UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

GOYA FOODS OF FLORIDA, INC.	**Cases 12-CA-19668**	**12-CA-20127**
	12-CA-19765	**12-CA-20233-1**
	12-CA-19779-1	**12-CA-20233-2**
and	**12-CA-19945**	**12-CA-20256**
	12-CA-19962	**12-CA-20426**
	12-CA-20041	**12-CA-20496**
	12-CA-20099-1	**12-CA-20542**
		12-CA-20570

SOUTHERN REGIONAL JOINT BOARD,
WORKERS UNITED, a/w SEIU

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S AMENDED EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (herein called the General Counsel) files the following Answering Brief to Respondent's Amended Exceptions and Brief in Support of Exceptions to Decision of Administrative Law Judge.[1]

I. Statement of the Case

The hearing concerning the compliance specification in this matter was held before the Honorable Margaret G. Brakebusch, Administrative Law Judge (herein called the "ALJ") on January 11 and 12, 2011. On March 21, 2011, the ALJ issued her Supplemental Decision and Recommended Order finding that the private settlement agreements (herein called the agreements) signed by discriminatees/claimants Jesus Martin and Alberto Turienzo are insufficient to waive reinstatement or toll backpay for Martin and Turienzo.[2] (ALJD 20:30-32). The ALJ found that the private settlement agreements are repugnant to the purposes and policies of the Act and must be rejected in their entirety. (ALJD 20:32-34).

More specifically, the ALJ concluded in her detailed and well-reasoned Decision and Recommended Order that an analysis of the factors considered by the Board in *Independent Stave* required that the agreements be rejected because: 1) the Union and the General Counsel were not parties to the agreements and strongly oppose the agreements (ALJD 12:11-17); 2) the agreements are not reasonable given that the General Counsel spent significant time and

[1] Although Respondent refers to itself as "Petitioner" in its Amended Exceptions and Brief in Support, General Counsel will use the term "Respondent" or "Goya", as is customary and as is used by the ALJ in her Supplemental Decision and Recommended Order. (ALJD 1).

[2] The ALJ's Supplemental Decision and Recommended Order will be identified by "ALJD", page, and line. Respondent's Amended Exceptions will be identified by "RE" and the number of the exception, and Respondent's Amended Brief in Support of Exceptions to Decision of the Administrative Law Judge will be identified by "RB" and the page number. Transcript pages will be identified by the page, line, and name of witness, where necessary for clarification. "GCX" refers to General Counsel's exhibits, and "RX" refers to Respondent's exhibits.

resources litigating this case prior to the execution of the agreements and the strength of the General Counsel's case had already been disclosed to Respondent (ALJD 12:44-51); 3) Respondent engaged in deception and "intentionally misrepresented the status of the unfair labor practice proceedings" when the agreements were executed (ALJD 14:27-29; 15:44-46); and 4) the agreements contain provisions that are clearly repugnant to the policies and purposes of the Act, including a provision prohibiting Martin and Turienzo from engaging in any union activities related to Respondent and/or its employees, and a provision prohibiting Martin and Turienzo from disclosing the terms to anyone other than their attorney, accountant or tax advisor (ALJD 18:14-20; 20:5-16). In so doing, the ALJ found the testimony of Robert and Francisco Unanue incredible, and she fully credited Martin and Turienzo's testimony. (ALJD 14:34-35; 16:30-37).

On April 18, 2011, Respondent filed its Amended Exceptions and supporting brief to the ALJ's Supplemental Decision and Recommended Order. The procedural history leading up to the litigation in the instant matter, as properly described by the ALJ, is as follows:

A. Goya I

On August 30, 2006, the Board issued its Decision and Order affirming Administrative Law Judge Lawrence W. Cullen's decision,[3] as modified by the Board, reported at 347 NLRB 1118 (sometimes referred to herein as Goya I).[4] (ALJD 2:14-34; 3:1-5) (GCX 1(a)). The Board found, in part, that on July 7, 1999, Respondent unlawfully discharged warehouse employees and union activists Jesus Martin, Alberto Turienzo, and Humberto Galvez,[5] in violation of Section 8(a)(3) and (1) of the Act. (Id.; 5:21-29) (GCX 1(a), p. 1119, 1133-1134). The remedies for

[3] Judge Cullen has since retired from the agency.
[4] The Board's modifications to ALJ Cullen's decision do not affect the issues in this proceeding.
[5] Humberto Galvez did not sign a private settlement agreement, and there are no issues in this proceeding pertinent to Galvez.

Respondent's unfair labor practices ordered by the Board included requirements that Respondent make whole Jesus Martin, Alberto Turienzo, and Humberto Galvez, with interest, for any loss of earnings and other benefits they may have suffered as a result of their discharges from the Respondent on July 7, 1999, and offer Martin, Turienzo and Galvez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. (Id.) (GCX 1(a), p. 1124-1125).

In addition to finding that Respondent unlawfully discharged Martin, Turienzo and Galvez, in Goya I the Board also found that Respondent committed numerous additional violations of the Act. Specifically, Respondent violated Section 8(a)(3) and (1) of the Act by suspending and subsequently under-employing salesman Reinaldo Bravo because of his actions in support of the Union's campaign.[6] (Id.) (GCX 1(a), p. 1119-1120). Mary Ann Unanue, the president of Respondent's Miami warehouse operations, and other Respondent managers engaged in numerous independent violations of Section 8(a)(1) of the Act, including informing employees that it would be futile for them to select or continue to support a union because Respondent would never recognize or negotiate with it; interrogating employees about their union membership, activities and sympathies; promising to relieve employees of disagreeable assignments, soliciting grievances and promising to adjust grievances if employees cease supporting the Union; threatening employees with elimination of jobs, subcontracting of work, underemployment, closing of the company, moving of Respondent's operations out of state, loss or reduction of pension, and assaults on union representatives, if they engage in union activities; ordering employees not to wear union paraphernalia; requesting employees to ascertain and

[6] Reinaldo Bravo entered into a private settlement agreement with Respondent, but there are no issues in this proceeding with respect to Bravo. (GCX 5).

disclose to Respondent the union membership, activities and sympathies of other employees; and informing employees that it would not recognize the authority of employees designated by the Union to represent them. (Id.) (GCX 1(a), pp. 1118 at fn.4; 1124, 1128-1133, 1141). In Goya I the Board also found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reassigning drivers' routes without giving notice to the Union and an opportunity to bargain. (Id.) (GCX 1(a), pp. 1120-1121). Respondent further violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the representative of bargaining units of warehouse employees and drivers, and of sales and merchandising employees, at its Miami, Florida facility,[7] because Respondent's "substantial and continuing" unfair labor practices tainted disaffection petitions and caused employee disaffection from the Union. (Id.) (ALJD 2:4-51; 3:1-15) (GCX 1(a), pp. 1121-1122).

On September 25, 2006, almost six years after the execution of the private settlement agreements, Respondent filed a Motion for Reconsideration and to Reopen the Hearing, mentioning for the first time that three of the discriminatees, including Martin and Turienzo, had entered into the private agreements with Respondent. (GCX 1(b), p. 8). On October 3, 2006, the General Counsel filed a response in opposition. (GCX 1(c)). On December 15, 2006, the Board issued an Order denying Respondent's Motion, stating, in part, that Respondent's claim that some of the cases had been privately settled should be raised and litigated in a compliance proceeding. (GCX 1(d)).

[7] On October 26, 1998, the Union was certified as the collective-bargaining representative of the warehouse unit, and on December 4, 1998, the Union was certified as the collective-bargaining representative of the sales unit. (GCX 1(a), p. 1118).

On April 24, 2008, the United States Court of Appeals for the Eleventh Circuit, as reported at 525 F.3d 1117, fully enforced the Board's order in Goya I. (ALJD 3:7-15) (GCX 1(e)).

B. Respondent's Subsequent Unfair Labor Practices – Goya II, III and IV

Since committing the above-described unfair labor practices that include the unlawful discharges of Martin and Turienzo, as found by the Board in Goya I, Respondent has continued to repeatedly violate the Act, and the ALJ properly took judicial notice of those cases. (ALJD 2, fn. 2). Thus, the Board has found that Respondent violated Section 8(a)(5) and (1) of the Act by making various unilateral changes in terms and conditions of employment of drivers, warehouse employees, and sales employees at its Miami facility on various dates, including in August or September 2000 (before Martin or Turienzo executed the private settlement agreements), in mid-October 2000 (before Turienzo executed a private settlement agreement), and on dates in 2001 and 2002. Goya Foods of Florida, 350 NLRB 939 (2007), referred to herein as Goya II. Thus, these unfair labor practices were ongoing at the time Respondent obtained the private settlement agreements from Martin and Turienzo in about October 2000.

