

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AGGREGATE INDUSTRIES,

Respondent,

vs.

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS LOCAL
631, affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Party.

Case No. 28-CA-23220
28-CA-23250

**RESPONDENT'S BRIEF IN SUPPORT
OF CROSS EXCEPTIONS TO
DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

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I. FACTS/CASE NO. 28-CA-23250

Before Aggregate Industries (“AI” or Respondent) purchased Frehner and SNP, both of the companies had sweeper trucks. At the time of the purchases both Frehner’s and SNP’s sweeper trucks were operated by Operating Engineer employees pursuant to their collective bargaining agreements with Operating Engineers Local 12. Around 2004, SNP reassigned to the Teamsters the operation of its sweeper trucks. **(TR p. 479)**. During negotiations with Laborers Local 872 in 2004 the Laborers produced evidence that they had organized three sweeper companies and the classification of sweeper driver was added to the Laborers master labor agreement. **(TR p. 480)**. In 2005, Laborers Local 872 filed a grievance against AI because, at a time when AI’s own sweeper trucks were busy, it contracted with a non-union sweeper company. AI settled the grievance and agreed that in the future if it needed outside sweeper companies it would contract with a company with a contract with the Laborers Union. **(TR p. 480)**. In the first half of 2010, both Operating Engineers and Laborers Local 872 representatives asked that the sweeper truck work be assigned to them. The classification of sweeper driver is in all three collective bargaining agreements; Operating Engineers Local 12, Teamsters Local 631 and Laborers Local 872. **(TR p. 483)**.

Andrew Barnum and Mike Crane were members of Teamsters Local 631 and drove sweeper trucks for AI under the Construction Agreement with Local 631. In or around September 2010, Andrew Barnum and Crane discussed among themselves their unhappiness with the Teamsters Union. Barnum contacted Mike Kuck of Respondent and asked if he could continue with AI, but transfer to a different Union. **(TR pp. 217-218)**. They persisted in this effort and decided they wanted to continue working for AI but wanted to join Laborers Local 872

and work under the Local 872 collective bargaining unit. They believed that the Laborers had a better benefit package in its contract than did Operating Engineers Local 12. (TR pp. 222-223).

On October 8, 2010, Sean Stewart issued a Letter of Assignment (GC Exh. 35) addressed to Laborers Local 872, assigning the work of street sweepers and vacuum trucks to Laborers Local 872:

“Aggregate Industries –SWR, Inc.” (“AI”) hereby assigns to the Laborers Union Local 872 the work of street sweepers and vacuum trucks.”

Stewart also informed Local 872 in the correspondence that Andrew Barnum and Michael Crane, two of the drivers of the street sweepers, had requested to join the Laborers Union. He then noted that a third driver of the trucks was a member of Operating Engineers Local 12 and that she would be allowed to continue to operate under the Local 12 agreement. He then assigned any new hires for the position to be dispatched through the Laborers’ hiring hall. (GC Exh. 35).

After the filing of the charge in this case Stewart informed the Laborers Union that AI might be forced through settlement to move the drivers back to the Teamsters. Dave McCune, the president of Laborers Local 872, told Stewart that AI was not going to move them back, and if they did, Local 872 would “take action.” (TR p. 482). Respondent did not bargain with the Teamsters over this issue.

II. ARGUMENT/CASE NO. 28-CA-23250

The assignment of the sweeper driver work to the Laborers Union was part of a work jurisdictional dispute and is not subject to the provisions of Section 8(a)(5) of the Act.

There is no dispute that the classification of sweeper driver is covered in three different agreements with Respondent; the Teamsters Construction Agreement, the Operating Engineers Agreement and the Laborers Agreement (GC Exh. 4, page 18, Article IX, Section, G.8). There is also no dispute that the classification was added to the Laborers’ agreement in the 2004

negotiations after the Laborers presented evidence that it had organized three sweeper companies. It is also uncontradicted that the Laborers filed a grievance in 2005 when AI contracted with a non-union sweeper truck company when it needed excess sweeper trucks, and that AI resolved the grievance by agreeing to contract with a company signatory to the Laborers the next time AI needed additional sweeper trucks.

Sean Stewart also testified that Laborers Local 872 and the Operating Engineers Local 12 both made requests to him in early 2010 that sweeper truck work be assigned to their labor organization. The Judge, however, stated that Kuck “contradicted Stewart, denying that the Laborers had ever demanded or claimed the sweeper driver work.” **(JD. p. 22, n. 51, lines 53-54)**. The Judge thereafter stated: “Surely, Stewart would have alerted Kuck to the Laborers’ repeated requests to perform the mechanical sweeper truck driving work for Respondent.” **(JD. p. 24, lines 25-27)**. Based on this, the Judge found that there was no genuine work jurisdictional dispute.

The Judge’s conclusion that “surely” Stewart would have informed Kuck of the requests by the Laborers Union and the Operating Engineers Union for sweeper driver work is simply not logical. Stewart simply did not act on their requests and the parties moved on. If there is one thing that is abundantly clear from the record is that Sean Stewart is the person in charge of negotiating with labor organizations and he is the one that is the point person in communications with the unions. There is simply no reason for Stewart to pass on to Kuck the denied requests of unions for certain work assignments. Kuck did not contradict Stewart. He simply testified that he had no “knowledge” of the Laborers Union coming to AI where they “demanded to be recognized as the bargaining agent for the sweepers” or claimed that work. **(TR pp. 244-245)**.

It should be noted that Stewart was not in any hurry to assign the work to the Laborers union even after the two Teamster employees requested to continue their work as members of the Laborers Union. As noted by the Judge, when Kuck first notified Stewart of the request of the two Teamster drivers he “initially did nothing, hoping the matter would ‘blow over.’” (**JD. p. 23, n. 52, lines 45-46**). It was only when Kuck advised him that the employees renewed their request that he proceeded to assign the work to the Laborers union. (**JD. p. 23, n. 52, lines 46-47**).

It should also be noted that the Judge found the testimony of Stewart, Kuck and employee Barnum to be “mutually corroborative” on all points other than the one alleged discrepancy between the testimony of Stewart and Kuck. (**JD. p. 23, lines 32-35**). Further, the Judge noted the only conflict in their testimony concerned the one assertion by Stewart that on numerous occasions in early 2010 he spoke to Tommy White of the Laborers where White requested the assignment of sweeper work. (**JD. p. 22, n. 51, lines 50-54**).

