UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 28

In the Matter of	)	
	)	
FOOD SERVICES OF AMERICA, INC.,	)	
a subsidiary of SERVICES GROUP OF	)	
AMERICA, INC.,	)	
	)	
and	)	**Case 28-CA-063052**
	)	
PAUL LOUIS CARRINGTON, an Individual)		

RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT

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COMES NOW RESPONDENT FOOD SERVICES OF AMERICA, INC. ("Respondent" or "FSA"), by its attorneys Walker & Peskind, PLLC, and pursuant to the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, 29 C.F.R. § 102.46(f)(1), hereby submits its Answering Brief in response to the Acting General Counsel's ("AGC") Cross-Exceptions to the Administrative Law Judge's ("ALJ") Decision and accompanying Brief in Support of the AGC's Cross-Exceptions (collectively, "AGC's Cross-Exceptions"),[1] filed in this proceeding on May 22, 2012.

I. PROCEDURAL HISTORY

This case was tried before ALJ Joel P. Biblowitz on January 24 through 27, 2012. The ALJ issued his decision on March 27, 2012. The AGC sought, and obtained, an extension of the deadline for filing exceptions to the ALJ's decision from April 24, 2012, to May 8, 2012. Despite his request for the extension, the AGC filed no exceptions.

Charging Party Paul Carrington ("Charging Party" or "Carrington") filed a document denominated "Paul Louis Carrington's Exceptions to the Administrative Law Judge's Decision" on May 7, 2012. Respondent filed Exceptions to the Decision of Administrative Law Judge Decision and a Brief in Support less than 10 minutes after the electronic filing deadline of 11:59 p.m. Eastern Daylight Savings Time on May 8, 2012.[2] The AGC's Cross-Exceptions and Brief

[1] Citations to the AGC's Cross-Exceptions are referenced herein as "Cross-Exc.," and citations to the AGC's accompanying Brief are referenced as "AGCBr." References to the ALJ's decision are reflected herein as "(J.D. at p. ___.)." References to the transcript of testimony at the hearing before Judge Joel P. Biblowitz, conducted January 24, 2012, through January 27, 2012, are shown generally as "(Tr. ___.)," with citation to both page and line numbers, and when the reference is to testimony from a witness, the name of the witness is shown in brackets (e.g., "(Tr. ____ [Manuszak].)"). References to exhibits introduced at the hearing by the Acting General Counsel and Respondent are shown as "(GCX___.)" or "(RX___.)," respectively, and Joint Exhibits are referenced as "JX___." Exhibits relating to Respondent's Motion to Exempt From Disclosure or For Protective Order are cited as "SX___." In those instances where a particular portion of a lengthy exhibit is referenced, either page numbers or Bates numbers of the particular portions referenced are also provided.

[2] Due to unanticipated computer problems, Respondent's Exceptions and accompanying Brief were filed electronically at 12:07:46 a.m. and 12:08:05 a.m. Eastern Daylight Savings Time ("EDT"), respectively, on May 9, 2012, a few minutes past the deadline of May 8, 2012, at 11:59 p.m. Upon receipt of notice that its Exceptions and Brief in support had been rejected as not having been timely filed, FSA filed a Motion to Accept the documents on

in Support were filed on May 22, 2012. Respondent's deadline for filing its Answering Brief was extended by motion to June 19, 2012.

II. THE AGC'S CROSS-EXCEPTIONS

The AGC's Cross-Exceptions fall into three distinct categories. Those are:

1. Cross-Exceptions Relating to Rules and Alleged Rules. The AGC excepts to the ALJ's failure to find overly broad and discriminatory Respondent's: (a) no-solicitation rule (Cross-Exc. 1); (b) an alleged rule prohibiting disclosure of employee cell phone numbers (Cross-Exc.3); (c) an allegedly orally promulgated rule prohibiting employees from talking to each other (Cross-Exc. 4(2)); and (d) an alleged rule prohibiting employees from "providing personal references to [sic] other employees" (Cross-Exc. 5).
2. Cross-Exceptions Relating to Alleged Threats, Interrogation, and Surveillance. The AGC excepts to the ALJ's failure to find violations of Section 8(a)(1) of the National Labor Relations Act ("the Act") on the grounds that: (a) Respondent's confidentiality rules allegedly "threatened it employees with unspecified reprisals" (Cross-Exc. 2); (b) Respondent allegedly interrogated employees about their concerted activities (Cross-Exc. 4(1)); and (c) Respondent allegedly created an impression among its employees that their concerted activities were under surveillance (Cross-Exc. 4(4)). Finding that Carrington and Rubio were not

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May 16, 2012, accompanied by an Affidavit from Respondent's counsel explaining that the cause of the delay of less than 10 minutes in filing Respondent's Exceptions and Brief in Support had been last-minute, unanticipated computer problems. The Motion to Accept was not opposed by either the AGC or Carrington, and there is no evidence that either of them were prejudiced by the late filing, or that the Board's processes were in any way adversely affected. Nevertheless, the Board issued a decision dated June 5, 2012, stating, without further elaboration, that the reasons for the delay "do not rise to the level of excusable neglect." On June 15, 2012, Respondent filed a motion seeking reconsideration of that ruling on the grounds that it was at odds with the recent decision of one of the Board's ALJs, as well as the decisions of several federal courts, and that it was arbitrary, capricious, an abuse of discretion, and a denial of Respondent's constitutionally guaranteed right to the due process of law.

engaged in activities protected under Section 7 of the Act. (*See* Amended Cmplt. at ¶ 4(f); JD at p. 14, l. 37 – p. 15, l. 19.)

3. Cross-Exceptions Relating to Employee Terminations. The AGC excepts to the ALJ's failure to find, with respect to Respondent's terminations of Carrington and Elba Rubio ("Rubio"), that: (a) the AGC established a prima facie case that the terminations were because Carrington and Rubio engaged in protected concerted activities; (b) the terminations were in fact because of Carrington's and Rubio's having engaged in protected concerted activities; and (c) Carrington's termination was because he violated Respondent's allegedly unlawful confidentiality rules and alleged rule prohibiting disclosure of employee cell phone numbers (Cross-Exc. 10).

