UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ROOMSTORES OF PHOENIX, LLC
d/b/a THE ROOMSTORE

and **Case 28-CA-22404**

DIANE PASSAFIUME, an Individual

and **Case 28-CA-22633**

BRUCE KIRALY, an Individual

BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS

Mary Gray Davidson
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178
Email: mary.davidson@nlrb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ROOMSTORES OF PHOENIX, LLC
d/b/a THE ROOMSTORE

and **Case 28-CA-22404**

DIANE PASSAFIUME, an Individual

and **Case 28-CA-22633**

BRUCE KIRALY, an Individual

BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS

Pursuant to Section 102.46 of the Board's Rules and regulations, Counsel for the Acting General Counsel files the following Brief in Support of Cross-Exceptions to the Decision of Administrative Law Judge Gregory Z. Meyerson, [JD(SF)-15-10] (ALJD), issued on April 16, 2010, in the above captioned cases. Specifically, Counsel for the Acting General Counsel excepts to the Administrative Law Judge's (ALJ) failure to find that Respondent (a) violated Section 8(a)(1) and (4) of the Act by terminating its employee Bruce Kiraly (Kiraly); (b) violated Section 8(a)(1) of the Act by threatening to discharge Kiraly for engaging in protected concerted activities; (c) violated Section 8(a)(1) by promulgating an overly broad rule prohibiting discussion of terms and conditions of employment; and (d) separate and apart from the other reasons upon which the ALJ properly found that Respondent unlawfully discharged Virginia Gabrielson (Gabrielson) and Diane Passafiume (Passafiume), the failure to find that Respondent violated the Act by discharging Gabrielson and Passafiume because they violated Respondent's unlawful rules which prohibited them from talking about their terms and conditions of

employment with other employees. It is respectfully submitted that in all respects, other than what is excepted to herein, the findings and conclusions of the ALJ are appropriate, proper, and fully supported by the credible record evidence.[1] These findings and conclusions include that Respondent violated Section 8(a)(1) of the Act by: (a) discharging Passafiume and its employee Gabrielson because they engaged in protected concerted activities; (b) maintaining ambiguous and overly broad Personnel Handbook rules that prohibit employees from: (i) "trespassing on company property when off duty"; (ii) "collusion with another employee in order to violate company policy"; (iii) using information obtained from company records, vendor records or customer records; and (iv) engaging "in any outside activity that would conflict in any way with the interests of the company" or that "could result in criticism of or have an adverse effect on the company"; (c) maintaining rules in its Salesperson Agreement that prohibit employees from: (i) disclosing confidential information to anyone outside of the Company including sales data, training materials, customer lists, sales invoices, and names of personnel; and (ii) inducing current or prospective employees not to work for Respondent; (d) maintaining rules at its Superstition Springs store that prohibit employees from exhibiting "any type of negative energy or attitudes" and from discussing their terms and conditions of employment with co-workers; and (e) reinforcing the rule against negativity at the Superstition Springs store and impliedly threatening to suspend employees for violating the policy against "negative energy or attitudes."

[1] The RoomStores of Phoenix, LLC, d/b/a/ The RoomStore will be referred to as "Respondent" and/or "RoomStore." Bruce Kiraly will be referred be referred to as "Charging Party Kiraly" and/or "Kiraly." Diane Passafiume will be referred to as "Charging Party Passafiume" and/or "Passafiume." References to the official transcript will be designated as (Tr.), with appropriate page citations. The Acting General Counsel and Respondent's exhibits will be referred to as (GC) and (RS) respectively, with the appropriate exhibit number.

I. BACKGROUND

A. Respondent's Operations

Respondent operates a chain of ten retail furniture stores in Arizona. (Tr. 671, 672; ALJD at 3) Nine of those stores are located in the Phoenix metropolitan area and the other store is located in Prescott, Arizona. (Tr. 671, 672; ALJD at 3) Most of the events in this case occurred in two stores located in Mesa, Arizona—the Superstition Springs store (the Superstition Springs Store or Store 6) and the Fiesta store (the Fiesta Store or Store 8). (ALJD at 3) During the events in question, Sid Serda (Serda) was the Respondent's manager of the Superstition Springs Store and Justin Stacey (Stacey) was the manager of the Fiesta Store. (Tr. 32, 34; ALJD at 3) Charging Parties Passafiume and Kiraly and discriminatee Gabrielson were all sales associates at the time of their discharges in March 2009. (Tr. 34, 130, 222; ALJD at 3) Passafiume and Gabrielson were working at the Superstition Springs Store, and Kiraly was working at the Fiesta Store. (Tr. 32, 34; ALJD at 3)

B. Bruce Kiraly

1. Employment History; Early Protected Conduct

The ALJ dismissed the Complaint insofar is it alleges that Kiraly was discharged in violation of Section 8(a)(1) and (4) of the Act. As discussed below, the credible record evidence shows that Kiraly was discharged for engaging in protected concerted activities and for filing charges with the Board.

When he was fired by Stacey on March 30, 2009, Kiraly was working at Respondent's Fiesta store.[2] (Tr. 336; ALJD at 18) However, the record shows that Kiraly was an employee whose protected concerted and charge-filing activities, and Respondent's animus toward such

[2] All dates hereinafter are 2009 unless otherwise noted.

conduct, went back to at least the Fall of 2007. Moreover, despite the fact that during his career Kiraly was a valued and skilled employee, and at times manager, of Respondent, Respondent's hostility toward Kiraly's protected conduct, stretching back almost two years, resulted in his discharge.

More specifically, Kiraly had worked for Respondent in various capacities since 2001, when he began as a sales associate. (Tr. 441; ALJD at 10) In March 2004, Kiraly was promoted to sales manager at the Respondent's Ahwatukee store. (Tr. 441; ALJD at 10) Kiraly continued as sales manager and took on the additional position of corporate sales trainer. (Tr. 441; ALJD at 10) As corporate trainer, Kiraly held two classes a month for newly-hired sales associates and he taught them Respondent's policies, philosophies, ethics and sales techniques. (Tr. 442-443; ALJD at 10) For most of his time as corporate trainer, Kiraly worked as an independent contractor for Respondent. (Tr. 536, 693; ALJD at 10) In January 2006, Kiraly was promoted to store manager of the Ahwatukee store and continued as the corporate sales trainer. (Tr. 441; ALJD at 10) In May 2006, Kiraly was hospitalized. (Tr. 443) While he was in the hospital, owner Danny Selznick replaced Kiraly as the Ahwatukee store manager with Cindy Gregory (Gregory). (Tr. 442; ALJD at 10) Kiraly returned to work in mid-2006 as a sales associate and continued as corporate trainer for another year and a half. (Tr. 442, 445; ALJD at 10) As corporate trainer, Kiraly did not have the authority to hire, fire, schedule or discipline employees. (Tr. 693)

In the fall of 2007, Kiraly was sent to Respondent's new store in Prescott, Arizona, to train the employees there and to sell furniture.[3] (Tr. 538-539; ALJD at 11) Kiraly conducted three training sessions in Prescott lasting five days each in August, September and October 2007.