Despite the fact that the alleged conflict in the testimony of Stewart and Kuck was not a conflict, it should not be forgotten that the Judge found, based on uncontradicted testimony, that the Laborers Union submitted proof in the 2004 negotiations that it had organized three sweeper truck companies; that the sweeper truck classification was added to the Laborers’ master agreement; that the Laborers filed a grievance when AI used a non-union sweeper truck company for overflow sweeper truck work; and that AI settled the grievance by agreeing to utilize subcontractors signatory to the Laborers for such overflow work in the future.

It should also be noted that Stewart stated that both Laborers Local 872 and Operating Engineers Local 12 made requests for the sweeper truck work in early 2010, not just the Laborers Union. In that regard, AI had a composite crew of both Teamsters and Operating

Engineers performing sweeper truck work at all times material. **(TR pp. 240, 245)**. Stewart's assignment of work to the Laborers' left the partial assignment of sweeper truck work to the Operating Engineers unchanged. **(GC Exh. 35)**. It simply can not be denied that there existed a claim by three unions, through their collective bargaining agreements, for the work of sweeper trucks and that there existed a certain tension between the unions based on their written agreements covering the same work.

The Judge's apparent finding that there was no communication between Tommy White and Sean Stewart in early 2010, where the Laborers Union made requests for the sweeper truck work, is not based on demeanor. Rather it is based on the illogical conclusion that there was a conflict in the testimony of Kuck and Stewart. When an administrative law judge makes a credibility finding based on factors other than demeanor, the Board may make independent evaluations of credibility based on the "weight of evidence, established facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Storer Communications, Inc.*, 297 NLRB 296, 296 n. 2 (1989). *See also, BJ&R Machine & Cureco*, 270 NLRB 267 (1984).

The Board should credit the testimony of Sean Stewart that he had numerous conversations in early 2010 with both the Laborers Union and the Operating Engineers Union where both unions requested the sweeper work and should find that the testimony of Kuck and Stewart was not in conflict. In any event, even without the testimony of Stewart on this one minor fact, there is an abundance of evidence that the Laborers claimed the work of sweeper drivers. It is difficult to imagine finding that the Laborers do not claim such work when it has had the job description added to its master labor agreement and has filed grievances over the contracting of such work.

Respondent is free to assign, and to re-assign, work to various members of different unions without bargaining with any of the unions if its conduct was part of a jurisdictional work dispute. Furthermore, it could discharge employees based on their union membership when assigning work to members of other unions without violating Section 8(a)(3) of the Act, as long as its conduct was part of a jurisdictional work dispute. In *Brady-Hamilton*, 198 NLRB 147 (1972), the Board held that Section 8(a)(3) does not apply in such work jurisdictional disputes.

Brady-Hamilton involved a dispute where there was a Section 10(k) proceeding. However, in *J.L. Allen Co.*, 199 NLRB 675 (1972) and *Pipeline Dehydrators, Inc.* 239 NLRB 172 (1978) the Board applied the rationale of *Brady-Hamilton* to situations where there was no Section 10(k) hearing and where there was no threat that would cause a filing of a Section 8(b)(4)(D) charge which would trigger a 10(k) hearing. Furthermore, the Board in *J.L. Allen Co.*, also held that Section 8(a)(5) has no application to work jurisdictional disputes stemming from a work assignment that occurs without bargaining with the union that has lost the work.

Construction industry contracts of various crafts typically have bargaining unit coverage that overlaps with the bargaining unit descriptions of other trades. Work assignments, and re-assignments, take place on a routine basis and involve displacement of employees based on their union membership, and take place without notice or bargaining with any union involved, and Sections 8(a)(5) and 8(a)(3) have no application to the process, as long as one union is trying to obtain the assignment to the work to the detriment of other employees.

A review of 10(k) proceedings will reveal examples of cases where work was taken from one bargaining unit without notice to the union involved and given to another union. For example, in the recent case of *AMS Construction Inc.*, 356 NLRB No. 57 (December 28, 2010), the employer had an agreement with the Laborers Union since 1991 and an agreement with the

Operating Engineers since 2001. From 1999 to 2004 the employer assigned directional drill machine work to employees represented by the Laborers. In 2004, the Operating Engineers filed a grievance alleging the work belonged to them. The employer resolved the grievance by converting three of its six Laborers represented employees into Operating Engineers represented employees, and it executed separate assignment letters with each union covering the work. In 2010 the employer re-assigned all of the work to the Laborers on a particular project. The Laborers threatened a work stoppage if the work was re-assigned to the Operating Engineers, which triggered a Section 10(k) proceeding. It is clear from Board case law, that the employer's conduct in *AMS* did not constitute violations of Section 8(a)(3) or Section 8(a)(5) even though its conduct involving employees was based on their union membership and even though it moved employees back and forth with assignments and re-assignments without bargaining with the unions involved.

Even though the work assignment in this case was triggered by the requests of two employees, the requests did not occur in a vacuum. The facts, as found by the Judge, remain that the Laborers' collective bargaining agreement covered the type of work that the employees performed, that the Laborers Union has filed grievances over the contracting of such work to entities not signatory to the Laborers, and that the Laborers Union made a demand for the work after learning that Respondent might reassign the work back to the Teamsters in settlement of the charge filed in this case. This is a typical jurisdictional work dispute and Section 8(a)(5) has no application.

Finally, it should be noted that the decision of the Judge, as noted by the Judge, does not protect the two employees who chose, on their own, to change union affiliations. As noted by

the Judge, these employees may end up out of a job based on the ruling of the Judge. (**JD. p. 26, n. 59, lines 36-43**).

III. FACTS/CASE NO. 28-CA-23220

The facts of Case No. 28-CA-23220 are set forth in Respondent's Answering Brief to General Counsel's Exceptions To Decision Of The Administrative Law Judge.

