) As Barton explained, "[t]here was such a large amount of issues that
20 I personally couldn't handle as an organizer, that I said just go talk to the lawyers because there's a
21 lot of issues I don't know how to deal with." (Tr. 50.)

22 The drivers confirmed that the Union had no material involvement in the lawsuit beyond
23 referring the attorneys. For example, at meetings where the lawsuit was discussed, the Union was
24 not. At the "first meeting" where the lawsuit was discussed, Joel Ochoa testified that there was no
25 discussion about the Union: "No, not at the time, it wasn't about joining the Union. That specific day
26 was for this agreement and this agreement alone, it wasn't—not that I know of. Maybe some guys
27 had questions which I don't remember about, questions that come up about the Union and non-Union

28 _____
⁵ Joel and Jose Ochoa are not related. (Tr. 91.)

1 stuff but, I don't remember saying join the Union and sign this, no." (Tr. 98.) In fact, Ochoa was not
2 even aware if a Union representative was present at the meeting. (Tr. 98.) No driver testified that he
3 received any information about the lawsuit, such as Exhibit 6, from the Union. Barton testified that
4 she did not know how the drivers obtained it. (Tr. 50.) Joel Ochoa testified that he received a
5 retainer agreement from his attorney. (Tr. 73.) Benjamin Hernandez, Santos Gonzalez, and Jose
6 Ochoa received the agreement from Joel Ochoa. (Tr. 74.) Hernandez said he also got Spanish
7 translation of agreement from attorneys, who explained what it said. (Tr. 156-57.) Rivera testified
8 that he received the agreement in the mail from his attorneys. (Tr. 212.)

9 Joel Ochoa testified that any communication with the Union regarding the lawsuit was
10 extremely limited. (Tr. 102.) Both Burns and Rivera testified that Barton never spoke to them about
11 the lawsuit. (Tr. 203 (Burns), 216-17 (Rivera).) Hernandez testified that he never spoke with the
12 Union about the lawsuit. (Tr. 158.) In fact, under vigorous questioning from the Employer's
13 counsel, Hernandez maintained that in an entire day of questioning from his supervisor about the
14 lawsuit, the Union campaign did not come up. (Tr. 154-55.) The drivers also testified that they
15 returned the signed agreement to their attorneys, not the Union. Joel Ochoa misunderstood the
16 questions on cross examination about to whom he gave his signed retainer agreement. (Tr. 78-79.)
17 Although Jose Ochoa testified, without foundation, that Joel Ochoa said he was "going to turn them
18 into some lady for the Union" (Tr. 127), Joel testified that he in fact gave his agreement to the
19 attorneys. (Tr. 79.)

20 **E. The ALJ correctly determined that no drivers were promised money from the**
21 **wage and hour lawsuit.**

22 The ALJ correctly determined that no employees were promised money from the wage and
23 hour lawsuit. Of course, compensation is possible from any lawsuit, but the drivers testified
24 uniformly that they were not told by the Union or the attorneys that they would receive money from
25 the case. Under examination from the Employer's counsel, Joel Ochoa testified that "I didn't hear no
26 numbers. I heard some of the guys ask the question of how much but, I didn't hear no numbers from
27 [the attorneys], or from Mrs. Barton thrown out or discussed. I heard the questions but there was no
28

1 promise of numbers or any sort of thing like that.” (Tr. 81; *see also* 101.) The Employer’s counsel
2 pressed Ochoa, who responded:

3 Yes, I did sign up not expecting money. The main purpose was this, to
4 get the employer’s attention and basically this is the kind of character
5 that I am, money to me, like I said, I’m not an eager person but, it was
6 more about the principle of it all when we were, like I expressed earlier,
7 that a lot of the drivers were not taking their lunches or sacrificing their
8 lunches and mealtimes. And during meetings we were pushed to
9 continue to stop overtime and stuff like that in that sense, and we were
10 doing everything possible already, as you can see we were sacrificing
11 our meal times and breaks and we weren’t acknowledged for that, we
12 kept getting pushed. So, to me the reason I joined that lawsuit was
13 more the principle of getting that attention recognized that we were
14 getting from the company, and it wasn’t about money for me.

