UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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DRESSER-RAND COMPANY

and **Cases 3-CA-27141**
3-CA-27260

LOCAL 313, IUE-CWA, AFL-CIO
---X

BRIEF IN SUPPORT OF EXCEPTIONS OF CHARGING PARTY TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Charging Party Local 313, IUE-CWA, AFL-CIO (herein, "Local 313") submits this brief in support of its exceptions to the Decision of the Administrative Law Judge ("ALJ") issued February 18, 2011.

STATEMENT OF THE CASE

This case involves the discharge of Local 313 Chief Plant Steward and negotiating committee member Glenn Painter for his third party communications to financial analysts concerning the state of collective bargaining at Respondent's Painted Post, New York facility, and concerning negotiations and working conditions at two of Respondent's other facilities. Respondent discharged Painter because it claims the communications were maliciously false statements, which violated its Insider Trading and Code of Conduct Policies.

The ALJ found that Painter's conduct was concerted, union activity, but that one of the statements he made to the analysts was a false statement, and that the statement was malicious and reckless because he made the calls anonymously, misstated his position and authority, that the statement did not advance the interests of the bargaining unit members and that he made the statement without a good faith basis for reaching the conclusions asserted in the statements to the analysts. The ALJ did not find that the other statements lost the protection of the Act.

The statement Painter made that the ALJ found to be false was that the "workload" at the Olean facility dropped off by 50 percent. In finding that this statement was maliciously false, the ALJ relied on Respondent's evidence concerning the level of direct labor hours at the Olean facility and described the exhibits as measuring workload. Painter never used the term "direct labor hours," and never made a statement implying that workload and direct labor hours were the same thing.

The ALJ further found that Respondent discharged Painter for the reasons asserted in the termination letter, specifically that he violated the Code of Conduct and Insider Trading Policy.

QUESTIONS PRESENTED

1. Did the ALJ err when he found that Painter made a false statement? (Exceptions 6, 7, and 8.)
2. Did the ALJ err when he relied on Painter's decision to make the calls to the analysts anonymously to find that he acted with malice? (Exceptions 1 and 3).
3. Did the ALJ err when he found that the fact Painter made a statement about labor conditions at a plant where he did not work evidenced that he made the statement with malice? (Exception 2.)
4. Did the ALJ err when he applied a reasonableness standard to Painter's conduct and found that Painter's reliance on hearsay statement from an employee relayed to him by a former employee was evidence of recklessness? (Exception 4.)
5. Did the ALJ err when he found that tactical decisions Painter made regarding the statement, specifically the content and timing of the statement, were evidence of malice? (Exceptions 3, 5, 10 and 12.)
6. Did the ALJ err when he implicitly held that Respondent met its burden of proving that Painter made maliciously false statements and that Respondent was, therefore, privileged to discharge him? (Exceptions 9, 13, and 14.)
7. Did the ALJ err when he failed to find that Respondent's application of its Insider Trading Policy and Code of Conduct did not violate Painter's Section 7 right to communicate with third parties concerning the labor dispute) (Exceptions 15 and 16.)

ARGUMENT

This case involves the discharge of Painter based on phone calls he made to stock analysts that Respondent were false and misleading. All parties stipulated at the hearing to the content of the statements Painter made and a transcript of the message was entered into evidence. (GC 8(a).[1] The ALJ found that one of the statements concerning the drop in workload at

[1] References to the exhibits from the hearing shall be cited as "GC" for the general counsel and "R" for Respondent, followed by the relevant exhibit number. References to the Transcript of the hearing shall be cited as "Tr" followed by the relevant page number. References to the ALJ's Decision shall be cited as "ALJ" followed by the relevant page and line numbers.

Respondent's Olean facility was maliciously false. It is this finding to which Charging Party takes exception.

The National Labor Relations Act protects the right of employees to engage in activity to improve their working conditions "through channels outside the immediate employee-employer relationship." Valley Hospital Medical Center, Inc. 351 N.L.R.B. 1250, 1252 (2007)(citation omitted). Employee communications with third parties relating to a labor dispute, however, "may be so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection." Id. (citation omitted). In Valley Hospital, the Board described the law on activities that lose the protection of the Act as follows:

> Statements have been found to be unprotected as disloyal where they are made 'at a critical time in the initiation of the company's business and where they constitute 'a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.' The Board is careful, however, 'to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues.' To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence 'a malicious motive.'
>
> Statements are also unprotected if they are maliciously untrue, i.e. if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. Whre an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act. In addition, in the context of an identified, emotional labor dispute, the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected.