IV. ARGUMENT/CASE NO. 28-CA-23220

A. Contract Clear On Its Face

The Judge actually found that any signatory to an R S & G Agreement could haul aggregate material to a construction project under the terms of the R S & G Agreement. In footnote 20 on page 8 of the Decision, the Judge stated:

There does not seem to be any dispute that material haul drivers, employed by a signatory to a ready-mix agreement, may haul aggregate to a job site whether on a subcontract basis for a Construction Agreement contractor or on a direct retail sale basis to a Construction Agreement contractor. In such a circumstance, the driver must drop his load at a designated stockpile site. If delivering to a job site on a subcontract basis, a ready-mix agreement signatory must pay its material haul drivers at the prevailing or Construction Agreement wage rate; while, if doing so on a retail sale basis, the contractor may pay its drivers at the ready-mix agreement wage rate. Finally, on either basis, if the material haul driver is utilized for work on the job site (for example, delivering aggregates from the stockpile to the work site), he or she must be paid at the Construction Agreement wage rate. (Emphasis added herein).

It should be noted that the Judge actually is incorrect in describing two different rates for hauling material to a construction project under a rock, sand and gravel agreement. As will be set forth later in this brief, a material hauler under a rock, sand and gravel agreement pays only the wages set forth in the rock, sand and gravel agreement. It is only when they do work on a construction site that they pay the prevailing rate which equates to the Construction contract rate. The Judge's recitation is the result of the extremely confusing and contradictory testimony of

General Counsel's witnesses Dewey Darr. Indeed, the Judge acknowledged that his testimony was both confusing and contradictory. **(JD. p. 16, lines 40-41).**

Nevertheless, what the Judge found, and which is clear from the testimony of all pertinent witnesses, is that any party signatory to a rock sand and gravel agreement could haul aggregate material to construction projects under the terms of said rock, sand and gravel agreement. Respondent's R S & G Agreement is clear on its face and parol evidence concerning the negotiation of the agreement is not needed, and, in fact, should be excluded. The Judge should have dismissed the complaint based on his finding that a signatory to a rock, sand and gravel agreement, which would include Respondent, had a right to haul aggregate material to construction projects under such rock, sand and gravel agreement.

The coverage of Respondent's R S & G Agreement, and its application, for all practical purposes, is identical to the coverage and application of the rock, sand, and gravel agreements the Union has with Cemex and Nevada Ready Mix. It is noteworthy that it was the Union that insisted that Respondent's R S & G agreement be identical to the Cemex and Nevada Ready Mix agreements. Sean Stewart noted that he would have liked to change some of the terms and conditions of employment of the agreement when he negotiated with the Union in 2008, but that the Union insisted that Respondent's agreement track the Cemex and Nevada Ready Mix agreements. **(TR p. 397).** This was confirmed by Dewey Darr, the General Counsel's own witness:

JUDGE LITVACK: All right. And so, when you began negotiating with Southern Nevada ReadyMix, they wanted the same Appendix A as CI-Mix?

THE WITNESS: Right. They wanted - - them and we, we mostly, wanted to mirror the other two contracts because we didn't want any discrepancies between them. What they did with their trucks that had to [sic] Southern Nevada ReadyMix on them was up to them. We wanted them to be classified - - they had to say Southern Nevada ReadyMix on them to haul plant mix, but they were

allowed to use those trucks just like MI-Mix [sic] and Southern [sic] Nevada ReadyMix. It was never our intent to stop that . . . (Emphasis added herein).

(TR p. 272)

Cemex, Nevada Ready Mix and Respondent all operate their own quarries. **(TR pp. 271, 531).** They all use the same types of trucks to haul material from quarries. The types of trucks used are set forth in all three of their rock, sand, and gravel agreements. They all haul similar material. Some of the material that is hauled from the quarries has nothing to do with the making of ready mix. **(TR pp. 434-435)** They haul to batch plants. They haul to construction projects. They all perform work on the site of construction projects, and, when doing so, pay the “prevailing wage rate” under state law that equates to the rate set forth in the Construction Agreement. **(TR pp. 530-535 and throughout record).**

Accordingly, the terminology set forth in the three rock, sand, and gravel agreements have clear meanings in the industry which have been established over decades of use. Respondent can not have engaged in a violation of Section 8(a)(5) by operating under the clear terms of its R S & G Agreement.

It also does not make any difference that the R S & G Agreement has the employer’s name of Southern Nevada Ready Mix on the cover of the agreement and that Southern Nevada Ready Mix was initially a fictitious name utilized by Regal Materials, Inc. Regal Materials, SNP and Frehner were, at all times material, owned and controlled by AI. Sean Stewart was the general counsel and vice president of all three subsidiaries. One person was the human resource director of all three entities. **(TR p. 368-369).** They clearly operated as a single employer at all times under established Board law. Furthermore, even if they did not constitute a single employer when they were separate corporate subsidiaries, when the common parent company consolidated the subsidiaries, their various collective bargaining agreements were adopted by

that single remaining entity. Indeed, it would clearly be a violation of the Act if, after consolidation, the remaining entity abrogated any of the collective bargaining agreements of the former subsidiaries based simply on the contention that there was a new employing entity.

Finally, the employees of Southern Nevada Ready Mix were actually employees of the corporate entity Frehner from April 2009 to the present. In April 2009, Sean Stewart, as an employee of Aggregate Industries Management, Inc. (**TR p. 368, lines 15-16**), and as general counsel for Regal Materials and Frehner, moved Southern Nevada Ready Mix from Regal Materials to Frehner by executing and filing a new fictitious name under Frehner. (**Resp. Exh. 15, TR pp. 178, 484**) Accordingly, Frehner, for sixteen months prior to the consolidation of Frehner, SNP and Regal Materials, was operating under the terms of both the Construction agreement and the R S & G Agreement. In August 2010, Frehner simply changed its name to Aggregate Industries, SWR, Inc. Section 10(b) of the Act precludes any attack on the moving of Southern Nevada Ready Mix employees from Regal Materials to Frehner in April of 2009.

The Judge incorrectly stated that Regal Materials operated the R S & G agreement until the consolidation of the three entities in August 2010. (**JD. p. 4, lines 10-12**). He failed to note in his decision that Frehner the employees of Southern Nevada Ready Mix were Frehner employees for sixteen months prior to the corporate consolidation. Also, although the Judge recited that Respondent raised Section 10(b) as an affirmative defense, he did not pass on this issue even though it was briefed to him. He simply ignored the issue and misstated the facts.

