# No. 09-60843

## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

**TEXAS DENTAL ASSOCIATION**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument may be helpful to the Court in this case, and suggests that 15 minutes per side would be sufficient.

## TABLE OF CONTENTS

**Headings** **Page(s)**

**Headings-Cont'd** **Page(s)**

**Headings-Cont'd** **Page(s)**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Cases — Cont'd** **Page(s)**

**Cases — Cont'd** **Page(s)**

**Cases — Cont'd** **Page(s)**

**Cases — Cont'd** **Page(s)**

**Cases — Cont'd** **Page(s)**

**Statutes**

**National Labor Relations Act, as amended**
(29 U.S.C. § 151 et seq.)

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF JURISDICTION

This case is before this Court on the petition of the Texas Dental Association ("the Association") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Decision and Order issued against the Association. The Board's Decision and Order issued on July 29, 2009, and is reported at 354 NLRB No. 57.

(D&O 1-14.)[1] The Board's Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). (D&O 1 n.1.)[2] The Association filed a combined motion for reconsideration and to reopen the record (Vol. III, pp. 524-55). The Board's Order issued on November 25, 2009, and reported at 354 NLRB No. 107, denied those motions (Vol. III, p. 564).

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[1] "D&O" references are to the Board's consecutively paginated decision, which incorporates the administrative law judge's decision. "Tr." refers to the transcript of the unfair labor practice hearing, contained in Volume I of the record. "GCX" refers to the General Counsel's exhibits, contained in Volume II. Pleadings filed with the Board are referred to by title and are contained in Volume III. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the issuance of decisions by the same two-member quorum. *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (Nov. 2, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On November 2, 2009, the United States Supreme Court granted a writ of certiorari on the issue in *New Process*, and argument was held on March 23, 2010. Before this Court, the issue was argued in *Bentonite Performance Minerals LLC v. NLRB*, No. 09-60034, and *NLRB v. Coastal Cargo Co*., No. 09-60156, on February 1, 2010, and briefed in *Oaktree Capital Management L.P. v. NLRB*, No. 09-60327.

The Board found that the Association violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq., 158(a)(1)) ("the Act") by discharging an employee for engaging in protected concerted activities, and by discharging a supervisor for refusing to engage in an unfair labor practice.

The Board had jurisdiction over this matter under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Association filed its petition for review on November 16, 2009. The Board in turn filed a cross-application for enforcement on December 23, 2009. Both the petition and cross-application were timely as the Act places no time limitation on these filings.

The Board submits that this Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), as the unfair labor practices occurred in Texas, within this circuit. The Board's Order is a final order within the meaning of Section 10(e) and (f) of the Act.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Association violated Section 8(a)(1) of the Act

by discharging employee Nathan Clark for engaging in concerted protected activity.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Association violated Section 8(a)(1) of the Act by discharging supervisor Barbara Jean Lockerman for refusing to engage in an unfair labor practice.

## STATEMENT OF THE CASE

In response to several unfair labor practice charges filed against the Association, the Board's General Counsel issued a consolidated complaint, later amended, alleging that the Association violated Section 8(a)(1) of the Act by: (1) discharging employee Nathan Clark for engaging in concerted protected activity; (2) discharging supervisor Barbara Jean Lockerman for refusing to engage in an unfair labor practice; and (3) interfering with Patricia St. Germain in the exercise of her Section 7 rights.

After a hearing, an administrative law judge found that the Association violated the Act by discharging Clark and Lockerman, and dismissed the allegation pertaining to St. Germain. After considering the exceptions filed by the parties, the Board issued its Decision and Order affirming the judge's rulings, findings, and conclusions, and adopting the

judge's recommended Order. Thereafter, the Association filed a motion for reconsideration and motion to reopen the record, which the Board denied.

## STATEMENT OF FACTS

## I. THE BOARD'S FINDINGS OF FACT

### A. Overview of the Association

The Association is a professional membership association that advocates on behalf of more than 7,700 dentists throughout Texas. (D&O 5; GCX 2A.) The membership is divided into numerous dental councils and committees, which elect delegates to the Association's House of Delegates. The delegates attend the Association's annual convention, referred to as the annual session, where they elect the Association's board of directors. (D&O 5; GCX 2A, 2B.)

The Association is closely affiliated with a for-profit entity, TDA Holdings, Inc., as well as a private foundation, the Texas Dental Association Smiles Foundation. (D&O 5; Tr. 22-23, GCX 3.) Together, they have a staff of about 30 employees at the Association's headquarters in Austin. (D&O 5; Tr. 21.) The Association's staff is divided into several departments, including Administration and Membership; Annual Sessions and Meeting Services; Communications; Ethics and Dental Benefit Services; Finance; and Legislative and Regulatory Affairs. (D&O 5; GCX 3.) The

Association's Executive Director, Mary Kay Linn, reports to the board of directors, manages the Association's staff, and oversees each department. (D&O 5; GCX 4A p.3.) Each department is led by a director who acts as the supervisor of that Department's employees. (D&O 5; GCX 3.)

### B. Association Employees Hold Several Meetings and Sign a Petition Expressing Concern About the Association

In late February 2006, the Association discharged Katherine Simms, Director of Ethics and Dental Benefit Services, after Simms broke off a personal relationship with another director. (D&O 5; Tr. 54-55, 125, 334.) Simms spoke about her discharge with Dr. Jay Baxley, Chairman of the Association's Ethics and Judicial Committee, who shared Simms' belief that Linn had terminated her for unfair reasons. (D&O 1 n.5, 5-6; Tr. 124-25.) [3] Dr. Baxley raised his concerns with other members of the Ethics and Judicial Committee, who agreed with his assessment. (D&O 6; Tr. 126.) The board of directors, however, told Dr. Baxley that Simms' discharge was not the concern of his committee. (D&O 6; Tr. 126-27.)

On March 21, Dr. Baxley sent an email about this matter to various members and employees of the Association. (D&O 6; Tr. 125-26, GCX 33.) Several employees anonymously responded to Dr. Baxley by email to share

[3] As discussed below (p. 38), Simms later retained counsel and entered into a settlement agreement with the Association, which included the payment of an unspecified amount of money.

their belief that Linn's decision to discharge Simms "was typical." (D&O 6; Tr. 128.) They informed Dr. Baxley that Linn would "squelch" matters she did not like by making things difficult for complaining employees or by terminating them. (D&O 6; Tr. 128.) These employees notified Dr. Baxley of various other complaints, including the unfair treatment of employees, deteriorating conditions at the Association's facility, and alleged financial improprieties at the Association. (D&O 6; Tr. 133-34, 162.)

After receiving Dr. Baxley's email, several employees began discussing their concerns with one another and decided to hold a meeting at a local restaurant. (D&O 1, 6; Tr. 156, 161-62.) About seven employees, including Nathan Clark and Patricia St. Germain, as well as two directors, attended that first meeting. (D&O 6; Tr. 156; 276.) Clark and St. Germain both worked in the Finance Department and were supervised by Director of Finance Laura Haufler. (D&O 5; Tr. 42; GCX 3.) In addition to the Simms discharge, the employees discussed the Association's decision to discharge maintenance worker Victor Sanchez in December 2005. (D&O 6; 157.) Clark also spoke about alleged financial improprieties and problems at the Association's facility, including pooling water in the parking lot, suspected mold, and a malfunctioning stairwell light. (D&O 6; Tr. 157-58.) One employee in attendance complained that she had been asked to remove hours

from her timecard. (D&O 6; Tr. 158.) Another asserted that she had been subjected to sexual harassment. (D&O 6; Tr. 158.)

In response to these complaints, St. Germain asserted that the employees must "stand as one and go address the person [Linn] that [they] want[ed] to get something across to." (D&O 6; Tr. 276.) Although St. Germain believed this would lead to a meeting with Linn, other employees did not want to confront Linn, fearing she would retaliate. (D&O 6; Tr. 276-77.) The employees instead decided to create and sign an employee petition outlining their concerns. (D&O 6; Tr. 156, 277.) They hoped to present this petition to the House of Delegates during the Association's May 2006 annual session. (D&O 6; Tr. 156, 207, 226, 277.) Thereafter, Clark drafted the petition on his home computer. (D&O 2 n.8, 7; Tr. 167-68.)