Id. at 1252-53. (citations omitted). The burden is on Respondent to prove that statements are "clearly erroneous, much less that they [are] maliciously false." Id. at 1261; see also Diamond Walnut Growers, Inc., 316 N.L.R.B. 36, 47 (1995)(burden is on Respondent to show that employee's statements are false and malicious); Springfield Library and Museum, 238 N.L.R.B.

1673, 1673 (1979). In El Mundo Broadcasting Corp., the Board rejected the Respondent's assertion that it was privileged to discharge an employee who wrote a letter critical of management, stating:

> The Respondent's position would have been better supported had there been proof that Ortega's letter was a gross fabrication, and that the specific actions ascribed therein to the Respondent had no basis in fact whatever. No such showing has been made.

108 N.L.R.B. 1270, 1280 (1954).

POINT I

THE RESPONDENT FAILED TO MEET ITS BURDEN OF PROVING THAT PAINTER'S STATEMENT WAS FALSE (Exceptions 6, 7 and 8)

A. The ALJ Found False a Statement Painter Did Not Make

As proof that Painter's statement regarding workload was false, Respondent offered the testimony of Edward Wilber, the turbo Components Manufacturing manager at Respondent's Olean facility. (Tr. 698.) Through Wilber, Respondent offered an Excel spreadsheet that showed direct labor hours and subcontracting hours over a two year period. ((Tr. 701, R. 11.) In his decision, however, the ALJ erroneously stated that the Excel spreadsheet, which Wilber testified measured direct labor hours and subcontracted hours, in fact measured workload. (ALJ. p. 32, lines 49-50.) In his decision, the ALJ stated that Painter claimed "that Olean had lost fully half of its volume of production," (ALJ p. 32, lines 35-36), and that Painter claimed "that production at Olean had declined by half." (ALJ p. 33, line 17.) The ALJ correctly noted that the parties stipulated that Painter made the following statement: "Olean's workload has also dropped off by 50 percent." (ALJ p. 11, lines 14, 28.)

There is no evidence that Painter stated that direct labor hours declined 50%, or that direct labor hours and subcontracted hours declined 50%, or that production declined 50%. Respondent proved false a statement that Painter never made. Thus, the ALJ erred when he equated the statement Painter made regarding workload with the evidence the Respondent provided that measured direct labor hours and subcontracted hours.

Painter never specified in his statement what he meant by the term workload. The dictionary meaning of "workload," however, does not mean production or direct labor hours. The dictionary meaning of workload is as follows:

1. The amount of work or of working time expected or assigned.
2. The amount of work performed or capable of being performed . . . usually within a specific period.

Merriam-Webster's Collegiate Dictionary, 11th Ed. (2004). Workload has also been defined as follows: The amount of work assigned to or expected from a worker in a specified time period. http://www.thefreedictionary.com/workload.

The ALJ also erred in his discussion of Wilber's spreadsheet to find that Painter's statement was "more than [a] four-fold exaggeration of the true loss of workload at Olean." (ALJ p. 33, lines 10-11.) The ALJ reached this conclusion based on an examination of Wilber's spreadsheet to compare the three month period prior to Painter's call to the analysts in 2009 with the same three month period in 2008. (ALJ p. 32, lines 50-52, p. 33, lines 2-8). However, Painter never claimed that production or workload declined in any specific time period, much less for the three month period prior to his call as opposed to the same three month period the prior year. Indeed, judging by the dictionary meanings of workload cited above, the term "workload" is a forward looking concept, speaking in terms of the work expected or assigned, or capable of being performed. The ALJ's decision to use a backward looking measure is a

mystery, but it certainly is not based on the actual, stipulated statement Painter made nor any other evidence in the record.