The Board has also found that Respondent violated Section 8(a)(1) and (5) of the Act on dates in 2006 and 2007, by making additional unilateral changes in the terms and conditions of drivers at its Miami facility in April and May 2001. Goya Foods of Florida, 351 NLRB 94 (2007), referred to herein as Goya III. In yet another Decision and Order, the Board found that Respondent violated Section 8(a)(1) of the Act by informing employees that its retirement and 401(k) plan excluded union employees, and violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information requested by the Union that is relevant to and necessary for

the Union to perform its function as the exclusive representative of unit employees; and by eliminating its pension plan for unit employees and replacing it with a retirement and 401(k) plan without giving the Union notice or an opportunity to bargain. Goya Foods of Florida, 352 NLRB 884, 886 (2008), referred to herein as Goya IV.[8]

C. The ALJ Correctly took Judicial Notice of Goya II, III, and IV, and Respondent's Exception 2 Should be Denied

The ALJ properly took judicial notice of the proceedings in Goya II, III, and IV, and Respondent's contention to the contrary should be rejected. (ALJD 2-3: fn.2) (RB 14-15). In fact, the ALJ specifically noted that she was not taking judicial notice of the record evidence in those cases or that the cases were relevant to her determination of the reasonableness of the agreements, but rather, that she was noting "the subsequent proceedings and Board decisions for historical completeness." (Id.) (ALJD 12:39-42). Accordingly, Respondent's Exception 2 should be denied.

II. The ALJ's Findings of Fact Should be Affirmed, and Respondent's Exceptions 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, and 28 Should be Denied

A. The General Counsel and Charging Party were not Parties to the Agreements and Strongly Oppose the Agreements

As the ALJ noted, prior to the opening of the hearing and during the hearing, there were settlement discussions, but an agreement was not reached.[9] (ALJD 16:16-24) (RX 4, Tr. 76, 77:4-11, Robert Unanue; Tr. 107:12-21, Francisco Unanue; Tr. 176-181, Heekin; Tr. 120,

[8] Respondent's unfair labor practices in Goya I, Goya II, Goya III and Goya IV all occurred at its Miami facility.

[9] In its brief, Respondent contends that the settlement failed because the employees demanded $300,000 a piece to settle the cases. (RB 3). Although Denise Heekin, attorney for Respondent, provided hearsay testimony that the discriminatees each wanted $300,000 to settle the cases during the hearing, Turienzo recalled only that Respondent offered $120,000 in total for Turienzo, Martin, Galvez, and Bravo. (Tr. 181:19-20,Heekin; Tr. 121:1-10, Turienzo). Heekin made notes of the settlement discussions, yet there is no mention of a $300,000 figure in her notes. (Tr. 184:14-25, 185:1-5). Moreover, in response to the General Counsel's objection to Heekin's testimony on hearsay grounds, the ALJ ruled that she was not accepting the testimony for the truth of the matter asserted. (Tr. 183:11-18).

121:11-13, Turienzo). On February 22, 2001, ALJ Cullen issued his decision. (ALJD 2:5-6) (GCX 1(a), p.1118).

Respondent negotiated the agreements through Robert Unanue and Francisco Unanue. (Tr. 78-80, Robert Unanue; Tr. 109-110, Francisco Unanue). Robert Unanue became the president of Respondent in or about August 1999 and served in that capacity until in or about 2004, when he became the president of Goya Foods, Inc. (ALJD 5: fn. 5; 5:36) (Tr. 67, Robert Unanue). Francisco Unanue, Robert Unanue's cousin, took over as Respondent's president in or about 2004. (ALJD 5:45-46) (Tr. 101:11-19, 105:3-7, Francisco Unanue). Although Francisco Unanue was not working for Respondent at the time the agreements were negotiated, Francisco Unanue testified that Robert Unanue brought him in as a mediator to negotiate the agreements because of his prior employment with Respondent. (ALJD 6:5-7) (Tr. 336:14-19).

The private settlement agreement signed by Jesus Martin consists of four separate documents that were all signed on October 4, 2000. (ALJD 4:21-36) (GCX 3(a)-(d)). The agreement, like Turienzo's, was signed after the hearing before ALJ Cullen, but before ALJ Cullen issued his decision. (GCX 1(a)). "The Full Waiver of All Claims, General Release, and Confidential Settlement Agreement" is in English, and there is a Spanish version of the agreement signed by Martin as well. (Id.) (GCX 3(a)-3(b)). On that same date, Martin signed a "Waiver of Reinstatement and Statement of Receipt of Full Backpay" in English, and Martin also signed a copy of the waiver in Spanish. (Id.) (GCX 3(c)-(3(d)). Martin received $25,000 pursuant to the agreement. (Id.). On October 31, 2000, Alberto Turienzo signed an agreement consisting of four separate documents that mirrors the agreement signed by Martin, except that Turienzo received $22,000. (Id.) (GCX 4(a)-4(d)).

As the ALJ correctly found, it is undisputed that the General Counsel and the Charging Party Union were not parties to the agreements. (ALJD 5:4-7) (GCX 1(h), GCX 3-4). Moreover, neither the General Counsel nor the Union was made aware of the agreements either before they were executed, or for years after they were executed. Robert Unanue and Francisco Unanue admitted that they did not inform the Union or the Board of the agreements and that they are not aware of any other company officials doing so. (Id.) (Tr. 80:13-19, 81:6-21, 82:1-2, 84:7-25, 85, 86:3-8, Robert Unanue; Tr. 110:7-25, 111:1-20, Francisco Unanue).

B. Respondent Engaged in Fraud and Intentional Misrepresentation by Telling Martin and Turienzo that they had Lost the Cases before the ALJ

1. Alberto Turienzo

The ALJ fully credited Alberto Turienzo's testimony. (ALJD 14:26-35). As further discussed below, the established policy of the Board is not to overrule and administrative law judge's credibility findings unless the clear preponderance of the all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Turienzo, whose native language is Spanish, speaks "a little bit" of English and testified using an interpreter. (ALJD 5:13-14) (Tr. 5-24, 118-4-24). On July 7, 1999, Turienzo was unlawfully discharged by Respondent for engaging in protected activity by soliciting support from a Winn-Dixie store regarding the Union's campaign against Respondent's health and safety practices. (ALJD 5:21-29) (GCX 1(a), pp. 1133-1134). Turienzo, as found by the ALJ, credibly testified that Francisco Unanue told him that the Union had lost the cases, in order to convince Turienzo to sign the agreements. (ALJD 7:29-30) (Tr. 127:10-25). Turienzo's credibility as a witness was also previously established by ALJ Cullen who fully credited Turienzo's testimony at the initial trial in this matter. (GCX 1(a), pp. 1130-1131).

The ALJ also credited Turienzo's testimony that Francisco Unanue initiated the settlement discussions that led to the agreement. (ALJD 7:22-24) (Tr. 398:7-18). The ALJ found that a day or two before Turienzo signed the agreement, Francisco Unanue called him and asked Turienzo to meet him in Unanue's office.[10] (ALJD 7:22-24) (Tr. 126:21-24, 127:5-8). Accordingly, Respondent's Exception 9 should be denied.

On October 31, 2000, Turienzo went to Francisco Unanue's office located at Sazon Goya, a building close to the warehouse where Turienzo worked prior to his unlawful discharge. (ALJD 7:25-26) (Tr. 126). Francisco Unanue and Robert Unanue were present, and Francisco Unanue conducted the meeting in Spanish. (ALJD 7:27-28) (Tr. 127:12-13;135:11-19). Turienzo testified that Francisco Unanue told him that "the Union had lost their cases against Goya, I (Turienzo) had already lost all my legal resources, and they were going to offer me a proposition of giving me a—since I had been a good employee there during 13 years." (ALJD 30-31) (Tr. 127:15-19).

Turienzo further testified that Francisco Unanue told him that, "...I could be compensated with a settlement of $22,000 if I signed a paper that I would never talk or anything, some kind of waiver of never talking bad about Goya, never going on television, newspapers, or any kind of press, radio." (ALJD 7:31-36) (Tr. 127:20-25, 398:20-25). When Turienzo said that he made more than $22,000 when he worked at Goya, Francisco Unanue responded that that was the most they could offer him. (ALJD 7:38-39) (Tr. 128:1-3). Turienzo testified that he asked Francisco

[10] Although Respondent contends that Turienzo lied about whether he had ever spoken to or met Robert Unanue before he signed the agreement, this argument should be rejected. (RB 26). Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Turienzo did not waiver in his testimony that it was Respondent that contacted him to initiate settlement discussions, as found by the ALJ. (ALJD 7:22-23: 9:39-41). Moreover, the ALJ specifically credited Turienzo's testimony that he had spoken to Robert Unanue before the meeting with Francisco and Robert Unanue, and there was no prior meeting with Robert Unanue. (ALJD 14:50-51). Turienzo testified that he shared "two words" with Robert Unanue upon seeing Unanue once in a cafeteria, but this was unrelated to settlement discussions. (Tr. 145-146).