III. RELEVANT FACTUAL BACKGROUND

A. The Nature of FSA's Business

FSA is a broad line food distributor. Respondent screens and assembles suppliers (vendors) to provide it with manufactured products and distributes those products to a wide range of food service operators across the Pacific Northwest. (Tr. 404, l. 24 – 405, l. 10 [Bixby].) The market served by FSA is highly competitive. (*Id.* at 406, ll. 22-25 [Bixby].) Key variables that figure in the success of participants and provide the bases for competitors to differentiate themselves in that market include identity of the vendor base, product specifications, volume of products purchased from specific vendors, customer identities, array of products sold to specific customers, pricing, and the ability to maintain the confidentiality of vendor and customer information. (*Id*. at 405, l. 18 – 413, l. 12 [Bixby].) Such information is highly valuable, and its

disclosure to FSA's competitors could be very harmful to its ability to compete effectively against its business rivals. (*Id.*)

B. Employment Histories of Rubio and Carrington

Rubio was employed by Knight Brokerage, an affiliate of Knight Transportation, Inc. ("Knight"), prior to commencement of her employment with FSA as a Supplier Information Specialist on May 27, 2008. (Tr. 108, l. 22 – 109, l. 4 [Rubio]; Tr. 172, ll. 8 - 19 [Rubio].) After only about three months with FSA, Rubio transferred to a position with GAMPAC Express, Inc. ("GAMPAC"), another subsidiary of FSA's corporate parent, where she worked for a little less than two years, and then was hired back into FSA in the position of Supplier E-Commerce Specialist in June of 2010. (Tr. 109, ll. 6-16 [Rubio].) Throughout the time Rubio worked for FSA – both before and after her employment with GAMPAC – Merissa Hamilton ("Hamilton") was her supervisor. (*Id*. at 110, ll. 11-25 [Rubio].) It was Hamilton who brought to Rubio's attention the Supplier E-Commerce Specialist opening and the opportunity to return to work at FSA in Hamilton's department. (Tr. 181, l. 11 – 182, l. 7 [Rubio].)

Carrington began his employment with FSA as a Supplier Information Specialist in September of 2008. (Tr. at 270, ll. 6-22 [Carrington].) He was laid off as part of a reduction in force in August of 2009, and then recalled to the same position in early November of that year. (*Id*.) He also reported to Hamilton throughout his tenure with FSA. (Tr. 270, l. 25 – 271, l. 2 [Carrington].)

C. Rubio's Relationship With Hamilton

Rubio and Hamilton first came to know each other, and became close friends, while Rubio was employed by Knight Brokerage, and Hamilton was employed by Knight Transportation. During this period, they hung out together, got to know each other's families,

talked about a broad range of issues, spent time in each other's homes, and celebrated holidays together, including Christmas, when they exchanged Christmas cards and presents. (Tr. 172, l. 8 – 173, l. 19 [Rubio]; Tr. 174, l. 25 – 175, l. 11 [Rubio].) Indeed, they became so close that Hamilton considered Rubio to be her "best friend and we talked about religion all the time throughout our friendship for the several years we were close friends." (Tr. 485, ll. 11-14 [Hamilton].) Rubio even served as a bridesmaid at Hamilton's wedding in October of 2010. (Tr. 183, l. 15 – 184, l. 11 [Rubio].) By late 2010, however, their friendship had soured. (Tr. 486, ll. 10-13 [Hamilton].)

In January of 2011, Rubio lodged an oral complaint with Steve Manuszak, FSA's Senior Vice President for Associate Services ("Manuszak"), alleging that she had been subjected to religious discrimination (Rubio claims to be agnostic, and Hamilton is Christian)[3] by Hamilton and asserting that Hamilton had been less than honest in her dealings with employees and her superiors. (Tr. 122, l. 10 – 123, l. 10 [Rubio].)[4] The allegation of religious discrimination arose out of an exchange of emails between Rubio and Hamilton that had occurred November 6-8, 2010. (GCX21; Tr. 118, l.22 – 119, l.23 [Rubio]; Tr. 159, ll. 12 – 160, l. 9 [Rubio].).

Rubio interpreted the emails from Hamilton in this exchange as "encouraging me to be religious and that my life would change in that, you know, I would be more promotable at work if I became religious." (Tr. 119, ll. 9-11; Tr. 120, ll. 10-11.) In fact, Hamilton repeatedly

[3] (Tr. 118, l. 22 – 119, l. 11 [Rubio].)

[4] At the hearing, Rubio claimed that she had reported to Manuszak that she been subjected to discrimination on the basis of her national origin, in addition to alleged religious discrimination. (Tr. 116, l. 10 – 118, l. 21 [Rubio]; Tr. 120, ll. 16-24.) Manuszak recalls her having only made allegations of religious discrimination when she lodged her complaint with him. (Tr. 47, ll. 7-18 [Manuszak]; Tr. at 48, ll. 8-12 [Manuszak]; Tr. 72, ll.17-23 [Manuszak]; Tr. 499, ll. 14-20 [Manuszak].) Carrington also understood Rubio's discrimination complaint as having had to do with religious discrimination. (Tr. 278, l. 20 – 279, l. 5 [Carrington].)

emphasized in this exchange that she was concerned about Rubio as a friend and was offering, not imposing, religion as a possible solution for Rubio's personal problems.[5]

Nevertheless Manuszak counseled Hamilton that, her long-term friendship with Rubio notwithstanding, communications about such subjects with subordinate employees was not appropriate. (Tr. 72, ll. 4-16 [Manuszak].) Manuszak's counseling was reinforced by Jeff Chester, Hamilton's immediate supervisor, in a separate conversation. (Tr. 428, ll. 2-17 [Bixby].) This seemed to have resolved the issue. (Tr. 428, ll.18-23 [Bixby].)

D. <u>Rubio's Harassment of Coworker Michelle Aparicio</u>

Rubio recommended that Hamilton hire for a part-time position in her department Michelle Aparicio ("Aparicio), with whom Rubio had become friends when Aparicio worked for another subsidiary of FSA's corporate parent. (Tr. 114, l. 24 – 115, l.4 [Rubio].) Although Rubio and Aparicio were friends when the latter began working for FSA in October of 2010, that changed shortly after Aparicio started working for FSA because of Rubio's repeatedly telling Aparicio that she (Aparicio) was on the verge of getting fired, and because Aparicio discovered that Rubio had lied to a mutual friend about her. (Tr. 257, l. 4 – 258, l. 5 [Aparicio].)

Rubio started telling Aparicio that she was about to be fired in December of 2010 (two months after Aparicio started her job with FSA), and continued to do so every other day, until Rubio was terminated in early March of 2011. (Tr. 258, l. 6 – 259, l. 4 [Aparicio].) It was a lie. In fact, Hamilton was quite pleased with Aparicio's job performance, had no thought of

[5] (GCX21 at 1.) Notably, Rubio effectively acknowledged in the exchange itself that she was "distressed because of my personal life, and problems with my family I can't control or help with." (*Id*.)

terminating her, and even changed her status from part-time to full-time at the beginning of January of 2011. (Tr. 229, ll. 2-6; 230, l. 9 – 231, l. 16 [Hamilton].)[6]

The malicious nature of Rubio's fabrications is made all the more egregious by the fact that she knew Aparicio is the single parent of three minor children and the sole source of financial support for her family. (Tr. 126, ll. 3-4 [Rubio]; Tr. 187, ll. 22-24 [Rubio].) As a result of being constantly told by Rubio that she was going to be losing her job at any time, Aparicio was sufficiently concerned that she began actively looking for employment elsewhere to ensure that she could continue to provide for her family, and Rubio actively encouraged this by sending Aparicio links to sites with job openings so she could fill out applications on line. (Tr. 259, ll. 11- 22 [Aparicio]; Tr. 262, l. 24 – 263, l. 2 [Aparicio].)