B. The Union Agreed to Allow Material Hauling in the 2008 Negotiations.

Although the terms of the R S & G Agreement are clear, parol evidence concerning the 2008 negotiations also establishes that Respondent had the contractual right to haul materials under the R S & G Agreement. This is not only true from the clear testimony of Stewart, but the

testimony of Dewey Darr, General Counsel's own witness, corroborates Stewart. Respondent had the contractual right to perform material hauls under the terms of the R S & G Agreement, and such material hauls could include not only hauls from the Sloan Quarry to Respondents own plants, but material hauls to construction projects.

First, it is important to again emphasize which party insisted on following the terms of the Cemex and Nevada Ready Mix rock, sand and gravel agreements. It was the Union. This was confirmed by Darr's own testimony:

They wanted - - them and we, we mostly, wanted to mirror the other two contracts because we didn't want any discrepancies between them. What they did with their trucks that had to [sic] Southern Nevada ReadyMix on them was up to them.

(TR p. 272)

Darr said they simply wanted the trucks "classified" and that as long as they had "Southern Nevada Ready Mix" on the door of their transport trucks that Respondent could use those trucks just like Cemex and Nevada Ready Mix did. **(TR p. 272, lines 16-19).**

As noted above, the Judge noted in his Decision that the testimony of Darr was at times confusing and was contradictory. The Judge noted one instance in which he appeared to contradict himself by stating that Respondent's trucks operating under the R S & G agreement could be utilized just like Cemex and Nevada Ready Mix and that it was never the intent of the Union to stop that. **(JD. p. 8, lines 4-10).** In fact, Darr repeatedly acknowledged such. A careful review of his testimony revealed that he agreed that material hauls under all three rock, sand, and gravel agreements, for Cemex, Nevada Ready Mix and Southern Nevada Ready Mix, could be made under their respective agreements, utilizing the wage rates of the agreements for material hauls from quarries to batch plants and from quarries to construction projects. Darr noted that if the material haul truck should remain on the construction project, performing

construction work, that the drivers would then receive Nevada's prevailing wage rates for such on site work, which would be the same rates as the Construction Agreement. Darr repeated this several times in his testimony.

In responding to a question by the Judge, Darr stated:

As a delivery company, they're allowed to deliver into a construction site without paying prevailing wage. As a delivery company if they're selling their own material. But if they're working on the site and putting the load right into the grade of the work being performed, then they must be paid the prevailing wage.

(TR p. 277)

When addressing the Union's intent in negotiating Respondent's R S & G Agreement, Darr, under cross-examination, confirmed again that he wanted the three agreements to be the same:

MR WINKLER: I believe that you said that you wanted all three to be the same, whether it's the Appendix A or the entire contract. Were you talking about not only Aggregate Industries, Southern Nevada ReadyMix, but also CI-Mix and Nevada ReadyMix?

A Yes, sir. Basically, the same.

(TR p. 279)

Darr then acknowledged that the types of trucks covered by the three agreements are the same, even though some of the terminology of one of the agreements differed. **(TR pp. 285-289)**. Darr then described in detail the wage rates that Cemex would pay if it was delivering materials to a construction project and if it actually performed construction work on the project:

Q. BY MR. WINKLER: CI-Mix can take its own material, deliver it to a project, a construction project, dump it and stockpile it and be paid - - and the wages will be paid under the ReadyMix agreement, correct?

A. Correct.

Q. Now, if for some reason CI-Mix stayed on the project or spread out the material, it would be paid prevailing wages under state law, correct?

A. It would.

...

Q. - - for the work on the project it would be paid prevailing wages under state law?

A. Right.

Q And those are equal to the wages in the construction master agreement, correct?

A Yes, correct.

...

Q Right. As they're driving to the project, they're paid the ReadyMix wages.

A. Because they are a supplier.

(TR pp 315, line 21 – 316, line 25)

Darr then acknowledged that there were no differences in the agreements of Cemex and Nevada Ready Mix as to how the companies were allowed to deliver material. He then acknowledged that Nevada Ready Mix could haul materials to construction projects and be paid the wages set forth in its rock, sand and gravel agreement. **(TR pp. 318-319).**

Darr was then asked questions tracking his statement in his Board affidavit and acknowledged that at the time the Union was negotiating the agreement with Southern Nevada Ready Mix that Southern Nevada Ready Mix had no “sand and gravel” drivers, but that the company insisted on putting the classifications in the agreement. He then acknowledged that he asked Pat Ward of Aggregate Industries why Respondent “didn’t just move a few trucks from the construction division over to the sand and gravel pit haul division” and Ward responded that at that time the trucks were tied up on construction projects, but they would use sand and gravel trucks in the future. **(TR pp. 319-320).**

The Judge saw where this cross examination was going and interjected:

JUDGE LITVACK: Well, just – Mr. Darr, I think you testified earlier that what you contemplated was that, if Southern Nevada ReadyMix had its own fleet of material hauling trucks, they would be utilized to haul to batch plants or from batch plant to batch plant.

THE WITNESS: Correct. Plant haul.

JUDGE LITVACK: Right. And I realize - - I know what you're going to say, Mr. Giannopoulos. It's been asked and answered, but I wanted a definitive answer to this.

Did you also contemplate that some of those trucks or all the trucks could have been utilized to haul materials to jobsites and stockpiled just as Rinker/CI-Mix, and Nevada ReadyMix were doing?

THE WITNESS: If they had Southern Nevada ReadyMix on the door, then, yes, they could haul the same way Nevada ReadyMix and Rinker could haul. Thank you. (Emphasis added herein).

(TR pp. 320-321)

The Judge then asked whether they could haul in the same way that material drivers for Southern Nevada Paving or Frehner did and he answered no. However, it is important to review his entire answer. When he was asked by the Judge for the difference he began by responding that “if they're utilized to do construction work with that truck, it takes a driver that is able to do construction work. . .” **(TR pp. 321-322)** It is clear from his answer that he was again addressing the work of Southern Nevada Paving or Frehner employees on construction projects. In his somewhat lengthy answer, he, nevertheless, again confirmed that the hauling to the project would be paid under the R S and G Agreement, and he gave an example of Southern Nevada Ready Mix delivering materials to Southern Nevada Paving on a construction project:

ReadyMix is a material truck that goes plant to plant and, if he's subcontracted out to a construction project, like Southern Nevada Paving, he can deliver to the jobsite if they buy their material and dump it under ReadyMix wages. . . (Emphasis added herein).