Five to six employees then attended a second meeting at the restaurant. (D&O 6; Tr. 204.) During that meeting they reviewed and signed "A Petition from Concerned Staff of the Texas Dental Association."[4]

[4] In its entirety, the petition stated the following:

> In order to better serve the membership of an organization for which we have gained great respect and affection, and born from a deep and sincere concern for the future of your association, we, the undersigned staff of the Texas Dental Association, are humbly requesting your assistance. In recent years, we have watched and been saddened as poor management, a dwindling morale, and a declining work ethic led by a few staff members has pervaded your central office in Austin. Many of us have tried on numerous attempts to correct these problems by bringing them to the attention of current management through use of the "proper channels." Unfortunately, our concerns have gone unanswered and we are now compelled to ask for your help. You are the stewards of the mission and ethical principles of the Texas Dental Association. You have been entrusted by the members of your districts with the power to oversee and effect change in an organization for which they pay not only with their finances, but also with their time and dedicated efforts. Certain staff members of your association are poorly serving the current membership in many respects. We seek not to point a finger at any individual member of the staff, but to voice our concern to an impartial outside source, free from any retaliation or repercussion. You will be surprised when you begin to hear specific examples of poor management, negligence, and unfair treatment that have occurred. Please help this brave member of your organization by ensuring that a resolution requiring that all of our voices are heard confidentially and treated with equal respect. Some may balk at talk of a "cover-up." The truth is—as it usually is—that there are two sides to every story you hear. Please make certain that you, the House of Delegates, are the recipients of <u>both</u> sides of the story by insisting on reviewing all information relevant to this investigation in a timely manner. Do not be deceived by staff members dismissing our concerns as the ramblings of disgruntled employees. We all care deeply about this association and believe it

Fearing retaliation but wishing to support the petition, the employees decided to sign using aliases. (D&O 6; Tr. 198, 204, 206, 226, GCX 8.) Eleven Association employees ultimately signed the petition. (D&O 6; Tr. 198, 277-78, GCX 8.) St. Germain signed under the alias Feather7. (D&O 6; Tr. 277.) Teresa Kim signed under the alias Spartacus. (D&O 6; Tr. 206.)

Clark invited Barbara Lockerman to attend this meeting. (D&O 2, 6; Tr. 222.) Lockerman was the General Manager – a director level position and a statutory supervisor – of TDA Financial Services, a department within TDA Holdings, Inc. (D&O 1; GCX 3.) She accepted the invitation and, on

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> can be a wonderful place to work. Please do not wait for another year to pass before acting on this urgent matter. Those signing below are permanent, full time employees who seek to shed light on the reality of the current situation at the TDA central office. We represent many different departments and all levels of the current organizational hierarchy at the Texas Dental Association. In fairness to their situations, we have not asked new or temporary employees to join us in signing. We sign anonymously for fear of retaliation and not because we do not truly believe in this cause. Many of us are willing to do more, if necessary, to prove that we represent a real and large portion of concerned staff members. Your current president has made a habit of saying: "We cannot become what we need to be by remaining what we are." This was never truer than today for the staff of your beloved Texas Dental Association. Please help us make your Texas Dental Association what it needs to be—a better, fairer, and more ethical place to work—so that it can work better for you.
>
> We sign by typing our alias below in optimism and sincere hope. [D&O 6-7; GCX 8.]

her way to the restaurant, contacted Dr. David May, the president of the Department of Financial Services. (D&O 2, 6; Tr. 223, 317.) Lockerman explained that the employees were holding a meeting and planned to submit something anonymously to the House of Delegates. (D&O 6; Tr. 324.) She also informed him that she did not know what the employees planned to discuss at the meeting and she questioned whether the meeting could take place. (D&O 6; Tr. 224, 324.) Dr. May responded, "Barbara, they'll be fired." (D&O 2, 6; Tr. 224.) Nevertheless, Lockerman attended a portion of the meeting, arriving after the meeting began and leaving before it ended. (D&O 2, 6; Tr. 222, 225.) Lockerman did not sign the petition. (D&O 6; Tr. 227-28.)

About one week later, Finance Director Haufler asked Lockerman to talk Clark "out of these activities, because . . . [Clark] would be fired." (D&O 2, 6; Tr. 229, 249-50.) Lockerman explained she could not do that because Clark was his own person. (D&O 2, 6; Tr. 249-50.) Lockerman had no further involvement in the employees' activities. (D&O 7.)

### C. Prevented From Presenting the Petition to the Association's House of Delegates, the Employees Send the Petition to the Board of Directors

After the second employee meeting, Clark drafted a resolution calling for the appointment of "an impartial and outside source to investigate all

matters pertaining to the management of the TDA staff." (D&O 6; Tr. 156, GCX 34.) Clark anonymously sent the resolution, and later the employee petition, to Dr. Baxley, who was a member of the House of Delegates, understanding that Dr. Baxley would present both to the House of Delegates at the Association's May 2006 annual session. (D&O 2, 6; Tr. 130, 162.)

At the annual session, the speaker of the House of Delegates permitted Dr. Baxley to read the resolution, which the delegates elected not to consider, but refused his request to read aloud the petition. (D&O 2, 7; Tr. 60-61, 130-31.) Thereafter, Clark anonymously emailed the petition to the board of directors. (D&O 1, 7; Tr. 167, 198.)

Executive Director Linn witnessed the events at the annual session. (D&O 7; Tr. 59-61.) She later read the employee petition and learned that someone emailed the petition to the board of directors anonymously. (D&O 7; Tr. 57, 348-49.) Linn believed the petition was from "some very disgruntled employees who ha[d] some issues but who [were] not being specific and who [had] not gone through the specific channels." (D&O 9; Tr. 58.)

### D. Executive Director Linn Launches an Investigation To Determine Who Was Involved in the Petition and the Anonymous Emails, and Afterwards Terminates Clark and Lockerman

On May 17, the first day after the staff returned to the office following the annual session, Linn held a staff meeting with all employees and management. (D&O 2, 7; Tr. 52, 65.) She directed anyone who had participated in "these anonymous communications" to come forward and meet with her as a condition of their employment. (D&O 2, 7; Tr. 51-52, 65, 84, 209, 230.) As the employees left this meeting, St. Germain observed several employees making zipper motions across their mouths. (D&O 2, 7, 10; Tr. 279.)

Later that day, Linn reiterated this directive in the following email to staff:

> Just to reiterate what I said at today's staff meeting regarding the anonymous communications—
>
> By now I am sure that each of you knows what took place on the House Floor on Thursday with Dr. Baxley and the reaction of the House of Delegates regarding the anonymous communication. We have now had another anonymous communication that was sent to the Board of Directors.
>
> **In order to allow one more opportunity to discuss any concerns within appropriate channels, I expect that anyone who has participated in anyway [sic] in these anonymous communications to call or e-mail me by the end of this week to schedule an appointment with me on an individual basis.** I will be traveling over the next few days so call me on my cell phone . . . or e-mail me . . . .

> **This is a requirement of your employment & this is a matter we intend to resolve.** [D&O 2, 7; GCX 9 (emphasis in original).]

None of the involved employees came forward. (D&O 5; Tr. 52.) Lockerman also did not come forward because she feared that anyone involved would be fired. (D&O 3; Tr. 231.)

The following day, St. Germain anonymously wrote to Dr. Tommy Harrison, the president of the Association, and to President-Elect Dr. May, expressing dismay over Linn's directive. (D&O 7; Tr. 67, 279-80, GCX 10.) St. Germain stressed that the Association's decision to discharge Simms was only one of many issues that employees were concerned about. (D&O 7; GCX 10.) For instance, she noted that a receptionist for the Association had resigned because, after she had complained that she had too many duties, she felt that Linn tried to build a case against her. (D&O 7; GCX 10.)

On May 19, the Association's legal counsel, William Bingham, sent the employee petition to Andrew Rosen, a forensic scientist specializing in computer storage devices and file systems. (D&O 7; Tr. 27, 71-72, GCX 11 ¶ 5.) At Linn's direction, and with approval from the board of directors, Bingham had hired Rosen to examine the computer hard drives of five staff members whom Linn suspected were involved in the petition and anonymous emails. (D&O 2, 7; Tr. 50, 64, 353.) Linn identified two

employees, Clark and St. Germain, as well as three directors, including Lockerman, as suspects. (D&O 7; Tr. 50-51, 70, GCX 11.)