By early March, 2011, Aparicio had become convinced that Rubio had not been truthful with her, however, and she informed Hamilton. (Tr. 261, l. 8 – 262, l. 10 [Aparicio].) By way of corroboration, Aparicio sent Hamilton an Instant Message ("IM") exchange between Rubio and herself (GCX4), which was in Spanish, and she helped Hamilton translate it into English. (Tr. 263, l. 9 – 265, l. 17 [Aparicio].)

In the IM exchange, Rubio again repeated her refrain that Hamilton wanted to fire Aparicio. (GCX4.) Rubio also said she wanted to see whether Hamilton "says something racist again," and she tried to enlist Aparicio in a scheme to ambush Hamilton by provoking her: "Let's talk in Spanish when she comes back several times and see if she can get pissed off and say something stupid." (*Id*.) Aparicio declined the invitation. (*Id*.)

[6] Both Rubio and Carrington admitted at the hearing that they actually thought Aparicio was receiving "preferential treatment" from Hamilton. (Tr. 158, ll. 14-15 [Rubio]; Tr. 338, l. 12 – 339, l. 2 [Carrington].)

E. The Termination of Rubio's Employment

When Manuszak and Scott Bixby ("Bixby"), FSA's Senior Vice President and Chief Merchandising Officer, learned of Rubio's campaign of harassment and lies against Aparicio, they decided it was necessary to terminate her employment with FSA on Friday, March 4, 2011. (Tr. 45, ll. 6-8 [Manuszak]; Tr. 89, l. 19-21 [Manuszak]; Tr. 429, l. 7 – 432, l. 19 [Bixby].) The decision was based primarily on Rubio's maliciously false representations to, her harassment and manipulation of, and her attempt to bring about the departure of, Aparicio. (Tr. 71, ll. 3-20 [Manuszak]; Tr. 431, ll. 16-24 [Bixby]; Tr. 498, ll. 12-24 [Manuszak].)[7] Manuszak also weighed in the factor of Rubio's vindictiveness toward Hamilton and her attempt to undermine Hamilton's authority as a supervisor. (Tr. 498, l. 25 – 499, l.6 [Manuszak]).[8]

F. Carrington's and Rubio's Theft of Confidential Trade Secret and Proprietary Information and the Termination of Carrington's Employment

Acting at Rubio's behest, Carrington went to FSA's offices early in the morning of Saturday March 5, 2011, the day immediately following her termination, picked up his FSA-issued computer, and proceeded to transmit, over that day and the next, more than three hundred email strings (in excess of 2,100 pages in hard copy), most of which contained highly confidential trade secret or proprietary information belonging to FSA, its vendors, and its customers. (*See* RX7; JX1-9; Tr. 163, l. 20 – 164, l. 8 [Rubio]; Tr. 191, l. 4 – 192, l.10 [Rubio]; Tr. 278, ll. 110-19 [Carrington]; Tr. 295, l. 6 – 296, l. 18 [Carrington]; Tr. 298, l. 2 – 308, l. 23

[7] For Bixby, an additional consideration was a violent episode a few weeks earlier when Rubio had lost control of her temper in the workplace and had slammed a chair and thrown a keyboard. (Tr. 431, l. 25 – 432, l. 9 [Bixby].)

[8] Both Manuszak and Bixby testified unequivocally that Rubio's discrimination complaint had played no role in their decision to terminate her. (Tr. 432, ll. 16-19 [Bixby]; Tr. 499, ll. 7-13 [Manuszak].)

[Carrington].)[9] Carrington had no legitimate, work-related, reason to be in FSA's offices over that weekend, or to access FSA's computer system, and he was not in any sense authorized to disclose such information to anyone outside the Company, including most particularly a recently terminated former employee. (Tr. 323, l. 13 – 324, l. 19 [Carrington].)

The email strings Carrington transmitted contained confidential and commercially sensitive information including the names of FSA's vendors, names of FSA's customers, manufacturer codes, brand names, pricing information, and terms of sale. (Tr. 103, l. 14 – 104, l. 7 [Rubio]; Tr. 281, ll. 8-24 [Carrington].) He opened each of the emails before transmitting them, so he knew full well the nature of the information he was sending to Rubio and himself. (Tr. 299, l. 16 – 301, l. 5 [Carrington].) The value of the materials taken by Rubio and Carrington on March 5 and 6, 2011, is estimated to be well in excess of $25,000. (Tr. 484, ll. 10-25 [Hamilton]; Tr. 489, l. 10 – 492, l. 14 [Hamilton].)[10]

There is also evidence that Carrington took another large amount of confidential trade secret and proprietary information in early February of 2011 ("the February Dump"), which was not discovered until after his termination. (RX6; RX7; Tr. 367, l. 20 – 370, l. 10 [Babbitt]; Tr. 379, l. 15 – 382, l. 21 [Babbitt].] The ALJ cut off a witness who was testifying about the contents of the materials taken in February, however, and stated on the record: "I'm not interested in the February ones . . . ." (Tr. 383, ll. 4-8.)

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[9] Carrington's transmission of these email strings on March 5 and 6, 2011, was frequently referred to at the hearing, and will be similarly referenced hereinafter, as "the March Dump."

[10] Neither the AGC nor Carrington adduced any evidence challenging this estimate. The significance of the $25,000 figure lies in the fact that theft of property or services with a value of $25,000 or more is a class 2 felony in Arizona, punishable by up to 10 years in prison for a first offense under Arizona law. A.R.S. §§ 13-1802, 13-702(D). Similarly, violations of the federal Computer Fraud and Abuse Act where the value of the information affected exceeds $5,000 are punishable by fines and imprisonment for up to five years. 18 U.S.C. § 1030(a)(2) and (c)(2)(B).

There is also evidence that Rubio stole similar information from her prior employer Knight Brokerage. (RX3; Tr. 209, l. 12 – 213, l. 23 [Rubio].) The ALJ refused to receive evidence of this, however, on the ground that it was not relevant. (Tr. 214, l. 6 – 216, l. 4.)

G. Refusal by Carrington and Rubio to Return Stolen Information

On March 8, 2011, Steven J. Twist, FSA's General Counsel, sent letters to both Rubio and Carrington informing them that FSA was aware that they had "wrongfully, illegally, and without authority" acquired confidential and proprietary information belonging to Respondent, and demanding its return. (RX2; RX4.) Rubio never responded to the letter and returned none of the stolen information in her possession. (Tr. 198, l. 23 – 200, l. 20 [Rubio].) Carrington responded with an email to Mr. Twist on March 14, 2011 (RX5), in which he asserted that he had no such information. At the hearing, however, Carrington admitted that this assertion had been false. (Tr. 315, l. 3 – 316, l. 16 [Carrington].)