(TR p. 322, lines 4-8).

Darr provided very confusing testimony concerning certain alleged restrictions on utilizing rock, sand, and gravel drivers when contractors signatory to the construction master agreement still had trucks available. He again got various concepts confused. At one point he noted that companies like Cemex could haul material from quarries under a rock, sand and gravel agreement, but could also work on construction projects if a construction contractor such as Frehner or Las Vegas Paving “or somebody” needed extra trucks. **(TR p. 271, lines 7-10)**. He further said that if Las Vegas Paving asked to “rent” or “lease” Cemex trucks and drivers to work on the construction project they could do so and the Cemex drivers would get prevailing wages. Darr said this happens “all the time.” **(TR pp. 271-272)**. Darr brought up the Cemex example again under questioning by the Judge and noted that if Southern Nevada Paving hired Cemex “behind all of its trucks” to utilize the Cemex drivers “on the construction project” that it could do so but the Cemex drivers would get prevailing wages for their work on the construction project. **(TR p. 306, lines 5-8)**. The Judge then asked if Southern Nevada ReadyMix could use its trucks the same way if Southern Nevada Paving called it instead of Cemex, Darr said yes, but again noted that all of Southern Nevada Paving’s construction trucks had to be used first. **(TR p. 306)**. Darr noted that such requirement is “hard to police.” **(TR p. 306)**

What Darr is referring to is a requirement on contractors that are signatory to the Construction Agreement. Article 4, Section 8 of the Construction Agreement **(GC Exh. 2, page 10)** provides:

Legitimate vendors of materials may deliver materials to a material yard but shall not be allowed to place, unload, or apply materials at the work site. Employees covered under this Agreement shall move the materials from the material yard to the work site. Notwithstanding the above, the Employer may utilize a signatory rock, sand, and gravel company to unload its materials at the work site when 1) the Employer has none of its equipment available to perform the work; 2) there are no signatory subcontractors to perform the work.

The testimony of both Darr and Stewart is clear that Respondent, Cemex and Nevada Ready Mix could haul aggregate material to a construction project utilizing the wage rates set forth in their rock, sand and gravel agreements. Darr emphasized that they had to deposit the material at a material yard and “stock pile” it. Article 4, Section 8 memorializes that vendors of materials could deliver material to the material yard at a construction project but could not move the material to the actual work on the site. Such movement from the material yard had to be done by employees covered by the Construction Agreement. However, the Section provides that notwithstanding such restriction that the employer signatory to the Construction Agreement could utilize a rock, sand and gravel signatory to unload its materials at the work site (as opposed to the material yard) when it did not have any available equipment to do the work and could not get another subcontractor signatory to the Construction Agreement to do the work. (As noted by Darr, this could be difficult to enforce).

It should be noted that the Union’s position that applying material by a supplier to the actual work on a construction project would be considered construction jobsite work has Section 8(e) implications. The Board has held that the final act of delivery, even on the work on a construction project, is not necessarily jobsite work. *Operating Engineers Local 12 (Robert E. Fulton)*, 220 NLRB 530 (1975). However, regardless of when a rock, sand and gravel contractor would be considered to be doing construction job site work, to be required to pay prevailing wages, it should be noted that Darr confirmed that the same restrictions that would apply to Cemex would also apply to Southern Nevada Ready Mix.

In this regard, the Judge asked Darr if Respondent transferred 50 or so drivers who had been working under the Southern Nevada Paving Construction Agreement to work under the R S & G Agreement, and the trucks were designated and labeled accordingly, would they be

treated the same way that Cemex would be treated, “[t]hat is, they could just stockpile, but they couldn’t come on to - - the specific area of the construction and dump there?” Darr responded: “If they utilized the rest of their [Southern Nevada Paving] trucks first.” (TR p. 312) Darr’s response was an affirmation that Southern Nevada Ready Mix would be treated the same way that Cemex would be treated, even if 50 Southern Nevada Paving employees were “transferred” to Southern Nevada Ready Mix. It is respectfully submitted that Darr’s reference to Southern Nevada Paving having to use the rest of its trucks first is based on his belief that the hypothetical in the question posed to him involved work by Southern Nevada Ready Mix on a construction project. There is no restriction in any rock, sand, and gravel agreement or signatures thereto in delivering material to a jobsite and stockpiling it. The restriction on the use of rock, sand, and gravel employees under Article 4, Section 8 of the Construction Agreement, that rock, sand, and gravel employees could not work unless the Construction Agreement employees were not available, only involved work on construction projects. Sean Stewart also commented on this, stating:

“If the Southern Nevada ReadyMix trucks didn’t have a material haul for the day, they couldn’t jump in line with the construction trucks and go do construction work for the day. They had - - the construction guys, under our master labor agreement with the construction and - - before you use a ReadyMix or a rock, sand, and gravel driver, you have to make sure there’s no other construction trucks available in the valley.

Q. That was under the construction agreement?

A. That was under the construction agreement.” (Emphasis added herein)

(TR p. 398, lines 4-12).

The Judge then asked whether it would be the same result if Southern Nevada Paving’s entire fleet went to Southern Nevada Ready Mix and operated under the R S & G Agreement.

Darr responded that they would have to “supplement” to some other contractor. He then stated

that some other construction contractor had to be called first. “Las Vegas paving, Frehner, anybody else that had an agreement under this master labor agreement had to be called first and they had to be supplemented. They couldn’t be called out first.” (TR pp. 312-313). It should be remembered the question was directed at whether Southern Nevada Ready Mix would be treated the same as Cemex in that they could stockpile material at a jobsite, but could not take it to the specific area of the construction project and dump it there. Although Darr’s interpretation and explanation of the requirements of Article 4, Section 8 is somewhat confusing, it should be noted that his response evidenced an opinion that the entire fleet of Southern Nevada Paving trucks could be transferred to the R S & G Agreement as long as it followed the rules of the agreement. According to Darr, that meant that a contractor signatory to the Construction Agreement had to have first opportunity to perform the work of taking material from the material yard to the construction work. Yet that would be true for Cemex and Nevada Ready Mix as well.