In August, Linn received a report from forensic scientist Rosen summarizing his findings. (D&O 2 n.8, 8; Tr. 69, GCX 11.) Rosen had discovered a fragment of the petition text on Clark's computer. (D&O 2 n.8, 8; Tr. 69, 72, GCX 11.) Rosen did not make findings about any other employees' hard drives that he examined. (D&O 8; Tr. 72, GCX 11.) Linn discharged Clark on August 17. (D&O 2 n.8, 8; Tr. 44, GCX 7.)

Meanwhile, on August 15, Linn had received from Sandy Blum, the Association's Director of Annual Session and Meeting Services, a letter stating that Lockerman had come to her and had denied any involvement in the employee petition. (D&O 2, 7; GCX 18.) Lockerman also acknowledged that she had tried to discourage some staff members from this activity. (D&O 2, 7; GCX 18.) Blum had reported this to Linn in person in mid-July, at which time Linn asked her to reduce it to writing. (D&O 2, 7; Tr. 87-88, GCX 18.) The Association's Director of Public Affairs, Jenny Young, had previously informed Linn that Lockerman admitted she had known about the employee petition and that she had advised the employees involved in it to "take a different route." (D&O 2, 7; GCX 17.)

On August 17, two days later after receiving this statement from Blum, and the same day she discharged Clark, Linn discharged Lockerman for failing to discuss with Linn what she knew about the employee petition. (D&O 2, 8; Tr. 83, GCX 16.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On July 29, 2009, the Board (Chairman Liebman and Member Schaumber), in agreement with the administrative law judge, found that the petition and communications anonymously sent by Clark, and his subsequent decision to ignore Linn's directive that the employees involved in the anonymous actions meet with her, constituted concerted protected activity. By discharging Clark for engaging in this activity, the Association violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (D&O 1, 10.)

The Board, also in agreement with the administrative law judge, found that Lockerman had refused to participate in the Association's "reasonably evident quest to identify and terminate employees involved in concerted protected activity." (D&O 3.) By discharging Lockerman based on that refusal, the Association violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (D&O 1, 3, 10.)

The Board's Order requires the Association to cease and desist from discharging employees for engaging in concerted protected activity, and

from discharging supervisors for refusing to engage in unfair labor practices. (D&O 1, 5, 13.) Affirmatively, the Board's Order requires the Association to reinstate Clark and Lockerman to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, make each whole for any loss of earnings and benefits they may have suffered, remove from its files any reference to their discharges, and post a remedial notice. (D&O 13.)

The Association filed a combined motion for reconsideration and to reopen the record to allow the Association to present evidence that the Board's Order would impose an undue burden on the Association. The Board denied the motion for reconsideration, finding that the Association failed to specify any extraordinary circumstance or identify any material error in the Board's decision, as required by the Board's Rules and Regulations. 354 NLRB No. 107. The Board also denied the motion to reopen the record, explaining that the Association would have the opportunity to present such argument, and submit previously unavailable evidence in support thereof, at the compliance stage of the Board proceeding. *Id.*

## SUMMARY OF ARGUMENT

When a number of Association employees met together and shared their common concerns about poor management, negligence, and unfair treatment that had occurred at the Association, they created and signed a petition they hoped would improve their working conditions and allow them to better serve the Association's membership. As agreed by those employees, Clark anonymously emailed the petition, and a related resolution, to Dr. Baxley, Chairman of the Association's Ethics and Judicial Committee. When Dr. Baxley's efforts to read the petition and introduce the resolution to the Association's legislative body – the House of Delegates – failed, Clark emailed the petition to the Association's board of directors.

Executive Director Linn responded swiftly to the employees' Section 7 activities. She immediately met with staff and directed that all involved employees meet with her on an individual basis as a condition of their employment. No one did. She also hired a forensic scientist to examine the computer hard drives of employees whom she suspected were involved. When that examination revealed a fragment of the petition on Clark's hard drive, Linn discharged Clark. Based on substantial evidence, the Board found that Clark and his colleagues had engaged in a concerted effort to improve the terms and conditions of their employment, and had further acted

together in refusing to meet with Linn, both of which were protected under the Act. By discharging him for these activities, the Association violated Section 8(a)(1) of the Act.

Prior to the second employee meeting, Clark had invited supervisor Lockerman to attend the meeting. Lockerman did so, but did not sign the petition, and had no further involvement in the employees' activities. Having been warned by other members of management that the employees would lose their job based on their actions, Lockerman held a reasonable belief that if she met with Linn as directed, Linn would expect her to identify employees involved in the petition so that Linn could terminate those employees. As a result, she did not meet with Linn. When Linn later learned that Lockerman had failed to discuss with her what she knew about the employees' activities, Linn terminated Lockerman. Because Lockerman could not be compelled to participate in the Association's unlawful endeavor to identify and terminate employees engaged in concerted protected activity – an unfair labor practice – the Association violated Section 8(a)(1) by terminating her for that reason.

## ARGUMENT

### Standard of Review

In reviewing the Board's decisions, this Court's deference "extends to both the Board's findings of facts and its application of law." *California Gas Transport, Inc. v. NLRB*, 507 F.3d 847, 852 (5th Cir. 2007) (internal quotation omitted). Findings of fact are "conclusive," as specified by Section 10(e) of the Act (29 U.S.C. § 160(e)), if supported by substantial evidence on the record as a whole. *See, e.g., California Gas Transport, Inc.*, 507 F.3d at 852. Likewise, the Board's application of the law to the facts is reviewed under the substantial evidence standard. *Tellepsen Pipeline Serv. Co. v. NLRB*, 320 F.3d 554, 559 (5th Cir. 2003). Under the substantial evidence test, so long as a reasonable person could have made such findings, the decision must be upheld, even if a reviewing court might have reached a different conclusion *de novo*. *Id.* And so long as the Board's construction of the Act is reasonably defensible, it should not be rejected "merely because the courts might prefer another view of the statute." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

Credibility determinations are "peculiarly within the province of the trial examiner and the National Labor Relations Board and are entitled to affirmance unless inherently unreasonable or self-contradictory." *Central*

*Freight Lines, Inc. v. NLRB,* 666 F.2d 238, 239 (5th Cir.1982); *see also NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007). Finally, the Court "defer[s] to plausible inferences [the ALJ] drew from the evidence, even though [the court] might reach a contrary result were [it] deciding this case *de novo.*" *Blue Circle Cement Co. v. NLRB*, 41 F.3d 203, 211 (5th Cir. 1994) (internal quotation omitted).

## I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE ASSOCIATION VIOLATED SECTION 8(a)(1) OF THE ACT WHEN IT DISCHARGED CLARK FOR HIS INVOLVEMENT IN THE EMPLOYEE PETITION AND FOR FAILING TO RESPOND TO EXECUTIVE DIRECTOR LINN'S DIRECTIVE THAT EMPLOYEES WHO WERE INVOLVED MEET WITH HER

### A. It Is Unlawful for an Employer To Discharge an Employee for Engaging in Concerted Protected Activity

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[5] This protection applies

[5] Section 7 states, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

equally to nonunion and union employees. *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 639 (5th Cir. 1986). Indeed, the Supreme Court has indicated that the broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must "speak for themselves as best they [can]." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

An employee's Section 7 rights are protected by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." An employer thus violates Section 8(a)(1) of the Act by discharging employees for engaging in concerted protected activity. *See Washington Aluminum Co.*, 370 U.S. at 17-18; *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 835-36 (5th Cir. 1991). A violation may be established even in the absence of evidence that the employer is motivated by animus, as long as the concerted protected activities for which the employee was discharged "are lawful and the character of the conduct is not indefensible in its context." *Reef Indus., Inc.*, 952 F.2d at 835.

