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6 TEMECULA MECHANICAL, INC.

7  
8 UNITED STATES OF AMERICA  
9 BEFORE THE NATIONAL LABOR RELATIONS BOARD  
10

11 TEMECULA MECHANICAL, INC.,  
12 Respondent-Employer,  
13 and  
14 PLUMBERS AND PIPEFITTERS LOCAL  
398, UNITED ASSOCIATION OF  
15 JOURNEYMEN AND APPRENTICES OF  
THE PLUMBING AND PIPE FITTING  
16 INDUSTRY OF THE UNITED STATES AND  
CANADA, AFL-CIO,,  
17 Charging Party-Union.  
18

Case No. 21-CA-39667  
21-CA-39834

**EXCEPTIONS, SUPPORTING  
AUTHORITIES AND ARGUMENT OF  
RESPONDENT-EMPLOYER  
TEMECULA MECHANICAL, INC.**

[Board Rules and Regulations Section  
102.46(a),(b)]

19 Respondent-Employer Temecula Mechanical, Inc. (“TMI”) files the following Exceptions,  
20 Supporting Authorities and Argument in response to the Recommended Decision and Order  
21 (“Decision”) of the Administrative Law Judge (“Judge”) dated May 17, 2012 in the above-  
22 captioned matter.

23 **Exception 1: The Judge found discrimination by TMI against employee Norman Guardado**  
24 **(“Guardado”) at pages 8-10 of the Decision judging TMI’s position and**  
25 **defense a sham and fabrication which ultimately reveals that the Judge failed**  
26 **to adequately consider TMI’s corroborated and consistent evidence of lawful**  
27 **action.**

28 This determination goes against the weight of the evidence, much of which the Judge

1 failed to give meaningful consideration. The evidence established that TMI did not know of  
2 Guardado's union activity or support until after Guardado's discharge. The timing of action  
3 against Guardado occurred at a time when TMI faced a severe decline in work with numerous and  
4 contemporaneous documented layoffs of coworkers. Individuals laid off at or near the same time  
5 expressed that the layoffs were for a lack of work in pursuing unemployment claims.  
6 Respondents' Exhibit 2. There is no meaningful contrary evidence. Thus the action against  
7 Guardado was neither discriminatory nor discriminatorily timed. In fact, TMI retained Guardado,  
8 qualified neither as a journeyman nor an apprentice, longer than other more qualified employees.  
9 Public works construction performed by TMI requires use of certified journeymen or certified  
10 apprentices, neither of which Guardado is at any relevant point in time.

11 TMI is a construction industry contractor performing mechanical and pipe fitting work for  
12 public entities in the State of California. Tr. 236:16-24, 302:23-303:12.<sup>1</sup> TMI operates on most  
13 of its jobs as a non-union employer. Tr. 309:17-19. TMI performs work on many jobs as a  
14 unionized contractor pursuant to the requirements of project labor agreements, which bind TMI  
15 and other contractors to agreements with unions covering specified scopes of work and require  
16 hiring from the required union's hiring hall. Tr. 240:18-242:4, 252:7-13, 222:25-223:7.

17 TMI operates an office in Temecula, California. At all relevant points in time  
18 administrative staff reporting to Pamela Leonard were Trina Wellsandt and Sandra Covarrubias,  
19 wife of alleged discriminatee Norman Guardado.

20 TMI used to be a unionized employer in all aspects of its operation. Tr. 239:24-240:17,  
21 309:2-3. Patrick Leonard, President of TMI, was for many years a unionized construction worker  
22 and a union official. Tr. 309:20-310:12. Pat Leonard's daughter Pamela, is the Secretary of TMI  
23 who is responsible for much of the day to day management, bidding, and staffing for TMI jobs.  
24 Tr. 199:18-200:15, 302:15-22.

25 Norman Guardado, a longtime friend of Pam Leonard, began employment with TMI in  
26 2002. Tr. 46:23-25, 77:22-24. His work did not fall into a specific category of TMI's work. Tr.

27 \_\_\_\_\_  
28 <sup>1</sup> Transcript citations will be reflected as "Tr" followed by page and line.