Unanue if the Labor Board knew about the agreement, but Unanue told him that "the Labor Board didn't have to know anything about it because the Union already lost the trial." (ALJD 7:40-42) (Tr. 131:23-25, 132:1, 134:24-25, 135:1-3). Accordingly, Respondent's Exception 10 should be denied.

The ALJ properly failed to credit Robert Unanue's testimony regarding the negotiation of the agreement with Turienzo. (ALJD 14:27-44). Robert Unanue testified that Turienzo, whom Robert Unanue contends he never met, called him out of the blue during the summer of 2000 to initiate the negotiation of the private settlement agreement. (ALJD 8:8-9) (Tr. 352:15-18). Francisco and Robert Unanue testified that there were various phone calls, group meetings with the disciminatees, and meetings that were held separately with Turienzo. (ALJD 8) (Tr. 296-321, Francisco Unanue; Tr. 357-362, Robert Unanue). However, the ALJ credited Turienzo's testimony on rebuttal that he did not initiate settlement discussions; only attended one settlement meeting with Robert and Francisco Unanue; and did not have any telephone conversations with Robert Unanue. (ALJD 9:45-49, 14:27-44). The ALJ also credited Turienzo's testimony that he did not speak on behalf of the other discriminatees when he met with Respondent. (ALJD 9:44-45) (Tr. 157:4-10; 399:10-12, Turienzo).

Turienzo testified that he spoke to the media about Respondent's unsafe food practices, and that he had not slandered Respondent. (Tr. 171:24-25). In this regard, at least during part of the time when Turienzo spoke about Respondent's unsafe food practices, Turienzo was working for the Union, which is consistent with Turienzo's testimony that he could not find employment after his discharge. Any ambiguity in the record in regard to Turienzo's ability to obtain employment after his discharge appears to relate to Turienzo's inability to find warehouse-type work. (Tr. 162, 170-171, Turienzo). The ALJ properly credited Turienzo's testimony that he did

not offer to stop disparaging Respondent in exchange for a settlement. (ALJD 9:41-43, 14:27-44). Accordingly, Respondent's Exception 11 should be denied.

Turienzo, who the ALJ found spoke a little English, used the interpreter throughout his entire testimony, and there are only two times in the record where Turienzo said brief, broken words or statements in English. At one point, Turienzo said during cross-examination by Respondent, "I wait for you", in English while Respondent's Counsel was referring to a document. (Tr. 165:6). In addition, during testimony by Martin, Turienzo said, "Good" and left the room coughing. (Tr. 258). Turienzo heard Martin's testimony in Spanish, and that testimony was translated by the interpreter. Contrary to Respondent's arguments, Turienzo's ability to say the word "Good" or a short phrase such as "I wait for you" does not equate to mastery of the English language. (RB 7, fn. 4). In addition, there is no record evidence that Turienzo said "No" during the testimony of Respondent's witness, only that Turienzo left the courtroom. (Tr. 341:22). It should be noted that the ALJ stated during the hearing that she did not hear any comments by Turienzo. (Tr. 258:16-19; 343:7-8). Similarly, Respondent's characterization of Turienzo as hostile based upon the "Good" statement or "I wait for you" is without merit. Cf. Jones v. Shcanck, 248 F. 2d 658, 659 (D.C. Cir. 1957). Accordingly, Respondent's Exception 4 should be denied.

With respect to the provisions in the agreement, Turienzo credibly testified that he did not suggest any of the language in the agreement, including the non-disclosure language. (ALJD 7:46-47) (Tr. 142:18-25, 143:1-6). The ALJ credited Alberto Turienzo's testimony that the confidentiality provision in the private settlement agreement was Respondent's idea. (ALJD 7:47-49, , 14:27-44) (Tr. 314:8-15, Tr. 354:16-22, Robert Unanue; Tr. 141:1-25, 142:1-5, 399:1-6, Turienzo). In crediting Turienzo, the ALJ noted that Turienzo and Martin were not seeking

reinstatement, yet Respondent contends that they wanted confidentiality. (ALJD 16:7-8). The ALJ correctly found that Turienzo glanced over the agreement before signing it. (ALJD 7:44-45) (Tr. 135:20-25; 168:11-13). In sum, the ALJ correctly found that Respondent engaged in fraud and intentional misrepresentation by telling Martin and Turienzo that they had lost the case in an effort to stop the perceived smear campaign against Respondent.

2. Jesus Martin[11]

Jesus Martin was also born in Cuba, his native language is Spanish, and he testified using an interpreter. (ALJD 5:16-19) (Tr. 207, 219). Martin does not speak or understand English. (Id.). As found by the Board, on July 7, 1999, Respondent unlawfully discharged Martin from his position as a forklift driver because Martin engaged in protected activity by soliciting support from Winn-Dixie regarding Respondent's health and safety practices. (ALJD 5:21-29) (GCX 1(a), p. 1133-1134) (Tr. 231, Martin). As credited by the ALJ, Martin testified that he was coerced by Respondent into signing the agreement when Respondent, by Francisco Unanue, misled him by stating that the Judge had declared that the cases had been lost. (ALJD 6:13-26) (Tr. 235:12-17).

As found by the ALJ, Martin credibly testified that Francisco Unanue called him and asked him to go to his office. (ALJD 6:13-15) (Tr. 235:12:14). Martin went to the office where he met Francisco and Robert Unanue. (ALJD 6:15-17) (Tr. 235). Martin testified that Francisco Unanue said, "I've called you because the Judge declared that you workers have no right, in other words, that we had lost the Union, that we had lost the case." (ALJD 6:17-19) (Tr. 235:12-

[11] Respondent does not except to the ALJ's finding that Martin was competent to testify although Martin's primary care physician diagnosed him with "a mild impairment which precludes him from being able to understand new material easily." (ALJD 17:14-50; 18:1-5) (GCX 6; Tr. 216, Martin).

17). When Martin asked Francisco Unanue if the Judge's statement that they had lost the case was true, Francisco Unanue said, "Yes." (ALJD 6:19-21) (Id.).

Prior to signing the agreement, as the ALJ found, Martin spoke to Turienzo. (ALJD 6:28-33) (Tr. 249:1-8). Turienzo told Martin that Respondent also told him that, "the Judge of the National Labor Relations Board had decided that the Union and the employees had lost the case." (Id.) (Tr. 249:1-8). Martin further testified that Turienzo told Martin that if that was the case, they would have to sign the agreement. (Id.). Martin signed the agreement a few weeks after Francisco Unanue initially contacted him, and he did not read the documents before signing them. (Id.; ALJD 6:29-30) (Tr. 235:21-25, 236:1-3, 243:11-14, 279:17-19). In fact, Francisco Unanue read the documents to him. (ALJD 6:30). Martin testified that he signed the private settlement agreement because he has diabetes, had no money, and had debts to pay. (ALJD 6:32-33) (Tr. 237:2-6).

3. Gilberto Torres told Martin that they had Lost the Case and Urged Martin to Sign the Agreement

The ALJ also properly credited Martin's testimony with respect to the involvement of Gilberto Torres, who is currently Respondent's fleet maintenance supervisor. (RE 8, 16; RB 29-30) (ALJD 6-7; 15:7-47). In this regard, the ALJ credited Martin's testimony that Torres called him several times after Respondent approached Martin with the settlement offer and echoed Francisco Unanue's statements about having lost the cases before ALJ Cullen. (ALJD 6:37-42; 14:27-44; 15:8-10) (Tr. 237:7-25, Martin; 395:19-21, Torres).

Torres has been employed by Respondent since in or about March 1993, and on May 14, 2001, Torres was promoted to fleet maintenance supervisor. (ALJD 6:44:45) (RX 3, Tr. 395:19- 21, Torres). Prior to his promotion, Torres was a warehouse employee. (ALJD 6:45-46)

(Id.). Martin testified that Torres called him two or three times and told Martin that he should sign the agreement because "it was true what the Judge had said that we had lost the case, that we had no right to neither the job nor to pay, not to get any pay ourselves." (Tr. 237:7-25). As found by the ALJ, Torres also told Martin that Goya was not trying to trick him and he should sign the settlement agreement before he lost everything. (ALJD 6:39-41;15:10-11) (Tr. 255:16-21). The ALJ also noted Torres' testimony that he believed Torres, as he believed Francisco Unanue, when Torres said they had lost the case. (ALJD 6:41-42;15:27-29).

