

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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In the Matter of:	:
	:
ATELIER CONDOMINIUM AND COOPER SQUARE REALTY, as joint employers,	:
	:
Respondents,	:
	:
- and -	:
	:
LAURA QOKU, an individual, SEBASTIAN CHRISTPHER, an individual, NAZMIR ALOVIC, an individual, and BLERTA BEHLULI, an individual	:
	:
Charging Parties.	:
	:
	:
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**RESPONDENTS' BRIEF IN SUPPORT OF
EXCEPTIONS**

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PRELIMINARY STATEMENT

In this matter, Counsel for the General Counsel asserts that Respondents made certain unlawful statements in the course of an organizing drive, unlawfully discharged two employees (Nick Alovic and Sebastian Christopher) and unlawfully filed a lawsuit against one of the discharged employees, Sebastian Christopher. Two other original charging parties, Laura Qoku and Blerta Behluli, were previously dismissed from the case by the NLRB.

A hearing was held on November 15-18, 2011 before Judge Mindy Landow to offer evidence on the claims asserted. Testimony was received from Dov Kerner (“Kerner”) [custodian of records], Sebastian Christopher (“Christopher”), Nick Alovic (“Alovic”), Lulzim Alaj (“Alaj”) [building service employee and brother of Alovic], Lotfi Habib (“Habib”) [building service employee], Lindsey Perez (“Perez”) [building service employee], Luis Lopez (“Lopez”) [building service employee], Jeffrey Dweck (“Dweck”) [attorney], Sabrina Mehmedovic (“Mehmedovic”) [property manager] and Daniel Neiditch (“Neiditch”) [condominium Board president]. The hearing was closed on November 18, 2011 and the deadline for the submission of briefs was set as December 23, 2011.

On April 10, 2012, Judge Landow issued a decision in this matter. The deadline for submission was subsequently extended to up to and including May 22, 2012.

This brief is submitted in accordance with the foregoing. For each of the following reasons, Counsel for the General Counsel has failed to prove a claim of a violation of the Act and, consequently, the Complaint should be dismissed in its entirety.

1. Counsel for the General Counsel is unable to prove Union animus.
2. Counsel for the General Counsel is unable to show that the reasons for the discharges of Alovic and Christopher are pretextual.

3. Counsel for the General Counsel is unable to show that there was not a dual motivation for the discharges of Alovic and Christopher.
4. Counsel for the General Counsel has failed to establish an agency relationship permitting a conclusion that Respondents have brought a lawsuit against Christopher.
5. Counsel for the General Counsel has failed to show both a lawsuit without reasonable basis and retaliatory intent.
6. Counsel for the General Counsel's *Bill Johnson's* claim is time-barred.
7. Counsel for the General Counsel's *Bill Johnson's* claim is contrary to public policy and inconsistent with the guidance of the Office of the General Counsel.

STATEMENT OF FACTS

In 2007, the Atelier was under the control of The Moinian Group, the sponsor of the building, a new residential property on the West Side of Manhattan. (Tr. 357:24-358:19). While under the control of The Moinian Group, the building was the subject of an unfair labor practice charge filed by Local 32BJ, SEIU (“Local 32BJ” or the “Union”) relating to its organizing activity. (G.C. Exh. 8). Pursuant to a settlement agreement, Local 32BJ secured protections for its organizing activity at the Atelier. (G.C. Exh. 7).

In February 2008, the Atelier Board of Directors was formed. (Tr. 359:1-10). Cooper Square provides management services to over 250 buildings, including the Atelier. (Tr. 361:2-362:3). Cooper Square and Local 32BJ “have a pretty good relationship” due to the fact that Cooper Square manages many buildings where the employees are represented by Local 32BJ. (Tr. 362:22-363:5).

The Atelier has also been a member of the Realty Advisory Board since 2007. The Realty Advisory Board represents employers in labor relations matters. (R.Exh. 3; Tr. 363:8-15). In May 2008, the Atelier received a notice from Local 32BJ stating that it wanted to meet to discuss the organizing of the building’s employees. In correspondence from the Atelier Board, it was noted that:

This [32BJ’s request to discuss organizing] is not unexpected and infact [sic] was fortunately budgeted for by Marc [Kotler] as 32BJ has higher compensation costs. The employees are free to choose their union and we should not stand in their way.

(R. Exh. 4).

In June 2008, the Atelier Board agreed to begin contract negotiations with Local 32BJ. (R. Exh. 5, p. 3). In November 2008, the Atelier Board reviewed the status of contract negotiations with Local 32BJ. (R. Exh. 6).

Despite admittedly advising the Respondents of their interest in Local 32BJ as early as January 2009, neither Alovic nor Christopher were discharged until late June 2009. Alaj is the brother of Alovic. (Tr. 235:22-25). Alaj spoke with “almost everyone” about signing a union card in March 2009. (Tr. 241:6-15). He also engaged in numerous conversations wherein he advised management that he supported the Union. (Tr. 238:14-240:3). However, he was never terminated by the Atelier. (Tr. 242:24-243:1).

Lopez also signed the Local 32BJ petition. (G.C. Exh. 6, Tr. 320:25-321:8). Despite having signed the petition, neither Neiditch, Mehmedovic nor Robert Morricone (“Morricone”), the Resident Manager at the Atelier during the period relevant to the complained-of discharges, spoke with Lopez regarding Local 32BJ. (Tr. 321:9-322:3). Indeed, on the day after Christopher was investigated for performing a side job without authorization and while on suspension, Morricone made no threat to Lopez related to any union activity. (Tr. 320:5-24).

In addition, despite being a newly hired employee (May 2009) at the time of the alleged union organizing, neither Neiditch, Mehmedovic nor Morricone ever spoke with Perez about Local 32BJ. (Tr. 269:21-22, 277:21-278:16).

Mehmedovic denied having any conversation with Alovic (Tr. 399:7-9) or Alaj (Tr. 399:18-23) in 2009 regarding Local 32BJ. Likewise, she did not speak with any employees regarding their support for the Union in March 2009 (Tr. 400:5-8), April 2009 (Tr. 400:14-16) or June 2009 (Tr. 400:17-19). Also, Neiditch spoke with neither Christopher nor Alovic about Local 32BJ or unions in 2009. (Tr. 440:2-20; 443:19-444:11). He spoke with no other employees in 2009 regarding Local 32BJ. (Tr. 445:1-14).

In sum, there were several employees who were actively supporting Local 32BJ for whom it is undisputed were never discharged or spoken to regarding their union activity. A

newly hired employee was never spoken to about Local 32BJ. The evidence, simply stated, lacks any indication of a coordinated anti-union effort by the Respondents in 2009.

1. *Sebastian Christopher*

Christopher allegedly had three conversations with Neiditch, all on or before March 2009, wherein he expressed his support for Local 32BJ. In January 2009, Christopher testified, Neiditch inquired as to his interest in having a union and, in turn, Christopher expressly stated his support for having a union at the Atelier. (Tr. 77:10-22). On or before March 2009 (when Christopher signed his Union card), he had an additional conversation with Neiditch wherein he reaffirmed his support for a Union. (Tr. 71:23-72:25, 78:7-22). After he finished signing the card, Christopher had a third conversation with Neiditch expressing his support for the Union. (Tr. 78:23-79:19). Yet, he was not discharged until June 2009. According to Christopher, Local 32BJ secured the signatures of over 50% of the employees on a petition in support of representation by the time the card signing campaign ended. (Tr. 76:13-23).