15 (Tr. 102-03.) Jose Ochoa testified that Joel told him that the drivers could get money from the
16 lawsuit, and that Gonzalez told him the drivers could get “between ten and twelve thousand dollars.”
17 (Tr. 129.) However, both Gonzalez (Tr. 183) and Joel Ochoa denied this version of events. Joel
18 stated that in his conversation about the lawsuit with Jose, “[w]hat I mentioned was our rights for the
19 meal time and breaks, no time, it was never about money and never to any driver have I ever
20 mentioned money. I stand on my character which I m not eager about money, and I stand strong and
21 firmly in what I believe and what I am, and I never mentioned money whatsoever. I did explain to
22 him about the meal times and breaks.” (Tr. 139.) Similarly, Rivera testified that the drivers did not
23 talk about the amount of money they were likely to get from the lawsuit. (Tr. 218.) And Barton
24 confirmed the drivers’ testimony that the Union never told the drivers that they would get money
25 from the lawsuit. (Tr. 67.) For these reasons, the Board should overrule the Employer’s exception to
26 this ALJ finding.

27 **III. The ALJ properly declined to consider the irrelevant allegation that the Union sought to**
28 **settle the lawsuit in exchange for a bargaining advantage.**

The ALJ properly excluded most evidence of, and declined to consider, allegations that the
Union sought to settle the lawsuit in exchange for a neutrality agreement. As set out below, the
Employer failed to establish that the Union did so. In any case, the ALJ correctly found that this
allegation did not relate to the objection that was before him, but rather to one that had been
dismissed by the Region. Finally, regardless, it would not be objectionable conduct under the Act for

1 the Union to attempt to settle the lawsuit, as doing so would not impermissibly confer any benefit on
2 the employees.

3 The Employer spent much of the hearing, and much of their brief in support of their
4 Exceptions, discussing evidence regarding a meeting on December 22, 2008 at the Employer's
5 premises in which the Union allegedly offered to settle the wage and hour lawsuit in exchange for a
6 neutrality agreement. The ALJ properly declined to consider such evidence, because it was
7 immaterial to the Objection before him, which was that the Union conferred a benefit on the
8 electorate by supporting the lawsuit. Rather, this allegation related directly to Objection No. 4, which
9 the Region dismissed before the hearing. *See* Supplemental Decision and Notice of Hearing at 5.
10 Objection No. 4 alleged:

11 4. Using this lawsuit as leverage, before the election the Union, not
12 plaintiffs to the federal lawsuit, offered to make the lawsuit "go away" in
13 exchange for Stericycle's agreement to sign a statewide neutrality
agreement.

14 The Employer could have, but did not, appeal the dismissal of Objection No. 4.⁶ Therefore,
15 this allegation was simply not before the ALJ, who therefore properly declined to consider it.

16 The Judge permitted evidence regarding what was told to voting employees regarding this
17 incident, none of which demonstrated objectionable conduct. Joel Ochoa testified that when he found
18 out about the alleged offer, "[m]y reaction was I just wanted to find out if it was absolutely true if she
19 did or not, so I wanted a yes or no answer, simple yes or simple no. . . . I was told that it wasn't, and
20 I was told it was, so that the company said that they did and Ms. Barton says that they didn't, so it
21 was a yes and no." (Tr. 87.) No other driver testified that they heard about anything about the
22 meeting.