Analytically, this Court has explained that an employer violates Section 8(a)(1) where it is established that (1) an employee has engaged in concerted activity; (2) the employer knew of the concerted nature of the

employee's action; (3) the concerted action was protected under Section 7 of the Act; and (4) the employer's adverse action was because of, or motivated by, the concerted protected activity. *Reef Indus., Inc.*, 952 F.2d at 835; *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 640 (5th Cir. 1986).

Determining whether activity is both concerted and protected within the meaning of Section 7 is a task that "implicates [the Board's] expertise in labor relations" and is for "the Board to perform in the first instance . . . ." *NLRB v. City Disposal Sys.*, 465 U.S. 822, 829 (1984). This deference is appropriate given the breadth of cases that the Board confronts and the Board's recognized expertise in labor relations. *Id.* at 829-30 and n.7 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)).

As shown below, ample evidence supports the Board's finding that the Association violated Section 8(a)(1) by discharging Clark for engaging in concerted protected activity.

## B. Clark Engaged In Concerted Activity Protected by Section 7, Which the Association Had Knowledge of, and Which Motivated the Association To Discharge Him

### 1. Clark's activity was concerted

Although the Act does not define "concerted activity," this term "clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *Mobil Exploration &*

*Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) ("*Mobil Exploration*") (quoting *City Disposal,* 465 U.S. at 831). This Court has further explained that "an employee's activity is concerted if it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 835 (5th Cir. 1991).

There can be no question that Clark and his coworkers engaged in activity that was concerted. During the first of two employee meetings held at a local restaurant, a number of Association employees met to discuss a host of concerns related to their employment. While the Association's decision to discharge Director Simms served as the "catalyst" for this meeting (D&O 9), or as the Association now contends "the genesis" (Association's Brief ("Br.") 40), substantial evidence supports the Board's finding that the employees' concerns included "multiple issues and concerns unrelated to Simms." (D&O 9.)

During that first meeting, Clark discussed safety issues relating to the Association's headquarters, including pooling water in the parking lot, suspected mold in the building, and an unlit stairwell. (D&O 6; Tr. 157-58.) While the Association now contends that these complaints were Clark's alone (Br. 42-45), substantial evidence supports the Board's contrary

finding. (D&O 9.) For example, employee St. Germain also shared these concerns, having taken pictures of the pooling water, and having testified that "the condition of the building . . . was something that we were having a chronic problem with . . . since our maintenance man [Sanchez] had been fired." (D&O 9; Tr. 298-99, GCX 36.) These facts also refute the Association's unsupported assertion (Br. 42-45) that Clark only made "after-the-fact complaints" about the Association's building.

In addition to the building conditions, Clark and St. Germain expressed concern over the Association's unfair treatment of several former employees, including maintenance worker Sanchez and receptionist Rhonda Green. (D&O 9; Tr. 156-57, 299, GCX 10.) In this same vein, another employee complained that she was asked to remove hours from her timecard. (D&O 9; Tr. 158.) And another employee felt she had been sexually harassed. (D&O 9; Tr. 158.)

Galvanized by these common concerns but fearful that Executive Director Linn would retaliate if they brought them to her attention, the employees decided to submit a petition to the House of Delegates. (D&O 6; Tr. 168, 193, 207, 276-77.) At the second employee meeting, employees reviewed and signed a petition that Clark had drafted on his home computer. (D&O 6; Tr. 198, 277-78, GCX 8.) The employees signed the petition using

aliases out of fear of retribution. (D&O 6; Tr. 198, 204, 206, 226, GCX 8.) The fact that the employees chose to use aliases did not make their activity any less concerted. (D&O 9.) *See Chrysler Credit Corp.*, 241 NLRB 1079, 1080-81 (1979) (employee's anonymous letter to employer's headquarters, protesting problems and morale, and asking for an investigation of those issues, was concerted protected activity), *affirmed per curiam sub nom. Ardizzoni v. NLRB*, Nos. 79-510, 79-1835, 1980 WL 8131 (D.C. Cir. June 21, 1980), *modified on other grounds*, 663 F.2d 130 (D.C. Cir. 1980); *see also United Serv. Auto. Ass'n v. NLRB*, 387 F.3d 908 (D.C. Cir. 2004). Regardless, employees St. Germain and Teresa Kim testified that they each signed the petition (D&O 6; Tr. 206, 277), and the administrative law judge credited Clark's unrebutted testimony that the 11 signatories were all current Association employees. (D&O 6.)

The record also provides substantial evidence supporting the Board's additional finding that Clark engaged in concerted activity when he decided not to come forward and meet with Linn concerning his involvement in these activities. (D&O 10; GCX 7.) In the petition the employees expressed fear of retribution. (D&O 10; GCX 8.) And several employees were observed making zipping motions across their mouths when leaving the May 17 staff meeting, which, the Board explained, "signaled . . . their intent not

to comply with Linn's instruction to reveal their involvement." (D&O 2 n.11, 7, 10; Tr. 279.) Likewise, the day after the staff meeting, St. Germain sent a follow up email to the board of directors reiterating the employees' fear of repercussion, and stating her belief that no employee planned on coming forward in response to Linn's command. (D&O 7; GCX 10.) Linn confirmed that no employee came forward. (Tr. 52.)

As found by the Board, Clark's refusal to come forward was a continuation of the employees' earlier concerted protected activity. (D&O 10.) And as this Court has explained, "individual employee action may also constitute concerted activity if it represents either a 'continuation' of earlier concerted activities or a 'logical outgrowth' of concerted activity." *Mobil Exploration*, 200 F.3d at 238; *see also Alton H. Piester, LLC v. NLRB*, 591 F.3d 332, 341 (4th Cir. 2010).

**2. The Association Knew of the Concerted Nature of Clark's Activity**

Linn discharged Clark on August 17, within days of learning that forensic scientist Rosen had discovered a fragment of the petition on Clark's work computer. (D&O 9.) For Linn, this discovery established both Clark's involvement in the employee petition and his failure to comply with Linn's directive that employees who were involved come forward. (D&O 10.) There is no question that, at that time, Linn was aware of the concerted

nature of Clark's activities. Linn informed Clark she was terminating him for "participating" in what she characterized as "the anonymous e-mail scheme," which Linn acknowledged included the petition. (D&O 10; GCX 7.) The petition, which was from the "Concerned Staff of the Texas Dental Association," bore the aliases of 11 staff members, and was written in the collective: "we, the undersigned staff . . ."; "[m]any of us have tried . . ."; and "our concerns have gone unanswered . . . ." (D&O 6-7; GCX 8.) And as discussed above, during the hearing Linn acknowledged that she understood the petition was from "some very disgruntled employees who ha[d] some issues but who [were] not being specific and who [had] not gone through the specific channels." (D&O 9; Tr. 58.) Linn also received a copy of another anonymous email, which St. Germain later acknowledged sending to President Harrison and President-Elect May, reiterating the collective concerns of the Association's employees. (GCX 10, Tr. 66-68.) With regard to this email, Linn testified she understood it was from "some employees who had a lot of misinformation . . . ." (Tr. 67.) The Board's finding that the Association knew of the concerted nature of Clark's activities is thus supported by ample evidence. (D&O 10.)

### 3. Clark's activity was protected

In determining whether concerted activity is also protected, that is, is engaged in for the purposes of "mutual aid or protection," the Supreme Court has indicated that this statutory phrase should be liberally construed to protect activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-68 and 567 n.17 (1978). *Accord Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 838-39 (5th Cir. 1991). These include activities taken that "might reasonably be expected to affect terms or conditions of employment." *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981).

In the petition, the employees expressed their general concerns over "poor management, a dwindling morale, and a declining work ethic," and offered to provide "specific examples of poor management, negligence, and unfair treatment that ha[d] occurred." (D&O 9; GCX 8.) They expressed their desire to "make . . . [the] Association . . . a better, fairer, and more ethical place to work," a goal they hoped would be furthered through the "appointment of an impartial and outside source." (D&O 6-7, 9; GCX 8.)

The employees "decided [the] petition would be submitted to the House of Delegates," leading Clark to email the petition, and a related resolution he drafted, to Dr. Baxley. (D&O 6; Tr. 129, 162, GCX 34.)