[3] Respondent's Counsel and Kiraly initially referred to the Prescott store as opening in 2008 but later corrected themselves when they realized that the Prescott store opened in 2007. (Tr. 537-539)

(Tr. 553; ALJD at 11) While working as a sales associate at the Prescott store, Kiraly was under the supervision of the store manager and the assistant managers and had no authority over the other store employees. (Tr. 575, 575, 578) After the Prescott store opened in October 2007, Kiraly engaged in protected concerted activities, which started when sales associates began telling Kiraly that the two assistant managers were taking sales from them. (Tr. 554; ALJD at 11) Kiraly advised his co-workers to take their complaints to management. (Tr. 554; ALJD at 11) Kiraly himself followed the Respondent's "chain of command" when he heard about or saw problems and talked first to the assistant managers "to try to resolve it," and if that did not work, he went to the store manager. (Tr. 575:11-15) Kiraly told the managers on several occasions that "several sales associates fresh out of class were complaining about commissions being split or taken from them unjustly." (Tr. 575:17-19) Kiraly found out later that some Prescott employees sent anonymous letters to Respondent's corporate office. (Tr. 556; ALJD at 11)

On December 28, 2007, store manager Gregory told Kiraly that he was no longer the corporate trainer. (Tr. 445; ALJD at 11) When Kiraly pressed Gregory for a reason why he was, in essence, demoted, Gregory[4] admitted that it was because of his "antics up in Prescott, the riling up [of] fellow employees, and so forth." (Tr. 446:6-7; ALJD at 11) During this conversation, Gregory told Kiraly she had a message for him from owner Danny Selznick (Selznick) to "keep your nose out of other stores, and if you don't keep it clean, you'll be terminated." (Tr. 471:21-23; ALJD at 11) Kiraly responded, "All I ever did there, Cindy, was ask the salespeople to follow the chain of command for their mistreatment in regards to commission[s]." (Tr. 472:15-17) Gregory told Kiraly, "well, you know, you're just – you're

[4] During the hearing, the Paragraph 3 of the Complaint was amended to allege that Cindy Gregory was a store manager for Respondent at the Fiesta Store and was a supervisor under Section 2(11) of Act and an agent of Respondent under Section 2(13) of the Act. Respondent admitted these allegations. (Tr. 466:19-20, 469:8-9, 470:1-8)

stirring the pot basically. And Danny [Selznick]'s message to you is that keep your nose clean or else." (Tr. 472:18-20) The ALJ properly credited Kiraly's testimony about Gregory's warning, in part because Gregory failed to testify, and also finding that Kiraly's testimony "simply has the ring of authenticity to it." (ALJD at 11) After that, Kiraly learned he was "banned" from the Prescott store and that he was "not to coerce people to write letters to corporate complaining about their conditions." (Tr. 569:15-17) Shortly after that, in January 2008, Kiraly was involuntarily transferred from Gregory's store to the Fiesta Store. (Tr. 563)

2. Kiraly's Protected Concerted Activity

In June and August 2008, Kiraly filed two separate unfair labor practice charges with the Board—the first alleging that Respondent unlawfully demoted Kiraly and interrogated and warned employees for engaging in protected concerted activities; the second filed on behalf of other employees and alleging that Respondent discriminated against employees for engaging in protected concerted activities and by maintaining certain rules in the employee handbook.[5] (Tr. 451, GC 24 and GC 25; ALJD at 11) On October 24, 2008, Kiraly signed Board informal Settlement Agreement between Respondent and Region 28 concerning his second charge. (Tr. 452, GC 26; ALJD at 11) Kiraly was working at Respondent's Fiesta Store at the time, which Gregory was then managing. (Tr. 454; ALJD at 11) Though the earliest unfair labor practice alleged in the instant matter, other than the starting dates of the period in which Respondent has maintained its unlawful rules, occurred in or about December 2008, Respondent's conduct during 2007 and 2008 reflect the degree of hostility harbored by Respondent against Kiraly and his protected conduct.

[5] The first charge was dismissed because it was determined that Kiraly was a managerial employee at the time of his demotion. The second charge was settled by means of an informal Board Settlement Agreement before a complaint issued, which provided for a notice posting and the expungement of certain discipline from the records of two of Kiraly's co-workers.

More to the point, the record shows clearly that Respondent's hostility toward Kiraly did not recede as a result of the Board settlement. In fact, the day after he signed the Board informal Settlement Agreement, on October 25, 2008, assistant sales managers Ashley Ryan (Ryan) and Ed Sackett (Sackett) called Kiraly into an office and gave him a write up signed by Gregory alleging that Kiraly had threatened two female co-workers. (Tr. 454-455, GC 27; ALJD at 11)

Initially, Kiraly had no idea why he was receiving this write up or about or who the two female co-workers could be. (Tr. 455-456) Ryan told Kiraly that the write-up was related to Kiraly "bad rapping me [Ryan] behind my back." (Tr. 455:19; ALJD at 11) Kiraly then explained to Ryan and Sackett that "yesterday the RoomStore and the government signed off on an agreement that represents employee rights. We're allowed to talk about our working conditions or speak freely at work regardless." (Tr. 455:23-24) Kiraly eventually figured out that this write-up related to a conversation he had several days earlier in the break room with two female associates, Jeri Johnson (Johnson) and Monica Lansiquot (Lansiquot). Kiraly had told the two women that another associate named Victor Lopez (Lopez) had been treated unfairly by Ryan and was reprimanded by Gregory. (Tr. 456, 457) During their meeting, Ryan confirmed that the write-up was related to Johnson and Lansiquot but refused to allow Kiraly to speak to Gregory, who had signed the write-up. (Tr. 456) Kiraly told Ryan and Sackett that he "would be attempting to form a union at the RoomStore or a grievance committee specifically to deal with this kind of railroad job." (Tr. 458:6-8; ALJD at 12) Kiraly also told Ryan that he did not say anything behind Ryan's back that he "hadn't said to his face." (Tr. 458:10-11)

Nevertheless, Ryan and Sackett sent Kiraly home for two days causing Kiraly to lose about $1,500 in sales income. (Tr. 457) Because Ryan did not testify at the hearing, the ALJ properly credited Kiraly's testimony about this meeting, and the ALJD drew an adverse

inference that assistant sales manager Ryan "would have admitted that Kiraly made the statement about forming a union." (ALJD at 12)

Respondent's reasons for disciplining and suspending Kiraly were pretextual. More specifically, one of the two women whom Kiraly allegedly threatened, Johnson, testified that Kiraly did tell her and Lansiquot what Ryan and Gregory did to Victor Lopez. (Tr. 585-587; ALJD at 12) Johnson said that Kiraly was frustrated, but she never felt threatened in any way by Kiraly's conduct. (Tr. 587-588; ALJD at 12) Kiraly did not do anything that was physically aggressive while talking to her and Lansiquot. (Tr. 588) Assistant sales manager Ryan later questioned Johnson about what Kiraly had said about him and told her she needed to speak to store manager Gregory. (Tr. 589) Johnson was also instructed by Gregory "to write down the events of that morning." (Tr. 587:10-11; GC 29)

Kiraly continued to be very vocal in publishing the fact that he had obtained a settlement from the Board as a result of his charge against Respondent, conduct that became known to Respondent. Beginning in November 2008, Kiraly began handing out copies of the Board Settlement Agreement to his co-workers at various Respondent locations, including employees at the Fiesta, Superstition Springs, Ahwatukee, and the Paradise Valley stores. (ALJD at 12) He gave copies to, among others, Sharon Walker, Vicki Quin, Gerald Limbrick, Mark McGovern, Jeff Kratchman, Jeff Johnson, Lansiquot and Castro. (Tr. 459-460) Kiraly gave discriminatee Gabrielson a copy while meeting with her at a Dunkin Donuts and asked her to make copies and hand them out to people at the Superstition Springs store. (Tr. 460; ALJD at 12) Kiraly also met with employees of Respondent's Paradise Valley store, along with sales associates Burt Bain and Ronda Kelly. (Tr. 460; ALJD at 12) A few weeks later he went to the Ahwatukee store and handed out six copies to employees there and left seven copies for sales associate Donny Coletta

to distribute. (Tr. 460; ALJD at 12) When Kiraly gave copies of the Settlement Agreement to other employees, he would tell them that the agreement gives them "the right to talk about their working conditions, hours, wages, commissions, adjustments amongst themselves or to management without fear of retaliation, which hadn't been the case at the RoomStore for a long time." (Tr. 464:18-22; ALJD at 12) Kiraly also informed them, "you have protected rights and, you know, if you have a complaint, take it to them, but if you don't, you know, feel it's being handled, the government's there for you." (Tr. 464:23–465:7; ALJD at 12)