Accordingly, it is clear that Darr suggested to Respondent during the 2008 bargaining that Respondent transfer some of the trucks that were operating under the Construction Agreement and transfer them to the R S & G Agreement, and it is clear that Darr bargained to let Southern Nevada Ready Mix operate material hauls in the same manner and under the same rules as Cemex and Nevada Ready Mix. It is also clear that he understood the R S & G Agreement would permit Respondent to conduct business this way even if its entire fleet were transferred to the R S & G Agreement and even if Respondent transferred all of its drivers that had been operating under the Construction Agreement to the R S & G Agreement.

Another note should be made concerning the testimony of the 2008 negotiations. Although Darr did not say that any issue concerning ownership or control of the Sloan Quarry was discussed at the negotiations, he did make general statements that rock, sand, and gravel

contractors would haul their own material from their quarries. He at one point noted that he did not think that Southern Nevada Ready Mix had its own quarry, that it was “Barton’s” quarry. However, Barton was just a fictitious name utilized by Frehner. Frehner and Southern Nevada Paving each owned one half of the Sloan Quarry when they were purchased by AI. At all times it has been under the control of Aggregate Industries. The current ownership of a portion of the Sloan Quarry is divided between Sloan Quarry, LLC and Aggregate Industries – WCR, Inc. Each entity owns 50%. **(GC 38, TR pp. 487-488)**. Aggregate Industries – WCR, Inc. is a sister company to Aggregate Industries, SWR, Inc. However, Sloan Quarry, LLC is actually owned by Aggregate Industries, SWR, Inc., Respondent herein. **(TR p. 488)**.

It should be noted that Southern Nevada ReadyMix operated the Sloan Quarry and that it operated such as a fictitious name of Frehner from April 2009 to August 2010 when all three corporate subsidiaries were consolidated. Respondent has at all times controlled the operation of the quarry. It should also be noted that there is no requirement of ownership of a quarry, or even control of a quarry, in any of the rock, sand and gravel agreements in evidence. Finally, even though Cemex has a quarry **(TR p. 271)**, it also purchased aggregate material from the Sloan Quarry and used its material haul trucks to haul the material from the Sloan Quarry, and it utilized the wage scales set forth in its rock, sand, and gravel agreement when it did so. Cemex certainly did not own or control the Sloan Quarry, yet it was free to utilize its rock, sand, and gravel agreement to conduct those material hauls. **(TR pp. 450-453)**.

Another note should be made concerning the 2008 negotiations. The Judge had Darr review the second paragraph on the second page of Stewart’s September 27, 2010 correspondence to Dey **(GC Exh. 23)** which read:

In June of 2008 Teamsters Local 631 and AI entered into a materials agreement which covers, among other things, the delivery of materials. At the time of

signing, Local 631 encouraged AI to transfer trucks to the materials division so that AI could compete directly with other signatory material suppliers. At that time AI's construction divisions were so busy that the trucks were needed for construction work on site more than they were need for materials deliveries from the commercial plant. As a result, AI chose not to immediately make changes but to wait for a more appropriate time.

The Judge asked him if he disagreed with any portion of that paragraph. He responded, after a long pause, that he disagreed with the verbiage "so AI could compete directly with signatory material suppliers." (TR p. 311) First, it should be emphasized that he agreed with all of the factual recitations in the paragraph, that the agreement covered material hauling, that the Union made the suggestion to transfer trucks from the construction division to the rock, sand and gravel division, that AI's trucks were too busy doing construction at that time, and that AI chose not to immediately make changes but to wait for a more appropriate time.

He only disagreed with the conclusionary statement that the material hauling was included in the agreement so that AI could compete with material suppliers. However, in making this statement, he stated:

And I don't now who they would have to compete with. They would have to compete with Nevada ReadyMix and Rinker, but, if they had Southern Nevada ReadyMix on those trucks, then they could compete however – according to both the M - - I call them CBAs, the MLA and the CBA of the ReadyMix. They would compete by the rules established in both of those agreements laid down. (Emphasis added herein)

(TR p. 311).

Accordingly, in the very breath that he said that he did not agree to the agreement being used to compete with material haulers he said that Respondent would certainly have to compete with Cemex and Nevada Ready Mix, and that Respondent could do so under the rules of the collective bargaining agreements. Finally, the context in which these negotiations took place should not be forgotten. AI had decided to throw money into the ready mix market and was expanding its

aggregate industry work. Furthermore, it informed the Union of these ventures. **(TR p. 389)** Darr repeatedly admitted that Respondent could utilize its R S & G agreement in the same manner as Cemex and Nevada Ready Mix used their rock, sand, and gravel agreements. Darr must be charged with understanding the consequences of entering into the R S & G Agreement with Respondent; that Respondent would be able to use the agreement to compete with Cemex and Nevada Ready Mix. Accordingly, Darr effectively acknowledged that the entire paragraph referred to in Stewart's September 27, 2010 correspondence was true.

One final note should be made concerning the 2008 negotiations. The Judge found that Dewey Darr, "notwithstanding his sometimes confusing and contradictory testimony," was concerned during the negotiations "only with hauls from the Sloan Quarry to SNRM's batch plants and that he would never have agreed to anything which would have abrogated or diminished the terms of the Construction Agreement." The Judge then stated that he found it "telling that Respondent failed to demand that the Union enter into a memorandum of understanding, similar to that which it negotiated for the nine Sloan Quarry employees, concerning the rate of pay for any material haul drivers whom SNRM might employ in the future for transporting aggregates to construction sites. Finally, he followed by stating that "such a document would have memorialized any 2008 agreement between the parties, binding the parties for an uncertain event at an unforeseen time, and would have certainly permitted Respondent, if it had so desired, to immediately have taken advantage of a cost saving." **(JD p. 16, n. 44, lines 40-54, emphasis added herein).**

There are numerous flaws in the Judge's rationale. First, there was no need for a memorandum of understanding because the contract terms of the R S & G Agreement clearly covered material hauling. It was clear that the parties knowingly set forth the work of driving

trucks that were used in hauling in the R S & G Agreement at a time when the ready mix operations of Respondent did not have such trucks. The trucks are specifically described in the Agreement. In this regard, the Judge's conclusion is inconsistent with his finding in footnote 20 of his Decision that any party to a rock, sand and gravel agreement could haul material to a construction project. The parties clearly negotiated a contract in the industry that covered the hauling of material to construction projects. There simply was no reason to prepare a memorandum of understanding repeating the clear meaning of the industry agreement.