IV. ARGUMENT

Respondent agrees, for the most part, with the AGC's statement that "[t]his case, at its core, deals with a very simple proposition" (AGCBr. at 1), but Respondent and the AGC differ fundamentally on what that simple proposition is. From FSA's perspective, the overarching question presented in this case is whether the Act can be construed to provide a license to employees to conspire to steal, and to steal, massive amounts of their employer's confidential trade secret and proprietary information in open defiance of several applicable federal and State criminal laws. There is nothing in the long history of the Act's construction by the Board and the courts to support such a radical extension of the protections accorded employees under it, and considerable precedent pointing to precisely the opposite conclusion. Moreover, it is simply absurd to suggest, as the AGC effectively contends, that employers cannot lawfully terminate

employees for engaging in conduct that could land those employees in a federal or State penitentiary for extended stays.

With respect to FSA's rules that the AGC would have the Board find to be unlawfully broad and discriminatory, his arguments suffer from three fatal flaws. First, two of the four rules challenged by the AGC (rules supposedly prohibiting employees from disclosing cell phone numbers or talking with each other) simply do not exist, other than as figments of the AGC's imagination, and the undisputed evidence record clearly establishes that another of the four rules (regarding restrictions on giving references) applies only to Management personnel. Second, regarding Respondent's confidentiality rules, only by ignoring their wording and surrounding context can one wring from them a meaning that would unlawfully threaten FSA employees who exercise their acknowledged right to discuss their terms and conditions of employment. Third, the fourth of the four rules – FSA's no solicitation rule, the only one that actually exists and is applicable to "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. § 152(3) – reserves to Respondent's employees the right to engage in solicitation when both the soliciting and the solicited employees are on breaks (expressly excepted by the rule from "working hours") and in non-work areas, precisely as established precedent requires.

The AGC's contentions that the ALJ should have found, that FSA engaged in unlawful interrogation, threatening of employees, and creating the impression of unlawful surveillance find no credible support in the evidence. All of this supposedly occurred during a single 15-minute meeting between Bixby and Carrington on March 4, 2011. There is no evidence whatsoever of any interrogation having occurred in that meeting, and the only evidence of either unlawful threats or anything that could be said to have approached the creation of an impression of unlawful surveillance is the uncorroborated and implausible description of what transpired at

the meeting by Carrington, whose testimony the ALJ found to be "somewhat evasive . . . in other areas." (J.D. at p. 12, ll. 43-44.) Even if Carrington's version of what happened in the meeting is credited, however, comments attributed by him to Bixby contain no hint of a threat or any surveillance related to protected concerted activity.

A. The ALJ's Findings With Respect To The Credibility Of Carrington And Rubio And Other Evidence Of Their Lack Of Credibility

The ALJ found Rubio to be "the least credible" among the key witnesses who testified at the hearing, and he noted in particular that her "testimony was often evasive on cross examination." (*Id.* at p. 14, ll. 16-17.) Carrington, he found, was "at times, evasive in [his] testimony, but, at times . . . also fairly credible." (*Id.* at p. 14, ll. 18-19.)

Beyond the ALJ's express findings, however, there is considerable evidence in the record of prevarication in the testimony of both Rubio and Carrington. Perhaps most glaringly, there is the problem with their testimony about what happened on the morning of Saturday, March 5, 2011, the day following Rubio's termination. Both acknowledged that Rubio had accompanied Carrington when he went to the building where FSA's offices are located, but both vehemently denied that she had entered the building with him. (Tr. 193, l. 1 – 194, l. 18 [Rubio]; Tr. 294, ll. 12-25 [Carrington].) Unfortunately for the two of them, Marcus Smith, a Computer Operator employed by Respondent, was in the building that day and personally witnessed Rubio entering the building in the company of Carrington. (Tr. 396, l. 12 – 397, l. 9 [Smith].)

In addition, there is the problem of Carrington's having been forced to admit that his email to FSA's General Counsel on March 18, 2011 (RX5), denying that he had any of FSA's materials in his possession was a bald-faced lie. (Tr. 315, l. 3 – 316, l. 16 [Carrington].) Where Rubio is concerned, the evidence in the record of her campaign of incessant lies to Aparicio about Hamilton's wanting to get Aparicio fired is overwhelming. (GCX4; Tr. 257, l. 4 – 259, l.4

[Aparicio].)[11] Significantly, no testimony or other evidence was introduced at the hearing controverting this.

Rubio's credibility is further undercut by internal inconsistencies. In one instance, she testified that Hamilton had reprimanded an employee for speaking Spanish in the workplace in ***July or August of 2009***. (Tr. 120, ll. 16-24 [Rubio]; Tr. 124, l. 22 – 125, l. 5 [Rubio].) She also testified that Aparicio had been present when Hamilton allegedly had expressed disapproval of an employee's speaking Spanish in the workplace. (Tr. 126, ll. 6-12.) The record is clear, however, that Rubio left FSA around August of 2008, did not return to FSA until ***June of 2010***, and Aparicio did not begin her employment with FSA until ***October of 2010***. (Tr. 108, l. 25 – 109, l. 14; Tr. 111, ll. 1-8 [Rubio].) Moreover, at another point, Rubio testified that she herself had had not seen, but only ***heard about***, the alleged incident from another employee. (Tr. 120, ll. 19-22 [Rubio].) Thus, neither Rubio nor Aparicio could have been present for the 2009 incident Rubio alleges inspired the ambush she wanted to lay for Hamilton,

Yet another instance clearly showing Rubio's and Carrington's credibility deficits is to be found in their testimony about the pricing information that was included in the massive amount of materials in the email strings Carrington admittedly transmitted to Rubio and himself on March 5 and 6, 2012. Rubio denied that she had had any access to pricing information in her job with FSA. (Tr. 113, ll. 9-13 [Rubio]). Carrington claimed that whatever pricing information to which he had access in his job was sent to a separate email address, and not to his own work email address. (Tr. 272, l.24 – 273, l. 10 [Carrington].) When the email strings transmitted on March 5 and 6, 2011, are examined, however, one finds considerable pricing information to which both of them had access and that had been received by them at their work email addresses.

[11] With respect to Aparicio's credibility, the ALJ found: "As regards credibility, . . . I found Aparicio clearly the most credible. Although she was still employed by the Respondent and had been harassed at work by Rubio, it appeared to me that she was attempting to testify in an open and truthful manner." (JD 14, ll. 12-15.)

(JX1 at p. FSA0035; JX3 at p. FSA0371; JX4 at pp. FSA0514-FSA0515 and FSA0573-0576; JX9 (Attachments) at pp. FSA4215-FSA4216, FSA4341 – FSA4343, FSA4353 – FSA4354, and FSA 4412 – FSA4419).