Although Torres denied that he told Martin that the Union had lost the case or urged Martin to sign the settlement agreement, the ALJ credited Martin's testimony.[12] (ALJD 6:46-47; 15:29-38). The ALJ also properly credited Martin's testimony that Martin considered Torres to be his friend and that Martin had financially helped Torres when they had worked together. (ALJD 15:27-29). Martin was consistent in his testimony when he stated that that he had helped Torres; that they were friends; but that he also felt betrayed by Torres. (Tr. 237:24-25, 238:1-4, 255:13-14; Tr. 256:15-20, 258:1-8; Tr. 260:7-16). While there may be some ambiguity on the record on this point, the clear import of Martin's testimony is that he felt betrayed by Torres, in part, because Torres had lied to him about having lost the case.[13] Moreover, the ALJ found that any inconsistencies in Martin or Turienzo's testimony due to the use of an interpreter or discomfort with the hearing process did not diminish their credibility. (ALJD 17:3-12). Accordingly, Respondent's arguments in this regard should be rejected. Thus, the ALJ properly found that "the record evidence strongly suggests that Torres was a friend to Martin and a likely

[12] Contrary to Respondent's argument (RB 34), the ALJ specifically considered Torres' testimony denying that he told Martin that he had lost the case or advised him to take the settlement and credited Martin instead of Torres. (ALJD 6:46-47; 15:29-38).

[13] Martin also testified that he felt betrayed by Torres because Torres turned against the Union, but the timing of when Torres did so is unclear. (Tr.56, 258, 260).

person to reinforce to Martin that the Union had lost the case and that Martin should sign the settlement agreement." (ALJD 15:33-35) (Tr. 256:15-20, 258:1-8).

Moreover, although the ALJ found that Respondent's loans to Torres were suspicious and specifically credited Martin's testimony over that of Torres, the ALJ found that there is insufficient evidence to establish that Torres acted as Respondent's agent in misrepresenting the status of the unfair labor practice proceeding to Martin, and accordingly did not rely on Torres's conduct or on the suspicious nature of the loans in making her finding that Respondent intentionally misrepresented the status of the unfair labor practice proceedings to Martin and Turienzo. (ALJD 15:37:42).[14] Accordingly, Respondent's Exceptions 8 and 16 should be denied.

4. <u>The ALJ Correctly Concluded that Martin and Turienzo's Testimony was more Credible than the Testimony of Respondent's Witnesses</u>

The ALJ correctly concluded that Martin and Turienzo "presented a credible description of the circumstances surrounding the signing of the settlement agreements." (ALJD 14:43-44). The ALJ also recognized that Francisco and Robert Unanue's very precise and mirror-image

[14] While not finding that Torres was an agent of Respondent at the time he urged Martin to sign the agreement, the ALJ correctly found that "the timing of the significant loans and promotion are certainly suspect." (ALJD 6:47:51;7:1-6;15:36-37). As properly found by the ALJ, Respondent gave Torres several advances and loans, including significant loans made during the same time frame as the private settlement agreements were signed by Martin and Turienzo. (<u>Id.</u>) (GCX 8-10, GCX 12-14, RX 5). Specifically, records of loans and/or advances given to Torres by Respondent show that on September 6, 2000, approximately one month before Martin signed the settlement agreement, Torres received a "loan" of $2,500, and on November 3, 2000, just three days after Turienzo signed the settlement agreement, Torres received a "loan" of $3,000. (ALJD 15:16-19). Prior to the fall of 2000, Torres had not received such a large loan. (ALJD 15:19-25). It was only after Torres became a supervisor that he began receiving loans in such large sums. (<u>Id.</u>). Contrary to Respondent's contention, there is nothing deceptive about the loan documents presented by the General Counsel, as none of the large loans received by Torres pre-date his promotion. (GCX 8-10, GCX 12-14, RX 5). In addition, the September 6, 2000 and November 3, 2000 "loans" are two out of only three loans received by Torres during his employment that do not have a notation showing the loans are to be deducted from his paycheck or have been repaid. (<u>Id.</u>). Other than Torres' testimony that he repaid the loans, Respondent did not produce a single document or other any other evidence showing that these large loans were repaid by Torres. (<u>Id.</u>). The ALJ correctly analyzed the loan documents and testimony to conclude that the timing of the loans and Torres' promotion were suspicious. (RB 29, fn. 6) (ALJD 15:36-37).

testimony could not be credited given the incredulous story that they presented. (ALJD 35-44; 16:50-51). While noting that Martin and Turienzo's testimony was not as polished or specific, the ALJ found that Respondent's tale about Martin and Turienzo approaching them to end the smear campaign, a top priority of Respondent, was incredulous. (ALJD 14:38-39; 16:1-24; 16:51; 17:1).[15]

The ALJ correctly found that Robert Unanue took over as president of Respondent in late 1999, replacing his cousin Mary Anne Unanue, because of "an untenable situation in Florida and [to] save the company from what was a very public campaign against the company." (ALJD 16:26-37) (Tr. 74:4-10). Robert Unanue further testified that one of his responsibilities when he assumed the position of president was to save the facility from the "onslaught of a very public smear campaign against the company." (Id.) (Tr. 71:17-24). Thus, the ALJ correctly concluded that, "Goya's explanation suggests that despite the apparent disparity in language skills, background, and employment experience, the discriminatees participated in negotiating a settlement on equal terms with two accomplished businessmen who must have appeared quite formidable to these former employees. Such a scenario is simply not realistic." (ALJD 16:12-16). Accordingly, Respondent's Exceptions 15, 17, and 18 should be denied.

The ALJ found that Martin and Turienzo both testified that Respondent engaged in the same fraud and intentional misrepresentation to get them to sign the agreement, and all of Respondent's arguments regarding minor contradictions in their testimony are meritless. (ALJD 14:27-44) (RB 24, 28). In fact, the ALJ rejected Respondent's arguments regarding minor inconsistencies about the timing of the settlement discussions and found Martin and Turienzo to

[15] Although Respondent is correct in saying that the General Counsel inadvertently pursued a line of questioning not related to Francisco Unanue, this does not affect the conclusions of the ALJ that Respondent's motive for misrepresenting the status of the case to Martin and Turienzo was based upon its desire to end the smear campaign against Respondent. (RB 2, fn. 3; RB 33) (Tr. 339).

be more credible than Respondent's witnesses. More specifically, as found by the ALJ, Turienzo told Martin that Respondent also told him that they (the employees) had lost the case. (ALJD 6:28-33) (Tr. 249:1-8, Martin). The ALJ stated that there were instances where Martin and Turienzo's testimony may have been "abbreviated or condensed" due to the nuances of using an interpreter. (ALJD 17:3-5). Moreover, the ALJ, in judging Martin and Turienzo's demeanor, concluded that some inconsistencies or contradictions in their testimony may have been because Martin and Turienzo were "initially confused by the questions or uncomfortable with the hearing process." (ALJD 17:6-9) (RB 27-29). However, the ALJ properly concluded that while the exact timing of when Turienzo first learned of the settlement proposal is somewhat unclear, that does not diminish Martin and Turienzo's credibility. (ALJD 17:10-12). Accordingly, Respondent's Exception 6 should be denied.

Martin and Turienzo did not contact the Union or any other individual to verify Respondent's misrepresentations before signing the agreements because they believed that the case had been lost. Martin had already confirmed, when he spoke to Turienzo, that Respondent made the same statements to Turienzo. The ALJ properly found that Martin did not contact the Union because he believed Francisco Unanue. (ALJD 6:28-29). Furthermore, as explained in more detail below, the ALJ found that Martin also believed Gilberto Torres who repeated Francisco Unanue's statements that he had lost the case and that Respondent was not tricking him. (ALJD 6:39-42). Although Martin and Turienzo testified that they did not feel "threatened or coerced" when they signed the agreement, they also testified that they did not know what the Board considers to be a threat or coercion. (Tr. 242:1-5, 275:25, 276:1-3, Martin) (Tr. 150, 166-167, Turienzo). Martin and Turienzo were facing financial hardship and were not experienced businessmen. Under these circumstances, their signing of the agreement without consulting the

Union or counsel, without thoroughly reading the agreement or attempting to verify Respondent's intentional misrepresentations, is exactly what one would expect. In fact, more sophisticated individuals have done the same when faced with economic hardship and offered settlement by a large, powerful corporation such as Respondent.

While Respondent also contends that Martin and Turienzo did not "challenge" the agreements by filing a charge, lawsuit, or complaint, it is the General Counsel, through the compliance specification, who rightly challenged the agreements. Moreover, Respondent did not bring up the existence of the agreements until it filed its Motion for Reconsideration before the Board. (GCX 1(b)). Accordingly, Respondent's Exception 5 and 7 should be denied.