Why the ALJ settled on three-months prior to the date Painter made the statement as the measure of workload is also a mystery. Wilber testified that the average cycle for large units is almost one year. (Tr. 700.) Painter's statement to the analysts did not assert that the direct labor hours for the prior three months declined. The ALJ arbitrarily and erroneously picked three months to measure whether Painter's statement was accurate.

The other problem with Respondent's evidence is that it only measures direct labor hours, which only measures hours worked for part of the bargaining unit. Painter did not limit his statement to direct labor hours, work performed by production workers only, or even work performed by bargaining unit members only. Wilber testified that the spreadsheet measured direct labor hours, which only measured hours worked by production employees, not others, like maintenance workers. (Tr. 702.) However, Wilber admitted that the spreadsheet did not measure other work performed by production workers, such as cleaning machines, which is called indirect labor. (Tr. 710.) Respondent does keep track of indirect labor, but it was not reflected on the spreadsheet, (Tr. 711), nor was any evidence of it introduced at the hearing. Presumably, if this evidence would have been helpful to Respondent, it would have produced it. The fact that it did not raises the inference that such evidence would not have been helpful to Respondent's case. Martin Luther King Sr., Nursing Center, 231 NLRB 15, fn. 1 (1977).

One need only do a minimal analysis of the spreadsheet to see how inadequate it is in proving that Painter's statement is false. There are 500 employees in the Olean bargaining unit. (Tr. 703.) In 2009, there were 545,390 total direct labor hours worked at the Olean facility. (R. 11.) Assuming a 40 hour work week, which translates to 2,080 hours worked a year, not

including overtime (52 weeks x 40 hours/week), the chart only accounts for approximately 262 full-time equivalent employees (545,390 total direct labor hours ÷ 2,080 hours per year). At most, the spreadsheet accounts for roughly[2] a little more than half of the bargaining unit. The record evidence is simply too skimpy to find that the Respondent has met its burden of proving that Painter made a false statement.

The ALJ cites as support for his conclusion TNT Logistics North America, 347 N.L.R.B. 568, 569 (2006), rev'd on factual grounds, Jolliff v. NLRB, 513 F.3d 600 (6th Circuit). The Board should note that the Sixth Circuit reversed that decision for precisely the errors the ALJ made here. Specifically, two of the four factors that the Board found persuasive were that the testimony of one of the witnesses "was not as conclusive as the Board's decision suggests," and that the Board "misinterpreted" one of the witness' statements. 513 F. 3d 615. Indeed, Respondent's evidence leaves gaping holes in what in with reference to the actual workload. For example, it completely fails to address indirect labor hours, which are also part of the plant's workload. Thus, Respondent's spreadsheet and the testimonial evidence of Wilber was not as conclusive as the ALJ's decision suggests and the ALJ misinterpreted Painter's statement as meaning level of production or direct labor hours. Accordingly, Respondent failed to meet its burden of proving that Painter made a false statement and the ALJ erred by finding that it did.

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[2] I say roughly because, while the Olean collective bargaining agreement is not in evidence, not all of the 2,080 hours representing a 40 hour week would be direct labor time. Obviously, some of it would be vacation, sick and holiday time. However, presumably few of the production employees worked strictly 40 hour weeks, as there is evidence that there were times when production employees worked overtime, 10 to12 hour days seven days per week at times. (Tr. 180.)

B. The Spreadsheet does not Prove that Painter Made an Inaccurate Guess

The ALJ incorrectly stated that Painter inaccurately guessed the loss of production at Olean. As stated above, there is no evidence Painter made any claims concerning production at Olean. Moreover, his statement had no temporal limitations, so it is too vague to adequately determine whether or not it was accurate. As stated above, workload is a forward looking concept. It is quite plausible to understand Painter's statements as including all work expected to be done in the plant covering an extended period of time, given that, as Wilber testified, the average cycle for orders of large units was almost a year. (Tr. 700.) Even if the ALJ was correct to equate "workload" with production, one could plausibly argue that production at Olean actually fell by more than 50%. Assuming that the spreadsheet is the measure of all production at the Olean facility, although nothing in the record proves that it is, the spreadsheet shows that in the two year period covered in the spreadsheet, production as measured by direct labor hours and subcontracting hours fell from a high of 72,419 hours in February 2008 to a low of 33,926 hours in December 2009, a decrease in production of approximately 53%. (R. 11.) By that measure, Painter's prediction was extremely accurate. Thus, the ALJ erred when he found that Painter inaccurately guessed the decrease in production.