When Dr. Baxley's request to read the petition aloud to the House of Delegates was refused, and the resolution failed, Clark emailed the petition to the board of directors. (D&O 7; Tr. 167.) By seeking the assistance of these bodies to improve the working conditions at the Association, Clark and the other employees engaged in activity that the Act clearly protects. *See Mobil Exploration*, 200 F.3d 230, 238 ("the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to outside channels.").

The fact that the employees did not enumerate the specific concerns that led them to sign the petition is not, as the Association implies (Br. 42), fatal to a finding that their activity was protected; nor is it even relevant. As the Board explained (D&O 9), "[t]he Act is concerned with concerted activity, not concerted thought. Any contention that a failure of all participants in a group activity to entertain identical reasons for engaging in that activity renders the activity individual rather than concerted is plainly without merit." *See NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 264 n.1 (9th Cir. 1995) (quoting *Advance Cleaning Serv.,* 274 NLRB 942, 944 n.3 (1985), *and Smithfield Packing Co.,* 258 NLRB 261, 263 (1981)). Moreover, it is well established that "[t]he motives of an employee who takes an action related to working conditions [are] irrelevant in determining

whether the action is protected." *NLRB v. Parr Lance Ambulance Serv.*, 723 F.2d 575, 578 (7th Cir. 1983) (citing *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 n.10 (7th Cir. 1976)). Thus, regardless of what each employee was thinking at the time he or she signed the petition, the fact remains that in doing so, they collectively sought assistance in improving the working conditions at the Association.

Furthermore, Linn testified that she believed the petition came from "some very disgruntled employees who ha[d] some issues." (D&O 9; Tr. 58.) As the Board noted, this belief that protected activity occurred is controlling. (D&O 9) (citing *Henning and Cheadle*, 212 NLRB 776, 777 (1974)). This finding by the Board is in accord with the well-established principle that it is unlawful for an employer to take an adverse action against an employee based on a belief that an employee engaged in protected activity, even if it turns out the employee engaged in no such activity. *See JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840-41 (8th Cir. 2003).

The Board also reasonably concluded that Clark's decision not to come forward and meet with Linn was protected activity. (D&O 10.) As recognized by the administrative law judge (D&O 10), an employee cannot be terminated for refusing to acknowledge his or her participation in concerted protected activity. *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d

908 (D.C. Cir. 2004). As the Board explained long ago in *St. Louis Car Co.*, 108 NLRB 1523, 1530 (1954), "[w]hatever an employer's right to inquire concerning union activities, an employee may assume that reprisal would follow disclosure, and certainly the intent of the Act is to permit him to withhold such information." *See also Onyx Envtl. Servs., LLC*, 336 NLRB 902, 907 (2001) (employee's conduct "did not lose the protection of the Act because he lied when questioned about his involvement . . . . His untruth did not relate to the performance of his job or the [employer's] business, but to a protected right guaranteed by the Act, which he was not obligated to disclose."); *Squier Distrib. Co. v. Local 7, Int'l Bhd. of Teamsters*, 801 F.2d 238, 242 (6th Cir. 1986) (terminating employees for refusing to come forward to explain involvement in concerted protected activity is "tantamount to firing the employees for their participation in protected activity").

The Association argues (Br. 30) that the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464, 466-67, 476 (1953), commonly referred to as *Jefferson Standard*, and subsequent Board decisions, support an argument that Clark's communication with the board of directors was "disparaging and disloyal to" the Association so as to lose the protection of the Act. The Association is foreclosed from making this

argument under Section 10(e) of the Act because it failed to present this argument to the Board.

Section 10(e) states that an appellate court lacks jurisdiction to entertain any "objection that has not been urged before the Board, its member, agent, or agency" absent extraordinary circumstances. 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). This provision serves "the salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged upon review of its order[s]." *Marshall Field & Co. v. NLRB,* 318 U.S. 253, 256 (1943). As this Court has recognized, because this rule is jurisdictional, application is "mandatory, not discretionary." *NLRB v. Houston Bldg. Svcs., Inc.*, 128 F.3d 860, 863 (5th Cir. 1997); *see also Plumbers Local 60 v. NLRB*, 941 F.2d 1326, 1336 (5th Cir. 1991).

The Association did not argue in its exceptions that it filed with the Board (Vol. III p. 402-431) that Clark lost the protection of the Act by making disparaging statements about the Association. Nor did it cite to the Supreme Court's *Jefferson Standard* decision or the Board's decision in *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), on which it now principally relies (Br. 32-33).

In any event, the Association's argument would have no merit even if it were properly before this Court. The Board has explained that:

> In cases decided since *Jefferson Standard*, the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection.

*Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).[6]

Here, the Association has failed to make the predicate showing under *Jefferson Standard* that Clark's decision to send the petition to the board of directors – the executive body of the Association (GCX 2) – was tantamount to seeking the support of a third party.[7] The very fact that the Association failed to afford the Board the opportunity to make this factual determination underscores why the Association should be precluded from raising this argument.

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[6] The Association's decision to raise *Jefferson Standard* to this Court in the first instance, rather than to the Board, is also ironic, given that in *Jefferson Standard* the Supreme Court acknowledged that it is the Board's initial responsibility to make the difficult determination of whether an employer discharged an employee due to disobedience or disloyalty, or rather because the employee engaged in protected concerted activity. *Jefferson Standard*, 346 U.S. at 475.

[7] The Association mistakenly states (Br. 34) that Clark's petition and email were "provided to TDA delegates and alternates or to various members of the TDA Board . . . ." But as found by the Board (D&O 8), Clark sent the petition to the board of directors, not the delegates.

Regardless, the petition itself, as discussed above, was undoubtedly related to a dispute between the employees and the Association. And it was not "so disloyal, reckless or maliciously untrue as to lose the Act's protections." *Mountain Shadows Golf Resort*, 330 NLRB at 1240. *Accord Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007), *enforced mem. sub nom. Nevada Serv. Employees Union, Local 1107*, No. 08-70234, 2009 WL 4894275 (9th Cir. Nov. 17, 2009). It bore none of the disparaging or disloyal characteristics that were discussed in *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008), on which the Association relies (Br. 32-33). It did not contain inflammatory language or criticize any particular member of the Association's management, nor did it seek to harm the Association's reputation.[8] To the extent that it offered vague criticism of the Association's "poor management," as the Association contends (Br. 34-35), such communications have routinely been deemed protected. *See e.g., Delta Health Center, Inc.*, 310 NLRB 26, 35 (1993) (employees "stinging criticism" of management found protected), *enforced mem.*, 5 F.3d 1494 (5th Cir. 1993).

[8] The Association suggests (Br. 34, 37) that Clark also sent Dr. Black emails, including one dated April 14, 2006, that in Dr. Black's opinion were "inflammatory" and "disruptive." But Dr. Black acknowledged that he did not know who sent the emails he referred to (Tr. 260), and no such emails are in the record.

The Association's efforts (Br. 33-34) to distinguish this Court's decision in *Blue Circle Cement Co. v. NLRB*, 41 F.3d 203 (5th Cir. 1994), are also unavailing. There, even a seemingly malicious attack upon the employer's product was protected because the attack arose out of a concern for the health and safety of employees. *Id.* at 211. Here, Clark's conduct does not present the more complicated issue the Court confronted in *Blue Circle Cement* because nothing about Clark's conduct is malicious.[9] Therefore, contrary to the Association's argument, Clark's conduct did not lose the protection of the Act.

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[9] The Association also cites (Br. 31-32) to *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006), but with a parenthetical that would seem to refer to the facts of *St. Luke's Episcopal-Presbyterian Hospital, Inc. v. NLRB*, 268 F.3d 575 (8th Cir. 2001). In any event, the disparaging communications that were at issue in those cases cannot be compared to the employees' petition here. In *Endicott*, the court held a veteran employee had made a "sharp, public, disparaging attack upon the quality of the company's product [printed circuit boards for the computer industry] and its business policies" at a "critical time" for the company and was thus unprotected. 453 F.3d at 537. In *St. Luke's*, the court found that the televised statements of a labor and delivery nursing assistant, complaining that shift changes possibly endangered the lives of mothers and their babies, not only "clearly disparaged the quality of patient care . . . in a way guaranteed to adversely affect the hospital's reputation with prospective patients and the public at large," but also that the hospital had proved that "the disparagement was materially false." 268 F.3d at 580.