B. The FSA Rules Attacked By The AGC Are Either Nonexistent, Applicable Only To Management Employees, Or Fully Consistent With Board And Court Precedent.

1. FSA has no rule prohibiting its employees from disclosing cell phone numbers or talking to each other.

The AGC's sole basis for alleging that FSA has a rule prohibiting disclosure of employee cell phone numbers is Bixby's Affidavit submitted in support of Respondent's Motion to Exempt From Disclosure or for Protective Order. (*See* AGCBr. at 7-8.) The overwhelming majority of Bixby's Affidavit is taken up with an explanation as to why information such as customer and supplier identities, costing and pricing, and product specifications is valuable in the market in which FSA competes, and nothing is said in that vein about employee cell phone numbers. (SX at Ex. A)

Moreover, during arguments on Respondent's Motion during the first day of the hearing, Respondent's counsel made it quite clear that Respondent was not claiming that employee cell phone numbers were in the same category as the commercially valuable information that was the primary focus of FSA's Motion and the Bixby Affidavit.

> Now, one category I mentioned that is an exception and is addressed strictly to your discretion, is the cell phone numbers, of FSA employees. In every case, where there was an office number and a cell phone number for an individual employees, we're not proposing to redact the office number, we're only proposing to, ***as a matter of privacy***, to redact the cell phone numbers.

(Tr. 24, l. 24 – 25, l. 5 (emphasis added).)

Neither Respondent's Motion nor the Bixby Affidavit say anything whatever about a rule prohibiting FSA employees from disclosing the cell phone numbers of other employees. Indeed, both of those documents are addressed to the competitive harm that could come from disclosure of the information Respondent sought to protect to ***competitors***. Although employee cell phone numbers may have less commercial value than information such as product acquisition cost and pricing, it cannot legitimately be argued that employers do not have a significant business interest in preventing the phone numbers of their employees from ending up in the hands of their competitors, making it easy for such competitors to engage in employee raiding. That said, the main point here is that FSA has never had any rule prohibiting employees from disclosing employee phone numbers, and there is no evidence in the record in this case that would support a contrary conclusion.

2. The AGC's contention that FSA promulgated a rule prohibiting employees from talking to each other is premised entirely on uncorroborated Carrington testimony that is inherently incredible.

The AGC's contention that FSA had a rule prohibiting employees from talking with each other (AGCBr. at 15-16) is similarly imaginary. This contention is based solely on Carrington's uncorroborated testimony that, in their meeting on March 4, 2011, in the wake of Rubio's termination, Bixby told him that "he had a future with [FSA] if he ceased talking to Rubio . . . ." (*Id*. at 16.) Relative credibility assessments aside,[12] Carrington's testimony on this point is

[12] The ALJ stated that the differing accounts of Carrington and Bixby as to what was said in their March 4, 2011, meeting presented "a difficult credibility determination because neither Carrington nor Bixby clearly lacked credibility." (J.D. at p. 12, ll. 43-44.) Although he noted that he had found "Carrington to be somewhat evasive in his testimony in other areas," the ALJ nevertheless resolved this dilemma by finding Bixby's testimony regarding the conversation "unconvincing," because it "sounded more like something that was prepared for trial rather than a spontaneous discussion with Carrington about his relationship with Rubio." (*Id*. at p. 12, ll. 44-46.) This resolution, however, overlooks the fact that not only was Carrington's testimony "somewhat evasive in other areas," but there was substantial evidence that some of that testimony was clearly outright false (*e.g*., Carrington's testimony about not having access to pricing information and having had nothing to do with vendors) (*See* Tr. 272, l. 21 – 273, l. 3 [Carrington]; Tr. 291, ll. 14-17 [Carrington]; Tr. 303, ll. 14-25 [Carrington].), and it was firmly established that he had lied in testifying that Rubio had not entered the building with him on March 5, 2011, and in telling FSA's

inherently implausible. Rubio had been fired, and both Carrington and Bixby knew she would no longer be in the workplace and available to be associated with by Carrington or any other FSA employees. To believe Carrington's testimony that Bixby told him his future was somehow tied to his no longer speaking to Rubio, therefore, one must leap to the conclusion that Bixby was presuming to dictate that Carrington was not to associate with Rubio *outside the workplace*.

It would take a supervisor spectacularly lacking in intelligence and common sense even to entertain the notion that issuing such a directive to an employee would accomplish anything other than to *increase* whatever desire there had theretofore been for such association to occur, especially in light of the fact that Management would never have any way of knowing whether the employee receiving the directive ever complied with it. There is absolutely nothing in the record in this case to suggest that Bixby would have been so lacking in insight that he would have been capable of making such an idiotic statement, which makes Carrington's testimony that he did so inherently incredible. Especially when considered with the several other instances when Carrington demonstrated a propensity for prevarication, acceptance of such implausible testimony from him without anything to provide independent corroboration simply cannot be justified on any rational basis. There is, therefore, no credible evidence in the record that FSA has ever promulgated a rule prohibiting its employees from talking to each other, or to former employees.

3. FSA does have a rule placing restrictions on providing references for former employees, but it is a rule that is published only to Management personnel and applicable exclusively to them.

The AGC contends that "Respondent has a policy forbidding employees from giving references regarding their coworkers." (AGCBr. at 17 (citation omitted).) Based on this, the

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General Counsel that he had no confidential and proprietary information belonging to the Company. (*See* Tr. 294, ll. 12-25 [Carrington]; Tr. 396, l. 12 – 397, l. 9 [Smith]; Tr. 315, l. 3 – 316, l. 16 [Carrington].)

AGC argues that the ALJ erred in finding that: (1) only supervisors were prohibited from giving references under FSA's rule; (2) there was no testimony that any employees were aware of such a restriction applying to non-Management personnel; and (3) none of the employees who had agreed to provide references for Rubio in response to her post-termination email were not disciplined for doing so. (J.D. at p. 13, l. 33 – p. 14, l. 3)

Manuszak provided uncontroverted testimony that it is only FSA's *Management* employees who are instructed to refer all requests for references to Associate Services (HR), and that this rule is in place because of concerns about potential exposure to libel and slander claims. (Tr. 75, l. 15 – 76, l.13 [Manuszak]; Tr. 506, l. 21 – 507, l. 8 [Manuszak].) The AGC ignores this testimony. He tries to portray Manuszak's decision on the morning of March 7, 2011, to block incoming emails from Rubio's personal email address in such a way as to suggest that the rule on references was applied more broadly. (*See* AGCBr. at 17-18.) That decision, however, was made after the discovery of the massive amount of trade secret and proprietary information that Carrington had transmitted to Rubio and himself over the prior two days, and after Rubio's email to various employees of FSA and a sister company stating that she had been "laid off" was brought to Manuszak's attention.