On June 23, 2009, Christopher was suspended for engaging in prohibited conduct involving a non-party, Michael Buckley. (G.C. Exh. 16). With regard to this suspension, Christopher admitted that Mehmedovic first told him that she wanted to fire him, but then said that she wanted to suspend him, during the same conversation and before Christopher spoke with “Mr. Ben.” (Tr. 145:19-147:5). Another employee, Habib, was suspended at the same time for the same incident. (G.C. Exh. 21). Christopher filed an unfair labor practice charge challenging his suspension which, after investigation, was dismissed. A subsequent appeal was also dismissed. (R. Exh. 1).

During his suspension, Christopher returned to the Atelier to perform side work for a tenant (“Ricardo”). Christopher made arrangements with Ricardo to do the move prior to being

suspended. (Tr. 152:14-16). Neither during nor after his suspension meeting did he seek the permission of either Neiditch or Mehmedovic to return to the building to do the Ricardo job.

Christopher bases his assertion that his side work was authorized by management solely on his belief that Ricardo was going to speak to Neiditch to secure approval for Christopher to perform the side job.¹ Christopher admitted that he needed to obtain the permission of either Mehmedovic or Neiditch to use the service elevator (which he did use, without permission, on the day that led to his termination). (Tr. 95:18-96:3). He admitted that, for other jobs, he had first obtained the permission of Neiditch. (Tr. 141:25-142:16). However, after evasive testimony which was commented upon by Judge Landow as casting doubt over its veracity, Christopher admitted that he had obtained permission from neither Neiditch nor Mehmedovic for the Ricardo job. (Tr. 142:20-144:20). Indeed, save for the Ricardo job, he had never performed a side job other than with the permission of Neiditch. (Tr. 171:12-172:17). The approved schedule form for the use of the service elevator for tenant moves must be present at the front desk, according to Christopher. (Tr. 97:5-9). Alovic, after repeated avoidance of the question posed to him, admitted that Mehmedovic instructed employees not to do side jobs without permission. (Tr. 226:19-229:2). Habib also testified that, until a year prior to the hearing (and, therefore, at the times relevant to this proceeding), the permission of management was required to perform side jobs. (Tr. 262:11-15). The clear evidence was that side jobs were not permitted without the permission of Neiditch or Mehmedovic. It is undisputed that Christopher did not secure that permission. Counsel for the General Counsel may argue that Neiditch knew about the

¹ The alleged statements of building tenants, particularly “Ricardo” with regard to the events leading to Christopher’s termination, were provisionally admitted depending on the purpose of the testimony. (Tr. 93:25-94:4). Clearly, it could not be admitted for the truth of the matter asserted. Therefore, to the extent Counsel for the General Counsel relies on such testimony as purported evidence of permission for Christopher to be on premises during his suspension or that he had permission to do the job moving the tenant, such reliance is patently impermissible. Counsel for the General Counsel was empowered to subpoena the tenants to provide such testimony but failed to do so.

assignment because he had referred Ricardo to Christopher. The referral, however, does not manifest that Neiditch knew that Christopher accepted the job. More significantly, Christopher was suspended after any such referral.

After he was terminated, Christopher testified that Morricone cryptically stated that, “you [Christopher] have to go to the Union and complain.” (Tr. 101:2-11). However, Counsel for the General Counsel adduced no evidence demonstrating how knowledge of Christopher’s complaint to the Union made it back to Morricone or any other manager or supervisor at the Atelier in the brief period of time between the suspension and termination.

2. *Nick Alovic*

In January 2009, Mehmedovic had decided to fire and then, upon reconsideration, suspend Alovic for misconduct in the building’s lobby. (Tr. 197:23-199:2). At the same time, Mehmedovic warned Alovic that, “Next time, I fire you.” (Tr. 198:24-199:2, 222:13-223:10). Mehmedovic’s warning of termination for future misconduct came two months before Alovic’s commencement of activity in support of Local 32BJ.

In March 2009, Alovic began his efforts at Union organizing by contacting Local 32BJ and distributing authorization cards to employees. (Tr. 179:11-180:8). Alovic, who was placed in charge of collecting cards by Local 32BJ, completed his efforts to collect cards in the beginning of May 2009. (Tr. 212:8-17).

Also in March 2009, Neiditch asked Alovic if Alovic had more of Neiditch’s business cards. Neiditch directed Alovic to hand out Neiditch’s business cards to anyone seeking to sell, rent or buy an apartment at the Atelier, that Neiditch would “take care of you [Alovic]” as a result and would pay Alovic a commission. (Tr. 183:12-184:13). That same day, Neiditch asked Alovic whether Christopher was working for Ben Haroosh (a broker allegedly in competition

with Neiditch) and that if anyone works for Ben Haroosh, “I [Neiditch] will fire them.” (Tr. 185:12-18; 233:3-8). Ben Haroosh was described by Mehmedovic as a broker who was a “nightmare” for the Atelier and did a lot of illegal activities in the building. (Tr. 400:20-401:3).

In March 2009, contrary to the claims of the Counsel for the General Counsel, Alovic admitted, Mehmedovic did not threaten him with termination for supporting the Union. Rather, she told him that “if you [Alovic] get fired, don’t think [sic] will the union bring me [sic] back in the building.” (Tr. 184:24-185:3).² Again, after attempting to evade the question repeatedly and being confronted with his prior sworn affidavit, Alovic admitted that he had never been threatened by Mehmedovic with termination for his support of Local 32BJ. (Tr. 230:5- 233:14). Alovic’s ultimate admission directly contradicted testimony he offered at the hearing during Counsel for the General Counsel’s case-in-chief. (Tr. 231:4-6).

In April 2009, after Alovic’s commencement of activity in support of Local 32BJ, an incident occurred between Alovic and a tenant (Mr. Wagner). (Tr. 199:8-202:19). According to Alovic, Mehmedovic yelled and screamed at Alovic when she was asking Alovic for information regarding the incident. (Tr. 202:5-10). Notwithstanding being clearly upset by the situation between Alovic and a tenant and that, a month prior, Alovic was allegedly being interrogated about his union activity, no disciplinary action was taken against him. (Tr. 202:11-19).

3. *Events Leading to Alovic’s Discharge, as Testified to by Alovic*

On June 19, 2009, Alovic told Perez (a concierge and non-management, non-supervisory employee of the Atelier), that he was going on his lunch break at 12:10-12:15 p.m. Perez acknowledged Alovic’s comment (Tr. 192:17-20). Alovic bought food for lunch, went downstairs in the building and ate his lunch until Morricone arrived at 12:25 p.m.

² The alleged comment by Mehmedovic is nothing more than a truthful, lawful expression of fact... a Union cannot guarantee job security.