### 4. The Association Discharged Clark Because of His Involvement in the Employee Petition and Because of His Failure To Meet With Linn and Reveal His Involvement in the Petition

Two days after Linn learned from the report of forensic scientist Rosen that a fragment of the petition was discovered on Clark's work computer, she discharged him for, as she put it, "participating in the anonymous email scheme and ignoring" Linn's May 17 directive that employees who were involved meet with her on an individual basis. (D&O 8, 10; GCX 7.) Because Clark's participation in these matters, as discussed above, was concerted and protected, substantial evidence supports the Board's finding that "[t]here [was] no motivation issue in this case," and that the Association's discharge of him was unlawful. (D&O 10.)

The Association nonetheless asserts (Br. 46) that Clark committed two other infractions that played a role in the decision to discharge him: his decision, along with St. Germain, to speak with the Association's auditor about how to code the Simms settlement payment; and his use of the Association's email system. But given Linn's admission that Clark's petition-related activities played at least a part in its discharge decision, and was thus a "motivating factor," the burden shifts to the Association to prove that Clark would have been discharged for one of these other reasons absent his petition-related activities. *Valmont Indus. v. NLRB,* 244 F.3d 454, 465

(5th Cir. 2001) (discussing the burden shifting analysis set out in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir.1981), *approved in NLRB v. Transp. Mgt. Corp.*, 462 U.S. 393 (1983), and adopted by this Court in *NLRB v. Ryder/P.I.E. Nationwide, Inc.,* 810 F.2d 502, 507 (5th Cir. 1987)). The Association has not shown that either of these asserted grounds was an actionable infraction, let alone the kind of infraction that would have independently led the Association to discharge Clark.

Regarding Clark's conversation with the auditor, the Association insists (Br 46) that it "would have discharged any employee who had gone outside of his responsibilities to obtain information about a confidential settlement." But the record rebuts any contention that Clark attempted to obtain information about the Simms settlement that was outside of his responsibilities. The Association reached a settlement agreement with Simms in April 2006 that included the payment of an unspecified amount of money. (D&O 8; Tr. 54.) As an employee in the finance department responsible for paying the Association's bills, Clark knew the amount of this settlement. (D&O 8; Tr. 43, 158.) After he and Financial Reporting Accountant St. Germain were instructed to code the amount as salary, they contacted the Association's Auditor, Patti Schmidt, to determine whether this was proper. (D&O 8; Tr. 153, 158.)

Linn acknowledged that it was appropriate for Clark to speak with the auditor about how to code a particular budget item. (D&O 9; Tr. 361.) Nevertheless, Linn considered the conversation to be "very inappropriate," as she assumed that Clark and St. Germain were seeking more information about the settlement. (D&O 8, 9; Tr. 361.) Noting that Schmidt did not testify at the hearing, the judge found no evidence to support Linn's suspicion. (D&O 8, 9.)

Indeed, although Linn learned of this conversation from Schmidt the following day, she did not inform either Clark or St. Germain at the time that she felt the conversation was "inappropriate." (D&O 8, 9; Tr. 361.) Nor did Linn discharge St. Germain for participating in this same phone conversation. (D&O 8, 9; Tr. 361.) Thus, as the Board found (D&O 10), substantial evidence supports the finding that "Clark's inquiry regarding the coding of the settlement was proper, and this asserted reason [for Clark's discharge] that Linn did not mention to Clark until August was a pretext." (D&O 10.)

Likewise, substantial evidence supports the Board's finding (D&O 10) that, absent Clark's concerted protected activity, the Association would not have discharged him based on his use of the Association's email system. The Association argues (Br. 35-38) that Clark violated the

Electronic Communications Policy by emailing the petition to the board of directors. That policy states employees are authorized to use electronic communications, including email, only for conducting Association business, and prohibits employees from using those tools to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." (D&O 8; GCX 4B.)[10]

The Board found that the employee petition "did not fall within the communications prohibited by the [Association's] rule." (D&O 1 n.3, 8.) The Board also found that, even if Clark's actions could be deemed an infraction, the Association acknowledged that it did not adhere to the Electronic Communications Policy and permitted employees to make personal use of the email system. (D&O 8; Tr. 107.) Employees, for example, regularly sent and received personal emails telling jokes and selling Girl Scout cookies. (D&O 8; Tr. 104-06, 209, 239, 281, GCX 28A-28c, 29A-29M, 42A-42E, 43A-43D, 44A-44D, 45A-45D.) Furthermore,

[10] The Association also maintains an Information Technology provision in its personnel manual that permits employees to use the Association's software and business equipment for reasonable personal purposes. (D&O 8; Tr. 31, 35, GCX 4A p. 18-19.) Although the Association now suggests that the electronic communications policy is merely an "addendum" to the Information Technology provision, this assertion is at odds with the judge's finding (D&O 8) that "Executive Director Linn, in her testimony, did not harmonize the inherent contradiction between the Information Technology and Electronic Communications Policy." In any event, the Association does not assert that Clark violated the Information Technology provision.

until Linn discharged Clark, the Association had never disciplined, much less discharged, an employee for violating the Electronic Communications Policy. (D&O 8; Tr. 239.) The Board explained that any doubt over whether Linn would have terminated Clark for sending an email to the board of directors absent his concerted protected activity was laid to rest by Linn's admission that if an employee were to send an email to delegates in an attempt to sell Girl Scout cookies, that employee "would not have been fired." (D&O 8, 10; Tr. 354.)

The Association's argument (Br. 35-38) that the Board's *Register-Guard* decision compels a different conclusion likewise misses the mark. *See Register Guard*, 351 NLRB 1110 (2007), *enforced in part and remanded on other grounds*, *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). In *Register Guard*, the employer argued that it lawfully disciplined an employee for sending a union-related email, which sought to clarify facts about a recent union rally, through the employer's system that allegedly violated its Communications Systems Policy ("CSP"), which prohibited communications that sought "to solicit or proselytize . . . ." 351 NLRB at 1111. The Board rejected this argument, finding that the email in question was not in violation of the CSP. *Id*. at 1119. As the D.C. Circuit explained in enforcing this aspect of the Board's Order, the employer's action "could

not constitute a neutral application of that policy because, simply put, the CSP did not cover [that] email." *Id.* at 58-59. Likewise, although the Board concluded that the employer did not discriminate in violation of Section 7 by disciplining an employee for sending emails that attempted to solicit employees in violation of the CSP (351 NLRB at 1119), the court disagreed, and reversed the Board's finding on this point, finding that the employer allowed employees to send emails that contained personal solicitations. 571 F.3d at 60. The court found that the CSP set forth no such distinction and the employer did not assert this as a justification at the time it discharged the employee, and thus it was a "post hoc invention." *Id.* As such, the court concluded that the employer had engaged in unlawful discrimination in violation of the Act. *Id.*

The Association's argument here suffers from these same flaws. In its zeal to argue that it neutrally applied its Electronic Communications Policy when it terminated Clark, the Association failed to rebut either the Board's finding that the Association did not adhere to that policy in the first instance, or the Board's finding that the petition did not fall within the communications prohibited by that policy. (D&O 1 n.3.)

Moreover, the Association argues for the first time that its policies draw a line between "disruptive" emails, which are prohibited, and

nondisruptive emails, which are not. But by failing to raise this argument in its exceptions, the Association prevented the Board from making a finding as to whether the Association had drawn such a distinction, and if so whether Clark's email was, in fact, disruptive. The Association should thus be precluded under 10(e) from belatedly raising this argument.

Regardless, the Association failed to produce any evidence that Clark sent any disruptive email. Clark merely sent the petition and resolution to Dr. Baxley, who then attempted unsuccessfully to read the petition and introduce the resolution to the House of Delegates. Likewise, there was no disruption caused when Clark emailed the petition to the board of directors after the annual session. And while the Association places great emphasis (Br. 37) on Dr. Black's testimony that the board of directors received emails he described as disruptive, as discussed above (p. 35, note 8), he acknowledged that he did not know who sent any such emails (Tr. 260), and no such emails were introduced into evidence.