4. FSA's rule on solicitation properly reserves the right for its employees to engage in solicitation activities in accordance with Board precedent.

Any analysis of FSA's rule on solicitation must begin with recognition of the fact, as the ALJ found (J.D. at p. 5, ll. 19-20), that it permits employees to engage in soliciting when both the soliciting employee and the employee being solicited are not on working time.[13] This is fully consistent with established Board precedent, as the AGC's Brief implicitly concedes.

[13] FSA's rule does use the phrase "working hours," which some Board decisions have interpreted to be impermissibly overbroad because it might be construed by some employees to embrace break times. FSA's rule

The AGC nevertheless claims that the ALJ's finding that the rule is lawful was erroneous "because the rule clearly prohibits solicitation in nonworking areas." (AGCBr. at 4.) This interpretation, however, construes the language of the rule to say something it does not say. The rule provides, in relevant part:

> Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited ***and in non-work areas***. (Working hours do not include meal breaks or designated break periods.)

GCX2 at 24 (emphasis added).

The construction the AGC places on this language effectively changes it to read: "Solicitation discussions . . . are limited to the non-working hours of the solicitor as well as the person being solicited and ***to*** non-work areas."[14] If the rule were written this way, the AGC might have a point. As it is actually worded, however, the rule lays out the two circumstances in which solicitation by employees is permissible: (1) when both employees are not on working time (regardless of location); and (2) when the solicitation takes place in a non-work area. Only by pretending that "in" and "to" have the same meaning, can the rule be read, as the AGC interprets it, to require that solicitation take place only in non-work areas.

C. <u>The Record Does Not Support The AGC's Allegations Of Interrogation, Creation Of The Impression Of Surveillance, Or Threats By FSA.</u>

The AGC's contentions with respect to interrogation and creation of the impression of surveillance are based entirely on Carrington's description of his conversation with Bixby on March 4, 2012, shortly after Rubio had been terminated. (AGCBr. at 11-13.) Even if Carrington's testimony about that conversation is assumed to be true and accurate in every

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eliminates any possibility of confusion on this score, however, by adding the clarifying parenthetical stating unambiguously: "Working hours do not include meal breaks or designated break periods." (GCX2 at 24.)

[14] Another, more substantial, rework of the language of the rule to give it the meaning the AGC ascribes to it would be to have it say: "Solicitation discussions . . . are limited to the non-working hours of the solicitor as well as the person being solicited and ***when they are in*** non-work areas."

respect – and, as has been discussed above, there are very good reasons why it should not be – his testimony cannot support a finding of either interrogation or anything that could even remotely be described as creating the impression of surveillance of protected concerted activity.

The AGC would also have the Board find unlawful threats of reprisals for engaging in protected concerted activity in Carrington's description of his March 4 conversation with Bixby, and in FSA's Confidentiality Agreement and confidentiality provisions in its Employee Handbook. (*Id*. at 5-6, 13-15.) Neither can reasonably be said to support a finding of threats of reprisal by FSA against employees who engage in protected concerted activity.

1. Bixby said nothing in his March 4 meeting with Carrington that can fairly be interpreted as either unlawful interrogation or a suggestion of surveillance of protected concerted activity.

Every sentence Carrington ascribes to Bixby in the March 4 meeting is a declarative statement, not a question, with the single exception that, in response to a leading question from the AGC, Carrington claims that Bixby asked him if he knew why they were meeting. (Tr. 277, l. 1 – 278, l. 3.) The AGC's argument that the ALJ erred in not finding unlawful interrogation in what was said in that meeting is grounded in a remarkable, not to mention radical, premise: "The ALJ failed to take into account, or improperly disregarded, that Bixby's statement to Carrington that his name had come up in connection with Rubio's 'disruptions' would reasonably tend to elicit, and call for a response from the employee regarding his concerted activity . . . ." (AGCBr. at 11-12.) In other words, declarative sentences are transformed into "interrogation" if they "tend to elicit, and call for a response" about an employee's protected concerted activity.

In common usage, the verb "interrogate" is defined to mean:

> 1. to ask ***questions*** of (a person), sometimes to seek answers or information that the person ***questioned*** considers personal or secret.

2. to examine by ***questions***; ***question*** formally.
3. to ask ***questions***, esp. formally or officially . . . .

THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 998 (2nd ed. 1987) (emphasis added).

In the world in which most of us live and conduct our daily business, there is no such thing as "interrogation" by the utterance of declarative statements that some might say "tend to elicit, and call for a response." Apparently, the English dialect spoken in the world the AGC inhabits is less encumbered by the notion that words carry relatively fixed meanings and rarely, if ever, can be made to take on a meaning diametrically opposite the one they have theretofore borne.

For the Board to endorse the AGC's attempt so to expand the commonly understood meaning of the word "interrogation," however, would take it into vast, uncharted waters. There are very few sentences in our language, regardless of whether phrased in interrogatory form, that cannot be said to "tend to elicit, and call for a response," of one kind or another. With the dramatically expanded meaning that the AGC would assign to "interrogation," it is not very difficult to imagine the endless litigation that undoubtedly would ensue over whether this declarative sentence or that was not at all what it seemed, but interrogation cloaked in the guise of a declarative sentence.[15]

The AGC also bases his "surveillance" argument on Carrington's testimony that Bixby had told him in the March 4 meeting that "his name had come up in connection with [Rubio's] disruptions." AGCBr. at 13. Because of this, the AGC contends, "it is not only reasonable that

[15] Apart from the linguistic defect described in the text, the AGC's argument that a declarative statement can amount to "interrogation" finds no support in the cases he cites. *See Hawaii Tribune-Herald*, 356 NLRB No. 63 slip op. at *16, *21-*27 (2011), *enforced* 2012 WL 1372162 (D.C. Cir. Apr. 20, 2012) (interrogation found where employer had ***questioned*** employees extensively about protected concerted activities); *Aladdin Gaming, LLC*, 345 NLRB 585, 595, 608 (2005) (***questions*** "were specific and intended to elicit a response . . . likely to disclose [employee's] or others' union activities").

Carrington would conclude that his contacts with Rubio and other employees were being monitored, such a conclusion would be the only reasonable conclusion." *Id*. Bixby testified, however – and on this point, his testimony was not contradicted by Carrington – that he had not gone into any detail about Ms. Rubio's issues in his March 4 conversation with Carrington. (Tr. 442, ll. 1-5 [Bixby].) Further, Carrington admitted that he had never filed a complaint with anyone in FSA alleging any form of discrimination, and that he had never told anyone in Management that he was supporting Rubio's allegations of discrimination. (*Id*. at 325, ll. 1-6 [Carrington].) And nowhere in his testimony does Carrington suggest that Bixby made any reference in the March 4 meeting to protected concerted activity in connection with either Rubio or Carrington.