The Judge's surmising that Dewey Darr would never have taken action that would have abrogated or diminished the Construction Agreement, is inconsistent with his acknowledgment later in his Decision, that the scope of the bargaining unit of the Construction Agreement was never changed by Respondent's actions or the existence of the R S & G Agreement. It should also be noted that Article 48 of the Construction Agreement contemplates companion rock, sand and gravel agreements. (This will be discussed later in this Brief.) The R S & G Agreement did not diminish or abrogate the Construction Agreement in any way.

Also, as noted by the Judge, the utilization of the R S & G Agreement for material hauling was, at the time the Agreement was signed, an event that could occur at an unforeseen time. Indeed, there is no dispute that Respondent stated in 2008 that it was not in a position to utilize material haul trucks at that time. Conversely, the parties specifically agreed during the 2008 negotiations to bring nine specific employees of SNP under the terms of the R S & G Agreement, and within days of signing the Agreement the parties worked out the particulars of such transfer and memorialized it in a memorandum of understanding. The imminent transfer of those employees presented a specific scenario for action by Respondent. The same scenario did not present itself to Respondent and where the R S & G Agreement covered the type of trucks

that would be used in material hauls, but no specific time for such use was known and where no specific employees were known to be affected.

Based on the above, it is clear that Respondent's R S & G Agreement permitted it to engage in the conduct it undertook in this case.

C. Respondent Followed Contract Terms In Requesting Dispatch And Seeking Employees.

When the employees of AI, who had previously received wages pursuant to the Construction Agreement, began receiving wages pursuant to the R S & G Agreement, following a short strike called by the Teamsters, they did so pursuant to an agreement between the Teamsters and Respondent. This agreement, initiated by the Teamsters, called for the end of the strike and the return of striking employees to work under the R S & G Agreement while the Teamsters pursued a charge with the National Labor Relations Board concerning Respondent's conduct. The conduct of Respondent to that point had been the request for drivers under the R S & G Agreement and the efforts of Respondent to secure drivers outside the R S & G dispatch procedures after the Teamsters refused to refer employees from the R S & G dispatch. That is the only conduct that is subject to the charge filed in Case No. 28-CA-22320. There is no evidence that the Respondent unilaterally "transferred" its employees from the Construction agreement to the R S & G agreement, and there is no evidence that Respondent attempted to do so when it followed the procedures of the R S & G agreement. Any "transfer" that arguably occurred, took place pursuant to the agreement initiated by the Teamsters.

Respondent placed requests for the dispatch of drivers under the R S & G Agreement pursuant to the terms of the agreement. Respondent requested transfer drivers, double belly drivers, double side dump drivers and end dump drivers. **(GC Exh. 24)**. There is no dispute that

the described vehicles for such drivers are listed in Appendix A of the R S & G Agreement. **(GC Exh. 3)**. Respondent utilized forms provided by the Union for such dispatch requests. The forms were entitled “Local 631 – Rock, Sand & Gravel Job Call Worksheet.” **(TR p. 467; GC Exh. 24)**.

The dispatch procedures are set forth in Article 3 of the R S & G Agreement. **(GC Exh.**

3). Article 3.1 provides, *inter alia*:

The Employer agrees to call upon the Union or its agent for such workers as may be needed. The Union agrees to immediately furnish to the Employer upon request the required number of qualified competent workers.

Dewey Darr acknowledged that the Union had an affirmative obligation under the R S & G Agreement to fill orders for employee dispatch requests. **(TR p. 325)**. Not only did the Union fail to do so, it failed to do so on purpose.

The procedures for Respondent to obtain workers if its dispatch request was not filled are set forth in Article 3.2:

Reasonable advance notice (not less than twenty-four (24) hours) will be given by the Employer to the Union or its agents upon ordering such workers or mechanics. In the event that forty-eight (48) hours after such notice, the Union or its agents shall not furnish such workers, then the Employer may procure workers from any source or sources. Regardless of union affiliation, provided however, that such workers or mechanics shall obtain clearance from the Union before commencing work.

The Union did not fill the dispatch within the 48 hours after the request for drivers. Indeed, Dey informed Stewart during that two day period that the Union would not honor the request for drivers. **(TR p. 469)**. On September 28, 2010, Stewart sent a notice to the Union that it was “exercising its option to procure workers from any source or sources, regardless of union affiliation.” Stewart also noted that once workers were procured Respondent would provide a list to the Union so that the workers could be cleared to commence work. **(GC Exh. 25)**.

Pursuant to Respondent's contractual right to procure workers from any source or sources, regardless of union affiliation, Respondent took steps to advertise for workers and to communicate with its current drivers to obtain drivers to perform work pursuant to the terms of the R S & G Agreement. **(TR p. 475)**. Respondent provided advance notice to the Union concerning every attempt to contact drivers for such work. Respondent gave a proposed schedule of transition rates to Dey before they were submitted to the Union. **(TR p. 477; GC Exh. 26)**. The Union was invited to attend, and attended, the meeting where Stewart met with its current drivers to continue Respondent's efforts to obtain R S & G drivers from any source or sources. **(TR pp. 144-145)**. On October 5, 2010 Respondent notified the Union, in writing, of its intended written communication with its drivers in Respondent's efforts to obtain R S & G drivers from any source or sources. A copy of the flyer that was left in the drivers "cubbyholes" was attached to the October 5 correspondence to the Union. **(TR p. 127, GC Exh. 28)**.

Respondent's communications with its drivers was not unlawful direct dealing. Its conduct was bargained for. Respondent was following the strict terms of the referral procedures in its contract. The Union unilaterally refused to follow the procedures of the contract when it refused to provide workers pursuant to the request, despite its contractual obligation to do so. Respondent was contractually privileged to seek drivers from any source or sources, and it was contractually privileged to do so regardless of the driver's union affiliation. Indeed, if Respondent had refused to seek R S & G drivers from its current employees simply because of their union status, Respondent would have discriminated against them in violation of Section 8(a)(3) of the Act.

In view of the clear provisions of the R S & G Agreement, the Union waived any objection to Respondent's communication with the drivers seeking drivers pursuant to the R S &

G Agreement's referral provisions. Further, the procedure for obtaining employees under the R S & G Agreement are covered by the terms of the R S & G Agreement. Any dispute arising from Respondent's use of the referral procedures should be addressed through the grievance procedures of the R S & G Agreement.