(Tr. 192:21-24). Morricone expressed confusion over Alovic's presence in the lunch room as, according to Morricone, Perez "kept calling" Morricone stating that she did not know where Alovic could be found.

At 12:40 p.m., Alovic returned to his post and said nothing to Perez other than that he was done with his break, despite the fact that 15 minutes earlier Morricone allegedly stated that Perez had been "repeatedly" calling him about Alovic's whereabouts. (Tr. 194:1-9).

At around 2:00 p.m., Alovic testified, Morricone approached him and said that he had seen "some cards downstairs in the cafeteria" and asked whether Alovic had signed a card. (Tr. 195:1-9). Morricone left and, returning shortly thereafter, asked Alovic the same question. Alovic answered affirmatively and Morricone summarily discharged him. (Tr. 195:13-21). Morricone's alleged statements in late June 2009 came almost two months after Alovic admits to having completed his efforts to have employees sign union cards. (Tr. 212:13-19). In addition, Alovic was not expecting to meet anyone during his lunch on June 19 (both facts which call into question why Alovic would have had cards with him on June 19). (Tr. 220:11-13). He testified that he had previously left a union card on the table in the break room, but could not identify when it was left, whether he recalled seeing it nor explain why, if the card-signing campaign had been completed two months earlier, he would have left a card on the table in June 2009. (Tr. 220:21-221:13).

Despite testifying that Morricone told him that Perez was repeatedly asking where he was on June 19, Alovic provided an earlier sworn statement to the NLRB stating that on the day he was terminated "there was no incident about me not being at my post." (Tr. 226:2-7).

4. *Events Leading to Alovic's Discharge, as Testified to by Disinterested Witnesses*

According to Habib, he saw Alovic in the cafeteria at approximately 1:45-2:00 p.m. bringing in food from outside the building. (Tr. 261:10-13). Thereafter, Morricone arrived and cursed at Alovic, asking what he was doing in the cafeteria. (Tr. 261:16-18). Habib testified in detail about an ensuing argument whereby Alovic flipped over and threw his box of food, cursed at Morricone and left the cafeteria. (Tr. 261:19-262:3).

Perez described her understanding of incident reports as being documents that are completed when “something happened in the building that’s out of the ordinary...” (Tr. 270:10-19). Perez testified in great depth and detail regarding incidents that occurred on June 19, 2009 and, in particular, the unexplained absence of Alovic from the workplace. (Tr. 270:24-274:9). Notably, Alovic returned to his post after his first conversation in Mehmedovic’s office that afternoon. It was only after he returned to his post in the Atelier’s lobby, yelled at Perez for speaking to Mehmedovic and told Perez to “mind your fucking business” in the presence of clients of Neiditch that Alovic was summoned back to Mehmedovic’s office and consequently terminated. (Tr. 273:1-274:9). Perez began completing an incident report on Alovic’s extended, unexplained absence on June 19 even before his profanity-strewn outburst, highlighting the fact that Perez found his absence to be “out of the ordinary” and, therefore, supporting her reasons for contacting other individuals in an effort to locate Alovic. (Tr. 274:11-20). After Alovic’s tirades punctuated with curses and yelling in the building lobby, Perez was able to complete an incident report on the events of the day. (R. Exh. 2).

Consistent with her version of the facts, Perez also described in detail how an employee could leave the building (for example, to buy lunch), return to the building through a side door

and out of view of the concierge and reappear in the building lobby from the basement (where the cafeteria was located). Likewise, an individual could get from Mehmedovic's office, to the basement, to the lobby out of the view of the concierge. (Tr. 316:7-318:10). Perez also testified in detail regarding the layout of the facility and, in particular, the considerable distance (30-45 seconds of walking, through two office doors) to get from the concierge desk to Mehmedovic's office, making it highly unlikely that any discussions occurring in Mehmedovic's office could be heard at the concierge desk. (Tr. 315:6-316:6).

5. *Dual Motivation Under Wright Line*

Much of the analysis of the discharges of the charging parties can be summarized in the opening statement of the Counsel for the General Counsel, wherein she argued,

Condo Board President Dan Neiditch, who is the real estate broker – who is also a real estate broker, along with Cooper Square Property Manager Sabrina Mehmedovic, instructed the doormen to prohibit other real estate brokers from entering the lobby. Mr. Neiditch promised the concierge cash bonuses for steering potential buyers and renters to him. Mehmedovic protected workers who were complicit and harassed workers who refused to assist them. With the competition locked out, his commissions were virtually assured. Atelier was their goose that laid million dollar eggs. (Tr. 57:24-58:8).

Placing Counsel for the General Counsel's argument in the context of Christopher's and Alovic's testimony, the only conclusion that may be reached is that they were discharged for failing to continue their participation in the alleged real estate scheme. Of course, this theory fails in light of the true reasons for the discharges, as expressed in more detail below. However, most significantly (in fact, determinatively) in this matter is that whichever explanation of the discharges is accepted, neither theory implies a discharge due to the support of Union activity.

For the past three years, the Atelier has had a restriction against short-term rentals (under three months) in order to comply with New York State law and avoid the use of the facility as a

transient building. (Tr. 420:17-421:11). Neiditch offered employees a \$500 bonus to find people that were engaging in illegal rentals. (Tr. 426:4-5). A group of the Atelier unit owners, who used Ben Haroosh as their broker, sued the Atelier, Neiditch, Neiditch's real estate company, Mehmedovic and others, claiming that the short-term rental rule violated their rights. (G.C. Exh. 11, Attachment "Exhibit B"; Tr. 422:3-14). The lawsuit was eventually dismissed in its entirety. (Tr. 426:7-9).

In 2009, Christopher admitted that Neiditch initiated an incentive program whereby employees who found someone who was renting "illegally" would receive an additional paycheck. (Tr. 154:24-155:17). According to Christopher, Mehmedovic would consistently harass employees about permitting illegal rentals. (Tr. 155:21-156:7). In April 2009, Neiditch confronted Christopher with his belief that Christopher was engaging in illegal rentals. (Tr. 157:21-158:17).

From the time that Neiditch became Board president until March 2009, Christopher testified, he engaged in an arrangement whereby he would refer potential buyers/renters at the Atelier to Neiditch in return for cash payments. (Tr. 158:19-159:23). He did not tell Neiditch that he was ending his part of the deal... he simply stopped making referrals specifically for Neiditch. A short time later, he was terminated.

In the beginning of 2008, Alovic began distributing business cards on behalf of Neiditch. (Tr. 212:18-213:10). Alovic handed out business cards on behalf of Neiditch and received compensation directly from Neiditch for doing so. (Tr. 206:6-207:4). The payments Neiditch gave to Alovic on real estate transactions Alovic referred to Neiditch were sometimes one thousand dollars and occurred at least once per month, according to Alovic. (Tr. 206:21-23). The payments to Alovic depended on the size of the transaction that Alovic referred.

(Tr. 214:11-20). Alovic had been told by Neiditch and Mehmedovic that, during open houses at the Atelier, he was not permitted to let brokers into the building. (Tr. 205:3-11). Two months before Alovic was fired, he stopped passing out Neiditch's cards and making business referrals to Neiditch. (Tr. 214:25-215:10).