1 266:1-18, 313:16-314:4, 314:16-315:3. As a licensed contractor performing work on public  
2 construction projects, TMI has had to use journeymen pipe fitters, pipe tradesmen, and  
3 apprentices. Guardado did not have the educational background to enter into an apprenticeship  
4 program. Tr. 266:19-267:7, 313:16-314:4. As a result, he was not able to work as either an  
5 apprentice or to become a journeyman. Tr. 267:15-18, 314:16-315:3. This limited the amount and  
6 type of work TMI could offer Guardado. Tr. 267:19-268:12, 314:16-315:3.

7 Guardado was never known by TMI, during his employment, to be a union supporter. Tr.  
8 268:13-15. Even given their longtime friendship, Guardado did not apprise TMI of any union  
9 involvement and instead kept his union activities secret. Tr. 268:13-15. TMI denies discussing  
10 the Union with Guardado.

11 There was testimony regarding labor compliance looking into issues on a job site where  
12 Guardado worked. Tr. 269:24-270:14. However, there is no evidence that Guardado was named  
13 as being involved in a complaint or otherwise known to TMI management as having been  
14 involved. Tr. 269:24-270:14. Again, labor compliance is a normal and routine occurrence for TMI  
15 given the nature of their public jobsites. Tr. 237:22-239:2, 304:20-22, 308:6-11.

16 The only time TMI heard of Guardado being involved in Union or wage related activity  
17 was after Guardado was laid off and after he was offered reemployment. Tr. 268:16-23.

18 TMI is down to a skeleton crew of two employees as of the time of trial. Tr. 311:17-312:3.  
19 TMI is not bidding new work and does not have jobs to which it could assign Guardado. Tr.  
20 329:8-18. TMI has no details regarding Guardado's current employment eligibility even assuming  
21 there was work to be performed.

22 In order for the GC to establish TMI acted unlawfully by discharging Guardado, the GC  
23 must prove by a preponderance of credible evidence that Guardado was engaged in protected  
24 activity, that TMI knew Guardado was engaged in protected activity, and that the protected  
25 activity was a motivating reason for TMI's discharge of Guardado. The GC did not present the  
26 factual evidence necessary to prove its case.

27  
28

1           **A. It is questionable based on the evidence whether Guardado engaged in**  
2           **protected activity.**

3           The GC failed to provide concrete credible evidence that Guardado engaged in protected  
4 activity. Guardado did not wear union paraphernalia, did not notify TMI management of his intent  
5 to organize or speak to TMI management regarding any type of workplace concern. At most  
6 Guardado may have attended a union meeting and/or spoken to a union representative, however  
7 these actions were unknown to TMI and arguably purposefully kept secret from TMI management.  
8 Tr. 25:1-26:6, 268:13-15.

9           Furthermore, the GC failed to establish that Guardado’s actions were protected concerted  
10 activity. Under *Meyers Industries*, 281 NLRB 882 (1986), an employee’s activity is protected as  
11 concerted when “an employee acts with or on the authority of other employees, and not solely by  
12 and on behalf of the employee himself” or when “employees seek to initiate or to induce or to  
13 prepare for group action, including individual employees bringing ‘truly group complaints’ to  
14 management’s attention.” The GC failed to establish that Guardado’s actions were with or on the  
15 authority of other employees, that Guardado was seeking to initiate group action, or that Guardado  
16 brought group complaints to TMI’s attention. Given the personal relationship between Guardado  
17 and the Leonards, Guardado had ample opportunity to apprise the Leonards of his union  
18 involvement and instead chose to keep his union activities secret.