Similarly, Respondent's argument that the ALJ failed to find an adverse inference based on the General Counsel's decision not to call Reinaldo Bravo and Jesus Galvez has no basis and should be rejected. (RB 30). The ALJ properly concluded, based on Martin and Turienzo testimony, that they did not attend any meetings with Reinaldo Bravo or Jesus Galvez and Respondent. There is no record evidence whatsoever in General Counsel's case-in-chief that Bravo or Galvez participated in the execution of the agreements signed by Turienzo and Martin. Rather, Respondent, in the presentation of their case, called Robert and Francisco Unanue, who testified that Bravo and Galvez participated in group settlement discussions with Martin and Turienzo. General Counsel's decision whether or not to call a specific rebuttal witness cannot be used to draw an adverse inference. If Respondent was certain that group meetings had occurred with Galvez and Bravo, they too could have called Bravo and Galvez to corroborate Francisco and Robert Unanue. Yet, Respondent did not. Moreover, the ALJ specifically discredited Robert and Francisco Unanue's testimony that Turienzo and Martin were involved in group

settlement discussions with Bravo and Galvez. Accordingly, Respondent's Exception 28 should be denied.

The ALJ's credibility findings are based on substantial record evidence and her evaluation of the witnesses' credibility. The established policy of the Board is not to overrule and administrative law judge's credibility findings unless the clear preponderance of the all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Contrary to the ALJ's well-reasoned decision that describes all of the testimony of the witnesses and evidence presented by Respondent and the General Counsel, Respondent cites to cases where judges disregarded objective evidence and/or the testimony of witnesses. The cases are inapposite, and Respondent's arguments in this regard should be rejected.[16]

III. The ALJ Correctly Considered All the Factors under the Board's Decision in Independent Stave, and Respondent's Exception 21 Should be Denied

The ALJ set forth a comprehensive description of Independent Stave Co., 287 NLRB 740, 741 (1987). (ALJD 10:1-40). The ALJ noted that although the Board has had a long policy of encouraging privately negotiated settlement agreements, the Board is not required to give effect to all settlements reached by the parties. Independent Stave, supra, at 741. In Independent Stave, the Board stated that "the Board's power to prevent unfair labor practices is exclusive and that its function is to be performed in the public interest and not in vindication of private rights"

[16] Domsey Trading Corp., 351 NLRB 824, 849 (2007) (ALJ erred by crediting witness given documentary evidence to the contrary); Marshall Engineered Products Co., 351 NLRB 767 (2007) (ALJ gave no weight to witnesses' direct testimony and objective evidence); Custom Recovery v. NLRB, 597 F.2d 1041 (5th Cir. 1979)(ALJ erred by misstating the testimony of a witness on direct and cross-examination). Moreover, two cases cited by Respondent did not involve the overturning of an administrative law judge's credibility findings. Gibralter Steel Corp., 323 NLRB 601, fn. 7 (1997) (hearing officer refused to credit uncorroborated testimony by a witness he found untruthful); Gates Rubber Co., 30 NLRB 170, 178-179 (1941) (Board rejected respondent's exceptions based on the credibility of a witness).

and "the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned." Id. Moreover, the Board will not be bound to a settlement that is contrary to the Board's policies. Id., at 741; Borg-Warner Corp., 121 NLRB 1492, 1495 (1958). Thus, the Board will use its own discretion to determine "whether under the circumstances of the case, it will effectuate the purposes and policies of the Act to give effect to any waiver or settlement of charges of unfair labor practices." Independent Stave, supra, quoting National Biscuit Co., 83 NLRB 79, 80 (1949).

As stated by the ALJ, in Independent Stave, the Board announced that it will examine all of the surrounding circumstances to review non-Board settlement agreements, including the following four factors: (1) whether the charging party has agreed to be bound, and the General Counsel's position regarding the settlement; (2) whether the settlement is reasonable given the nature of the violations alleged, the stage of the litigation, and the risks inherent in litigation; (3) whether there was "fraud, coercion, or duress" by any of the parties in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or breached previous settlement agreements resolving unfair labor practices charges. (ALJD 10:1-35) (Id., at 743). The Board has held that the principles set forth in Independent Stave apply to compliance proceedings. American Pacific Pipe Co., 290 NLRB 623, 629 (1988).

The ALJ correctly concluded that because there were no unfair labor practice findings against Respondent at the time the private agreements with Martin and Turienzo were executed, the fourth Independent Stave factor, a history of violations of the Act or breach of previous settlement agreements, does not support the rejection of the private agreements. (ALJD 20:20-26). However, Respondent does not cite a single case supporting its proposition that the *lack of* such evidence weighs in favor of accepting the agreements, especially given the ALJ's findings

regarding the other Independent Stave factors which support her rejection of the private agreements. (RB 23-24). In fact, in Beverly California Corp., 329 NLRB 977, 986 (1999), in a case where it rejected a settlement agreement, the Board decided that it was not necessary to address the fourth Independent Stave factor. Accordingly, Respondent's Exception 21 should be denied.

A. The ALJ Correctly Concluded that the fact that the General Counsel and the Charging Party were not Parties to the Agreements and Strongly Oppose the Agreements is a Significant Factor Favoring Rejection of the Agreements, and Respondent's Exceptions 3 and 12 Should be Denied

The ALJ correctly concluded that the first factor announced by the Board in Independent Stave, whether the parties agreed to be bound and the position of the Acting General Counsel, coupled with the other factors, does not support the acceptance of the agreements. (ALJD 12:11-17). The Charging Party and the General Counsel were not parties to the settlement agreements, and both the Charging Party and the General Counsel are strongly opposed to the agreements. (ALJD 11:10-19). In this case, Respondent completely circumvented the Charging Party and the General Counsel in the settlement negotiations. Respondent admitted that it did not inform the Union or the General Counsel of the agreements. (ALJD 11:10-19) (Tr. 80:13-19, 81:6-21, 82:1-2, 84:7-25, 85, 86:3-8, Robert Unanue; Tr. 110:7-25, 111:1-20, Francisco Unanue). In fact, Respondent did not bring up the existence of the settlement agreements for almost six years after they were executed, when, on September 25, 2006, it filed its Motion for Reconsideration and to Reopen the Hearing. (ALJD 11:5-9) (GCX 1(b), p. 8).

The ALJ correctly stated that the Board considers opposition by the Charging Party and the General Counsel to the settlement agreement to be a strong consideration in its analysis,

citing Cooper State Rubber of Arizona, Inc., 301 NLRB 138 (1991) and TNS, Inc., 288 NLRB 20, 22 (1988); see also Fischbach/Lord Elec. Co., 300 NLRB 474, 476-477 (1990). The ALJ also found the cases cited by Respondent to be inapposite, finding that where the Board has found settlement agreements valid in the absence of approval by the Charging Party and/or the General Counsel, the Board has not done so under the circumstances present here. (ALJD 11-12). The ALJ properly reasoned that, "the opposition of the Acting General Counsel and the Union is even more significant because of the content of the agreements and the evidence of fraud and misrepresentation." (ALJD 12:11-17). See also, Webco Industries, 334 NLRB 608 (2001), enfd. 90 F.d 276 (10th Cir. 2003); Beverly California Corporation, 329 NLRB 977, 986 (1999), enfd. 253 F.3d 291, 294 (7th Cir. 2001) (finding settlement agreement not binding, in part, because respondent failed to consult the General Counsel or union about the settlement agreement, the General Counsel and union opposed the agreement, and the agreement was not reasonable given the stage of the litigation); Al-Hilal Corp., Inc., 325 NLRB 318 (1998) (settlement rejected given the General Counsel's vigorous opposition to the settlement and the number and seriousness of the unremedied violations of the Act); See also Cooper, supra, 301 NLRB at 138.

The ALJ also rejected Respondent's reliance on BP Amoco Chemical-Chocolate Bayou, 351 NLRB 614, 615 (2007). As the ALJ properly concluded, that case is distinguishable because, although the Board approved a settlement agreement opposed by the General Counsel and the union, the parties stipulated that the alleged discriminatees understood the agreement, no charges had been filed at the time the agreements were signed, there was no evidence that the alleged discriminatees had engaged in any protected conduct, and there was no evidence that the agreement was fraudulent or that there was coercion in procuring the agreement. (ALJD

11:37:42). As the ALJ also noted, Independent Stave, 287 NLRB at 743-744, is also distinguishable because, although the Board accepted the settlement agreement over the General Counsel's opposition, the union approved the agreement, the settlement was reached at an early stage of the proceedings, the settlement provided for immediate reinstatement, and there was no evidence of coercion in procuring the agreement. (ALJD 11:25-35).

Furthermore, the ALJ specifically rejected Respondent's argument that the first factor of Independent Stave is met because Martin and Turienzo agreed to be bound. (ALJD 11:10-11). In so doing, the ALJ stated that, "there is no dispute…that the General Counsel and the Charging Party Union were not parties to the settlement. (ALJD 11:11-12). Similarly, Respondent's arguments concerning whether Turienzo and Martin "believed" they were bound to the agreement are irrelevant, as they could not be bound to an agreement that is unlawful. (RB 21). Accordingly, Respondent's Exceptions 3 and 12 should be denied.[17]

B. The ALJ Correctly Concluded that the Agreements are not Reasonable Given Respondent's Extensive and Related Unfair Labor Practices, the Stage of Litigation, and the Risks Inherent in Litigation, and Respondent's Exceptions 13 and 14 Should be Denied

The ALJ correctly determined that the agreements also failed the second factor of the Independent Stave analysis, concluding that, "the executed settlement agreements were totally unreasonable given the nature of the alleged violations, the stage of the litigation, and the risks inherent in litigation." (ALJD 14:13-14).