6. *Bill Johnson's Claim*

In September 2009, Dweck was substituted as counsel for Neiditch and Mehmedovic with regard to a lawsuit that they had brought against several internet companies and individuals for online defamation. (Tr. 332:14-24). After taking over the case and reviewing relevant case law, Dweck withdrew the claims against the internet companies. (Tr. 333:14-334:2). Dweck further withdrew the claims without prejudice against an individual defendant, Adrian Zaney, after Zaney provided a sworn statement that he did not have computer access and did not know how to use the internet. (Tr. 334:20-25).

In February 2010, Dweck attended a court conference. No one appeared for any of the Defendants. Consequently, the Court adjourned the conference until March 2010. (Tr. 335:14-21). At the March 2010 court conference, again no one appeared for any of the Defendants. Dweck explained to the judge that he did not want a default judgment against any of the Defendants (including Christopher) and asked for a new court date. In turn, the judge adjourned the conference to June 2010. (Tr. 335:22-336:13). Interestingly, if there had been a retaliatory intent, one would have expected Dweck to obtain the default judgment at the March 2010 conference.

In June 2010, Dweck did not attend the court conference. He had made arrangements with one of the Defendant's attorneys to adjourn the court conference whereby the Defendant's attorney would appear in court to request the adjournment. (Tr. 336:14-337:16). No one

appeared from either side and the Court removed the case from the court calendar.

(Tr. 337:17-338:7).³ Rather than undertake the delay, time and expense of filing a motion to restore the case, and risk the running of the statute of limitations, Dweck refiled the lawsuit and took the opportunity to clean up the pleadings to exclude parties who had been previously dismissed from the lawsuit. (Tr. 338:24-340:14).

Dweck represents Neiditch and Mehmedovic personally in the defamation lawsuit. (Tr. 348:7-11). The Atelier has never been charged and the Atelier has not paid Dweck for any services related to the lawsuit. (Tr. 351:5-11). Dweck is paid for his services personally by Neiditch. (Tr. 436:16-437:18).

Neiditch recalls seeing Christopher's name on a blog wherein "illicit stuff" was being said about Neiditch. Neiditch did not print or maintain a copy of the screen that he viewed. (Tr. 435:2-11). However, the defamatory blogs were removed shortly after the filing of the Complaint, demonstrating that in fact there was a reasonable basis for filing the lawsuit. (Tr. 433:21-434:14).

³ Dweck's testimony must be given considerable weight as he, in essence, has made a statement against self-interest by admitting to an instance of possible malpractice by failing to attend a scheduled court hearing.

ARGUMENT

I.

EVIDENCE OF LACK OF ANTI-UNION ANIMUS

Counsel for the General Counsel's theory of the case relies on the premise that Local 32BJ was engaged in an organizing drive at the Atelier wherein Alovic and Christopher were the lead organizers. However, the history of organizing at the Atelier provides compelling evidence that, in 2009, the Respondents were not in disfavor of Local 32BJ representing its employees.

In November 2007, Local 32BJ filed a wide-ranging amended unfair labor practice charge against The Moinian Group, Atelier Condominium and Cooper Square Realty regarding Local 32BJ's efforts to organize the Atelier. The resulting settlement agreement in 2008 provided Local 32BJ with several remedies to assist in their organizing activities, including but not limited to access to the building service employees.

Approximately one year later, through Alovic, Christopher and, apparently, Alaj, an organizing campaign was allegedly conducted wherein Local 32BJ secured representation cards from over 50% of the workforce. Shortly thereafter, according to Counsel for the General Counsel, Alovic and Christopher were discharged for their union activity.

The next logical and expected step would have been for Local 32BJ to file a new unfair labor practice charge, as they had when their earlier organizing campaign had been allegedly impaired. With the recent settlement agreement obtained by Local 32BJ, signed cards from the majority of the workforce and the discharge of the two allegedly lead organizers, the pursuit of injunctive relief and a bargaining order should have been a virtual certainty. Yet, Local 32BJ did nothing. No filing of a single charge. No effort to enforce the settlement agreement. No appearance in the instant proceedings.

Why? The only rational conclusion is that Local 32BJ saw the discharges of Alovic and Christopher as legitimate. There is no other explanation for a labor organization, which had previously engaged the Board's processes at the Atelier to protect its organizing rights, to sleep on its rights when its lead organizers were discharged.

Against this backdrop were the activities of the Atelier Board. When it was first advised that Local 32BJ was organizing its employees, it was a non-issue. In fact, the Board had already set its budget at a level comparable to the Local 32BJ wages and benefits in anticipation of Local 32BJ organizing its employees. Thus, the Atelier was already incurring the expense of what would be expected with a Local 32BJ contract. Indeed, it had already joined membership with the Realty Advisory Board for the purpose of negotiating with Local 32BJ.

In sum, there is no evidence that Local 32BJ thought that their allegedly lead organizers were unlawfully treated. There are multiple instances of evidence that the Respondents were assuming that their workforce would be represented by Local 32BJ and adjusted their budget to reflect the assumption. Only Christopher and Alovic, seeking to excuse the misconduct leading to their discharges, argue that their discharges were based on their union activity. As discussed more fully below, Counsel for the General Counsel is unable even with Christopher's and Alovic's own testimony to articulate a persuasive theory of unlawful conduct.

II.

THE ALLEGED DISCRIMINATEES WERE DISCHARGED FOR LEGITIMATE, NON-DISCRIMINATORY REASONS

1. Christopher

Christopher does not dispute that he returned to the Atelier while serving a disciplinary suspension in order to perform a side job. Likewise, he admitted that workers needed Neiditch's prior permission both to use the service elevator and perform side jobs and that he had obtained

the permission of neither Neiditch nor Mehmedovic to perform the Ricardo side job. Hence, it is objectively reasonable that Christopher would be disciplined for performing an unauthorized side job while on suspension. At most, Counsel for the General Counsel offered only Christopher's assumption, based on hearsay testimony as to what the tenant (Ricardo) told him, that Ricardo would speak with Neiditch to obtain permission for Christopher to perform the side job. Even with that, Christopher's alleged understanding came from a purported conversation with Ricardo that pre-dated the suspension. After a series of answers so evasive as to cause Judge Landow to warn that his credibility may be jeopardized, Christopher admitted that he did not seek to ask either Neiditch or Mehmedovic for permission to perform the Ricardo side job either before or after the suspension had issued, despite two conversations that Christopher had with Mehmedovic regarding the suspension.

As stated during the hearing, the suspension of Christopher had been complained of in an unfair labor practice charge, investigated by the Regional office, dismissed after investigation, appealed by Christopher and dismissed by the NLRB Office of Appeals. Counsel for the General Counsel attempted to resurrect the suspension claim by proffering that the Respondents had misrepresented themselves during the NLRB's investigation and falsely stated that an additional employee, Habib, had been suspended for the same incident. Counsel for the General Counsel's accusation proved patently false, however, when Habib testified that he, in fact, was suspended for the same incident.