POINT II

THE ALJ ERRED WHEN HE FOUND THAT PAINTER ACTED WITH MALICE WHEN HE MADE ANNONYMOUS CALLS TO THE ANALYSTS (Exceptions 1 and 3)

It is well settled that employees engage in protected activity when they engage in anonymous, concerted activity. Texas Dental Association, 354 N.L.R.B No. 57, slip op. at *4

(2009); Independent Stations Co., 284 N.L.R.B. 394, 394 (1987); South Hills Health System, 240 N.L.R.B. 1234, 1235 (1979). Thus, the ALJ erroneously found that Painter's decision not to identify himself in his calls to the analysts was evidence of a deceptive, reckless and malicious intent. (ALJ p. 24, lines 38-53, p. 25, lines 3-32.) The ALJ also erred when he implied that Painter's "vague description" of his position and failure to limit his designation to Painted Post was wrongful. (ALJ p. 28, lines 36-42). He had a protected right to make the calls anonymously, including withholding key descriptions of his role in the union in order to shield his identity. Painter's desire to retain some measure of anonymity was obviously well placed, inasmuch as Respondent's Chief Executive Office had already expressed his disapproval of Painter's earlier calls to the analysts. (Tr. 311-312, 889.)

Since Painter had a section 7 right to communicate with third parties anonymously, the ALJ erred when he found that Pinter's lawful, protected anonymous activity supplied the element of malice necessary to find the same, concerted activity unprotected.

POINT III

THE ALJ ERRED WHEN HE FOUND THAT PAINTER'S STATEMENT WAS MALICIOUS BECAUSE IT CONCERNED CONDITIONS AT A PLANT WHERE HE DID NOT WORK (Exception 2)

The ALJ erred when he found that Painter's decision to discuss labor conditions concerning a plant where he did not work or hold union office was evidence that he was "prepared to convey significant negative information about which he did not possess adequate knowledge." (ALJ p. 27, lines 20-24.) Employees have a section 7 right to engage in protected activities with employees in other bargaining units and other unions. Indeed, Painter engaged in

protected activity with a representative of the employees in the United Steelworkers International Union unit at Olean. (Tr. 13.) Painter had a protected right to communicate with the stock analysts concerning conditions at the other Dresser Rand facilities. United States Postal Service, 352 N.L.R.B 923, 939 ((2008). There, the Board found protected a communication by an employee in one bargaining unit made concerning shop stewards in a different bargaining unit and union. Id. There, the Board said

> Presumably, 'Carrier Stewards' referred to shop stewards in the letter carriers' bargaining unit. Although Cline is a member of a different bargaining unit, that fact does not remove Cline's letter from the Act's protection. To the contrary, it supports a conclusion that Cline was not writing simply on his own behalf but instead was expressing the concerns of other employees, even those represented by a different union.

Id. Since Painter had a section 7 right to communicate to the analysts concerning conditions relevant to employees in the different bargaining units and different units, the ALJ erred when he found that this conduct supplied evidence of the necessary recklessness to find his conduct unprotected.

POINT IV

THE ALJ ERRED WHEN HE APPLIED A REASONABLENESS STANDARD TO PAINTER'S CONDUCT
(Exception 4)

Assuming, *arguendo*, that Painter's claim was not accurate (which the Respondent failed to prove), the ALJ erred when he applied a reasonableness standard to evaluate Painter's claim that there was a 50% drop in workload at Olean. The ALJ particularly took issue with Painter's reliance on former employee Larry Dominski's information, which was relayed to him via the father of a current employee of Respondent. (GC 24.) Painter testified that he had no reason to doubt Dominski, (Tr. 330.), and the ALJ found that Painter believed "Dominski to be a a reliable

informant." (ALJ, p. 30, lines 47-48.) An employee does not lose the protection of the Act when he relays information from an employee reported by a non-employee. KBO, Inc., 315 N.L.R.B 570, 571 (1994). There, an employee was discharged for reporting information he learned through his union representative, who was reporting information given him by another employee. Id. at 570-71. The fact that the information might have been inaccurate does not remove the statement from the Act's protection." Id. at 571. Because Painter was relying on hearsay information reported to him by a non-employee, but whose source was a current employee, his reliance on that information was not unprotected. Moreover, as the ALJ found, Painter believed the informant to be reliable.