19           **B. TMI had no knowledge of Union or protected concerted activity by Guardado.**

20           The evidence makes clear that Guardado did not have any overt involvement in Union  
21 activity. Again, at most he attended a meeting or talked with co-workers who had minimal  
22 visibility but certainly more than Guardado himself. Tr. 25:1-26:6. Knowledge is not established  
23 directly. Nor is it established by what is anticipated to be a GC argument for “small plant  
24 doctrine.” Although TMI’s employee ranks declined and Guardado and his wife were at one time  
25 close friends with TMI management, the circumstances suggest that any alleged protected activity  
26 had complete secrecy on Guardado’s part. Tr. 268:13-15. Furthermore, the GC’s anticipated  
27 focus on labor compliance’s inquiry into job related issues on a jobsite where Guardado worked is  
28 not sufficient to establish knowledge of any union activity given the normal and routine

1 occurrence of correspondence between labor compliance and TMI. Tr. 237:22-239:2, 304:20-22,  
2 308:6-11.

3 Without knowledge of Guardado's union affiliation, it is impossible that TMI's decision to  
4 layoff Guardado was motivated by union animus or other alleged protected activity.

5 **C. There was no statement of animus against Guardado.**

6 An unlawful motivation is established by "direct evidence of employer animus toward the  
7 [employee's] protected activity." *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004).  
8 The GC failed to provide any anti-union animus on the part of TMI.

9 TMI denies making hostile statements about union or protected statements to Guardado.  
10 TMI has a union history and has continued to work on project labor agreement jobs as a union  
11 contractor for the scope of that work. Tr. 240:18-242:4, 252:7-13, 222:25-223:7. This has  
12 required TMI to employ union members, without incident, as a condition of the work. Tr. 240:18-  
13 242:4, 252:7-13, 222:25-223:7. Furthermore, Pam testified that even if she had been aware of  
14 Guardado's union activities, it would not have had an impact on her decision - she wanted  
15 Guardado to work for TMI. Tr. 279:6-15.

16 The evidence establishes that, in California, prevailing wage work is heavily regulated,  
17 with job site oversight and frequent information requests. Thus, as confirmed, there is no basis to  
18 find inordinate concern or retaliation by TMI or otherwise when TMI received notice that its  
19 payroll records and prevailing wage compliance information were requested.

20 Public construction work in California is regulated by prevailing wage and apprenticeship  
21 requirements spelling out pay rates and ratios for employment of job classifications including  
22 journeymen and apprentices. Tr. 310:17-311:16. Because the prevailing wage system is very  
23 complicated, California has implemented requirements for labor compliance programs to work  
24 with public entities having construction done to ensure that the prevailing wage and apprenticeship  
25 requirements are satisfied. Tr. 304:20-308-1, 310:17-311:16. California Labor Code Sections  
26 1770-1781 give the Department of Industrial Relations the power to determine the general  
27 prevailing rate of per diem wages on public works projects. Under Section 1776(a), each  
28 contractor and subcontractor must "keep accurate payroll records, showing the name, address,

1 social security number, work classification, straight time and overtime hours worked each day and  
2 week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other  
3 employee employed by him or her in connection with the public work.” In addition, under Section  
4 1776(b) such payroll records must be “certified and made available for inspection and furnished”  
5 upon the request of any employee, the body awarding the contract, the Division of Labor  
6 Standards Enforcement, and the Division of Apprenticeship Standards of the Department of  
7 Industrial Relations.

8 Given California law, it is not only common and routine for contractors performing public  
9 works construction to correspond with various agencies regarding wages - it is required and  
10 expected. It is a standard non-event that labor compliance programs visit public works job sites  
11 and ask persons on the job site about the work they perform and how they are paid. Tr. 237:22-  
12 239:2, 304:20-22, 308:6-11. Public works contractors, including TMI, regularly respond to  
13 information requests from labor compliance programs and unions about payment of wages and  
14 appropriate wage classifications. Tr. 237:22-239:2, 304:20-22, 308:6-11. Such requests are  
15 standard and do not, in and of themselves, indicate a wage violation by the public works  
16 contractor or union activity by anyone making or mentioned in connection with the request.