In sum, the AGC's contention is that Bixby created the impression of surveillance simply by stating that Carrington's name had come up in connection with Rubio's disruption that was in some unspecified way related to her termination. Without Bixby's providing any further elaboration as to what Rubio's disruption had been, in what way Carrington's name had come up in connection with it, or how any of that related to her termination, on what reasonable basis could Carrington have drawn the inference that any protected concerted activity in which he had been engaged was being, or had been, subjected to surveillance by Company Management?

As is discussed in greater detail *infra*, the circumstances that led to Rubio's termination had nothing whatsoever to do with any protected concerted activity, and were wholly unconnected to any activity in which Carrington had been involved. Bixby testified that his mention of Carrington's name having come up in connection with Rubio's disruption stemmed from the fact that Carrington's name had appeared in the instant message conversation between Rubio and Aparicio that figured in the decision to terminate Rubio. (*Id*. at 442, ll. 19-21

[Bixby].) Examination of that instant message (GCX4), however, reveals that Carrington's name is referenced only twice. In the first instance, Rubio urged Aparicio, "If you don't understand something, just play dumb and ask me or paul [sic] through I[nstant]M[essage]." (*Id*. at p. 2.) In the second reference to Carrington, Rubio states: "She's [Hamilton] also started to fight with paul [sic] over stupid stuff." (*Id*.) Neither of these references can be read to suggest, even faintly, that Carrington had been engaged in any protected concerted activity, whether with Rubio or otherwise.

While the content, or even the existence, of this instant message exchange were not shared by Bixby in the March 4 meeting with Carrington, it shows that the basis for Bixby's mention of Carrington's name having come up could not, in fact, have been awareness of any involvement in protected concerted activity. Carrington knew that Rubio had been fired, and Bixby's comments in the March 4 meeting suggested that her termination had had something to do with an unspecified disruption, in connection with which Carrington's name had come up in some unspecified way. The association of Rubio's termination with "disruption" suggests only that the disruption had something to do with misconduct on Rubio's part, and mention of the fact that Carrington's name had come up in connection with the disruption suggests an association, in Bixby's mind at least, between Carrington and the misconduct that had cost Rubio her job. This is a far cry from anything that would support a reasonable conclusion that protected activities were being monitored.

2. No threats of unlawful reprisals can be found in either Bixby's comments in the March 4 meeting with Carrington, or in FSA's Confidentiality Agreement and related policies.

a. The testimony of neither Carrington nor Bixby supports the AGC's contention that Bixby made threats of reprisals in the March 4 meeting.

The AGC's contention that Bixby made threats of reprisal for engaging in protected activity in the March 4 meeting is also tied to his comment about Rubio's disruption.

> Bixby also offered Carrington an ominous warning, i.e., that on Monday, March 7, Carrington had to decide whether he wanted to perpetuate the disruption or come in with a clean slate and focus on his work.

AGCBr. at 14.

The most obvious problem with the AGC's "ominous warning" characterization is that it is not consistent with the testimony of *either* Carrington or Bixby about the "clean slate" remark. Carrington's testimony was that Bixby told him Rubio would no longer be working with the Company, that Carrington's name had come up as being connected with hers, that he "could really have a future with the company" if he stopped talking to Rubio, that Bixby himself had once had problems with his manager and had work to overcome them, and that Carrington "could come in with a clean slate on Monday." (Tr. 277, ll. 1-12 [Carrington].) On cross-examination, Carrington acknowledged that he saw nothing wrong with Bixby's having informed him and others in the department that Rubio had been terminated, and that he had understood Bixby to have been imparting the message that he valued Carrington as an employee and thought he was a good employee. (Tr. 325, l. 17 – 326, l. 10 [Carrington].)

For his part, Bixby denied that he had "warned Mr. Carrington . . . that it was up to him to decide whether he could be associated with a disruptive Ms. Rubio." (Tr. 91, ll. 4-8 [Bixby].] Moreover, he testified with respect to the "clean slate" comment in particular:

> My advice to you is Monday, as far as I'm concerned, this is behind us. We'll start with a fresh, clean slate. And there are no implications around Rubio's termination.

(Tr. 442, ll. 10-13.)

This testimony is not inconsistent with Carrington's testimony, nor was it controverted by either Carrington or the AGC. The testimony of Carrington and Bixby on this subject cannot be transmuted into the "ominous warning" that the AGC would make of it.

b. FSA's Confidentiality Agreement and the confidentiality provisions in its employee Handbook are lawful and contain no threats of unlawful reprisals.

The AGC also argues that FSA's Confidentiality Agreement and the confidentiality provisions in its employee Handbook contain threats of reprisals against employees who engage in the protected concerted activity of discussing their terms and conditions of employment. (AGCBr. at 5-7.) In making this argument, he starts with the observation that the ALJ found that the Confidentiality Agreement and confidentiality provisions of the Handbook violate the Act. (Id. at 5 (citing J.D. at p. 4, ll. 30-51).) In this regard, Respondent respectfully suggests the ALJ got it wrong because his analysis fails to account adequately for highly significant contextual factors.

Neither the Confidentiality Agreement nor the confidentiality provisions in the Handbook explicitly restricts employees' exercise of Section 7 rights. Accordingly, they must be given a "reasonable reading," and particular portions of the rules must not be read in isolation or presumed to interfere improperly with the exercise of Section 7 rights. *Guarsdmark, LLC*, 344 NLRB 809; *LaFayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf.* 203 F. 3d 52 (D.C. Cir. 1999). In *LaFayette Park*, the Board found that a rule prohibiting employees from divulging hotel-private information to employees or other individuals or entities not authorized to receive the information could not reasonably be read to prohibit discussions of wages and working conditions.

In Respondent's Confidentiality Agreement (GCX14), Associates undertake, as a condition of being granted access to FSA's confidential information, to maintain the confidentiality of such information, both during and after their employment with FSA. Included in the agreement's definition of "confidential information" is information "related to the Company or any affiliate," with the following given examples:

> . . . financial matters, business plans, strategies, customer, marketing, product or service promotions, purchasing, vendors, discounts, rebates, earned marketing income ("EMI", EMI tracking methods, payroll or employee information (other than payroll or employee information about Associate), business techniques, business tools (including without limitation, Company's B/I, EIC payroll and Infinium systems), analysis, contractual terms, costs, margins, ownership structure, financings or other information.

(*Id*.)

Of the 19 or so specific examples provided in the definition, only one, "payroll or employee information (other than payroll or employee information about Associate)," has any arguable relationship to the terms and conditions of employment affecting FSA's Associates. The ALJ found, however, that this single reference ran afoul of the Act because "discussions of terms and conditions of employment requires the participation of two or more employees. If one of those employees refuses to permit the other employees to discuss his terms and conditions of employment pursuant to the Respondent's rule, the discussion would be unduly restricted, or foreclose entirely, thereby limiting the employees' protected concerted activities." (J.D. at p. 4, ll. 27-30.)