With respect to the risks and stage of litigation at the time the private settlement agreements were executed, the ALJ found that this factor weighed against acceptance of the

[17] In Exception 3, Respondent contends that the ALJ erred in her conclusion of law that the matters in this case involve the validity of the private settlement agreements. (ALJD 4:11-13). Although it is not clear what Respondent's exception is with regard the ALJ's framing of the issue, the only issue before the ALJ was the validity of the private settlement agreements.

agreements. (ALJD 12:44-51). See also Al-Hilal, supra, at 318-319. In this regard, the agreements were not executed until after the General Counsel had spent significant time and resources litigating the unfair labor practices, as noted by the ALJ, approximately 4 months after a 13-day trial. (Id.). At the time the private settlement agreements were executed, the hearing before ALJ Cullen had ended, the strength of General Counsel's case must have been evident to Respondent, and the risks of litigation were much lower than in cases when the Board has accepted private settlements reached at an earlier stage of litigation. (Id.). Cf. Weldun Intern, Inc., 321 NLRB 733 (1996), enfd. granted, in part, 165 F.3d 28 (6th Cir. 1998); Hughes Christensen Co., 317 NLRB 633 (1995) (severance agreement accepted where Regional Director had dismissed unfair labor practice charges); Independent Stave, supra, 287 NLRB at 743 (finding agreement reasonable given early stage of the proceeding and nature of allegations). Moreover, Respondent's contention that the strength of the Board's case could not have been evident to Martin or Turienzo at the time that they signed the agreements is misplaced. As the ALJ found, the relevant analysis is that the strength of Respondent's case had been disclosed to *Respondent* at the time the agreements were executed. (ALJD 12:49-51). Although Respondent argues that the outcome of the litigation was in doubt, the strength in General Counsel's case was already evident, as was later confirmed by the decisions of ALJ Cullen, the Board, and the 11th circuit.

The ALJ also found, as argued by the General Counsel, that the agreements completely fail to address the extensive related unfair labor practices committed by Respondent as found by the Board in Goya I and upheld by the court, including unlawful interrogation, promises of benefits, threats to employees, and numerous other statements in violation of Section 8(a)(1) of the Act, as described above in greater detail (GCX 1(a), p. 1128-1133); unilaterally reassigning

drivers' routes without giving notice to the Union and an opportunity to bargain in violation Section 8(a)(5) of the Act (GCX 1(a), p. 20); and unlawful withdrawal of recognition from the Union in two units in violation of Section 8(a)(5) and (1) of the Act. (ALJD 13:26-41) (GCX 1(a), pp. 1121, 1122).

In rejecting Respondent's argument that the agreements are reasonable because of the amount of money received by the discriminatees, the ALJ also stated that the agreements signed by Martin and Turienzo do not remedy any of the unfair labor practice findings by the Board other than the discharges of Martin and Turienzo, and discriminatee Galvez is not a party to any such agreement. (ALJD 13:20-41). The only employee interest addressed is the monetary remedy offered to Martin and Galvez. Id. More specifically, the agreements do not provide for the other remedies ordered by the Board in Goya I, including but not limited to: the cessation of the unfair labor practices found by the Board; the reinstatement of discharged employees Martin, Turienzo and Galvez; the making whole of Galvez; the making whole of Respondent's employees in both bargaining units for any losses of wages or other benefits they may have suffered as a result of Respondent's unilateral actions in assigning routes to drivers and stores to salesmen since dates in 1998, and as a result of the disproportionate increase in the number of temporary employees regularly employed as drivers; the making whole of Respondent's employees in the warehouse and driver unit for any losses occasioned by the unilateral rescission of the policy of allowing employees to take company-provided radio phones home with them; recognition of and bargaining with the Union; the rescission of unilateral changes upon the Union's request; and the posting of a notice to employees assuring them that they have a right to engage in Section 7 rights and that Respondent cannot violate the Act with impunity. (ALJD 13:20-41); see also Alamo Rent-A-Car, 338 NLRB 275 (2002) (settlement agreement

rejected where it was not approved by all the discriminatees, the General Counsel strongly opposed the agreement, and the settlement failed to address substantial portions of the case); Al-Hilal Corp. Inc., 325 NLRB 318, 319 (1998); Frontier Foundries, 312 NLRB 73, 74 (1993); Cooper, supra, 301 NLRB at 138 (1991).

The ALJ's conclusion that all of the unremedied violations in Goya I are important to determining the reasonableness of the agreements is proper, and Respondent's argument that the consideration of the unremedied violations is prejudicial should be summarily rejected. It appears that Respondent's Exception 1 relates to this argument. As employees in the bargaining unit, Martin and Turienzo were impacted by all of Respondent's violations of the Act, not only their unlawful discharges. For example, as warehouse workers, they were directly affected by Respondent's unilateral changes in the warehouse concerning company-provided radio phones and the unlawful withdrawal of recognition. Similarly, as stated previously, the ALJ's description of Goya II, Goya III, and Goya IV is proper for historical completeness of the record, and it is not prejudicial to Respondent. Accordingly, Respondent's Exception 1 should be denied.

Moreover, the ALJ found it significant that the Board's Order in Goya I requires the posting of a notice to the employees, and yet, the agreements do not contain a notice posting requirement. (ALJD 13:43; 14:1-11). The notice ordered by the Board gives employees assurances that Respondent will not engage in the unfair labor practices previously committed. (ALJD 13:49-51). Citing to the Board's decision in J Picini Flooring, 356 NLRB No. 9, slip op. at 2 (2010), the ALJ stated that the notice "informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by respondent to redress

the violations has been an essential element of the Board's remedies for unfair labor practices since the earlier cases under the Act."

The ALJ properly distinguished the facts in the instant case from those in American Pacific Pipe Co., 290 NLRB 623, 624 (1998), where the Board accepted a settlement agreement that paid a discriminatee 50% of the backpay calculated by the General Counsel. (ALJD 13:1-18). In that case, the settlement was executed by the charging party union, and there were discussions concerning the discriminatee's interim search for employment and discrepancies in the interim employment submissions to the unemployment office and the General Counsel. (Id.).[18] The ALJ correctly reasoned that the facts in American Pacific Pipe were quite different from those in the instant case, where neither the General Counsel or Charging Party Union were parties to the agreement, there was fraud and misrepresentation by Respondent in procuring the agreements, and the agreements contain repugnant provisions prohibiting union activity. Id. Thus, Respondent's argument that the ALJ incorrectly discounted litigation risks has no merit and should be rejected. (RB 11). Accordingly, Respondent's Exceptions 13 and 14 should be denied.

C. The ALJ Correctly Concluded that Respondent Engaged in Fraud in Order to Reach Agreement with Martin and Turienzo, and Respondent's Exception 19 Should be Denied

Based upon her findings of fact detailed above, including her determination that Turienzo and Martin were more credible than Respondent's witnesses, the ALJ determined that the agreements also failed the third prong of the Independent Stave analysis. (ALJD 14:34-35;

[18] Respondent's reliance on Beverly California Corp. v. NLRB, 329 NLRB 977, enfd. 253 F.3d 291 (7th Cir. 2001) is also similarly misplaced because in that case the Board rejected a settlement agreement for a multitude of factors, including that the General Counsel and charging party union had not agreed to be bound and that the backpay amounts were too low given the stage of the litigation.

15:44-47). Thus, the ALJ specifically found that, "the overall record reflects that Goya intentionally misrepresented the status of the unfair labor practice proceeding during the execution of the private settlement agreements." (ALJD 15:44-46).

In sum, the ALJ found that the testimony of Martin and Turienzo was more credible than that of Robert and Francisco Unanue finding, in part, that: Francisco Unanue contacted the discriminatees to initiate the settlement discussions; Martin recalled that Robert and Francisco Unanue called him over a 3-week period prior to meeting with them to sign the agreement; Turienzo spoke with Robert Unanue before the meeting where he signed the agreement but did not have any other meetings with Robert Unanue; both Martin and Turienzo recalled that Francisco Unanue told them they had lost the case; Martin called Turienzo to discuss their options; Turienzo told Martin that they would have to sign the agreements if they had lost the case; Torres called Martin several times to tell him that Goya was not tricking him and that he should sign the agreement before he lost everything; Martin was telling the truth concerning Torres' conduct in telling him that he had lost the cases and that Respondent was not tricking him; and Martin believed Francisco Unanue and Torres when they said the case was lost. (ALJD 14:46-51; 15:1-42). In rejecting the testimony of Robert and Francisco Unanue, as stated previously, the ALJ logically discredited Respondent's incredulous story that Turienzo initiated the settlement discussions, offered to stop disparaging Goya in exchange for a settlement and sought confidentiality in a manner that aligned so conveniently with Robert Unanue's stated goal of ending the Union's smear campaign. (ALJD 16).