17 **D. The timing supports a legitimate layoff for an established lack of work.**

18 TMI legitimately laid off Guardado due to a lack of work. Tr. 93:4-22, 318:8-319:10,  
19 320:23-322:5. TMI acknowledges that there was a disagreement between Guardado and Patrick  
20 Leonard about the lack of work on the day he was laid off. Tr. 93:4-22, 318:8-319:10, 320:23-  
21 322:5. However during this disagreement, neither Guardado nor Patrick made any reference to the  
22 Union. Tr. 93:4-22, 318:8-319:10, 320:23-322:5. And, in fact TMI even offered Guardado work  
23 at the Hillcrest jobsite after his layoff from the Banning job, in spite of the fact that Guardado  
24 simply did not have the skill set to be a journeyman or an apprentice. Tr. 275:1-277:9. This does  
25 not suggest timing or animus. This is particularly so as the evidence demonstrates a mountain of  
26 other layoffs of more qualified employees working as journeymen. Tr. 248:15-249:21, 311:17-  
27 312:3; Respondent’s Exhibit 2.

1           **E. There was no discriminatory action.**

2           TMI maintains that during Guardado’s employment they were unaware of any union  
3 involvement on Guardado’s part. Tr. 268:13-15. Guardado was one of many laid off as work has  
4 continued to decline for TMI. Tr. 248:15-249:21, 311:17-312:3, 329:8-18; Respondent’s Exhibit  
5 2. The GC fails to recognize that despite his relatively low credentials (neither a journeyman nor  
6 apprentice), Guardado enjoyed more work opportunity than others. TMI offered Guardado  
7 continued employment which, although he denies it, demonstrates that he was treated the same if  
8 not better than co-workers. Tr. 275:1-277:9. In fact, the longstanding friendship between  
9 Guardado and the Leonards’ supports the conclusion that TMI went out of its way to provide  
10 Guardado work and delayed laying him off until business necessitated otherwise. Furthermore,  
11 TMI attempted to recall Guardado, offering him work at the Hillcrest jobsite after his layoff. Tr.  
12 275:1-277:9.

13           These facts do not make the *prima facie* case of discrimination, the GC must establish. A  
14 *prima facie* case requires: (1) that TMI was hiring or recalling, or had concrete plans to rehire or  
15 recall at the time of the alleged unlawful conduct; (2) that TMI excluded the Guardado from the  
16 hiring or recall process; (3) that Guardado had experience and training relevant to the generally  
17 known requirements of the position for hire or recall, and (4) that antiunion animus contributed to  
18 the decision not to recall Guardado. *See Landmark Installations, Inc.*, 339 NLRB 422 (2003); *see*  
19 *also Wayne Erecting Inc.*, 333 NLRB 1212 (2001), citing *FES*, 331 NLRB 9 (2000) (by analogy  
20 applying to refusal to recall cases). The GC has failed to establish a prima facie case that TMI  
21 discriminatorily refused to recall Guardado from layoff.

22           Due to the economic downturn, TMI was in a steady period of severe layoff at the time  
23 Guardado was let go. Tr. 248:15-249:21, 311:17-312:3, 329:8-18 Respondent’s Exhibit 2. TMI  
24 did not fill Guardado’s position after his layoff, has not hired any new employees and since has  
25 not recalled for any positions which Guardado could have performed. Tr. 250-2-17, 251:25-252:6.

26           Moreover, TMI did not exclude Guardado from the recall process. In fact, TMI attempted  
27 to recall Guardado to the Hillcrest jobsite directly following his layoff, however he declined. Tr.  
28 275:1-277:9. At trial Pam Leonard confirmed that she wanted to return Guardado to work. Tr.

1 278:21-22. The GC fails to recognize that TMI's ability to continue to offer Guardado work is  
2 also limited by Guardado's minimal skill set and lack of formal education. Tr. 266:19-267:7,  
3 313:16-314:4.

4 Ultimately, TMI's decision to layoff and to not continue to recall Guardado was solely for  
5 economic reasons. Tr. 320:23-322:5. TMI could no longer afford to employ Guardado. Tr.  
6 320:23-322:5. TMI harbors no anti-union animus. Again, TMI has a union history and has  
7 continued to work on project labor agreement jobs as a union contractor, employing union  
8 members without incident for the scope of that work. Tr. 240:18-242:4, 252:7-13, 222:25-223:7.  
9 Furthermore, Pam testified at trial that even if she had been aware of Guardado's union activities,  
10 it would not have had an impact on her decision - she wanted Guardado to work for TMI. Tr.  
11 279:6-15.