Kiraly also gave a copy of the settlement agreement to assistant sales managers Ashley Ryan, Mark Elliot and John Marovich. (Tr. 465; ALJD at 12) Kiraly gave Elliot a copy of the settlement agreement in November or December 2008 when he was handing out copies to other employees. (Tr. 477) He gave Ryan a copy of the agreement a little later, in early February 2009, about a month before he was fired, while the two were in the parking lot at the Fiesta store. (Tr. 477) Kiraly told Ryan, "Here's a copy of the agreement that [the] RoomStore entered into and I hope this helps you better manage the store." (Tr. 477) He again told Ryan that "we need to form a union at the RoomStore or a grievance committee, one of the two, and that [I] would be working on that as long as I was at the RoomStore." (Tr. 478; ALJD at 12) Again, the ALJ properly found that Kiraly told his assistant sales manager that Respondent's employees needed a union or grievance committee. (ALJD at 12) Kiraly actually spoke about forming a union to all the employees to whom he gave a copy of the settlement agreement—about thirty employees altogether. (Tr. 479; ALJD at 12) Kiraly also told the two assistant sales managers at the Fiesta store, Ryan and Elliot, that maybe "we can have better treatment of the staff" and that "it's okay if they [employees] talk." (Tr. 465) Kiraly felt that employees were afraid to talk to him and that he was getting "a hairy eyeball from the management, including Cindy Gregory. And then

the people that I'd be talking to, even if it's not something personal, they would cut and run, 'I can't talk to you.' So, it's like I had the plague." (Tr. 465:15-24)

The Notice to Employees that was part of the Board Settlement Agreement was posted in Respondent's Prescott Store around November 2008 and remained posted for approximately 90 days. (Tr. 621, RS 24; ALJD at 12) Justin Stacey was manager of the Prescott store when the Notice was posted. (Tr. 621; ALJD at 12) Kiraly discussed the Notice with Stacey at a dinner in Prescott in early December 2008. (Tr. 700; ALJD at 12) Kiraly asked Stacey if he had read the Settlement Agreement and Stacey told him that it was posted in the Prescott break room. (Tr. 700) Kiraly explained to Stacey that the Notice "protects the employees' rights, you know, not to be retaliated against." (Tr. 701:1-2; ALJD at 12)[6] Stacey asked Kiraly "if there were any severe fines that were put on the RoomStore," and Kiraly responded, "not to my knowledge, but I'm not sure how that works or if it could be forthcoming." (Tr. 701:13-16) After that Stacey said he "shouldn't be talking about it," and that was the end of the conversation about the Notice and Settlement Agreement. (Tr. 701:17)

Kiraly transferred to the Fiesta Store in March, where Stacey had become manager. (ALJD at 13) Soon after he started working at the Fiesta Store, in early to mid-March, Kiraly gave a copy of the Settlement Agreement to Passafiume when she visited the Fiesta Store the day she was fired.[7] (ALJD at 13) Passafiume talked to Kiraly about a number of things including feeling physically threatened by assistant sales manager Joe Smith, "her commission adjustments and such and her being told that she wasn't allowed to talk about it. And when she did, she felt

[6] Stacey testified at the hearing that he did have dinner with Kiraly but denied that they discussed the Board Settlement Agreement. The ALJ incorrectly credited Stacey's testimony over Kiraly's about this meeting for the reasons that will be set forth later in this Brief.

[7] As discussed below, the ALJ properly found that Respondent's discharge of Passafiume was violative of Section 8(a)(1) of the Act.

she was being reprimanded." (Tr. 463:1-5; ALJD at 13) Kiraly talked to Passafiume about her rights under the Act, then took Passafiume to his car, which was parked in front of the store's showroom window, and gave Passafiume a copy of the Board Settlement Agreement. (Tr. 464) At the time, Kiraly saw a small crowd of sales associates at the front window and assistant sales manager Ryan "glaring" at him. (Tr. 464:7; ALJD at 13) Ryan stood out from the crowd because he is very tall. (Tr. 464) Passafiume corroborated Kiraly's testimony, and the ALJ properly accepted Kiraly's testimony as accurate. (ALJD at 13) Passafiume filed her charge with the Board on March 23, 2010. (GC 1(a))

3. Kiraly's Discharge

Given Kiraly's long history of protected concerted activities, Respondent's knowledge of and animus towards such activities, the ALJ properly found that "General Counsel made a *prima facie* showing that Kiraly's protected concerted activities and his having previously filed charges with the Board were a motivating factor in the Respondent's decision to terminate him." (ALJD at 33) However, including because the ALJ incorrectly credited Stacey's testimony where it conflicted with Kiraly's, the ALJ accepted Respondent's alleged reasons for firing Kiraly as being sufficient to overcome Respondent's burden under *Wright Line*, 251 NLRB 1083 (1980). (ALJD at 34) However, as demonstrated below, those alleged reasons, which all relate to events during Kiraly's last week at the Fiesta Store, were mere pretext.

One of the reasons proffered by Respondent for discharging Kiraly is his alleged confrontation with employee Andrew McCormack (McCormack). On March 22, Kiraly was first in line at "point" to take the next customer at the Fiesta store. (Tr. 480) Next in line, after Kiraly, was Gerald Limbrick. (Tr. 480; ALJD at 13) Another sales associate, McCormack, was also up at point, although store protocol only allows two people at point so as not to scare away

customers. (Tr. 480) Kiraly received an emergency call on his cell phone from his daughter and stepped outside to take the call. (Tr. 480-481; ALJD at 13) Kiraly missed his daughter's call and she sent him a text message telling her father she was safe. (Tr. 480-481) Kiraly was gone less than a minute and because no customers had entered the store during that time, he resumed his position at point. (Tr. 481) McCormack, who was third in line at point, began loudly complaining about Kiraly resuming his position and saying "this is bullshit" that Kiraly took his turn. (Tr. 481:17; ALJD at 14) Kiraly now had a customer and moved them away from point to explain pricing to them and then the customers left. (Tr. 281; ALJD at 14) McCormack was then yelling very loudly that Kiraly was "cheating" and "It's not your fucking turn and you're a fucking thief for taking it." (Tr. 482:7, 10-11; ALJD at 14) Kiraly told McCormack that "we'll take this up with management later," and McCormack told Kiraly to "chill the fuck out, dude." (Tr. 482:17-19; ALJD at 14)

The store manager was busy and Kiraly chalked the incident up to McCormack's inexperience and so decided to ignore the incident. (Tr. 483, 484; ALJD at 14) A few days later, store manager Stacey asked Kiraly why he didn't bring the incident with McCormack to his attention. (Tr. 484) Kiraly explained that he felt McCormack was "just immature and young, and based on our previous conversations that you were going to relieve him within days of his duties in the sales position that I didn't feel it was warranted to –you know, I just ignored it." (Tr. 484:17-21) Stacey told Kiraly that McCormack had contacted corporate about the incident and he "never want[s] to be blindsided again. You know, politically, this could hurt me at the RoomStore." (Tr. 484:12-14) Kiraly asked Stacey if he needed to write anything to corporate in response. (Tr. 484; ALJD at 15) Stacey said no. (Tr. 484; ALJD at 15) Kiraly also asked

several times if he was being warned, and Stacey said , "No, no, I just want to get your side of the story." (Tr. 484:24-25; ALJD at 15)[8]

The second proffered basis for discharging Kiraly is alleged to have occurred about five days later. More specifically, on March 27, Kiraly was working with a couple of customers and left them to check on inventory for items they were interested in. (Tr. 485; ALJD at 15) When he had stepped away from the customers, Kiraly saw another sales associate named P.V. George look around, walk over to Kiraly's customers, sit down and start talking to them. This is known in Respondent's stores as "crashing" another associate's sale. (Tr. 486; ALJD at 15) These customers had bottles of water with RoomStore labels on them, which is a clear signal to other sales people that the customers are already working with a sales associate. (GC 11; ALJD at 15) George then saw Kiraly looking at him and yelled out, "These customers had many, many questions." (ALJD at 15) Kiraly then walked over to the customers and one of them said, "I didn't have any questions." (Tr. 486:21-24; ALJD at 15) Kiraly did not challenge George but George stood up and walked away. (Tr. 486-487)

That same evening, Kiraly told assistant sales manager Ryan about the incident with George (ALJD at 15) because Ryan had previously told Kiraly that he was to report if George tried to crash a sale. (Tr. 486) Kiraly also spoke briefly with store manager Stacey about what happened with George. Stacey said, "I know, I know, I'll take care of it." (Tr. 489:15; ALJD at 15) Kiraly then heard George paged and saw him go into a meeting with Stacey and Ryan. (Tr.