Counsel for the General Counsel's argument continues to fail when considering the fact that Mehmedovic wanted to discharge Christopher for the Michael Buckley incident but chose not to do so. Had the Respondents harbored the anti-union animus as alleged by the Counsel for the General Counsel, the Michael Buckley incident was a prime opportunity to discharge

Christopher. Yet, he was merely suspended (which was previously determined not to be an unlawful disciplinary action and which the record establishes was not unlawful).

Likewise, had Morricone exhibited the anti-union animus as alleged by the Counsel for the General Counsel, one would have expected Morricone to make a comment to Lopez (who had signed his name on the petition in support of Local 32BJ) when he was investigating the Ricardo incident that ultimately led to Christopher's discharge. However, Morricone made no mention of the Union to Lopez.

In sum, Counsel for the General Counsel's case concerning the discharge of Christopher is a desperate attempt to bootstrap a suspension (which during the NLRB investigation as well as during the hearing was demonstrated to have been non-discriminatory) to an objectively reasonable discharge that Counsel for the General Counsel claims was inappropriate because Christopher thought, based on comments from another made before his suspension, that someone else was going to secure permission for him to do a side job. The utter lack of competent evidence supporting Christopher's claim that he had permission to be at the Atelier during his suspension undermines the Counsel for the General Counsel's efforts to defeat the reason given for Christopher's discharge – that he returned to the Atelier to perform work while on suspension. As such, the Christopher discharge claim must be dismissed.

2. Alovic

Alovic gave a decidedly unique accounting of his activities on June 19, 2009 that ultimately led to his discharge. None of Alovic's testimony was corroborated. Only Alovic, who has a financial interest in the outcome of this matter, testified as to his version of events. With regard to that testimony, he was factually inconsistent by reason of his testimony varying

from that provided in his affidavit to the NLRB during its investigation of his unfair labor practice charge.

Alovic's testimony to temporally link his union activity to his discharge was also incredible. He testified that he had left a card for an unknown individual to sign in the cafeteria on the evening of June 18, 2009 as a foundation for his claim that Morricone told him that he saw union cards in the cafeteria on June 19. However, Alovic clearly testified that the efforts to collect signed union cards ceased in early May 2009. It is wholly inconsistent to credit his testimony that he was continuing to leave union cards nearly two months later which, in turn, completely discredits his version of Morricone's conversation with him on June 19 based on his own testimony.

Likewise, Alovic's testimony as to the conversation he had with Perez upon his return from the basement cafeteria is not worthy of credit. Alovic testified that he told Perez that he was going on his break prior to leaving his post. Alovic testified that Morricone told him that Perez had called Morricone several times looking for him. Nonetheless, when Alovic returned to his post, he made no mention to Perez of what, even if one is to believe Alovic's version of events, was an unusual set of circumstances – Perez repeatedly asking her boss about Alovic's whereabouts when she was allegedly told by Alovic that he was on his break.

To the contrary, Perez's detailed testimony as a disinterested witness provides a much clearer view of Alovic's conduct on June 19. Moreover, her decision to begin writing an incident report on Alovic's absence (even prior to his vituperative outbursts) supports the conclusion that Alovic's absence on the day was an unusual event.

Alovic's testimony is also belied by a second disinterested witness, Habib, who testified seeing Alovic in the cafeteria around 1:45-2:00 and described the violent tone and behavior that

Alovic exhibited that afternoon. Habib's and Perez's testimony also follow a consistent timeline as to the chain of events involving Alovic.

The evidence supporting an argument that Alovic's discharge was unlawful is contradictory and irreconcilable. Corroborated, detailed evidence from disinterested witnesses (who appeared at the hearing willingly and voluntarily, contrary to the aggressive but failed efforts of Counsel for the General Counsel to allude otherwise) as well as contemporaneous documentary evidence showed that Alovic engaged in offensive, disruptive, aggressive behavior in the building lobby... an area of conduct for which he was warned in January 2009 (prior to Alovic's asserted protected activities) that future misconduct would result in his termination. He intimidated a co-worker for reporting his extended absence from the workplace ("mind your own fucking business") in the lobby and in the presence of clients of the Atelier Board President, Neiditch. Simply stated, there is no reason to credit the testimony of Alovic and, therefore, the Counsel for the General Counsel has failed in its burden of proof. Moreover, the overwhelming credible evidence establishes that Alovic committed the serious misconduct for which he was discharged. Finally, no credible evidence connects the discharge to any union activity. The claimed unlawful discharge of Alovic must be dismissed.

III.

ALTERNATIVELY, GENERAL COUNSEL'S THEORY FAILS UNDER A DUAL MOTIVATION ANALYSIS PROVIDED FOR IN *WRIGHT LINE*

Assuming, *arguendo*, the validity of the evidence put forward by the Counsel for the General Counsel, there remains no proven violation of the Act. As expressly mentioned during opening statements, the Counsel for the General Counsel complained of Neiditch's "business

practices” in excluding brokers other than himself from doing business at the Atelier.

Respondents vehemently deny the suggestion of such improper business practices.

Nonetheless, the evidence elicited (if Christopher and Alovic are to be credited) is that Neiditch was the equivalent of an overlord of the Atelier, who paid handsomely to those who did his bidding and harassed and terminated those who refused. Both Christopher and Alovic admitted to engaging in business with Neiditch whereby both make business referrals to Neiditch in return for commissions. Both Christopher and Alovic admitted to cutting off the pipeline of referrals to Neiditch within the two months prior to their discharges. Alovic testified that Neiditch would fire those disloyal to Neiditch’s real estate business.

Thus, if Alovic and Christopher’s testimony is to be believed, it lends itself to only one reasonable conclusion – that Neiditch arranged for the discharges of Alovic and Christopher because they discontinued their business relationship with him. However, even with this conclusion (albeit incorrect), the Counsel for the General Counsel’s case must fail. A decision to terminate employees because they fail and/or refuse to continue in a business relationship with the President of a condominium board does not equate to a violation of the labor law.

As reviewed in *Faurecia Exhaust Systems, Inc.*, 353 NLRB 382, 383 (2008), *citing Wright Line*, 251 NLRB 1083 (1980), *enf’d*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982):

Cases analyzing adverse action under *Wright Line* are treated as presenting either a question of “dual motivation” or one of “pretext.” In a dual motivation case, the “employer defends against a Section 8(a)(3) charge by arguing that, even if an invalid reason might have played some part in the employer’s motivation, the employer would have taken the same action against the employee for a permissible reason. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

In the instant matter, assuming as true the theory of the Counsel for the General Counsel and the evidence offered by Alovic and Christopher, their future with the Atelier was doomed the moment they crossed Neiditch by refusing to further support Neiditch's real estate business. This basis for discharge, entirely unrelated to the scope of Sections 7 or 8 of the Act, defeats the Counsel for the General Counsel's claims and the complaint of Alovic's and Christopher's discharges must be dismissed.

IV.