12 Even if the GC could establish a prima facie case, TMI can demonstrate that it would have  
13 treated Guardado the same regardless of protected activity this is a valid *Wright Line* defense;  
14 *Wright Line* 251 NLRB 1083 (1980). Because of the poor economy and lack of work, TMI has  
15 not hired any new employees or recalled any employees for positions for which Guardado could  
16 have performed given his limited skill set. Tr. 250-2-17, 251:25-252:6.

17 The Judge found that TMI showed anti-union retaliation against Guardado by speaking of  
18 terminating him on the Banning job at page 10 of the Decision. However, the evidence  
19 established that TMI was laying off many employees at this time in journeyman, pipe tradesmen  
20 and apprentice positions before and during January 2011. While Pam Leonard spoke of, and made  
21 a trip to see Guardado, she made clear her intention to keep him employed as long as possible  
22 particularly in light of the long and close friendship between her and the Guardado family for  
23 whom she is a Godparent.

24 The Board's ruling in *Horizon Contract Glazing, Inc.*, 353 NLRB 1094 (2009), is  
25 instructive in this regard. In *Horizon*, the NLRB found that the contractor employer, who was  
26 actively bidding new work and who was aware of an employee's union membership, did not  
27 violate the Act by failing to recall the employee because of the employee's dishonesty with  
28 regards to his union background and work history. Here, there is an even more compelling

1 argument that TMI did not violate the Act in light of the facts that TMI has been in a steady period  
2 of layoff, is not bidding any new work, and activity was unchanged by Guardado's alleged  
3 protected activities. Tr. 250-2-17, 251:25-252:6, 268:13-15.

4 TMI would have lawfully taken the same action regardless of protected activity by  
5 Guardado, consistent with *Wright Line*.

6 With the economic downturn starting in 2008, TMI's work began to decline. Tr. 248:15-  
7 17. TMI went from forty employees in the beginning of 2010 to a period of steep and severe  
8 layoffs. Tr. 248:15-249:21, 311:17-312:3, 329:8-18. TMI sent those employees most capable to  
9 available work. As jobs finished and the number of jobs declined, TMI laid off most all of its  
10 employees. Tr. 311:17-312:3. Most all of those laid off filed unemployment benefit claims with  
11 the State of California, which TMI did not oppose. Tr. 253:18-255:20; Respondents' Exhibit 2.  
12 Almost universally, the laid off employees stated in their unemployment claims that they were laid  
13 off for lack of work. Respondents' Exhibit 2.

14 In late 2010, Guardado was also laid off. Tr. 89:21-23, 114:25-115:2, 281:2-3. He had an  
15 argument with Patrick Leonard on the day he was laid off. Tr. 93:4-22, 318:8-319:10, 320:23-  
16 322:5. However, the argument had to do with the lack of work and neither Guardado nor Patrick  
17 ever mentioned the union. Tr. 93:4-22, 318:8-319:10, 320:23-322:5. Following his layoff, TMI  
18 offered Guardado work at the Hillcrest jobsite, which he declined. Tr. 275:1-277:9. Guardado  
19 then filed an unemployment claim on which he stated the reason for the layoff as lack of work.  
20 Tr. 671-13. Respondents' Exhibit 1.

21 The layoff was a difficult issue for TMI for several reasons. Tr. 279:6-280:18. Both  
22 Guardado and his wife worked for TMI and after Guardado's layoff his wife continued to work in  
23 the office. Tr. 29:6-9, 29:15-17. Guardado and his wife were also close personal friends with the  
24 Leonard family. Tr. 47:1-11, 264:5-9. Their friendship spanned over 10 years and Pamela  
25 Leonard is the godmother of the son of Guardado and his wife. Tr. 47:21-25, 201:2-4, 264:22-24.  
26 The relationships have since become strained by the pendency of this case.

27 Even assuming a prima facie case of discrimination, TMI established defensible action  
28 under *Wright Line*.

1 Under *Wright Line*, 251 NLRB 1083 (1980), TMI may defend accusations of  
2 discrimination by showing that it would have taken the same action even in the absence of  
3 Guardado's alleged protected activity. TMI would have taken the same action with Guardado as  
4 with others. Tr. 260:15-261:7.