The record evidence, as found by the ALJ, reflects that Robert and Francisco Unanue, two experienced businessmen, approached Martin and Turienzo with the intention of misleading them into signing the agreements in an attempt to stop the smear campaign. (ALJD 16:1-35). In

addition, as stated by the ALJ, Respondent's additional motive to fraudulently obtain the agreements was to negate Respondent's reinstatement obligation and toll backpay. (ALJD 16:44-46). The ALJ credited Martin's testimony that Torres also told Martin that they had lost the case and that Respondent was not tricking him. The ALJ properly credited Martin's testimony and the overall record evidence to establish that Respondent intentionally misrepresented the status of the cases. Accordingly, Respondent's Exception 19 should be denied.

D. The ALJ Correctly Concluded that the Agreements Prohibiting Union Activity and Requiring Non-Disclosure are Repugnant to the Purposes and Policies of the Act, and Respondent's Exception 20 Should be Denied

As found by the ALJ, it is undisputed that the agreements signed by Martin and Turienzo state that they "will not engage in any union activity relating to Goya and/or its employees." (ALJD 18:14-20) (GCX 3(a), p. 2, par.4, 4(a), p. 2, par. 4). Both agreements also state that the discriminatees "will not disclose or discuss the terms of this Agreement or the circumstances related thereto with any person except his attorneys, accountant, or tax advisor." Id. (GCX 3(a), pp. 2-3, par. 4, GCX 4(a), p. 3, par. 4). If the discriminatees violate this provision, "Goya shall immediately be entitled to recover all payments made under this Agreement." Id.

The ALJ concluded that the agreements could not stand because "the agreements waive not only the future Section 7 rights of Martin and Turienzo, but also waive a public right that is central to the core of the protection of the Act. As such, these overly broad terms are clearly repugnant to the purposes and policies of the Act," citing Ishikawa Gasket American, Inc., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). (ALJD 20:12-16). In so doing, the ALJ correctly determined that these provisions were placed in the private settlement agreement at

Respondent's request;[19] it was not established that the intent of the parties was for the provision to apply to the disparagement of Respondent; Martin and Turienzo did not voluntarily and knowingly sign the agreements with those provisions; and the Section 7 rights of the discriminatees, as well as other employees, to engage in union activities could not be waived. (ALJD 19:10-11; 19:27-32; 19:36-40).

The ALJ correctly relied on Turienzo's credited testimony that he did not prepare the agreement, and he did not know that the agreement contained a provision prohibiting union activity when he signed the agreement. (Tr. 169-170). Furthermore, Turienzo is not an attorney, has never attended law school or drafted a legal document, and does not have the ability to write in English that is required to draft such a document. (ALJD 19:12-14). Moreover, Turienzo attended only one settlement meeting, and he did not attend meetings with other employees regarding the agreements. (ALJD 19:14-16). With respect to Martin, the ALJ also relied on the Martin's credited testimony that Francisco Unanue gave him the agreement, that he did not read the document, and that Francisco Unanue read the agreement to him. (ALJD 19:16-18).

Based on the relative skills and interests of the parties and the fact that Respondent initiated the meetings with Martin and Turienzo, the ALJ appropriately drew the logical inference that Respondent was the party that insisted that in order to receive the money, Martin and Turienzo could not disparage Respondent. (ALJD 19:27-29). The ALJ found that this was not "a negotiation in which all "parties" exchanged information and positions and ultimately came to a mutual agreement." (ALJD 19:20-22). Moreover, the ALJ concluded that there was no credible evidence that union activity was discussed by the four individuals or that "there was

[19] The record reflects that Respondent 's attorneys drafted the documents. (Tr. 95:20-23, Robert Unanue; Tr. 110:4-6, Francisco Unanue).

agreement by the 'four parties' (the Unanues, Martin and Turienzo) that union activity would be used in the document to mean disparagement of the company as Robert Unanue suggests." (ALJD 19:29-32).[20]

The ALJ properly rejected Respondent's reliance on cases dealing with contracts between union and employers where the parties fully participated in the negotiations of the agreements, properly finding that there was no similar negotiation in the instant case. Allied Mechanical Services, 352 NLRB 662, 663-664 (2008) (Board looked to settlement agreement between the union and the employer to determine bargaining relationship); Flint Glass Workers v. Beaumont Glass Co., 62 F.3d 574, 578 (3d Cir. 1995) (case concerning the interpretation of a settlement agreement between a union and the employer); Park-Ohio Industries, 283 NLRB 571-572 (1987) (language in an informal settlement agreement executed by the union, employer, and Regional Director for the Board). (ALJD 18:41-44; fn. 4,11).[21]

The ALJ also correctly concluded that even if the discirminatees voluntarily signed the agreements, they did not have full knowledge or an understanding of the terms when they signed the agreements. (ALJD 19:34-39). Finally, contrary to Respondent's contentions, the ALJ correctly concluded that the discriminatees could not waive these statutory rights. (ALJD 19:39-51; 20:1-3). The ALJ determined that, under these circumstances, an individual cannot waive such statutory rights, and rejected Respondent's reliance on cases involving the union's waiver of certain rights. Id. In Postal Service, 300 NLRB 196, 197 (1990), the Board concluded that a

[20] Assuming arguendo that any ambiguity can be perceived by the use of the term "union activity," ambiguities in a document are read against the drafter of the document. California Offset Printers, Inc., 349 NLRB 732 (2007); Lafayette Park Hotel, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); Inta-Roto, Inc., 252 NLRB 764 (1980), enfd. 661 F.2d 922 (4th Cir. 1981).

[21] Respondent's reliance on the following cases involving grievance settlements, rather than on private settlement of cases in which a Regional Director has issued a complaint and initiated formal legal proceedings against a party, is also misplaced. Titanium Metals Corp. v. NLRB, 392 F.3d 439, 445 (D.C. Cir. 2004) (deferral to grievance settlement involving a union and employer); Catalytic, Inc., 301 NLRB 380, 383, fn. 15 (1991) (grievance settlement between union and employer upheld although the grievant did not obtain a full remedy) (RB 18).

union could accept a settlement in a grievance proceeding over the objection of the employee because the employee authorized the union to do so. Moreover, in Springfield Terrace LTD., 355 NLRB No. 168, slip op. at 1 (2010), where the Board denied an employer's request for review of a regional director's order denying a motion to reopen the record, the Board determined that the union did not waive its right to represent a specific group of employees. Id. See also Metro Networks, Inc., 336 NLRB 63 (2001); Retlaw Broadcasting Co., 310 NLRB 984, 991 (1993) (Board affirmed ALJ's finding that an employer cannot require an employee to waive union representation in order to obtain reinstatement); Prince Trucking Co., 283 NLRB 806 (1987) (reinstatement cannot be conditioned upon abandonment of grievance); Karsh's Bakery, 273 NLRB 1131 (1984) (reinstatement cannot be conditioned on waiver of union representation); Clark & Hinojosa, 247 NLRB 710, fn.1 (1980).

The publicity of a respondent's undertaking to cease and desist from unlawful conduct in the future and the affirmative action to be taken by a respondent to redress violations of the Act has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act. See J. Picini Flooring, 356 NLRB No. 9, slip op. at p.2 (2010), and the cases cited therein, including Pennsylvania Greyhound Lines, Inc., 1 NLRB 1, 52 (1935), enfd. denied in relevant part 91 F.2d 178 (3d Cir. 1937), revd., 303 U.S. 261 (1938).[22] Not only is there no notice posting provision in the private settlement agreements at issue in this case, but the agreements require that even the minimal undertakings therein be kept essentially confidential by the discriminatees. Specifically, the private settlement agreements prevent Martin and Turienzo from disclosing any of the terms of the settlements to persons other than their personal attorneys, accountant, or tax advisor. Therefore, Martin and Turienzo are

[22] See Office of the General Counsel Memorandum OM 07-27 at page 5, item 3 (December 6, 2006).

forbidden from disclosing the settlements to, among others, the Board, the Union, and other employees of Respondent.

Accordingly, the ALJ correctly concluded that the undisputed language in the agreements is that the discirminatees will not engage in union activity relating to them and/or Respondent's employees, and "these overly broad terms are clearly repugnant to the policies and purposes of the Act. (ALJD 20:5-16). Ishikawa Gasket America, Inc., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). Accordingly, Respondent's Exception 20 should be rejected.