ALLEGATIONS AGAINST ROBERT MORRICONE

Not surprisingly, much of the alleged unlawful conduct testified to by Christopher and Alovic is directed towards Morricone, who committed suicide in July 2009. Upon objection to the admission of such testimony, Counsel for the General Counsel quickly highlighted that state law Dead Man's Statutes are not strictly applicable to NLRB proceedings. Counsel for the General Counsel did not highlight, however, that the Board has long subjected such statements attributed to a deceased individual to "the closest scrutiny before deciding what weight to give it." *West Texas Utilities*, 94 NLRB 1638, 1639 (1951), *enfd.*, 195 F.2d 519 (5th Cir. 1952); *See also, Ann's Laundry*, 276 NLRB 269, 270 fn. 3 (1985) [emphasis supplied].

No evidence was offered supporting Morricone's alleged unlawful statements other than through Christopher and Alovic. Aside from being interested witnesses, both individuals repeatedly showed themselves to be evasive in their answers and inconsistent and contradictory in their testimony. For example, until confronted with his affidavit, Alovic continued to testify that Mehmedovic had threatened him with discharge for supporting Local 32BJ (when, as ultimately admitted by Alovic, that was not the case). There is absolutely no reason to credit their testimony on any issues, including their representations of Morricone's alleged comments.

V.

BILL JOHNSON'S ISSUES

1. **General Counsel Offered No Evidence of Agency Status**

All of evidence offered in this matter established that Neiditch and Mehmedovic brought the defamation lawsuit on their own behalf. The allegations complained of in the defamation lawsuit relate to defamatory statements against Neiditch and Mehmedovic personally – not against Cooper Square or the Atelier. Only Neiditch and Mehmedovic, not Cooper Square or the Atelier, are parties to the lawsuit. Plaintiffs' attorney, Dweck, has been retained and directly paid by Neiditch. Neither Cooper Square nor the Atelier has paid for Dweck's representation in the defamation lawsuit.

Against this backdrop, Counsel for the General Counsel adduced only summary arguments to support a theory that Neiditch and Mehmedovic are acting on behalf of Cooper Square and the Atelier with regard to the defamation lawsuit. Counsel for the General Counsel has offered no evidence supporting a conclusion that the lawsuit has been brought by Neiditch and Mehmedovic in their representative capacities.

As addressed in *Braun Electric Co.*, 324 NLRB 1, 2 (1997), citing, *Electrical Workers IBEW Local 453 (National Electrical)*, 258 NLRB 1427, 1428 (1981), it takes more than the holding of a certain position to find agency status as “the holding of an elective office does not mandate a finding of agency *per se*.” In *Braun*, agency status was found when the President of an organization wrote an allegedly unlawful communication regarding an employment encounter on company letterhead. There is no such evidence in this case. Counsel for the General Counsel has offered no evidence, aside from their formal titles, that either Neiditch or Mehmedovic acted on behalf of the Atelier or Cooper Square in filing the defamation lawsuit. Counsel for the

General Counsel is, in effect, attempting to create a *per se* finding of agency status which has been long since ruled improper.

Prior to addressing any of the *Bill Johnson's* issues, Counsel for the General Counsel has the burden of first proving that a lawsuit has been brought by a respondent against the charging party. In the instant matter, Counsel for the General Counsel's case is woefully inadequate and based solely on the repetition of speculative theory. As such, the complaint must be dismissed.

2. **General Counsel Cannot Establish Retaliatory Motive**

A single and determinative fact in this matter is that the Counsel for the General Counsel has not offered any evidence that the defamation lawsuit was brought in retaliation for Christopher engaging the Board's processes and, indeed, it is impossible to offer any such evidence. Christopher's charge of discrimination was not filed until August 26, 2009. (G.C. Exh. 1(e)). It was not served until August 31, 2009. (G.C. Exh. 1(f)). The original defamation lawsuit against Christopher was filed over a month earlier, on July 29, 2009 (G.C. Exh. 10, Exhibit A to Motion to Dismiss). With the lawsuit having been filed over a month before the protected activity upon which the *Bill Johnson's* claim is based, it is not possible to conclude that the lawsuit was filed in response to that protected activity. On this point alone, the Counsel for the General Counsel's theory must fail.

Counsel for the General Counsel will likely rely on the procedural failing of Plaintiff's counsel for allowing the case to be marked off the calendar by failing to attend a June 2010 court conference. However, such reliance is misplaced. When the complaint was refiled, the same claims remained against Christopher. Had Dweck simply taken a default judgment against Christopher in March 2009 or appeared at a routine court conference in June 2009, there would be no *Bill Johnson's* claim in this case. To argue that after the Court marked the lawsuit off the

calendar for the procedural misstep of missing a court conference that Plaintiffs decided to refile the same claims because of Christopher's engagement of the NLRB's processes approximately 11 months prior is beyond rationality and finds no support in the record.

The baselessness of Counsel for the General Counsel's theory is highlighted by the absence of Alovic from the defamation lawsuit. A complaint had been issued on Alovic's discharge claim on February 26, 2010. (G.C. Exh. 1(o)). Yet, when the defamation claim was refiled in July 2010, Alovic was not added to the lawsuit. If there were retaliatory intent in the refileing, one would fully have expected the refiled lawsuit to have included Alovic. It did not.

Simply stated, the timing of Christopher's protected activity and the timing of the filing of the defamation lawsuit do not allow for a finding of retaliatory motive. As such, Counsel for the General Counsel is unable to establish an essential element of the claim and it must be dismissed.

3. The Defamation Lawsuit is "Reasonably Based"

In *Ray Angelini, Inc.*, 351 NLRB 206, 208 (2007), issued concurrently with *BE&K Construction Co.*, 351 NLRB 451 (2007), the Board stated that it would be "guided by the Court's discussion, in *Bill Johnson's*, of the reasonable-basis inquiry in the context of ongoing suits." In *Bill Johnson's*, the Court indicated that finding a lawsuit to lack a reasonable basis would be warranted "if the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous" or if it rests on "plainly unsupportable [factual] inferences" or "patently erroneous submissions with respect to mixed questions of fact and law." Conversely, the Court indicated that a lawsuit could not be held to lack a reasonable basis "if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn

from undisputed facts” or if the lawsuit raises “genuine ... legal questions” for which there is “any realistic chance that the plaintiff’s legal theory might be adopted.”

The standard in a *Bill Johnson’s* claim is not one of ultimate success or preponderance of the evidence. Rather, it is whether the claim in the lawsuit is “reasonably based.” In the instant matter, Nieditch’s testimony was that he saw untrue statements about himself and Mehmedovic on a blog authored by Christopher. Christopher can deny those allegations as he has in the instant matter but his denials are of no moment. It is not for this forum to adjudicate whether Christopher actually engaged in defamation of Neiditch and Mehmedovic. Rather, the issue is whether the claim is reasonably based. With evidence that Neiditch saw the defamation statements published by Christopher, together with the detailed allegations of defamation in the Complaint (G.C. Exhs. 10, “Exhibit A” Attachment; G.C. Exh. 13), the standard is exceedingly met and the *Bill Johnson’s* allegations must be dismissed. Indeed, the fact that the blogs were taken down shortly after the claims were filed is additional evidence of the reasonable basis for the assertion of the claims.