23 As far as the Union's use of the lawsuit as leverage, Joel Ochoa was told that the lawsuit
24 would be used as leverage in collective bargaining: "As a group we were told that, it wasn't just
25 directed to me, it was in a group meeting, I don't know if you would call it a leverage to negotiate for
26 when the negotiations started for the Union. And we all heard it, it wasn't just directed to me
27

28 ⁶ The Supplemental Decision dismissing Objection No. 5 advised the parties of their right to appeal
the decision no later than March 16, 2009. The Employer did not appeal.

1 individual, it was directed to us as a group.” (Tr. 105.) His meaning was clarified by the Judge: “All
2 right. Was she saying that the lawsuit could be used as leverage in collective bargaining? A That’s
3 what I understood.” (Tr. 112.)

4 In any event, even if the Employer is correct that the Union sought to use the lawsuit as
5 leverage to gain union recognition, such conduct could not logically be considered objectionable
6 conduct. The only benefit the Union would be conferring on the workers through such a course of
7 conduct would be Union recognition. This is, of course, unobjectionable; everything the Union does
8 during an NLRB-supervised election campaign is directed at conferring on the employees the benefit
9 of Union representation.

10 Moreover, the Employer’s reasoning not only proves too much, it is circular. Under the
11 Employer’s reasoning, the Union induced the voters to vote in favor of Union representation by
12 conferring upon them the “benefit” of a lawsuit aimed at gaining Union representation. But, of
13 course, any employee who considers Union representation to be a benefit will already be voting for
14 the Union, and his vote would therefore be unaffected by the Union’s use of a lawsuit to attain the
15 same result. By the same token, an employee who opposes Union representation and is therefore
16 inclined to vote against the Union, would not consider a lawsuit aimed at attaining such
17 representation to be a “benefit” that would cause him to vote in favor of Union representation.

18 In sum, the ALJ correctly declined to consider the Employer’s claim that the Election should
19 be overturned because the Union offered to settle the wage and hour lawsuit. The Regional Director
20 dismissed the objection on this ground, there is no credible evidence that the Union did offer to settle
21 the case along the lines alleged, and, in any case, doing so would not constitute objectionable
22 conduct.

23 **IV. The ALJ Correctly Quashed the Subpoena of Union Counsel to Testify, on the Grounds**
24 **of Attorney-Client Privilege.**

25 Prior to the hearing, the Employer subpoenaed Union counsel to testify regarding discussions
26 they may have had with the Union and the employees regarding the lawsuit. The ALJ correctly
27 granted the Union’s Petition to Revoke the subpoena, holding that these communications were
28 privileged. (Tr. 12-13.) The Employer excepts to this holding on the grounds that (1) the privilege

1 was waived by the presence of the Union Representative at the attorney-client meetings; and (2) the
2 privilege was waived by the introduction into evidence of the letters from counsel to the employees.
3 For the reasons set forth below, the privilege applied to the subpoenaed testimony, it was not waived,
4 and therefore the ALJ properly revoked the subpoena.

5 **A. The ALJ Correctly Found that Verbal Communication Between The Attorneys**
6 **for the Union and the Union or Plaintiffs Named in the Suit is Subject to the**
7 **Attorney-Client Privilege.**

- 8 1. Policy considerations of both common law and labor law require the
9 application of the attorney-client privilege in the case.

10 The Board applies federal common law to matters of privilege before the Board. *Patrick*
11 *Cudahy Inc.*, 288 NLRB 968, is the most thorough NLRB decision on the application of the attorney-
12 client privilege in the context of labor relations. That case also provides the clearest corollary to the
13 issues in this matter and its rationale provides a clear privilege in all relevant communications at
14 issue.

15 In *Cudahy* the attorney for the employer made statements to their client encouraging the
16 commission of an unfair labor practice. The Board overturned the administrative law judge, finding
17 that these statements were not protected by the privilege. Instead the Board held that the attorney's
18 statements, being in the course of their legal preparation for bargaining, were privileged. This
19 privilege was broad enough to apply despite *Cudahy's* use of the attorney for related, but non-case
20 specific matters.