5 TMI's work had been steadily declining, forcing them to reduce their crew down to two  
6 employees. Tr. 248:15-249:21, 311:17-312:3 329:8-18. Indeed TMI offered Guardado  
7 reemployment during a layoff period, despite the dubious employment eligibility and a decline in  
8 work for others. Tr. 275:1-277:9. TMI's treatment of Guardado compares favorably with the  
9 many other employees laid off for lack of work who have not been recalled. Tr. 248:15-249:21,  
10 Tr. 260:15-261:7, 311:17-312:3, 320:23-322:5; Respondent's Exhibit 2. There is no  
11 discrimination. TMI's *Wright Line* defense, further disposes of the discrimination claim.

12 **Exception 2: The Judge improperly ruled that TMI made unlawful statements at pages 6-8**  
13 **of the Decision.**

14 The evidence taken in context reflects statements which are lawful, factual, and employer  
15 opinion, meeting the legal protection of Section 8(c) of the Act.

16 **A. TMI did not engage in or suggest surveillance of its employee's alleged union**  
17 **activities.**

18 The GC alleges TMI engaged in unlawful surveillance. Specifically, the GC alleges Pam  
19 Leonard created an impression of surveillance. (Amended Complaint paragraph 7) TMI denies  
20 engaging in or suggesting any type of surveillance of its employees.

21 "The test for determining whether an employer engages in unlawful surveillance or  
22 whether it creates the impression of surveillance is an objective one and involves the  
23 determination of whether the employer's conduct, under the circumstances, was such as would  
24 tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under  
25 Section 7 of the Act." *The Broadway*, 267 N.L.R.B. 385, 400 (1983); *U.S. Steel Corp. v. NLRB*,  
26 682 F.2d 98 (3rd Cir. 1982).

27 TMI maintains that it was unaware of Guardado's union involvement and that it did not  
28 question Guardado about union activities. Tr. 268:13-15. The anticipated focus by the GC on

1 Pam’s isolated inquiry into Esteban Delgado’s union status<sup>2</sup> can hardly be considered  
2 “surveillance.” Tr. 214:23-216:4. Even assuming Pam’s inquiry created an impression of  
3 surveillance, it did not interfere with, restrain or coerce Delgado’s exercise of his Section 7 rights  
4 under the Act. In fact, following his conversation with Pam regarding the union, Delgado  
5 intensified his union participation and eventually voluntarily resigned from TMI to pursue a career  
6 with the union. Tr. 285:15-21; Respondents’ Exhibit 3. Furthermore, Pam’s behavior is far from  
7 the spying on union membership and prying into union affairs which is prohibited under the Act.

8 **B. TMI did not interrogate employees or threaten lay off of an employee because**  
9 **of alleged union activities.**

10 The GC alleges Pam Leonard interrogated employees about union membership and laid off  
11 an employee because of his union activities. (Amended Complaint paragraph 7) TMI denies these  
12 allegations.

13 The test for determining whether an interrogation is unlawful is “whether under the  
14 circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights  
15 guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176 (1984); *See also Hotel Employees &*  
16 *Restaurant Emp. Union v. NLRB*, 760 F2d 1006 (9th Cir. 1985) (employer questioning regarding  
17 union activities held not coercive where they were casual and evidence indicated a lack of  
18 discriminatory intent and effect). TMI did not have any conversations with Guardado regarding  
19 the union. Pam’s isolated inquiry into Delgado’s union activities was not an interrogation. In fact,  
20 if an interrogation was conducted it was by Delgado drilling Pam about who apprised her of his  
21 union involvement. Tr. 214:23-216:4. Again, her inquiry did not interfere with, restrain or coerce  
22 the exercise of his rights under the Act.

23 TMI did not lay off Guardado or Delgado, or any other employee, because of their alleged  
24 union activities. TMI lawfully laid off Guardado due to a decline in work and Delgado voluntarily  
25 resigned from TMI. Tr. 93:4-22, 285:15-21, 318:8-319:10, 320:23-322:5; Respondents’ Exhibit 3.