Even as the Association concludes its brief, it volunteers that it "would not have fired someone who had admitted being part of the petition and then stated their complaints." (Br. 46.) It makes no sense for the Association to make this closing observation if it truly would have discharged Clark for his settlement-related conduct or his email conduct. In

any event, and apart from the fact that the judge discredited this observation (D&O 8), as we have shown above Clark's refusal to come forward and report on his concerted protected activity is a continuation of that activity and therefore protected, and the Association's attempt to use this refusal to justify his discharge is unlawful as well.

In sum, the Association has not carried its burden of showing that it would have discharged Clark for his settlement-related conduct or his email conduct absent the Association's unhappiness with Clark's petition-related, concerted protected activity.

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE ASSOCIATION VIOLATED SECTION 8(a)(1) OF THE ACT WHEN IT DISCHARGED SUPERVISOR LOCKERMAN FOR REFUSING TO PARTICIPATE IN AN UNFAIR LABOR PRACTICE

### A. It Is Unlawful for an Employer To Discharge a Supervisor for Refusing To Participate in the Commission of an Unfair Labor Practice

Although supervisors are not included in the Act's definition of "employee" (29 U.S.C. § 152(3)), and are thus not entitled to the Act's direct protection, a supervisor's discharge may nevertheless violate Section 8(a)(1) if it infringes on the Section 7 rights of employees. *International Longshoremen Ass'n v. Davis*, 476 U.S. 380, 384 n.4 (1986); *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209, 216-17 (5th Cir. 1954). This

is because, as this Court has explained, "[t]he Act does not require the Board to stand by powerless and watch an employer coerce supervisors into committing unfair labor practices under pain of being fired, but permits the Board to protect rank-and-file employees by allowing supervisors to perform their statutory duties without fear." *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966).

The Board has announced, with court approval, that "all supervisory discharge cases[] may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices."[11] *See Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982) ("*Parker-Robb*"), *enforced sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *see also Talladega Cotton Factory, Inc.* 213 F.2d at 216-17; *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1315-16 (5th Cir. 1994).

[11] While the Association argues (Br. 22-23) that Board decisions finding that an employer unlawfully discharged a supervisor involve "multiple bad acts," no such requirement can be found or inferred from applicable precedent. Regardless, here the Association engaged in multiple bad acts by unlawfully discharging both Clark and Lockerman.

If an employer asserts that it discharged a supervisor for a lawful reason in addition to the unlawful reason alleged (e.g., the supervisor's refusal to commit an unfair labor practice), the burden shifts to the employer to prove that it would have discharged supervisor in the absence of the unlawful reason. *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 93 (2d Cir. 1990). If, however, the employer concedes the reason for discharging a supervisor, no such burden shifting occurs, as the only remaining question is whether that reason was unlawful under the Act. *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 4 n.2, 4-6 (1st Cir. 1983).

### B. The Association Violated Section 8(a)(1) by Discharging Lockerman for Refusing To Participate in Linn's Unlawful Attempt To Identify and Terminate Employees Involved in the Petition

The Board held that the Association "unlawfully discharged Lockerman for refusing to participate in its reasonably evident quest to identify and terminate employees involved in protected concerted activity." (D&O 3.) We show below that substantial evidence supports both the Board's findings that the Association embarked on such a quest and that the Association fired Lockerman because she refused to participate in that quest. We then show that the Board reasonably concluded that the Association's firing Lockerman for that refusal was unlawful.

### 1. Substantial evidence supports the Board's finding that Linn sought to identify and terminate employees involved in the petition

The Board cites four events, each of which is well supported by the record, from which it concluded that the Association sought to identify and terminate employees who had participated in the employee petition. (D&O 3.) First, two members of management warned Lockerman that if Linn learned the identities of those involved in the petition, she would fire them. (D&O 3.) Dr. May warned that employees attending employee meetings would be fired. (D&O 2, 3, 6, 10; Tr. 224.) Likewise, Director of Finance Laura Haufler asked Lockerman to talk Clark "out of these activities, because . . . he would be fired." (D&O 2, 3, 6; Tr. 229, 249-50.) Second, Linn issued a blanket directive that employees involved in the petition meet with her on an individual basis -- thereby revealing their identities -- as a condition of their employment. (D&O 3; GCX 9.) Third, Linn hired forensic scientist Rosen in an attempt to discover the identities of those involved in the petition. (D&O 2, 3, 7; Tr. 50, 64, 353.) And fourth, upon learning that fragments of the petition were found on Clark's computer (D&O 2 n.8, 8; Tr. 69, 72, GCX 11), Linn terminated Clark without asking for any explanation as to his involvement. (D&O 3; Tr. 154-55.)

The Board found that Lockerman refused to participate in this unlawful endeavor because she had formed a reasonable belief that, had she met with Linn to discuss the employees' activities, Linn would have demanded the identities of these employees in order to terminate them. (D&O 3; Tr. 224, 231, 334.) The reasonableness of this belief was supported by the warnings she had received from Dr. May and Haufler, and was subsequently borne out by Linn's decision to terminate Clark. (D&O 3.)

**2. Substantial evidence supports the Board's finding that the Association discharged Lockerman because she refused to participate in the Association's unlawful endeavor**

Substantial evidence supports the Board's finding that the Association discharged Lockerman because she refused to participate in the Association's "quest." In late June, Director of Public Affairs Jenny Young reported to Linn that Lockerman admitted she had known about the employee petition and that she had advised those employees to "take a different route." (D&O 2, 7; GCX 17.) Several weeks later, Director of Annual Session and Meeting Services Sandy Blum similarly reported to Linn that Lockerman had denied any involvement in the matter but had acknowledged that she tried to discourage some staff members from this

activity. (D&O 2, 7; Tr. 87-88.) Blum confirmed this in writing to Linn on August 15. (D&O 2, 7; Tr. 87-88, GCX 18.)

Two days later, on August 17, after discharging Clark, Linn discharged Lockerman. Linn acknowledged that Lockerman was discharged because she "had knowledge of events leading up to the Annual Session petition and the anonymous e-mails and failed to discuss [her] knowledge with [Linn]." (D&O 2, 10; GCX 16.)[12] As the Board found (D&O 2, 3), in discharging Lockerman for her failure to divulge what she knew of the employees' protected concerted activities, the Association was discharging Lockerman "for refusing to participate in its reasonably evident quest to identify and terminate employees involved in protected concerted activity."

### 3. The Board reasonably concluded that the Association's discharge of Lockerman was unlawful

The Association's decision to discharge Lockerman for refusing to meet with Linn, which the Board found was tantamount to refusing to cooperate with the Association's unlawful endeavor (D&O 3), violated

[12] Linn also made reference to several other alleged infractions, including Lockerman's opposition to a paid time off policy (D&O 8; Tr. 84-86, GCX 16), which the Board concluded was long since resolved (D&O 4, 10), and Lockerman's penchant for "hosting employee grievances in [her] office" (D&O 8-9; GCX 16), which the Board found was "hardly a reason for termination." (D&O 10-11; GCX 16.) In its brief, the Association does not argue that either of these alleged infractions motivated Linn to discharge Lockerman, thus letting stand the Board's finding (D&O 10) that these reasons were pretextual under *Wright Line*.

Section 8(a)(1) of the Act. This conclusion comports with prior, factually similar Board cases that the courts have enforced. In *Country Boy Markets*, 283 NLRB 122 (1987), *enforced sub nom. Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989), a supervisor at one of the employer's supermarkets, on orders of his general manager, fired several employees who had signed union cards. The supervisor himself was fired several days later for refusing to prepare termination slips setting forth pretextual reasons for the discharges. Although the employer never instructed the supervisor to falsify information on the termination slips, the supervisor assumed he was being asked to do so, and the Board agreed. *Country Boy Markets*, 283 NLRB at 122 n.1. On review, the court found that this was a permissible inference, and thus upheld the Board's conclusion that the employer violated Section 8(a)(1) of the Act by firing the supervisor for refusing to take further part in the employer's unfair labor practices. *Delling*, 869 F.2d at 1398-99.