21 The Board in *Cudahy* reasoned that "a matter committed to a professional legal adviser *is*
22 *prima facie so committed for the sake of the legal advice... for some aspect of the matter, and is*
23 *therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice."*
24 *Patrick Cudahy*, 288 NLRB at 970 (Internal citation omitted). The communications with attorneys in
25 this case were not merely committed to a professional but were made to attorneys whose sole purpose
26 was to provide legal advice to both the Respondent and relevant employees in direct contemplation of
27 a lawsuit.

28 Furthermore, any attempt by Petitioner to claim that other non-related legal matters would not
be subject to the privilege is directly contradicted by the Board's agreement with federal courts that

1 “the privilege of non-disclosure is not lost merely because relevant nonlegal considerations are
2 expressly stated in a communication which also include legal advice.” See *U.S. v. United Shoe*
3 *Machinery Corp.*, 89 F.Supp 357 (D.C.Mass 1950). See also *Jack Winter, Inc. v. Koratron Co.*,
4 54 F.R.D. 44, 47 (N.D.Cal. 1971) (privilege covers mixture of legal advice and aid in patent
5 registration); *Zenith Radio Corp. v. RCA*, 121 F.Supp. 792, 794 (D.C.Del. 1954) (communications
6 retain privilege even if attorney’s advice is only “predominantly legal”). As a result, the Attorney-
7 Client Privilege remains intact as the intent and actions of the attorneys involved serving each client
8 in matters of legal representation.

9 Moreover, the Board sees the protection of the Attorney-Client Privilege as integral to the
10 process of protecting labor law policy. In finding the Administrative Law Judge incorrectly limited
11 the scope of the privilege the Board stated that, “the process of collective bargaining invites the
12 contribution of legal advice at all of its stages and that a primary purpose for the law firm’s
13 employment... was to render legal advice throughout contract negotiations with the union.” *Patrick*
14 *Cudahy, supra*, 288 NLRB at 971. As in *Cudahy* the attorneys for Respondent were asked by the
15 Union to render legal advice at all stages of the organizing campaign and like the attorneys in *Cudahy*
16 were used expansively because of their “knowledge in a highly specialized area of law.” *Id.*
17 Specifically, because of the unique role legal advice plays in labor law the Board in *Cudahy*
18 adamantly held, “we will not readily and broadly exclude attorney-client communications from
19 privilege on the ground that business and other considerations are also present”. *Id.* Nor must it now
20 be found that the privilege is lost when communications between attorneys and clients include a
21 multitude of “predominantly legal” subject matters.

22 2. The presence of both Union personnel and plaintiff employees during the
23 communications did not waive the privilege.

24 The Employer incorrectly asserts that the presence of Union Representative Pilar Barton at the
25 meetings in question waived the attorney-client privilege. However, because the Union is also in an
26 attorney-client relationship with counsel, the “common interest” exception to the waiver rule applies,
27 and the privilege is maintained for all parties in this matter. This “common interest” exception is
28 described as “an extension of the attorney-client privilege”. See *Waller v. Financial Corp. of Am.*,

1 828 F.2d 579 (9th Cir. 1987). As an extension of the doctrine “It serves to protect the confidentiality
2 of communications passing from one party to the attorney to another party *where a joint effort or*
3 *strategy has been decided upon and undertaken by the parties and their respective counsel.*” (Italics
4 added) *U.S. v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997). The communications sought by
5 Petitioner in this matter are exactly the communications involving the joint legal effort and strategy
6 of the Union and the plaintiff employees. As the attorneys for the Respondent, the Union and the
7 plaintiff employees were involved in the joint legal effort of organization; it is exactly those
8 communications for which the common interest exception applies.