[8] Again, the ALJ credited Stacey's testimony where it conflicted with Kiraly's, in particular Stacey's testimony that he did, in fact, warn Kiraly at this meeting and asked him to write a statement. However, as argued later in this Brief, Stacey was not a credible witness and the ALJ should not have credited his testimony over Kiraly's. Also, over Counsel for the Acting General Counsel's hearsay objections, the ALJ admitted into evidence statements written by McCormack and Limbrick about this incident, even though neither person testified. (ALJD at 14 n. 12) While the ALJ wrote that he admitted those documents for their impact on Stacey's understanding and actions (ALJD at 14), Counsel for the Acting General Counsel continues to contend that those inflammatory documents, as quoted in the ALJD, constitute hearsay and should not have been admitted into evidence. Nevertheless, those documents do demonstrate that Stacey was on a mission to get rid of Kiraly by documenting in Kiraly's file alone these ordinary disputes between sales associates.

489; ALJD at 15) George came out of the office about an hour later and left work at 7:30 p.m., even though his shift was not over until 9:00 p.m. (Tr. 489-490; ALJD at 15)

The following morning, Kiraly arrived at work around 8:30 and was surprised to see George back at work. (ALJD at 15) Kiraly asked assistant sales manager Ryan if that was the end of the discipline for George, and Ryan said, "Well, we'll talk afterwards." (Tr. 490; ALJD at 15) Kiraly then went into the break room to clock in and get some coffee. (Tr. 490-491; ALJD at 15) The store had not yet opened for the day. (Tr. 491; ALJD at 15) George walked into the break room and loudly said to Kiraly, "You lied last night to get me in trouble," and George called Kiraly a "fucking liar." (Tr. 491:11-12; ALJD at 16) Kiraly responded, "well, the truth hurts, pal." (Tr. 491:14; ALJD at 16) George told Kiraly he was going to "get [him] back for this" and again called Kiraly "a fucking liar." (Tr. 491:10-11) Kiraly was equally loud and responded, "Well, you're a fucking thief." (Tr. 492:16; ALJD at 16)

Sales associates Castro and Walker were in the break room for at least part of the argument. Walker, a current employee of Respondent when she testified at hearing, confirmed that Kiraly and George were "going back and forth with each other" and exchanging words like "Oh, you're the thief" and "No, you're the thief, you're the liar, you're the liar. You're dishonest. No, you're dishonest. You take people on the floor." (Tr. 510:22-25; ALJD at 16) Walker testified that the two men were standing about twelve feet away from each other and their voices were equally loud. (Tr. 511) Walker did not feel threatened by the two men at any time and she did not witness anything that led her to believe the argument would get physical.

(Tr. 511; ALJD at 16) Walker did not believe either Kiraly or George was a threat to the other. (Tr. 512)[9]

George has a reputation for crashing other associates' sales. As sales associate Johnson testified, she had had two or three "big confrontations" with George that ended up "going to management" when George "blatantly took some sales and broke big no-no's on sales[.]" (Tr. 583:18-22) George was written up and suspended for taking half of a commission which Johnson described as "out and out thievery, theft to his associates." (Tr. 584) When Johnson and Kiraly worked together, Johnson told Kiraly about the problems she had with George taking her sales. (Tr. 584)

The dispute between George and Kiraly lasted about 60 to 90 seconds (ALJD at 16) and occurred before the 9:00 a.m. employee meeting, which began a few minutes later after the argument. (Tr. 702) At the meeting, Stacey handed out typed "Meeting Notes," and Kiraly made his own handwritten comments on the document. (GC 30) Stacey had prepared notes on "Floor Ethics" and Kiraly wrote in "No Consequences for Bad Behavior. What a Surprise." (GC 30) Kiraly testified he was referring to the incident with George the night before, when George tried to crash Kiraly's customers, and the fact that George was not disciplined for it. (Tr. 704) Kiraly also noted on the document that he did not confront George on the sales floor and that he immediately took the issue to the managers. (GC 30)

The third incident relied upon by Respondent in discharging Kiraly is alleged to have occurred later that week. Specifically, within a week of the matters involving George, described above, Kiraly was working with a customer and had written an invoice for a $4,000 sale. He took the invoice and the customer's credit application to one of the clerical staff named Tiffany

[9] Here, again, in his one-sided investigation, Stacey obtained written or oral statements about this incident from everyone but Kiraly, who credibly testified that Stacey never asked him to write what happened and did not even mention the George incident to him until days later when he decided to fire Kiraly. (Tr.499, 502)

Carraway (Carraway) to do a credit check on the customer. (Tr. 493; ALJD at 17) Carraway told Kiraly that she needed an ID verification form for the customer. (Tr. 493) Kiraly told Carraway that he had never filled out an ID verification and asked her to process the credit application. (Tr. 494; ALJD at 17) Kiraly explained in his termination letter that management "requests" but does not require sales associates to fill out an ID verification form with credit applications (GC 28, p. 15 (handwritten in upper right corner)). Carraway said loudly, in the presence of Kiraly's customer, "I can't take your credit app." (Tr. 494:1) Kiraly apologized to his customer, and at that point, another office worker named Allison took Kiraly's credit application and processed it. (Tr. 494)

At hearing, Kiraly explained that the reason he stopped using the ID verification form is because it can take five minutes to fill out and the customers can get "cold feet" and abandon the sale at that point. (Tr. 495:14) Kiraly credibly testified that he did not yell at Carraway, curse at her or threaten her in any way during their conversation. (Tr. 496)[10]

Late in the evening of March 29, store manager Stacey called Kiraly into his office. (Tr. 496; ALJD at 18) Stacey told Kiraly to sit down and then said he "was considering what punishment to give [Kiraly] based on [Kiraly's] bad behavior on three different inciden[t]s." (Tr. 496:23-24; ALJD at 18) Stacey then proceeded to talk about the incidents with McCormack and George, and Carraway. (Tr. 497) Kiraly reminded Stacey that he had asked Stacey if he was being warned when they previously discussed what happened with McCormack. (Tr. 497)

[10] While the ALJ credited Carraway's version of what occurred over Kiraly's testimony and found that Carraway felt frightened by Kiraly (ALJD at 17), that finding ignores the fact that Carraway was compelled to testify in the presence of her employer, owner Alan Levitz (Levitz). Also, as discussed, infra, Respondent's investigation was tailored to find fault with Kiraly inasmuch as Stacey asked Carraway to write a statement with her version of events (ALJD at 18) but did not request the same of Kiraly. (Tr. 502)

Stacey claimed he did warn Kiraly and Kiraly reminded him, "No, you didn't." (Tr. 497:7)[11] Until the evening of March 29, Stacey had never discussed with Kiraly the incidents with George and Carraway. (Tr. 497; ALJD at 18) According to Kiraly, even during that meeting on March 29, Stacey did not ask Kiraly for his side of the story regarding these three events (Tr. 498), nor did Stacey ask Kiraly to write any statements about these events. (Tr. 498, 502)