26  
27  
28 <sup>2</sup> Pam’s inquiry into Esteban’s union activities occurred after Guardado’s layoff. Tr, 272:1-8.

1           **C. TMI spoke lawfully under Section 8(c) of the Act and made no unlawful**  
2           **threat.**

3           TMI does not harbor any anti-union animus. Again, TMI has a union history and has  
4 continued to work on project labor agreement jobs as a union contractor, employing union  
5 members for the scope of that work. Tr. 240:18-242:4, 252:7-13, 222:25-223:7.

6           Under Section 8(c), “[t]he expression of any views, argument, or opinion, or the  
7 dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or  
8 be evidence of an unfair labor practice under any of the provisions of the this Act, if such  
9 expression contains no threat of reprisal or force or promise of benefit.” TMI made no threats to  
10 Guardado with reprisal for his alleged union activities. Pam testified at trial that even if she had  
11 been aware of Guardado’s union activities, which she denies, it would not have had an impact on  
12 her decision - she wanted Guardado to work for TMI. Tr. 279:6-15.

13           **Exception 3: The Judge improperly failed to honor the NLRB settlement agreement TMI**  
14           **signed with NLRB Region 21 before the trial, which provided no**  
15           **reinstatement or backpay because of Guardado’s employment eligibility issues**  
16           **under Hoffman Plastics and Mezonos Bakery rulings at page 10 of the Decision.**

17           Similarly, the Judge refused to allow discussion of Guardado’s employment eligibility,  
18 mischaracterizing it as “immigration information” at page 10 of the Decision when *Hoffman*  
19 *Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) and *Mezonos Bakery*, 357 NLRB 47  
20 (2011) issues are Supreme Court and NLRB law respectively which limit the rights of the  
21 undocumented to remedies under the National Labor Relations Act.

22           TMI's settlement agreement should be enforced as it is consistent with *Mezonos*.

23           If a compliance phase is needed the case should consider and incorporate all available  
24 evidence of employment eligibility and *Mezonos* exclusion of Board remedies for the  
25 undocumented. *Mezonos* mandates that under the precedent established in *Hoffman Plastics*  
26 *Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Board cannot award backpay to an  
27 undocumented alien even if it is the employer who violated the Immigration Reform and Control  
28 Act.

1 **Exception 4: The Judge improperly ordered reinstatement and backpay for Guardado at**  
2 **pages 11-12 of the Decision.**

3 While TMI acknowledges that reinstatement and backpay, and remedial issues for  
4 undocumented employees comes under principles of *Hoffman* and *Mezonos* and may be addressed  
5 at a compliance phase, it was error to allow such claims to be litigated or to find violations of the  
6 Act. Thus further litigation or consideration of reinstatement and backpay remedies against a  
7 business laying off all of its employees and struggling to survive is both harmful and error.

8 **Exception 5: The Judge failed to rule that credibility favors TMI**

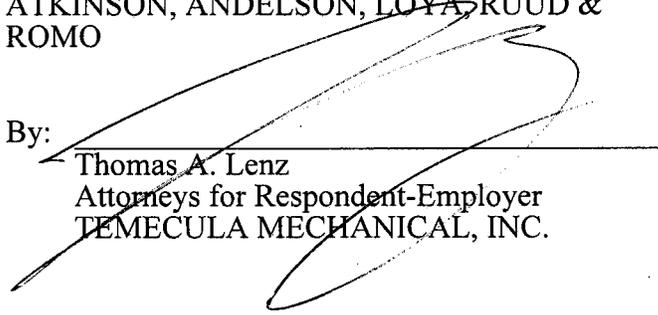
9 For reasons described above, this case presents highly emotional issues which have  
10 anguished TMI because of the long personal relationships involved. TMI witnesses thoroughly  
11 and candidly addressed the issues in greater and more consistent detail than GC witnesses and had  
12 corroboration, yet the evidence was either ignored or categorically chastised as sham or fabrication  
13 by the Judge. GC witnesses showed vagueness and evasiveness, and created gaps which are not  
14 credible and warrant adverse inferences on the most basic elements of a *prima facie* case. The  
15 Judge's findings are incorrect and should not be upheld. *Standard Drywall Products*, 91 NLRB  
16 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