9 The application of this waiver “exception” must not be disregarded off-hand. In the case of
10 the common interest exception it is not the exception which proves the rule but legal precedent and
11 scholarship demonstrate it is the exception which is the rule. In *U.S. v. McParlin*, 595 F.2d 1321
12 (7th.Cir. 1979), the court cites the Federal Rules of Evidence Advisory Committee, approved by the
13 Supreme Court, in finding that “the privilege protects pooling of information for any defense purpose
14 common to the participating defendants” and that such cooperation “is often not only in their own
15 best interests but serves to expedite the trial or... the trial preparation.” *McParlin*, 595 F.2d at 1337.
16 The application of the privilege to common defendants with common interests has been recognized in
17 case law for over a century. See *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871)). In this
18 matter, the fact that a communication occurred while two or more clients with a common interest
19 were present, cannot constitute a waiver given that “Any such client may invoke the privilege, unless
20 it has been waived by the client who made the communication.” *In re Grand Jury Subpoena Duces*
21 *Tecum*, 112 F.3d 910, 922 (8th Cir. 1997). Consequently, all attorney communications in this matter,
22 regardless of the presence of multiple represented parties, are protected under the attorney-client
23 privilege.

24 **B. All Written Communications Created in Anticipation of Litigation and**
25 **Disseminated to the Union or Plaintiffs Named in the Suit is Subject to the Work-**
26 **Product Privilege and Must Remain Confidential.**

27 All documents created by and disseminated to any relevant parties in this matter are protected
28 under the work-product privilege. To qualify for the privilege a document must first be created in

1 “anticipation of litigation.” *In re Grand Jury Proceedings, Thursday Special Grand Jury*, 33 F.3d
2 342, 348 (4th Cir. 1994). All communications between the attorneys and their clients at issue here
3 were directly in anticipation of potential litigation. Once that threshold is met one of two separate
4 theories of work-product are applied.

5 First, “fact work-product” is work that is created in litigation which does not contain the
6 mental impressions of an attorney. This level of work-product receives strong but not complete
7 privilege as it is discoverable only, “upon a showing of both substantial need and an inability to
8 secure the substantial equivalent of the materials by alternate means without undue hardship”. *In re*
9 *Allen*, 106 F.3d 582, 607 (4th Cir. 1997). Thus, even if the requested work-product included only
10 factual information, the Petitioner carries the burden of demonstrating that the information within
11 those legal communications is factual, needed and unavailable through other means.

12 Second, “opinion work-product” includes documents that contain “mental impressions,
13 conclusions, opinions or legal theories... concerning litigation.” *Accord National Union Fire Ins. v.*
14 *Murray Sheet Metal*, 967 F.2d 980, 984 (4th Cir. 1992). Work-product involving legal strategy, the
15 same kind as in this matter, enjoys “absolute immunity from discovery” as a failure to protect it
16 would have a severe effect on both the clients and the adversary system. *Id.* This applies with equal
17 force, in the labor law context, to documents created in anticipation of litigation. “The full range of
18 topics and events that may arise... Other documents... generated in this frame work, giving attorneys
19 needed information about the client’s circumstances and aims.” *Patrick Cudahy, supra*, 288 NLRB
20 at 971 (the Board holding that documents sought, covered by the privilege in the case of “both
21 communications which provided that advice and the communications that flowed from the client to
22 attorney as a basis for generating the advice.)

23 In applying privilege doctrine to this exact set of circumstances the Board gave an expansive
24 reading to the protections of the work-product privilege. See *Berbiglia, Inc.*, 233 NLRB 1476, 1495
25 (1977) (holding were an employer’s subpoena for union of records of employee meetings [during
26 labor activities]: “If collective bargaining is to work, the parties must be able to formulate their
27 positions and devise their strategies without fear of exposure.”) Wanting to protect the fundamentals
28 of labor policy, the Board read the privilege doctrine expansively as to allow open and frank

1 communication between attorneys and their clients in the full range of topics covered in
2 representation matters.