The next day, on March 30, at around 4:00 p.m., Stacey again called Kiraly into his office. (Tr. 498; ALJD at 18) Assistant sales manager Ryan was also in this meeting. (ALJD at 18) Stacey handed Kiraly a document and told Kiraly, "effective immediately, I'm terminating you on three charges per the handbook." (Tr. 499; ALJD at 18) Kiraly was "shocked and confused" that Stacey had written that he had given Kiraly a verbal warning for the incident with McCormack because Stacey had told him the previous week that he was "absolutely not" being warned. (Tr. 499:15) When Stacey told Kiraly that he had investigated the incident with George, Kiraly said, "Well, you never talked to me," and that "if you're going to do an investigation, why don't you at least investigate the accused party." (Tr. 499:22-500:1) Kiraly asked Stacey if his termination "had anything to do with me talking about a union or trying to organize people about their working conditions," and Stacey replied, "No, it has to do with your behavior," but he also told Kiraly that he "wasn't being loyal to him or the company." (Tr. 500:17-19, 500:3-4; ALJD at 18)[12] Assistant sales manager Ryan told Kiraly, "you're causing trouble with all the employees and, you know, your day's finally come basically." (Tr. 500:22-24) The ALJ did give Kiraly "the benefit of the doubt" and accepted that Ryan did, in fact, make this statement. (ALJD at 19) The only reasonable interpretation of such a statement is as

[11] Here, again, the ALJ incorrectly credited Stacey's testimony that he did warn Kiraly about the dispute with McCormack earlier in the week. (ALJD at 18)

[12] For reasons discussed later in this Brief, the ALJ improperly credited Stacey's testimony that Kiraly "never discussed with him the subject of unions or organizing the employees regarding their working conditions." (ALJD at 19)

summarizing for Kiraly that his long history of ongoing protected concerted conduct had finally caught up with him. Kiraly wrote a letter in response to Stacey's termination statement. (Tr. 503, GC 28; ALJD at 19)

After Kiraly was fired, Stacey told the sales associates in a Saturday meeting and on another occasion that they "were not to talk about [Kiraly] and discuss him." (Tr. 590:24-591:5)

II. ANALYSIS

A. The ALJ Erred in Failing to Find that Respondent Violated the Act by Discharging Kiraly Because He Engaged in Protected Concerted Activities

The ALJ properly found that Kiraly engaged in and "exercised a considerable amount of" protected concerted activity. (ALJD at 19) It is undisputed that Kiraly filed two unfair labor practice charges in 2008, one of which resulted in a Board settlement between Kiraly, Respondent. (ALJD at 21) It is also clear that beginning in November 2008 and up until the month he was fired, Kiraly was actively meeting with many employees and supervisors at different Respondent locations, handing out copies of the Board Settlement Agreement, and discussing with them "the terms of [the] Settlement Agreement, and the protected rights that the employees had under the Act to organize and voice complaints." (ALJD at 21) The ALJ also properly found that Respondent was aware of Kiraly's protected concerted activities and "was unhappy with" those activities. (ALJD at 21) Therefore, the ALJ properly found that Counsel for the Acting General Counsel met its initial burden under *Wright Line*, Id. (ALJD at 33) Specifically, the ALJ found that "Kiraly's protected concerted activities and having previously filed charges with the Board were a motivating factor in the Respondent's decision to terminate him." (ALJD at 33) The ALJ also properly determined that Respondent's written policies and oral statements by supervisors "have restrained and coerced the employees in the exercise of their Section 7 rights" in violation of Section 8(a)(1) of the Act, thus demonstrating

Respondent's animus toward its employees for engaging in protected activity. (ALJD at 33) Further, the ALJ found Kiraly's discharge was suspect because of Respondent's other violations and because Kiraly was fired shortly after discussing Passafiume's discharge with her while in view of a supervisor. (ALJD at 34)

The ALJ, however, erred in finding that Respondent met its burden of persuasion that it would have taken the same action absent the protected conduct. (ALJD at 34) The ALJ based this decision primarily on the testimony of Fiesta Store manager Justin Stacey, which he credited over Kiraly's testimony where it conflicted with Stacey's version of events. The clear preponderance of all relevant evidence shows that Stacey's version of events that he claims led to him, and him alone, firing Kiraly is simply not credible.

1. The ALJ Erred in Crediting the Testimony of Store Manager Stacey over that of Kiraly

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence shows that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950) enf'd. 188 F.2d 362 (3rd Cir. 1951). Such a burden is met here. The preponderance of the evidence shows that the ALJ clearly erred in crediting Stacey's testimony. As a witness, Stacey was inconsistent, overblown, and inflated his testimony as the trial progressed. A reading of the record shows that, at all times, Stacey was motivated by one priority—to avoid an unfair labor practice finding and to protect his job, especially since Stacey, as did all Respondent's witnesses, had to testify in the presence of Respondent's owner, Levitz. The most telling example of Stacey's unreliability as a witness is his sudden recollection on day four of the trial that he was concerned Kiraly might "go postal" following his argument with sales employee George. At no time during his examination on day two of the trial – either during questioning by Counsel for the General Counsel pursuant to FRE

611(c) or during examination by Respondent's counsel – did Stacey use the inflammatory and memorable phrase "going postal" or to "go postal." (Tr. 333-431) Nor does that phrase, or any variation on that phrase, appear in any of Stacey's notes and witnesses statements gathered by Stacey during his one-sided investigation of the dispute in the break room between George and Kiraly. All of those notes and statements were made while the incident was fresh in the minds of Stacey and the employees. The record strongly suggests that the "going postal" testimony was concocted during trial to further Respondent's cause. Thus, it was only when Stacey was recalled to the witness stand two days after his initial testimony, on Friday, January 15, 2010, that he purported to have remembered hearing people say Kiraly might be "going postal." (Tr. 629:21) By then, and despite his lengthy testimony earlier in the hearing, Stacey was testifying for the first time that employees "were afraid he [Kiraly] was going to go off on them[.]." (Tr. 629:18-21) Stacey said he heard people talking about the argument and Kiraly going postal "throughout the whole day," yet nothing in his own notes written at the time of this incident reflects this concern. (Tr. 640:2-9; RS 15, GC 23)

Doubtless, Stacey's recollection of the underlying events, including as to whether Kiraly was a threat or might "go postal," was better at the time of the actual incident than during his hearing testimony nearly a year later. See *Celtic General Contractors, Inc.*, 341 NLRB 862, 872 (2004) (worker's recollection about matters made during testimony closer in time to the events was better than his recollection made during a later hearing); *Best Western Motor Inn*, 281 NLRB 203, 206 (1986) (affidavit given at a time closer to the events in question is found to be more credible than denials made by witnesses at hearing). Therefore, Stacey's newfound recollection on day four of the trial that Kiraly was somehow a threat and might "go postal" simply does not stand up to scrutiny and undermines his credibility.

Moreover, Stacey's complete failure to fully and fairly investigate the incidents that allegedly led to his decision to fire Kiraly further destroys his credibility. While the ALJ found that Stacey conducted a "fairly complete, impartial inquiry" (ALJD at 36), that analysis is belied by the evidence. Stacey testified at trial that he conducts thorough investigations whenever he receives reports of employee misconduct. Stacey's "investigation" of Kiraly, however, consisted of interviewing the accusers and certain other employees, having them write statements, and putting those statements in Kiraly's file. Contrary to what would have comprised a complete and impartial investigation, Stacey never asked Kiraly to write his version of what occurred, and he did not put anything in the files of McCormack and George, even though there was substantial evidence that these employees had started the arguments with Kiraly and that those disputes were mutual. (Tr. 346, 352; ALJD at 14, 17) Nor did Stacey even document Kiraly's complaint about George "crashing" his sale, even though George had previously been disciplined for that very type of conduct. (Tr. 583-584; ALJD at 17) The ALJ credited Stacey's testimony that he did ask Kiraly to write a statement about the dispute with McCormack and that Kiraly declined to do so, but Stacey's testimony flies in the face of reason and is clearly inherently improbable. An employee who is aware that he is under investigation, particularly one who has served in management as Kiraly did, would not give up an opportunity to document his version of an incident, especially if that employee was warned about his behavior, as Stacey claims he warned Kiraly.