The ALJ also erred when he applied a reasonable person standard to Painter's conduct and found him reckless for his failure to further investigate the claims upon which he based his statement. The Board has held that, in making statements about employment conditions, employees do not have an independent obligation to investigate their claims. Id. at 571, n. 6. The Board has also found that employee statements are "protected by the Act whether or not they [are] correct, or even reasonable . . .." Fredericksburg Glass and Mirror, Inc. 323 N.L.R.B. 165, 179 (1997). This is consistent with Supreme Court precedent, which holds that a determination of recklessness under defamation law is not made with reference to a reasonableness standard and does not impose a duty to investigate. As the Supreme Court said with reference to defamation actions:

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Here, there is no evidence, or finding by the ALJ, that Painter entertained serious doubts about the truthfulness of his statement. Accordingly,

the ALJ erred when he applied a reasonableness standard and found Painter's conduct unprotected.

POINT V

THE ALJ ERRED WHEN HE EVALUATED THE TACTICAL DECISIONS PAINTER MADE CONCERNING THE TIMING OF THE PHONE CALLS TO THE ANALYSTS AND THE CONTENTS OF THE STATEMENT (Exceptions 3, 5, 10 and 12)

The ALJ erroneously considered the tactical decisions Painter made concerning when he phoned the analysts and the contents of the statement. Specifically, the ALJ found that the contents of the statement were indications of malice. He found that Painter's decision to give a vague description of his position and authority, (ALJ p. 28, lines 36-42), his failure to cite the 50% figure in his statement concerning the Painted Post facility where he worked, (ALJ. 31, lines 6-8), and that Painter's message concerning workload did not advance the interests of the bargaining unit members as evidence of misconduct. (ALJ p. 34, lines 17-19.) The ALJ also erred when he found that Painter's decision to call immediately prior to CEO Volpe's conference call revealed "a depraved state of mind consistent with actual malice." (ALJ p. 36, lines 36-38.)

Painter's decisions regarding the timing of his contact with the analysts and the content of the statements are tactical decisions that the ALJ improperly considered. See Allied Aviation Service Co., 248 N.L.R.B. 229, 231 (1980). There, the Board said:

> In the instant case, [the employee], in seeking outside assistance, chose to emphasize the safety aspects of the two ongoing disputes. Although the ongoing disputes vis-à-vis Respondent had not arisen strictly on safety grounds, we cannot say that the safety aspects emphasized by [the employee] were not part of or were unrelated to the disputes.
>
> [M]uch is made by the Administrative Law Judge of the fact that the safety aspects of these matters had not been raised with Respondent through the established channels available to [the employee]. By focusing on this issue, the

> Administrative Law Judge appears to be questioning the efficacy of the tactics utilized by [the employee], rather than seeking to evaluate the relationship between the letters and the ongoing disputes. Yet, in deciding case of these sort, it is not the Board's function to appraise the potential effectiveness of the tactics utilized by employees in their disputes with management. At what point the employees determine that third-party assistance will be of more benefit than private talks with their employer is a tactical decision. Thus, if the communication is related to the dispute, the employee sending the communication is equally protected whether such a step is taken early on in the dispute or at a later date after all internal avenues have been exhausted.

Id. (emphasis added). Thus, the ALJ erred when he considered the timing of Painter's calls and the content of the statements Painter made.

POINT VI

THE ALJ ERRED WHEN HE FOUND THAT RESPONDENT WAS PRIVILEGED TO DISCHARGE PAINTER (Exceptions 9, 13 and 14)

The ALJ's legal conclusions that Painter's statement concerning workload at the Olean facility was not protected and his statement concerning CEO Volpe's said employment levels would be maintained was a sharp, disloyal attack on the veracity of his employer are wrong as a matter of law. As stated above, Respondent failed to prove that the statements were false, much less maliciously false.