3 If any doubt about the application of the privilege to the relevant documents still remains, the
4 federal courts in this district conclude, “where attorney-client privilege is concerned, hard cases
5 should be resolved in favor of the privilege, not in favor of disclosure.” *U.S. v. Mett*, 178 F.3d 1058,
6 1065 (9th Cir. 1999).

7 **C. The Attorney Subpoenas Served in this Matter Were Properly Revoked.**

8 Attorneys Jason Rabinowitz and Zachary Leeds represented both the Respondent, Teamsters
9 Local 70 and the employee Plaintiffs at issue in this matter. The Petitioner subpoenaed both
10 individuals to appear before the Board. Board rules allow a party served with a subpoena to petition
11 in writing for revocation of the subpoena within five days of its service. *Board Rules and*
12 *Regulations*, Section 102.31(b). An Administrative Law Judge “shall” revoke the subpoena for any
13 of three reasons: (1) the evidence whose production is required does not relate to any matter under
14 investigation or in question in the proceedings; (2) the subpoena does not describe with sufficient
15 particularity the evidence whose production is required; or (3) for any other reason sufficient in law
16 the subpoena is otherwise invalid. *Id.* As Petitioner’s subpoenas fail all three categories the
17 Administrative Law Judge should have revoked the subpoenas to appear for both Mr. Rabinowitz and
18 Mr. Leeds.

19 In both cases the subpoena for the appearance contains no explanation of the purpose or the
20 information sought from either Mr. Rabinowitz’s or Mr. Leeds’ appearances. This lack of
21 explanation causes the subpoenas to be inadequate for the first two policies listed as reasons for
22 revocation. Primarily, having not sufficiently described the evidence which is sought, Respondents
23 have no way to tell whether the production will relate to any matter under investigation or is simply a
24 fishing expedition disguised as Board procedure. Likewise, without any information from the
25 Petitioner as to the purpose of the subpoenas Respondent can also not conclude whether the
26 information sought is “reasonably relevant” as is required by the Board Rules and Board precedent.
27 See *Perdue Farms*, 32 NLRB 345, 348 (1997). This lack of information provides an Administrative
28 Law Judge justification to revoke the petition for two reasons.

1 In addition, when the subpoenaed information is subject to a privilege the Board follows an
2 even more stringent standard in protecting the material. The NLRB follows Supreme Court
3 precedent when deciding matters of privilege subject to subpoena. In that case the Board finds the
4 relevant inquiry to be whether the subpoenaed material discloses a communication made in
5 confidence to an attorney for the purposes of seeking legal advice. See *Patrick Cudahy, Inc., supra*,
6 288 NLRB at 969-71 (finding that the complexities of the labor law create an analogous need for
7 broad protections as in *Upjohn Corp. v. U.S.*, 449 U.S. 383, 389-393 (1981) which held in a vast and
8 complicated regulatory area the privilege should be broad because “an uncertain privilege... [or]
9 results in widely varying application by the courts, is little better than no privilege at all.”) As
10 demonstrated above, all communications by clients of both attorney Rabinowitz and attorney Leeds
11 were made in the pursuit of legal advice. Therefore, the attorney-client privilege as well as the work-
12 product privilege apply in this matter, and the subpoenas are invalid for a reasons sufficient in law
13 and must be revoked.

14 The privilege in communication attorneys have with their clients is a bedrock of our
15 adversarial system. As the Board stated in *Cudahy*, the most analogous decision to the matter at
16 hand, the reasons for denying the privilege, “must be weighed, however, against the countervailing
17 policy reasons underpinning the privilege itself and the policy consideration of fostering collective
18 bargaining by protecting the seeking of advice and the uninhibited exchange of ideas in that context.”
19 *Patrick Cudahy, supra*, 288 NLRB at 973. For the sake of labor law policy this calculus must
20 necessarily tip the scales in favor of protection of the privilege. As without it lawyers will not be able
21 to help their clients navigate the complexities of labor relations with the candor and expertise
22 required and needed to produce what the Supreme Court in *Upjohn* stated as “sound and informed
23 advice.” *Upjohn, supra*, 449 U.S. 383. Therefore, the ALJ properly revoked the subpoenas for both
24 attorneys and the exclusion of all communications and documents made by the attorneys to their
25 clients in consultation and for the purpose of legal advice.