In addition, Stacey's failure to immediately investigate the events -- which he purportedly felt were serious enough to fire Kiraly -- also speaks to Stacey's disingenuousness and lack of credibility. The evidence as a whole only supports the conclusion that Respondent conducted a one-sided investigation with the aim of getting rid of its one employee who was known by

management to "stir the pot," and as having persistently, openly, notoriously, and in an "in your face" manner, exercised his rights under Section 7 of the Act.

In addition to the fact that Stacey's testimony as a whole and his manner of investigating Kiraly is suspect, Stacey himself agreed that someone "going postal" is a very serious concern, and he certainly does not want someone going postal in his store. (Tr. 640) Yet, further undermining the inherent probability of his testimony, Stacey did not send Kiraly home the day he allegedly heard Kiraly might "go postal." (Tr. 641:17-20) To the contrary, immediately after the dispute between Kiraly and George in the break room, Stacey allowed Kiraly to attend the weekly staff meeting and work alongside his fellow employees the rest of that day, the following day, and the day after that. He did not reprimand Kiraly, suspend Kiraly or even write him up. He did not even bother to speak to Kiraly about the incident for another three days.

Stacey also testified at trial that a witness to the George-Kiraly dispute, Castro, told him "she felt that Kiraly would've hit him" and "she did mention that she did hear a threat." (Tr. 402) It is telling that this is contrary to Castro's written statement, typed within days of the incident, in which she says nothing about Kiraly making a threat or that she was concerned Kiraly might hit George. (See R 14) In fact, Castro's own testimony about the incident confirmed that she was only there long enough to "hear a few words."[13] (Tr. 617:15-16) Castro testified that she was merely a "little embarrassed" by the two men's conduct and that she left the room before the argument was over. (Tr. 616:10-13; ALJD at 16) Castro also confirmed that Kiraly did nothing that was physically violent when she was in the room. (Tr. 618) Stacey's notes of his conversation with the other witness in the break room, Walker, also confirm that no

[13] Castro's meek testimony and written statement must be viewed in light of the fact that she was below the $55,000 sales standard in all but one month between August through December 2008. (GC 20, GC 4 (Store 08 (initials "RLC"))). It is reasonable to conclude that an employee with sales as poor as Castro's would not say anything to jeopardize her already precarious standing with Respondent.

threats were made and that the argument was "mutual," providing further, objective bases which undermine Stacey's credibility (R 15; ALJD at 16)

Likewise, Stacey's own notes confirm that Kiraly's dispute with McCormack was mutual, and in fact that Stacey had evidence that McCormack started the argument (RS. 8, 10; ALJD at 14), yet nothing appears in McCormack's file about this incident. Stacey testified at trial that he was concerned Kiraly might "take a swing" at McCormack, even though McCormack, a young man compared to Kiraly, is about 6 feet 5 inches tall and weighs around 200 pounds. (Tr. at 384, 482) Moreover, Stacey did nothing for days with this information about potential violence in the workplace and only spoke briefly with Kiraly about his concern that McCormack had gone over his head with his complaint. (Tr. 484) Despite Stacey's professed concerns -- at hearing -- about Kiraly and safety in the workplace, he allowed Kiraly to work full shifts nearly every day between March 22 and March 30, and Stacey never suspended Kiraly from work, never took any action to protect other employees from this "grave threat," never gave Kiraly written warnings, did not talk to Kiraly for four days about what happened with McCormack, and never spoke to Kiraly about what happened with George and the office worker until he decided to fire him. This failure to take any action flies in the fact of Stacey's long history in the retail furniture business and his concern about providing a "safe work environment." (Tr. 384) Such objective considerations further undermines Stacey's credibility and establishes a solid, sufficient basis for reversing the ALJ's credibility determinations in Stacey's favor.

"In assessing the credibility of witnesses, it is always helpful to have documentary evidence as a guide," and the documentary evidence here does not support Stacey's testimony about the "thoroughness" or fairness of his investigation or the gravity of the situation. *Celtic*

General Contractors, Inc., 341 NLRB at 875 (ALJ discredits testimony where the documentary evidence does not support the testimony of respondent's witnesses). Stacey only created or gathered documents that would justify firing Kiraly, and apparently intentionally avoided obtaining documents that would support Kiraly's assertions about the incidents. Those documents, and the lack of any documentation in the files of George and McCormack, even though Stacey claims he warned McCormack (ALJD at 14), clearly show that Stacey was building a case against Kiraly without ever obtaining Kiraly's version of events.

Accordingly, the clear preponderance of all relevant evidence shows that the ALJ erred in (1) crediting Stacey's testimony over that of Kiraly and (2) that Stacey made the decision to fire Kiraly based on his "investigation" of the incidents between Kiraly and three co-workers. Instead, the objectively credible evidence shows that Stacey was an unreliable witness whose overblown trial testimony is not supported even by the documents gathered in his one-sided investigation, and that Respondent manufactured this excuse in order to rid itself of a problem employee who was actively exercising and supporting the rights of employees to engage in protected concerted activities.

2. The ALJ Erred in Failing to Find that Respondent Violated Section 8(a)(1) and (4) of the Act

a. Counsel for the Acting General Counsel Met Its Burden of Persuasion

The ALJ erred in finding that Respondent would have discharged Kiraly even in the absence of his having engaged in protected concerted activity and having previously filed charges with the Board. (ALJD at 33, 37) As noted, the ALJ properly found that Counsel for the Acting General Counsel met its initial burden of persuasion under *Wright Line*, Id. (ALJD at 33) There is no question about Kiraly's protected activities or Respondent's knowledge of those

activities. (ALJD at 20) As to the Section 8(a)(4) violation, the record reflects a strong *prima facie* showing. Kiraly engaged in activity specifically protected by Section 8(a)(4), namely, filing the unfair labor practice charges in Cases 28-CA-21991 and 28-CA-22067, presenting evidence to the Board in those cases, and the entering into a Board Settlement Agreement related to one of those charges on October 24, 2008.[14]

The record is also replete with evidence of Kiraly's engaging in concerted activities protected by Section 8(a)(1). These activities include distributing copies of the Board Settlement Agreement to employees at different stores; openly speaking to employees and supervisors about the Settlement Agreement; speaking to employees and supervisors about the need for a union; speaking up on behalf of other employees; and counseling Passafiume in plain view of his supervisor, Ryan, after she had been fired.

The record also clearly establishes Respondent's ire and hostility towards Kiraly because of his protected activities. The first Board charges filed by Kiraly stemmed from his activities at Respondent's newly-opened Prescott Store. After the employees there gathered together to complain, Respondent banned Kiraly from the Prescott Store, told him he was riling up the employees in Prescott, and ordered him to keep his nose out of the store's business. Respondent explicitly threatened to fire Kiraly if he did not mind his own business. Additionally, the day after the Board Settlement Agreement was signed, on October 25, 2008, Respondent issued a written warning and suspended Kiraly, alleging that he had threatened two coworkers. However,

[14] The Board, appropriately, takes seriously the need to protect its processes and those who turn to the Board for help or who help it in its enforcement of the Act. See *General Services, Inc*., 229 NLRB 940, 941 (1977) ("if the Board is to perform its statutory function of remedying unfair labor practices its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings"). To this end, "[t]he approach to § 8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose." Id. (quoting *NLRB v. Scrivener, d/b/a AA Electric Co*., 405 U.S. 117, 124 (1972)). Thus, it is beyond purview that Section 8(a)(4) protects employees who file and process charges with the Board. See, e.g., *Larry Blake's Restaurant*, 230 NLRB 27 (1977); *S.E. Nichols Marcy Corp*., 229 NLRB 75 (1977); *Portsmith Ambulance Serv*., 323 NLRB 311 (1997); *Florida Steel*, 214 NLRB 264 (1974).

the evidence demonstrates that this warning was nothing more than a flimsy concoction, where one of the employees who was supposedly threatened testified that she did not feel threatened and was railroaded by a manager to supply a statement. Rather, the evidence demonstrates that the conversation for which Kiraly was disciplined – relating to the unfair treatment of another employee – was yet more classic concerted activity. The timing of the October 25, 2008 warning is further indication of Respondent's animus. *Sunrise Senior Living*, 344 NLRB, 1256, 1256-1257 (2005) (timing of involuntary leave, coming two days after protected activity, and demotion, coming five days later, is evidence of animus).