By using the term workload, Painter did not specify what it meant. However, as explained above, it is a forward looking concept, more in the nature of a prediction. It was not capable of proof at the moment it was made. At worst, it was an exaggeration or hyperbole. "[T]he mere fact that statements made in the context of an emotional labor dispute are hyperbolic does not remove them from the protection of the Act." Valley Hospital, 351 N.L.R.B. at 1254. Perhaps Painter could have been more careful in his choice of words, but that does not render his statements maliciously untrue. "While lawyers are trained to parse carefully arguments and to

pay close attention to the meaning of individual words, not everyone is so careful in crafting specific language and ordering ideas." Joliff, 513 F.3d at 616. Moreover, one cannot say that Painter's state "had no basis in fact whatever." El Mundo Broadcasting Corp., 108 N.L.R.B at 1280.

As stated above, the Respondent had the burden of proving not only that Painter's statement was false, but that it was maliciously false. Valley Hospital, 351 N.L.R.B. at 1261. The Respondent has surely not met its burden in this regard. The ALJ wrote a decision that appeared to be carefully crafted to withstand possible exceptions. He at various points in his decision described Painter as depraved, malicious and reckless. Yet, at the end of his opinion, he encouraged the Respondent to rehire Painter. (ALJ p. 58, lines 9-10.) If the evidence was so compelling to convince the ALJ that Painter was depraved, malicious and reckless, why would he have urged Respondent to rehire him?

POINT VII

THE ALJ ERRED WEN HE FOUND THAT REPSONDENT'S APPLICATION OF ITS INSIDER TRADING POLICY AND CODE OF CONDUCT DID NOT VIOLATE PAINTER'S SECTION 7 RIGHTS (Exceptions 15 and 16)

For the reasons stated above, Painter's conduct was protected, concerted activity and the Respondent's application of its Insider Trading Policy and Code of Conduct as justification for its discharge of Painter for his communications with the stock analysts violated Painter's Section 7 rights.

In addition, the ALJ erred when he found that Painter violated the Insider Trading Policy on "tipping" because Painter did not trade on inside information. The Supreme Court has recognized that concerns about the use of inside information are based on "a relationship of trust

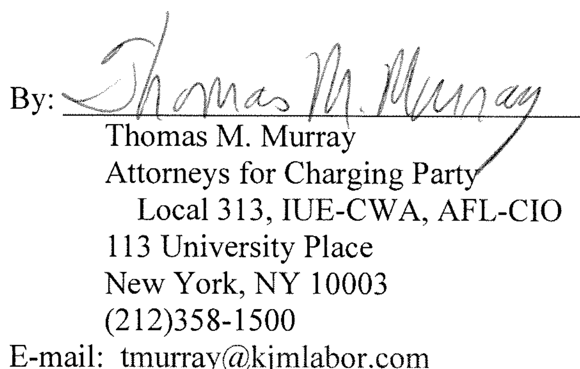
and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." Chiarella v. U.S., 445 U.S. 222, 228 (1980). Painter obtained the information he disclosed by reason of his position with the union, not his position with the corporation, or based on his outside friendship with Larry Dominsky. (Tr. 325-331.) The Supreme Court in Chiarella explicitly rejected the standard for finding §10(b) liability based on mere possession of information. 445 U.S. at 235, and n.20. Thus, the ALJ's finding that Painter violated Respondent's Insider Trading Policy by improper tipping is wrong as a matter of law because Painter did not disclose confidential information.

CONCLUSION

For the reasons stated above, Charging Party respectfully requests that the Board grant its exceptions and find that Respondent violated the Act when it discharged Painter for engaging in protected, concerted activity and that it unlawfully applied its Insider Trading Policy and Code of Conduct.

Dated: New York, New York
April 1, 2011

KENNEDY, JENNIK & MURRAY, P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT copies of the Charging Party's Exceptions to the Administrative Law Judge's decision and Brief in Support of the Exceptions have been served electronically on this date, at the e-mail addresses indicated below, upon:

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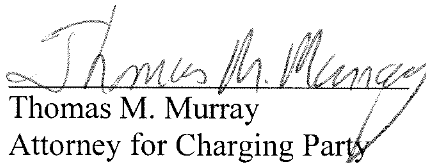

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