4. General Counsel’s Prosecution of this Case is Inconsistent with its Own Guidelines

In *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the U.S. Supreme Court addressed First Amendment issues concerning the right to petition the government through the courts and lawsuits allegedly brought for retaliatory motives. It invalidated the Board’s existing rule on such issues and remanded for further proceedings. Following the Supreme Court decision, the Board in *BE&K Construction Co.*, 351 NLRB No. 29 (2007), held that the filing and maintenance of a reasonably based lawsuit does not violate the Act regardless of the motive for bringing the lawsuit.

The *BE&K* decision, together with the related decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), has led to a series of memoranda from the Office of the General Council on the handling of charges alleging retaliatory lawsuits. In GC Memo 02-09 (September 20, 2002), the Office of the General Counsel analyzed in depth the difficult issues raised by such charges. It directed that charges alleging retaliatory lawsuits be handled by the Regional offices as follows:

When the Region receives a charge that an ongoing lawsuit is unlawful, it should investigate whether the suit is arguably reasonably based and whether it is arguably brought with a retaliatory motive. If it is both, the Region should hold the unfair labor practice charge in abeyance as it is often difficult to decide definitively at an early stage of litigation whether a suit is reasonably based. Thus, the pleadings may not disclose the full scope of the litigation and, during the unfair labor practice investigation, charged parties may not fully cooperate in disclosing the legal and evidentiary support for their lawsuit. Given these difficulties, we conclude it is more prudent to hold cases in abeyance at the early stage of litigation. [emphasis supplied].

The General Council's memorandum further advises that if evidence exists suggesting that only one criteria for a charge (a lawsuit not reasonably based or one brought with a retaliatory motive) is present, the matter should be submitted to the Division of Advice. A charge lacking evidence on either criteria should be dismissed. The continuing validity of the guidance in GC Memo 02-09 was noted in GC Memo 07-11 (September 25, 2007).

In the instant matter, Counsel for the General Counsel has inexplicably ignored the sound advice of the Office of the General Counsel and has prematurely moved forward with the prosecution of a *Bill Johnson's* case. Many of the difficulties predicted by the Office of the General Counsel have arisen in this case as a result. Consequently, the claim should be dismissed in accordance with the internal guidelines of the Office of the General Counsel.

5. The Charge Is Time-Barred

As reviewed in *United Kiser Services LLC*, 355 NLRB No. 55 (2010), the Section 10(b) limitations period begins when a party had “clear and unequivocal” notice of a violation of the Act. In the instant matter, Christopher had notice of the defamation claim being made against him on July 29, 2009. The refiling of the lawsuit after a dismissal due to a failure to attend a court conference does not change the nature of the claims. The instant charge, filed over a year after the claims were first asserted against Christopher, is consequently time barred. *E.g.*, *BE&K Construction Co.*, 329 NLRB No. 68 (1999) [charge pursuant to *Bill Johnson’s* filed four years after commencement of a lawsuit timely only due to fact that a timely charge had been previously filed by other parties].

6. Constitutional Issues

As reviewed in *Bill Johnson’s*, the Board is not empowered to enjoin an ongoing lawsuit unless the lawsuit is preempted by federal labor law. *See, also, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). In the instant matter, there is nothing in the defamation complaint itself that would support a conclusion that the claims asserted implicate Section 7 rights.

We are faced with the instant matter, therefore, simply because Counsel for the General Counsel wishes to ignore the testimony of Dweck and Neiditch and focus on the lack of documents produced in response to subpoenas *duces tecum* that were not served on the Plaintiffs in the defamation lawsuit. The *Bill Johnson’s* complaint is nothing other than an improperly aggressive effort to chill the ability of employers (in this case, individuals seeking relief from the courts for purely state law concerns) to petition the courts. The overreaching is only highlighted

in the instant matter by the fact that the alleged retaliatory conduct (the filing of the lawsuit) predates the alleged protected activity (Christopher's filing of the unfair labor practice charge).

For all of the foregoing reasons, the *Bill Johnson's* complaint must be dismissed in its entirety.

7. **Subpoena Issues**

During the course of the hearing, a number of subpoena issues were raised and resolved by Judge Landow. The sole open subpoena issue at the conclusion of the hearing was the Respondents' compliance with subpoenas *duces tecum* served on Cooper Square and the Atelier concerning the *Bill Johnson's* claims. (G.C. Exh. 4). On that matter, Judge Landow took as an offer of proof the testimony of Neiditch subject to further consideration of the agency status of Neiditch vis-à-vis the defamation lawsuit. (Tr. 431:10-438:2). Neiditch's remaining testimony was admitted without this limitation.

With regard to the subpoena at issue, Counsel for the General Counsel seeks relief from her own error. A subpoena *duces tecum* served directly on Neiditch and Mehmedovic (similar to the subpoenas that were purported to be served on both individuals) would have obviated this issue. If the information in G.C. Exh. 4 was genuinely sought by the Counsel for the General Counsel, it would have presumably been served on the named parties to the lawsuit – Neiditch and Mehmedovic, not Cooper Square and the Atelier. Even during the hearing, Counsel for the General Counsel was empowered to seek a new subpoena *duces tecum* to serve on Neiditch and Mehmedovic. However, she failed to do so.

The argument of the Counsel for the General Counsel is also deficient in that she failed to inquire on Neiditch's cross-examination as to the nature and scope of non-privileged documents that would have been responsive to G.C. Exh. 4 had the subpoenas been directed towards

Neiditch and Mehmedovic (and, in fact, asked absolutely no questions of Mehmedovic on any topic despite having subpoenaed her to appear at the hearing). There is no evidence that, even if an agency status is established between Neiditch, Mehmedovic and the Respondents specific to the defamation lawsuit, any non-privileged and responsive documents are in their possession.

Lastly, no documents were relied up by the Respondents in their direct examination of Neiditch concerning the *Bill Johnson's* claims. As such, assuming *arguendo* that there is an agency relationship found with regard to the defamation lawsuit, there is no basis to preclude Neiditch's testimony. The documents sought in G.C. Exh. 4, assuming that non-privileged information exists, were not testified to during Neiditch's direct testimony. As such, the testimony should be admitted without qualification.

VI.

JUDGE LANDOW'S DECISION

The record evidence, as outlined above, clearly does not support the conclusions and findings reached by Judge Landow. Highlighted below are several of the errors in Judge Landow's decision. In conjunction with the record evidence and issues argued above, the decision of Judge Landow should be reversed.

A preliminary issue deals with certain, uncommon credibility determinations made by the administrative law judge. The challenged determinations are not based on the oft-cited credibility determinations of a judge who, sitting in the hearing room, gauges factors that do not appear in the cold transcript of a hearing record. Rather, the challenges herein are based on

entirely unsupported and oftentimes contradictory factual conclusions on credibility criteria chosen to be relied upon by Judge Landow.

The Crediting of Alovic's Testimony

The administrative law judge acknowledged that Nick Alovic contradicted himself during testimony on a critical issue – whether he was threatened with discharge for his union activity. At hearing, Alovic testified that he was so threatened. However, in a previous affidavit, he made no mention of being threatened with discharge. Nonetheless, the administrative law judge excused Alovic's outlandish and outright false embellishment of a conversation he had with his supervisor.