Similarly, after Respondent saw Kiraly counsel Passafiume, and only days after Passafiume filed her Board charge in the instant consolidated matter, Respondent began documenting in Kiraly's file incidents involving Kiraly and coworkers, without documenting two of those incidents in the other employees' files, even when the evidence showed the disputes were mutual and even started by Kiraly's coworkers. Days later, on March 30, Respondent fired Kiraly. In his final meeting with store manager Stacey, Kiraly asked if his termination had anything to do with his protected activities and Stacey responded that Kiraly wasn't loyal to him or the company, and the assistant sales manager said Kiraly was causing trouble with the employees and that his day had "finally come." There is no question Respondent had had enough of Kiraly's protected concerted activities, including filing charges on behalf of Respondent's employees and talking to employees about their protected rights, and so finally devised a way to put an end to these activities.

b. Respondent's Explanation for Kiraly's Discharge is Pretextual

In the face of such a substantial, even classic prima facie case, Respondent's *Wright Line* defense pales. Respondent claims that it fired Kiraly is because he argued with two sales

associates and an office worker. Store manager Stacey claims he investigated these incidents and his investigation formed the basis for firing Kiraly. Yet the evidence shows that Stacey's investigation was a sham. It is well settled that "[a]n employer's failure to fully and fairly investigate an employee's alleged misconduct before disciplining or terminating him, or to provide the employee an opportunity to rebut the accusation, suggests the presence of discriminatory motivation." *Mid-States Express, Inc*., 353 NLRB No. 91, *20 (2009) (citing *Aljoma Lumber, Inc*., 345 NLRB 261, 285 (2005); *Pratt Towers, Inc*., 338 NLRB 61, 97 (2002); *Traction Wholesale Cr.*, 328 NLRB 1058, 1072 (1999)).

Stacey's investigation revealed that the conflicts between Kiraly and McCormack and George were mutual, yet Stacey put nothing in the files of McCormack and George about those incidents, nor did they receive any counseling or discipline. The only documentation, and the only discipline, was reserved for Kiraly, because Kiraly was the person targeted by Respondent. Such disparate treatment is hardly surprising given the one-sidedness and inadequacy of the investigation. Even though Stacey was on notice that both McCormack and George started the disputes with Kiraly, and obtained written statements from McCormack and George, Stacey never asked Kiraly to provide his side of the story in a written statement. Indeed, Stacey never mentioned the incident with George to Kiraly until he fired Kiraly. At hearing, Stacey himself admitted that his investigation did not meet his own standards when he conceded that a true investigation requires questioning all parties to the dispute, including the accused, as well as any witnesses offered by those parties. The record leaves no doubt that Kiraly was not afforded any of these opportunities with respect to any of the three incidents which formed the purported bases for his firing. Finally, in an attempt to make the allegations against Kiraly appear more

serious, and therefore make it appear that Respondent had ample cause to fire Kiraly, Stacey felt compelled to embellish on the "findings" of his sham investigation in his hearing testimony.

More specifically, according to Stacey, Kiraly was so out of control that employees expressed fear that he would go "postal." However, the record, and common sense, demonstrate that Stacey was simply trying to put on a good show for the ALJ and his boss, who was seated at counsel table. Faced with a "postal" employee, Stacey did nothing for days – he allowed Kiraly to come into work without warning him, without warning other employees, or taking any other precaution. These actions lead to the inescapable conclusion that the disputes were, at most, common workplace conflicts that typically do not result in the firing of a long-term employee such as Kiraly. Indeed, Kiraly's conduct appears relatively benign when compared to the misconduct of Respondent's assistant sales manager, Joe Smith. (See ALJD at 6-7) The record is undisputed that Smith, among his many other misdeeds, physically abused employees, including hitting them with papers and tipping their stools, and that Respondent simply turned a blind eye when told about this misconduct. (See ALJD at 6-7)

Respondent's failure to fully and fairly investigate the accusations against Kiraly, Respondent's failure to take any action – even a written memorialization of an oral warning – against McCormack and George, Respondent's attempt to embellish the facts at hearing, Respondent's tolerance of other workplace conflicts, Respondent's admission, by Stacey, that Kiraly was not loyal to him or the company, and Ryan's statement that Kiraly's day had "finally come," demonstrate that it was Respondent's intent to find a way to rid itself of an irritant, even if that irritant was one of its highest producers and most experienced and senior employees in what Respondent described as a particularly trying economic environment. By doing so,

Respondent violated Section 8(a)(1) and (4) of the Act. Accordingly, Counsel for the Acting General Counsel asks the Board to find the violations as alleged.

B. The ALJ Erred in Failing to Find that Store Manager Stacey's Threat of Discharge and Promulgation of an Overly Broad Rule Were a Violation of the Act

The ALJ erred in not finding that Respondent violated § 8(a)(1) of the Act by threatening Kiraly with discharge for engaging in protected concerted activities and later promulgating an overly broad rule prohibiting employees from discussing terms and conditions of employment. (ALJD at 34 n. 18) More specifically, the record shows that on March 29, the night before he fired Kiraly, Stacey told Kiraly that he was "considering what punishment to give [Kiraly] based on [Kiraly's] bad behavior on three different incident[s]." (Tr. 496:23-24) The following day, when Stacey told Kiraly he was fired, Kiraly asked Stacey if his termination "had anything to do with me talking about a union or trying to organize people about their working conditions," and Stacey replied, "No, it has to do with your behavior," and he also told Kiraly that he "wasn't being loyal to him or the company." (Tr. 500:17-19, 500:3-4) Assistant sales manager Ryan was also in the meeting and told Kiraly, "you're causing trouble with all the employees and, you know, your day's finally come basically." (Tr. 500:22-24)

Based on the record, it is apparent that the "disloyalty" and the "trouble" to which Ryan was referring is Kiraly's protected concerted activities, which are amply documented in the ALJ's finding. (See ALJD at 10-13). In this context, Stacey's statement to Kiraly that he was "considering what punishment" to give him can only be viewed as a threat, which was eventually made good when he fired Kiraly the next day. The ALJ gave little attention to Ryan's statement to Kiraly that, "You're causing trouble with all the employees and, you know, your day's finally come." Even though Ryan did not testify at trial, the ALJ credited Respondent's version by

finding that Ryan's statement, "appears to me to be nothing more than a reference to the three altercations with McCormack, George, and Carraway, which le[]d to Kiraly's discharge." (ALJD at 37)

Nothing in the record squares with the ALJ's assumption. The record is replete with evidence of Ryan's role in disciplining Kiraly for engaging in protected concerted activity. Specifically, beginning back in October 2008, the day after Kiraly signed the Board Settlement Agreement, Ryan sent Kiraly home for two days without pay for discussing Ryan's treatment of co-worker Victor Lopez. Ryan was very aware of Kiraly's activities because Kiraly actually gave Ryan a copy of the Board Settlement Agreement and told Ryan he hoped this would lead to better treatment of employees. Thereafter, less than a month before Kiraly's discharge, Ryan saw Kiraly give Passafiume a copy of the Settlement Agreement. (Passafiume filed a charge with the Board just days before Kiraly was fired.) As a result, the objective record evidence supports a finding by the Board that the ALJ erred in assuming that Ryan's statement at Kiraly's termination meeting only referred to the events involving McCormack, George and Carraway.