Similarly, in *USF Red Star, Inc*, 330 NLRB 53 (1999), *enforced*, 230 F.3d 102 (4th Cir. 2000), after the employer acceded to a union's demand that it fire an employee who opposed the incumbent union, the employer fired a supervisor who initially refused orders to fire the employee. The employer maintained it fired the supervisor because he failed to report that the employee had been in a minor accident. But the Board rejected this

explanation, finding that the supervisor held a "justifiable belief" that if he reported the accident the employer would use it as a pretext for terminating the employee. 330 NLRB 53, 58 and n.20 (1999). The court, enforcing the Board's order, concluded that "[the supervisor's] desire not to participate in an unlawful conspiracy was protected and could not serve as a valid basis for his termination." 230 F.3d at 107.

The same is true here. The Board found that Linn sought to identify and fire those employees who were involved in the petition and further found that Lockerman reasonably believed that if she met with Linn, Linn would have required her to participate in that endeavor. (D&O 3.) In discharging Lockerman for refusing to meet with Linn, the Association thus effectively discharged Lockerman for refusing to further the Association's plan to terminate employees who had engaged in concerted protected activity. (D&O 3.) Given these findings, the Association is simply wrong to now suggest (Br. 26) that no violation occurred here "unless this Court is prepared to hold that merely asking a supervisor to attend a meeting where she would be asked for information about vague employee complaints is a *per se* violation of that [sic] Act . . . ."

As found by the Board (D&O 3), this case is also quite similar to *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), *enforced*, 702 F.2d 1

(1st Cir. 1983). There, the employer questioned a supervisor about her knowledge of a union organizing campaign, and specifically asked her to identify employees who attended a union gathering that the supervisor had attended. After the supervisor refused to do so and left the meeting where she was being questioned, she was informed that if she did not return to the meeting she would be discharged. When she refused, she was fired. Although the supervisor did not know what questions she would be asked if she returned to the meeting, and the employer stated it fired her for failing to return, the court found that it could see "no significant difference between firing an employee for not answering questions about the identity of union supporters and not attending an interrogation about the same subject." *Id*. at 4.

The Association contends that Linn "understood" that the employees' complaints were about the Simms situation (Br. 25), and thus suggests that, absent additional information about the employees' specific concerns, she lawfully terminated Lockerman. But it was not reasonable for Linn to hold this belief. The Board rejected the Association's argument that the employees' activities were confined to the Simms discharge, noting that the petition did not mention Simms. (D&O 9.) Rather, the petition expressed employee complaints of "poor management, negligence, and unfair

treatment." (D&O 9.) Moreover, Linn testified that she believed that the petition was from "some very disgruntled employees who [had] some issues . . . ," which, the Board found, established Linn's belief that the employees were engaged in protected activities. (D&O 9; Tr. 58.)

The Association seeks support for this argument (Br. 24-25) in the inapposite case of *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958). There, the court explained that where employees chose to remain silent as to their reasons for engaging in concerted activity, they bore the risk that their employer's decision to discharge them may be found lawful "where the employer from the facts in its possession could reasonably infer that the employees in question [were] engaging in unprotected activity." *Id.* at 465. But that was not the case here. Rather, the employees spoke out about their concerns, which were protected complaints about terms and conditions of their employment.

The Association also relies (Br. 26-27) on *P.R. Mallory Co., Inc.*, 175 NLRB 308 (1969). But as found by the Board in its Order denying the Association's motion for reconsideration, (Vol. III, p. 564), that decision does not compel a different result. There, the Board affirmed the judge's finding that the employer lawfully terminated a supervisor for participating in union activity and rejected the contention that the supervisor was

terminated for not disclosing what he knew about the employees' union activity. *Id*. at 313. The judge, however, went on to explain that even if the General Counsel's theory were accepted, "it [was] far from clear that under Board precedents that circumstance would render [the supervisor's] discharge unlawful." *Id*. In the intervening years, however, it has become well established that a supervisor cannot be compelled to reveal information about employees' concerted protected activity to an employer when he or she has a reasonable belief that the information would be used to commit an unfair labor practice. *See Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), *enforced*, 702 F.2d 1 (1st Cir. 1983); *Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989); *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 107 (4th Cir. 2000).

Finally, the Association rehashes its argument (Br. 28) that the discharge of a supervisor can only violate the Section 7 rights of employees if the employees have knowledge that the supervisor was terminated for refusing to commit an unfair labor practice. But, as the Board explained in rejecting this argument, under its decision in *Parker-Robb*, 262 NLRB 402, 404 (1982), *enforced sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983), and its progeny, no showing of employee knowledge is necessary. (D&O 2, 4 n.14.) Prior to *Parker-Robb*,

it was unlawful to discharge a supervisor as part of "a pattern of conduct aimed at coercing employees in the exercise of their section 7 rights." 262 NLRB at 402. Under that standard, establishing that employees knew of the employer's conduct toward the supervisor was indeed relevant to show that the discharge had a secondary effect of causing employees to reconsider their participation in protected activities. In *Parker-Robb*, the Board expressly overturned that precedent and held that the discharge of a supervisor violates the Act when it directly interferes with employee rights, such as occurs when a discharge is based on a supervisor's refusal to commit an unfair labor practice. Because the decisions in *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204 (8th Cir. 1977), and *General Engineering, Inc. v. NLRB*, 311 F.2d 570 (9th Cir. 1963), predated this change, the Association's reliance on those cases is misplaced. (D&O 2, 4 n.14.)[13]

[13] Nevertheless, the Board went on to find that Association employees knew the basis of Lockerman's discharge, which the Board explained was evident from several facts, including that that employees were aware Lockerman attended the second employee meeting, Linn directed supervisors and employees alike to come forward with information about the petition as a condition of their employment, and that Lockerman was fired on the same day as Clark. (D&O 4-5.)

Thus, the Board reasonably concluded that the Association's discharge of Lockerman was unlawful and the Association has pointed to nothing that unsettles that finding.

### C. Reinstatement of Lockerman Is the Appropriate Means To Remedy the Association's Violation of the Act

The Association challenges the Board's Order requiring it to reinstate Lockerman, arguing (Br. 29) that reinstatement of a supervisor is only appropriate when necessary to vindicate employees' rights. This argument is based on the Association's misreading of *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981). In *Nevis*, the court explained that although the Act does not protect supervisors, exceptions to this general rule "protect employees' right 'to have the privileges secured by the Act vindicated through the administrative procedures of the Board.'" *Id.* at 910 (quoting *NLRB v. Southland Paint Co.*, 394 F.2d 717, 721 (5th Cir. 1968)). In those circumstances, as when an employer disciplines or discharges a supervisor for refusing to commit an unfair labor practice, reinstatement is the appropriate remedy. *Id.*; *see also Belcher Towing Co. v. NLRB*, 614 F.2d 88, 92 (5th Cir. 1980).

The Association also states (Br. 29), without argument or elaboration, that the Board abused its discretion by denying the Association's motion for reconsideration and to reopen the record to allow the Association to

introduce new evidence that reinstating Lockerman would be unduly burdensome. In its Order denying the Association's motion, 354 NLRB No. 107 (2009), the Board explained that these issues are appropriately resolved at the compliance stage of the Board's proceeding, and that at that time the Association would have the opportunity to introduce evidence that reinstatement would be unduly burdensome that was not available at the close of the unfair labor practice hearing. This is consistent with the Board's well established procedures, as affirmed by Supreme Court in *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 902 (1984): "[t]his Court and other lower courts have long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge." *See also Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 315 & n.8 (D.C. Cir. 2003); *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 718 (D.C. Cir. 2001).

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

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National Labor Relations Board
April 2010

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**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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| TEXAS DENTAL ASSOCIATION | : |
| | : |
| Petitioner/Cross-Respondent | : |
| | : Case No. 09-60843 |
| | : |
| v. | : Board Case No. |
| | : 16-CA-25349 |
| NATIONAL LABOR RELATIONS BOARD | : |
| | : |
| Respondent/Cross-Petitioner | : |

## CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2010, I electronically filed the National Labor Relations Board's brief with the Court using the CM/ECF system and that the Petitioner's counsel, listed below, is a CM/ECF Filing User and will thus receive an electronically generated Notice of Docket Activity:

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Dated at Washington, D.C.
this 9th day of April 2010

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| | : |
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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the Board certifies that its final brief contains 12,983 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, D.C.
this 9th day of April 2010