26 **D. The Union’s Introduction of the Letter to Employees did not Waive the Privilege.**

27 After the Union introduced the Rabinowitz Letter to the employees regarding the lawsuit
28 (Union Exh. 1), the ALJ permitted the Employer to call Rabinowitz as a witness, over the Union’s

1 objection, finding that the privilege had been waived as to the circumstances surrounding the letter.
2 (Tr. 220.) The Company now asserts that the submission of the letter waived the privilege as to all
3 communications between counsel and his clients. However, the Company never sought to admit, and
4 the ALJ never prevented them from admitting, such evidence while Rabinowitz was on the stand.
5 (Tr. 221-23.) Therefore, the Company cannot point to an evidentiary decision of the ALJ to which
6 they object. Additionally, the Company's assertion that Counsel waived the privilege with respect to
7 all communications by submitting the single letter into evidence is incorrect. At most, as the ALJ
8 determined, the privilege was waived as to the letter itself.

9 **V. The Employer's spurious allegations that Union counsel violated rules of professional**
10 **responsibility are well outside the scope of these proceedings and should be ignored.**

11 The Employer dedicates many pages of its brief to the scandalous and entirely meritless
12 assertions that Union counsel violated various rules of ethics. These allegations are unrelated to the
13 Objection before the ALJ, and therefore outside the scope of this proceeding. Indeed, the allegations
14 are well outside the jurisdiction of the Board. *See*, generally, National Labor Relations Act,
15 29 U.S.C. 151 *et. seq.* The Board should, therefore, disregard them.

16 **CONCLUSION**

17 For the reasons set out above, the Board should Adopt the ALJ's Report on Objections and
18 Recommendations, overrule the Employer's Exceptions, and certify the employees' vote.

19 Dated: June 3, 2009

BEESON, TAYER & BODINE, APC

20
21 By: /s/ Jason Rabinowitz

JASON RABINOWITZ

22 Attorneys for the TEAMSTERS LOCAL 70
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3
4 I declare that I am employed in the County of Alameda, State of California. I am over the age
5 of eighteen (18) years and not a party to the within cause. My business address is 1404 Franklin
6 Street, 5th Floor, Oakland, CA 94612-3208. On this day, I served the foregoing Document(s):

7 **PETITIONER’S ELECTION OBJECTION POST-HEARING BRIEF**

8 **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil
9 Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area
10 for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that
11 designated area is given the correct amount of postage and is deposited that same day, in the ordinary
12 course of business in a United States mailbox in the City of Oakland, California.

13 **By Personal Delivery** of a true copy thereof, to the parties in said action, as addressed
14 below in accordance with Code of Civil Procedure §1011.

15 Alan B. Reichard
16 NLRB Region 32
17 1301 Clay Street, Room 300N
18 Oakland, CA 94612-5211

19 **By Overnight Delivery** to the parties in said action, as addressed below, in accordance
20 with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a
21 sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail.
22 Mail placed in that designated area is picked up that same day, in the ordinary course of business for
23 delivery the following day via United Parcel Service Overnight Delivery.

24 Arch Y. Stokes, Esq.
25 Shea Stokes Roberts & Wagner
26 510 Market Street, 3rd Floor
27 San Diego, CA 92101

28 Bruno Katz
Shea Stokes Roberts & Wagner
510 Market Street, Third Floor
San Diego, CA 92101-7025

By Facsimile Transmission to the parties in said action, as addressed below, in accordance
with Code of Civil Procedure §1013(e).

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland,
California, on this date, June 3, 2009.

/s/ Korin M. Becraft
Korin M. Becraft