Moreover, in light of Kiraly's long history of protected concerted activities at Respondent, Stacey's statement that Kiraly "wasn't being loyal to him or the company" was without a reasonable doubt a threat that Kiraly and other employees could be discharged for engaging in protected concerted activities, and that Kiraly was, in fact, discharged for this disloyalty. See, e.g. *Health Now, Inc*., 353 NLRB No. 43, at *22 (2008) ("'It is well settled that statements equating union activity with disloyalty to the employer constitute coercion in violation of Section 8(a)(1) of the Act … as well as an implicit threat of repercussions for union loyalty, as opposed to company loyalty.'") (quoting *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996); and *Hialeah Hospital*, 343 NLRB 391, 391 (2004) (finding

implicit threat of unspecified reprisals where employer told employees that he felt "betrayed" and "stabbed in the back" because they had contacted a union).

In addition, store manager Stacey, after firing Kiraly, promulgated an overly-broad rule prohibiting employees from discussing terms and conditions of employment by telling employees that they could not discuss Kiraly. (Tr. 590:24-591:5) "Employees' right to discuss the terms and conditions of their employment may legitimately be restricted only if their interests are outweighed by an employer's valid confidentiality interest." *Phoenix Transit System v. NLRB*, 337 NLRB 510 (2002, enfd. mem. 63 Fed.Appx. 524, 525 (D.C. Cir. 2003). Here, Respondent has not presented a legitimate confidentiality interest or, for that matter, any reason for such an unduly broad prohibition that employees are not to discuss Kiraly, their former coworker.

Based on the foregoing, Counsel for the Acting General Counsel asks the Board to find that Respondent threatened its employees with discharge for engaging in protected concerted activities and promulgated an overly broad rule prohibiting employees from discussing terms and conditions of employment.

C. The ALJ Erred in Failing to Consider Counsel for the Acting General Counsel's Alternate Theory for the Discharges of Passafiume and Gabrielson

The ALJ properly found that Respondent fired Passafiume and Gabrielson because of their protected concerted activities. However, the ALJ dismissed Counsel for the Acting General Counsel's alternate theory that Passafiume and Gabrielson were also fired because they violated Respondent's unlawful rules prohibiting them from discussing terms and conditions of employment with other employees. (ALJD at 30 n. 15) The Board should not let this error go uncorrected because, even if Passafiume and Gabrielson had not engaged in any concerted activity, their discharges still violated the Act because the evidence establishes that they were

fired for violating Respondent's unlawful rules prohibiting them from talking about their terms and conditions of employment with other employees and exhibiting any negativity at work. The Board has made it clear that, when an employer imposes discipline pursuant to an unlawfully overbroad policy or rule, "that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004) (citations omitted). See also *Automatic Screw Products Co.*, 306 NLRB 1072 (1992) (employer unlawfully disciplined employee for violating rule against discussing salaries); *Northeastern Land Services, Ltd*., 352 NLRB 744, 745 (2008) (citing *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974)).

Here, the evidence establishes that Passafiume was fired for violating Respondent's unlawful rules, including store manager Serda's instruction to Passafiume just days before he fired her that "[f]rom now on, I don't want you, you know, out there talking about being, you know, in fear of losing your job. . . . It stays in here." (Tr. 247:7-9; ALJD at 7) The record is abundantly clear that Serda had a long-standing problem with employees discussing the terms and conditions of their employment (ALJD at 4-6), that he was already angry when he issued this order to Passafiume, and that Passafiume disregarded his unlawful order by immediately telling a coworker that she had been "hushed" by Serda. (Tr. 248; ALJD at 7) That same week, in response to Passafiume violating his rule, Serda voided another of Passafiume's sales and fired her. (Tr. 229, 36)

Likewise, the evidence establishes that Gabrielson was fired because she too could not adhere to Respondent's unlawful rules. Gabrielson was written up for the first time for her December sales – the same month she challenged assistant manager Smith about her right to discuss unions and pay issues and when she complained to Smith and Serda about Smith's conduct towards other sales associates, particularly the female associates. (Tr. 142-144, 153-154, GC 9, ALJD at 4-7, 29-30). Gabrielson, like Passafiume, violated Serda's and Smith's rules against "negativity" on several occasions, including on February 28, when she told Smith to stop hitting Passafiume and that he hurt Passafiume. (Tr. 154-156) Only four days later, Gabrielson was fired.

Accordingly, Counsel for the Acting General Counsel asks the Board to find that Respondent also violated § 8(a)(1) for firing Passafiume and Gabrielson because they disobeyed Respondent's unlawful rules.

D. The ALJ Erred by not Ordering Interest to be Compounded on a Quarterly Basis.

In determining make whole relief for the discriminatees, the Counsel for the Acting General Counsel asserts that the ALJ erred in failing to order that interest on backpay be compounded on a quarterly basis. Only the compounding of interest can make adjudged discriminatees fully whole for their losses. IRS practice, along with precedent from other areas of law, provide ample legal authority for assessing compound interest to remedy unfair labor practices.[15] See, 26 U.S.C. § 6622(a) (as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment of taxes); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993)

[15] When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to access compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97 – 494(1), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

(compound interest appropriate in Title VII case); *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy Reorganization Act of 1974), revd. on other grounds sub nom. *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002) (Department of Labor Administrative Review Board adopts policy of compounding interest on backpay awards); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest "will conform to commercial practices and proved the patent holder with adequate compensation for foregone royalty payments"); *Brown v. Consolidated Rail Corp.*, 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans Readjustment & Assistance Act case; compound interest awarded regardless of defendant's good faith or justification); *United States v. 319.46 Acres of Land More or Less*, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award). Indeed, the trend in recent years has been increasingly towards remedies that include compound interest, and the Act will soon be an anomaly if the Board continues with its current practice.

Accordingly, Counsel for the Acting General Counsel asks that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987). Because the short-term Federal rate is updated on a quarterly basis, it would make administrative sense to also compound interest on the same basis. Id at 1173-74. In addition, compounding interest on a quarterly basis is more moderate that daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than annual compounding,

which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

E. The Board Should Make Technical Corrections to the ALJD

The Board should make certain technical corrections to the ALJD. Specifically, on page 10, "Justin Tracey" should read "Stacey" and on page 16, paragraph 4, "Castro" should read "Walker." Accordingly, Counsel for the Acting General Counsel asks that pages 10 and 16 be corrected as indicated.

V. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board reverse the ALJ's findings and conclusions described above and find that Respondent committed the violations of Section 8(a)(1) and (4) of the Act as delineated herein, adopt the findings of the ALJ not excepted to herein, and order that interest on the backpay in this matter be compounded on a quarterly basis.

Dated at Phoenix, Arizona, this 9th day of July 2010.

Respectfully submitted,

/s/ Mary Gray Davidson
Mary Gray Davidson
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178
Email: mary.davidson@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS in THE ROOMSTORES OF PHOENIX, LLC d/b/a THE ROOM STORE, in Cases 28-CA-22404 et al., was served by E-Gov, E-Filing, E-Mail and regular mail on this 9th day of July 2010, on the following:

Via E-Gov, E-Filing:
Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW, Room 11602
Washington, DC 20570-0001

Via E-mail:
D. Samuel Coffman, Attorney at Law
Mariscal, Weeks, McIntyre &
Friedlander, PA
2901 North Central Avenue, Suite 200
Phoenix, AZ 85012
E-mail: Samuel.coffman@mwmf.com

Ms. Diane Passafiume
2773 South Arroyo Lane
Gilbert, AZ 85295
E-Mail: Konczpass1@yahoo.com

Mr. Bruce E. Kiraly
885 North Granite Reef Road, Unit #59
Scottsdale, AZ 85257-4583
E-Mail: curly711@hotmail.com

Via Regular Mail:
The Room Store
6315 East Southern Avenue
Mesa, AZ 85206

The Room Store
3011 East Broadway, Suite 100
Phoenix, AZ 85040

/s/ Mary Gray Davidson

Mary Gray Davidson
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2117
Facsimile: (602) 640-2178
E-mail: Mary.Davidson@nlrb.gov