However, even more significant (and not addressed by Judge Landow), was the judge's conclusion that Alovic had falsely testified at the hearing about the circumstances leading to his discharge. Therefore, Alovic not only contradicted his prior sworn testimony, he was found by Judge Landow to have testified untruthfully at the hearing on another substantial issue – the sequence of events leading to his termination.⁴ Notwithstanding Alovic embellishing on his prior sworn statement and the fact that Judge Landow found that Alovic did not testify truthfully before her under oath, she still chose to credit his testimony over that of other witnesses on other issues.

Simply stated, the judge offered no rational basis for crediting the testimony of Alovic. He contradicted his own previous sworn statement. From there, he went on to testify

⁴ Relatedly, Judge Landow erred when she ordered the reinstatement of Alovic. It strains credulity that a witness, who is found by an administrative law judge to have testified untruthfully under oath, can be found by that same judge to be entitled to reinstatement to his former employment.

untruthfully – as found by Judge Landow – as to the events leading to his discharge. To credit any such testimony in the circumstances is without basis.

The Crediting of Christopher's Testimony Over That of Mehmedovic and Neiditch

As stated earlier, Christopher was reprimanded by Judge Landow for being evasive in his answers. However, in her decision, she excuses his evasiveness. However, on several occasions, she found Mehmedovic and Neiditch to be evasive simply because they asked for clarifications to questions. Simply stated, the judge erred in holding Respondents' witnesses to a higher standard concerning the comprehension of attorney questioning.

The Failure to Credit Mehmedovic's Testimony

In her decision, Judge Landow opined that Mehmedovic embellished on facts and, therefore, was not worthy of credibility. Judge Landow fails to explain how Mehmedovic embellished on facts. However, more significantly, when Alovic embellished on the fact that Mehmedovic threatened him with discharge (when, in fact, she had done no such thing), she excused his conduct by crediting the remainder of his testimony. When Judge Landow found that Mehmedovic embellished on an unidentified fact or facts, she found cause to discredit all of her testimony. Again, Judge Landow was holding Respondents' witnesses to a higher standard of proof.

Interestingly, none of Judge Landow's credibility determinations concerning Mehmedovic came from cross-examination, where issues such as evasiveness or non-responsiveness might be considered on issues of credibility. In the instant matter, there was no

cross-examination of Mehmedovic. Counsel for the General Counsel forewent the opportunity to examine the witness.

Therefore, it was only on direct examination that Judge Landow based her credibility determinations. Again, she excused Christopher's lack of clear recollection of certain facts due to his expression of emotional distress about the nature of the questions. However, when Mehmedovic was called upon to testify about events that coincided with the suicide death of her close friend, Robert Morricone, Judge Landow offered no consideration to the effect her emotional distress had on her ability to answer. Once again, on an issue that Judge Landow decided to base a credibility determination (as she did with responsiveness to questions and embellishment of facts), she held Respondents' witnesses to a higher standard.

The Drawing of Inferences Against Neiditch

Judge Landow drew inferences against Neiditch's credibility due to his failure to appear on the first day of hearing in response to a subpoena directed to him. Neiditch did appear on the final day of hearing and was subject to both direct and cross examination. Judge Landow found that the General Counsel suffered no prejudice in having him testify on the last day of the hearing.

As addressed in the record, Neiditch was out of the country on his honeymoon at the start of the hearing. One can speculate as to Neiditch's attentiveness to his calendar. However, there is no basis in the record for Judge Landow to conclude that his failure to appear on the first day of hearing under these circumstances made him any less worthy of belief. Yet, Judge Landow made such inferences. She erred in doing so. There simply is no reason to believe that a scheduling error by Neiditch equated to a lack of veracity as a witness.

The Lack of Union Animus

Much of underlying motivations of this case can be gleaned from the opening statement of the Counsel for the General Counsel. (Tr. 57:9-63:1). Judge Landow's first introduction to this case was one of a greedy duo – Neiditch and Mehmedovic – attempting to corner the rental market at the Atelier. The Counsel for the General Counsel's theory of the case was that Neiditch and Mehmedovic harassed anyone who stood in their way. Perhaps this theme was the reason for Judge Landow's apparent bias against Memedovic and Neiditch.

One issue is abundantly clear, however. Even under Counsel for the General Counsel's theory, this case had nothing to do with union animus. It had everything, under General Counsel's theory, to do with protecting whatever scheme Neiditch and Mehmedovic had in place to rent units at the Atelier. Such a scheme, if even true, is not unlawful under the Act. Certainly, it implicates the dual motivation theory that, although raised with Judge Landow, went unaddressed in her decision.

Further, the only evidence offered in the record as to alleged animus was concerns voiced by Atelier Board members about the cost of a Local 32BJ contract. However, as conceded by the General Counsel, the Respondents had already budgeted for Local 32BJ rates. In short, there is no basis in the record supporting any reason upon which the Respondents would have opposed Local 32BJ.

Again, it is significant to highlight that Local 32BJ took no action to challenge the discharges of Alovic and Christopher. Contrary to the summary dismissal of this fact by Judge Landow, it is incomprehensible that a major New York City union, which knew of the discharge of its two primary organizers, would take no action on their behalf before the NLRB when, about

a year earlier, that same union brought charges against the same building in order to protect its organizing rights. Local 32BJ's silence in this proceeding is deafening.

The *Bill Johnson's* Claim

Judge Landow erred on a fundamental issue. How can a lawsuit commenced against an individual, before that individual engages the Board's processes, be considered in retaliation for engaging the Board's processes? Even though the first lawsuit was discontinued and a second reinstated shortly thereafter, the claims against Christopher (first asserted before he engaged the Board's processes) remained the same.

Judge Landow also erred in holding the lack of documentary evidence in response to a subpoena *duces tecum* served on the Respondents to be evidence of a lack of support for the lawsuits. Counsel for the General Counsel was the master of her own subpoena. She could have served it personally on Neiditch and Mehmedovic. She chose not to, preferring to serve the subpoenas on Cooper Square and the Atelier. Such a litigation tactic places the Respondent in any *Bill Johnson's* claim in a Hobson's Choice – collect information from the individual plaintiffs in order to comply with the subpoena and thereby give the appearance that they possess documents relating to the lawsuit, thereby aiding the proof of agency status, or honestly state that they have no such documents and suffer the presumption, as imposed by Judge Landow, that no such documents exist because of a later-in-time determination that agency status is present. Such a subpoena *duces tecum* served on a Respondent and not a Respondent's alleged agent, in short, precludes a Respondent from simultaneously arguing both (a) the lack of agency status and (2) the reasonable basis for a lawsuit brought by purported agents. As a policy matter, the Board

should not permit the use of subpoenas in this manner and, therefore, should not adopt the presumption reached by Judge Landow.

CONCLUSION

Based upon the foregoing, the Complaint should be dismissed in its entirety and the Respondents awarded such other and further relief as may be just and proper.

Dated: New York, New York
 May 22, 2012

Respectfully submitted,
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