17 **Exception 6: Board quorum and recess appointment issues may bar relief**

18 If the Board lacks a valid quorum, action on this case by the Board should be deferred and  
19 tolled.

21 Dated: June 14, 2012

Respectfully Submitted,  
ATKINSON, ANDELSON, LOYA, RUUD &  
ROMO

23  
24 By:   
25 Thomas A. Lenz  
26 Attorneys for Respondent-Employer  
27 TEMECULA MECHANICAL, INC.

Atkinson, Andelson, Loya, Ruud & Romo  
A Professional Corporation  
12800 Center Court Drive South, Suite 300  
Cerritos, California 90703  
Telephone: (562) 653-3200  
Facsimile: (562) 653-3333

1 **PROOF OF SERVICE**

2 (CODE CIV. PROC. § 1013A(3))

3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
5 years and am not a party to the within action; my business address is 12800 Center Court Drive  
6 South, Suite 300, Cerritos, California 90703.

7 On June 14, 2012, I served the following document(s) described as EXCEPTIONS,  
8 SUPPORTING AUTHORITIES AND ARGUMENT OF RESPONDENT-EMPLOYER  
9 TEMECULA MECHANICAL, INC. on the interested parties in this action by placing a true copy  
10 thereof enclosed in sealed envelopes addressed as follows:

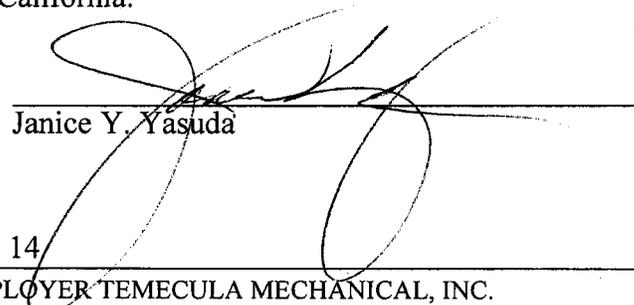
11 NLRB – Executive Secretary E-filing Via NLRB site  
12 Lisa McNeill Via Tel: 213/894-5204  
13 NLRB, Region 21 facsimile Fax: 213/894-2778  
14 888 S. Figueroa Street, 9th Floor  
15 Los Angeles, CA 90017-5449

16 Plumbers and Pipefitters Local 398, United Via e-mail Tel: 909-625-2493  
17 Association of Journeymen and Apprentices of Fax: 909-625-2493  
18 the Plumbing and Pipe Fitting Industry of the ualocal398@verizon.net  
19 United States and Canada, AFL-CIO  
20 4959 Palo Verde Street CHARGING PARTY  
21 Montclair, CA 91763

22 Client/Employer Temecula Mechanical Via e-mail

- 23  **BY MAIL:** I deposited such envelope in the mail at Cerritos, California. The envelope(s)  
24 was mailed with postage thereon fully prepaid. I am readily familiar with the firm's  
25 practice of collection and processing correspondence for mailing. It is deposited with  
26 U.S. postal service on that same day in the ordinary course of business. I am aware that  
27 on motion of party served, service is presumed invalid if postal cancellation date or  
28 postage meter date is more than one day after date of deposit for mailing an affidavit.
- 29  **BY FAX:** I sent such document by use of facsimile machine telephone number (562) 653-  
30 3333. The facsimile machine I used complied with California Rules of Court Rule  
31 2.301(3) and no error was reported by the machine.
- 32  **BY EMAIL:** I sent such document by use of email to the email address(es) above.  
33 (CCP § 1013(a)) Such document was scanned and emailed to such recipient and email  
34 confirmation is attached hereto indicating the recipients' email address and time of receipt  
35 pursuant to CCP § 1013(a).

36 Executed on June 14, 2012, at Cerritos, California.

37   
38 Janice Y. Yasuda

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