IV. The ALJ Correctly Granted the Motions to Revoke the Subpoena of Arturo Ross, and Respondent's Exceptions 23, 24, 25, and 26 Should be Denied

Prior to the commencement of the hearing, Respondent issued a subpoena to former Board agent Arturo Ross to compel his testimony during the compliance hearing. (ALJD 20:40-44). Both Arturo Ross and the Counsel for the Acting General Counsel filed separate petitions to revoke Ross's subpoena. (ALJD 20:44-48). On December 28, 2010, Respondent made a written request to the General Counsel under Section 102.118 of the Board's Rules and Regulations requesting consent for Arturo Ross to testify at the hearing. (ALJD 21:44-45) (RX 2). In its request, Respondent stated that Arturo Ross would testify that after the close of the hearing (before ALJ Cullen) he spoke to the unidentified "leader of the discriminatees" and that this person told Ross that the Respondent offered the discriminatees the agreements and asked Ross whether he thought that the Union and the General Counsel would win the case. (ALJD 21:45-51). Respondent's written request also stated that Ross would testify that he told the person that it could be a long time before the cases were resolved. (ALJD 21:50-51; 22:1). In addition, the written request contends that Ross would testify that the person did not ask whether ALJ Cullen had decided the case or decided against the discriminatees. (ALJD 22:1-3).

Respondent further averred that Ross could testify regarding the details of the settlement discussions during the unfair labor practice trial and that testimony would establish that the Board knew about the settlement discussions during and after the trial. (ALJD 22:3-6). Thus, Respondent argued in its written request that the testimony related to its defense of estoppel against the Board raising the issue, and related to rebuttal of expected testimony from the General Counsel's witnesses that the discriminatees were told their case was lost, and instead asked questions of Ross that show the discriminatees did not believe they had lost the case. (ALJD 22:8-14). Although Respondent did make a verbal proffer during the hearing, the proffer is substantially similar to the proffer made in Respondent's written request. Moreover, contrary to Respondent's argument, nothing in the verbal proffer made at the hearing regarding the timing of the agreements would be in direct contradiction to Turienzo's testimony, as Respondent has not provided any details that would show the precise timing of the alleged conversation with Ross relevant to settlement discussions.

On January 4, 2011, the Acting General Counsel summarily rejected Respondent's request noting that "absent a showing of most unusual circumstances, it is the policy of the Office of the General Counsel not to permit current or former Board agents to testify as witnesses with respect to the processing of unfair labor practice and representation cases," citing Laidlaw Transit, Inc., 327 NLRB 315, 316 (1998). (ALJD 22:16-37) (RX 2). The Acting General Counsel indicated that other witnesses such as Respondent's negotiators or the employees themselves could testify about the settlement discussions that took place after the trial. (ALJD 22:16-37) (RX 2).

During the compliance hearing, the ALJ properly granted both the General Counsel's and Arturo Ross's petitions to revoke the subpoena issued to Arturo Ross. (ALJD 22:39-44) (Tr.

55:13-16). The ALJ properly rejected Respondent's oral argument that suppression of exculpatory evidence favorable to the accused in criminal cases violates due process under Brady v. Maryland, 373 U.S. 83, 87 (1963), stating that that rule is inapplicable to Board cases. See NLRB v. Nueva Engineering, Inc., 761 F. 2d 961 (4th Cir. 1985). (Tr. 54:1-12).

In her Decision, the ALJ properly rejected Respondent's reliance on Stephens Produce Co., Inc. v. NLRB, 515 F.2d 1373 (8th Cir. 1975), noting that the court concluded that although asserted privilege protecting Board agents from testifying under Section 102.118 of the Board's Rules and Regulations is a limited one, "it takes something more than the mere hope or surmise that impeaching evidence will be found in the investigatory file or in the questioning of the agency investigator to overcome it." Id. at 1377. (ALJD 23:1-20).

Although Respondent relies heavily on Drukker Communications v. NLRB, 700 F.2d 277 (D.C. Cir. 1983), the ALJ properly concluded that the circumstances of that case are distinguishable. (ALJD 23:22-51; 24:1-20). In Drukker the employer subpoenaed a Board agent to testify about an oral understanding in connection with a stipulation concerning a bargaining unit, and the court determined that the privilege was not applicable, in part, because there was "uncontradicted evidence" that the stipulation was made in the presence of the Board agent.

As the ALJ found, this is quite different from the situation here where Ross's testimony, as proffered, is not central to the merits of the case. Even if Ross testified exactly as the proffer indicates, the testimony would not clearly rebut Martin and Turienzo's testimony. Moreover, Ross did not personally represent the discriminatees in the private settlement agreement negotiations, and the agreement prohibited Turienzo from divulging the terms of the agreements or the circumstances related to the agreements. (ALJD 24:30-20). Moreover, the proffer does

not include any assertion that Ross was present when the private agreements were reached, or that Turienzo divulged the terms of the private agreements or the substance of the settlement discussions that led to the private agreements to Ross or anyone else, or that Turienzo broke the confidentiality provision in his agreement. (ALJD 24:22-31).

In addition, as previously noted, the ALJ properly discredited the testimony of Respondent's witnesses that the discriminatees initiated the settlement and offered some of the settlement terms. The ALJ also properly noted that Respondent provided no basis to conclude that Turienzo would share the details of conversations he had with Respondent with Ross, and that even if such conversations were shared, it would not establish that Respondent did not intentionally misrepresent the status of the case to the discriminatees. (ALJD 24:33 to 25:3).

The ALJ properly relied upon Sunol Valley Golf and Recreation Co., 305 NLRB 493 (1991), for her conclusion that the petitions to revoke the subpoena should be granted. (Tr. 54:13 to 55:15). In that case, the Board found that the balance weighed against requiring the Board agent to testify, noting that the agent's testimony was "pure speculation." Similarly, the ALJ properly concluded that Ross did not participate in the settlement discussions between Respondent and the discriminatees, and his testimony is speculative.

With respect to the estoppel argument, the ALJ also properly concluded that Ross's testimony is not relevant noting that the Board and 11th Circuit have already ordered Respondent to reinstate the discriminatees and pay backpay. Thus, as stated by the ALJ, "Ross' knowledge or lack of knowledge in 2000 cannot constitute a waiver of Goya's responsibility under the Act or as a waiver of these discriminatees' rights under the Act." (ALJD 25:24-40). The ALJ also noted that the Board has stated that it is not stopped from processing complaint allegations based

upon advice received by Board agents, citing Capitol Temptrol Corp., 243 NLRB 575, fn. 59 (1979), enfd. 622 F.2d 574 (2d Cir. 1980); Stokely-Van Camp, Inc., 130 NLRB 869, 871 (1961).

Based on the foregoing, the ALJ re-affirmed her conclusion that there were no unusual circumstances warranting Ross's testimony. (ALJD 25:43-44). The ALJ did not err in granting the petitions to revoke Ross's subpoena, or in denying Respondent's motion, after the conclusion of the General Counsel's case-in-chief, that the ALJ reconsider her decision. (ALJD 22:39-44) Accordingly, Respondent's Exceptions 23, 24, 25, and 26 should be rejected.

V. The ALJ's Conclusions of Law and the ALJ's Decision and Recommended Order Should be Affirmed, and Respondent's Exceptions 1-29 Should be Denied

Based on the foregoing, the ALJ's conclusion that "the private settlement agreements are insufficient to waive reinstatement or toll backpay for Martin and Turienzo" and that "the private settlement agreements are repugnant to the policies and purposes of the Act" should be affirmed. (ALJD 20: 30-34). Accordingly, Respondent's Exception 22 should be denied.

Based thereon, the ALJ properly denied Respondent's motion to dismiss the compliance specification at the close of the General Counsel's case-in-chief, and Respondent's Exception 27 should be denied. (Tr. 203-207).

Moreover, the ALJ's Recommended Order that Respondent shall take the following actions should be affirmed in its entirety:[23]

1) Immediately offer Alberto Turienzo and Jesus Martin reinstatement to their former positions or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

[23] Respondent is also obligated to carry out the requirements set forth in the Board's Order in Goya I, as enforced by the 11th Circuit.

2) Pay Alberto Turienzo the remaining net backpay owed to him and other reimbursable sums for the period of time from his unlawful discharge on July 7, 1999, until the date of a valid offer of reinstatement, less the $22,000 paid to him on October 31, 2000; and

3) Pay Jesus Martin the remaining net backpay owed to him and other reimbursable sums for the period of time from his unlawful discharge on July 7, 1999, until the date of a valid offer of reinstatement, less the $25,000 paid to him on October 4, 2000.

Accordingly, Respondent's Exception 29 should be denied.

Based on the foregoing, the ALJ's findings, conclusions and recommended Order should be affirmed in its entirety, and Respondent's exceptions should be denied in their entirety.

Dated at Miami, Florida, this 2nd day of May, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that General Counsel's Answering Brief to Respondent's Amended Exceptions and Brief in Support of Exceptions to Decision of Administrative Law Judge in the matter of Goya Foods of Florida, Inc., Cases 12-CA-19668 et al., was electronically filed with the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 2nd day of May, 2011.

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