Accordingly, any "transfer" of employees to work under the R S & G Agreement took place pursuant to the strike settlement agreement initiated by the Union, and is not a violation of the Act. Respondent was following the procedures of the R S & G Agreement and would have taken employees referred by the Union. Respondent would have tested the referred employees to ensure they were qualified to operate the equipment, and, if qualified, would have retained those employees. **(TR p. 517)**

Finally, even though the utilization of its current drivers under the R S & G Agreement was done pursuant to a strike settlement initiated by the Union, it should be noted that Respondent complied with the dispatch procedures of the R S & G Agreement by submitting a list of said employees to the Union "for clearance" pursuant to Article 3, Section 3.2, of the R S & G Agreement. **(GC Exh. 31).**

D. The Judge Should Have Clearly Dismissed Complaint Based On Parties Reaching Impasse.

The Judge actually found that the evidence supported a finding that Respondent and the Union reached impasse on the issues concerning utilization of the R S & G Agreement to haul materials. In doing so he noted that Respondent did not raise the issue. However, Respondent's Thirteenth Affirmative Defense set forth in Respondent's Amended Answer states: "If there was any bargaining the parties reached impasse." **(GC Exh. 1)**

Respondent, at the hearing and in its brief, submitted several reasons why the Consolidated Complaint should be dismissed. If the Board finds that the Union did not request bargaining, it should find that it waived any obligation of Respondent to bargain. In the alternative, if the Board finds that the actions of the Union in 2010 constituted bargaining, it should find that the parties reached impasse.

E. The R S & G Agreement Contains Provisions Covering The Work In Question With A Grievance Arbitration Procedure. The Complaint In Case No. 28-CA-23220 Should Be Dismissed Based On Such.

As noted in the Seventh and Eighth Affirmative Defense of Respondent's Amended Answer, the R S & G Agreement contains provisions covering the work in question and also contains a grievance/arbitration procedure. The contract coverage of the issues herein should be resolved through the dispute resolution provisions set forth in the R S & G Agreement and the Complaint should therefore be dismissed. The Board should apply the contract-coverage waiver analysis set forth by Board members in *Baptist Hosp. of E. Tenn.*, 351 NLRB 71, 72 n. 7 (2007) and *Provena Hosps.*, 350 NLRB 808 (2007).

F. Miscellaneous

The Judge found that there was no evidence that Respondent changed the scope of the bargaining unit of the Construction Agreement. Respondent agrees with this finding. In so finding the Judge did not discuss Article 43 of the Construction Agreement (**GC Exh. 2**). The Judge should have found, in addition to the reasons advanced by the Judge, that Article 43 establishes that Respondent did not change the scope of the bargaining unit. It also establishes that all of Teamster represented employees of Respondent constitute one bargaining unit and the Judge should have so found. The R S & G Agreement is in fact a supplemental agreement

contemplated by Article 43 and the Judge should have so found. The discussion of these issues, which are additional reasons to support the Judge's decision to dismiss the Complaint, are addressed in Respondent's Answering Brief to General Counsel's Exceptions To Decision Of The Administrative Law Judge.

In dismissing the Complaint in Case No. 28-CA-23220 the Judge did not discuss the "Favored Nations" clause of the R S & G Agreement. The Judge should have decided as an additional reason to dismiss the Complaint that the Favored Nations Clause permitted Respondent to take the action it took. The discussion of these issues, which are additional reasons to support the Judge's decision to dismiss the Complaint, are addressed in Respondent's Answering Brief to General Counsel's Exceptions To Decision Of The Administrative Law Judge.

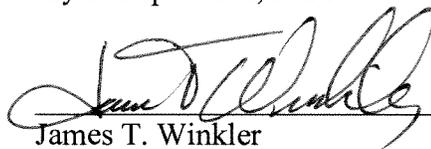
Finally, the Judge's comment in a footnote that Stewart, upon being confronted with Respondent's position statement "conceded" that Union agent Day may have used the word "fight" when describing a certain communication between them, is based on a silly misreading of the record and Respondent's position statement. At page 6 of Respondent's position statement an early August telephone conversation between Dey and Stewart is described where Dey said the Union would have to fight Respondent on paying material haul wages under the R S & G Agreement. **(GC Exh. 9, p. 6)**. Later in the position statement, at pages 7 and 8, a later telephone conversation between Dey and Stewart is described where Dey is noted, at page 8, to have told Stewart that Aggregate Industries "had a fight" on its hands. Counsel for General Counsel actually got the two conversations mixed up and asked Stewart, after describing the August conversation, whether Dey said at that time that Aggregate Industries "had a fight" on its hands. Stewart replied that he did not make such at that time. In fact, Stewart specifically stated

that such comment was made in a September conversation, and he repeated that he was sure that it was in September. **(TR p. 92)** Counsel for the General Counsel then showed page 6 of the position statement to Stewart who readily acknowledged that Dey said the Union would fight Aggregate Industries' position that it could pay material hauling rates under the R S & G Agreement. Stewart did not "concede" anything. When General Counsel moved to have the position statement admitted, the undersigned did not object, and noted to the Judge the correct location of the "had a fight on its hands" statement at page 8 of the exhibit. It was also noted that the statement occurred in the September 30 conversation **(TR p. 95)**. The record could not be any clearer. What began as a mix up (an innocent mix up) by the Counsel for the General Counsel, as to when a specific statement was made, ended up in a disparaging comment by the Judge despite being shown the portion of the position statement that showed that Stewart was correct in his adamant testimony that the "had a fight on its hands" statement occurred in the September 30 conversation after Dey called Stewart to report the result of a union members' meeting.

CONCLUSION

Based on the above, and the record as a whole, the Consolidated Complaint should be dismissed in its entirety.

Dated in Las Vegas, Nevada, this 6th day of September, 2011.



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On September 6, 2011, I served the within document(s):

**RESPONDENT'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

X By **United States Mail** – a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

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Kristin L. Martin
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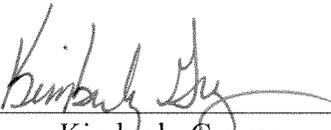
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 6, 2011 at Las Vegas, Nevada.



Kimberly Gregos