But this is a rule that leaves to the *employees* the discretion to determine the extent to which, if any, they may choose to discuss their own terms and conditions of employment with other employees, or with individuals who are not employed by FSA. In

this sense, the rule does no more than state the obvious – employees can choose to talk about their own terms and conditions, or not, as they see fit.

The ALJ conclusion that the provisions in the Handbook relating to protection of proprietary information, compensation, and confidentiality also impermissibly restrict employees' Section 7 rights is equally flawed for much the same reason. For one thing, a conclusion cannot be squared with the actual language of those provisions. To begin, he selectively quotes from one of FSA's Guiding Principles. In its entirety that provision states:

> We tear down communication barriers and share information within our organization. Outside of our company, we remain quiet and safeguard our proprietary knowledge.

(GCX2 (Handbook pg. 4).)

The first sentence cannot be read to do anything other than to sanction the sharing of information among employees. Only a fanciful reading of the phrase sentence "proprietary knowledge" can give rise to any presumption that it refers to terms and conditions of employment.

The Handbook section on compensation "***encourages***" employees to discuss questions or concerns about compensation with Management, but by its terms does not prohibit them from communicating about such matters with others. (GCX2 (Handbook pg. 10) (emphasis added).) Only by doing violence to the English language can one distort a statement encouraging one to do one thing into a prohibition against doing something else.

The exemption of information about terms and conditions of employment from the very definition of "Confidential Information" in the Confidentiality Agreement also precludes a reading of FSA's confidentiality policy in the Handbook as restricting in any way Respondent's employees from communicating with the NLRB, or even union organizers, about the terms and

conditions of their employment. The Handbook's confidentiality provision, while worded broadly, is prefaced by the observation that some of FSA's competitors "are free with disclosing their ***proprietary information***." GCX2 (Handbook pg. 18) (emphasis added). The context gives no indication whatsoever that this provision was intended to restrict discussions of terms and conditions of employment.

The only evidence adduced at the hearing on the question of how these provisions might reasonably be interpreted was the testimony of Manuszak, who sees in them nothing pertaining to terms and conditions of employment. Moreover, he testified that he, as the Senior Vice President of Associate Services is aware of employees who do discuss terms and conditions of employment among themselves, probably the best indicator of how the rules might be reasonably perceived. (Tr. 501, l.22 – 502, l. 4; Tr. 503, l. 24 – 506, l. 10 [Manuszak].)

Thus, when read in context, the provisions of the Confidentiality Agreement and the confidentiality provisions in the Handbook restrict FSA employees only with respect to disclosures of proprietary information to those who might use it to the Company's competitive disadvantage. Conversely, they do nothing to limit the ability of employees to discuss their terms and conditions of employment. To the extent those provisions suggest there may be adverse consequences for employees who violate them, they cannot be read to imply that any reprisals will be taken against employees who engage in activities protected by Section 7 of the Act.

D. The ALJ Was Correct In Concluding That The AGC Failed To Establish A Prima Facie Case Of Unlawful Conduct In Connection With The Terminations Of Rubio And Carrington.

As the ALJ held (J.D. at p. 14, ll. 18-21), under the Board's decision in *Wright Line, Wright Line Div.*, 251 NLRB 1083, 1089 (1980), *enf.* 662 F.2d 899 (1st Cir. 1981, *cert. den.* 455

U.S. 989 (1982), the AGC was required to make a prima facie showing of sufficient evidence to support an inference that protected conduct was a "motivating factor" in Rubio's and Carrington's terminations. The AGC and Carrington in his Brief have sought to suggest that Rubio's termination was an act of retaliation for her having lodged a complaint of discrimination with Manuszak in mid-January of 2011. As the ALJ held, however, there was "no credible evidence that Respondent harbored animus toward Rubio as a result of her complaint about the religious email and there is no evidence of any connection between the complaint that she made and her discharge two months later." (J.D. at 14, ll. 30-34.)

> There can, of course, be no violation of § 8(a)(1) by the employer if there is no underlying § 7 conduct by the employee. Conduct must be both concerted and protected to fall within § 7.

Yesterday's Children, Inc. v. NLRB, 115 F.3d 36, 44 (1st Cir. 1997), *accord Smithfield Packing Co. v. NLRB*, 510 F.3d 507, 516 (4th Cir. 2007).

The record in this case is devoid of any evidence indicating that either Manuszak or Bixby, who jointly decided to terminate Rubio and Carrington, had any knowledge of their involvement in protected concerted activity subject to protection under Section 7 of the Act. There was nothing whatever concerted about the complaint Rubio lodged with Manuszak in January of 2011. It was strictly about Hamilton's allegedly discriminatory treatment of Rubio and no one else. (Tr. 71, l. 21 – 73, l. 8 [Manuszak].)

Rubio's attempt to enlist Aparicio in a scheme to provoke Hamilton to "say something stupid" (GCX4 at 1.) also cannot be said to be conduct protected by the Act. While it is imbued with a "concerted" element, it is not worthy of Section 7's protection because it has nothing to do with "mutual aid and protection." This is not an instance of an employee seeking to engage a co-worker in complaining about existing terms and conditions of employment, and it is not an

instance of employees working in concert to propose new terms and conditions. Given the duplicitous scheme that was central to Rubio's campaign to convince Aparicio that she should find employment elsewhere, her motivation behind proposing that the two of them speak Spanish to see if they could get Hamilton "pissed off" was much more likely motivated by a desire to see if she could get Aparicio in trouble than it was to have been about "mutual aid and protection" sanctioned by the Act.

Beyond this, Rubio's invitation to Aparicio reflected, on its face, a scheme to see if they could incite supervisory conduct that Rubio thought would, if they were successful in provoking it, be objectionable. To extend Section 7's protection to employee attempts to *precipitate* employment conditions so they will have something to protest would be to convert the shield the Act was conceived to provide employees into a sword that could be used to stir up employment disputes where there are none. This would stand on its head the expressly declared Congressional purpose of eliminating or minimizing "[i]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce . . . ." 29 U.S.C. § 141.

In his Brief, the AGC attempts, for the first time,[16] to argue that Rubio's complaints about Hamilton in the Instant Message exchange with Aparicio that figured in the decision to terminate Rubio also constituted protected concerted activity. (AGCBr. at 20.) Apart from the fact that this argument was not raised before the ALJ, it fails because Rubio's termination was not based on her having complained about Hamilton, but her lies about Hamilton's intentions, both in the Instant Message exchange with Aparicio and in numerous prior communications, and her extensive harassment of Aparicio, almost to the point of driving her out of the Company. (Tr.

[16] *See* Acting General Counsel's Brief to the Administrative Law Judge at pp. 39-40 (filed herein on Mar. 16, 2012).

71, ll. 3-20 [Manuszak]; Tr. 84, l 12 – 85, l. 16 [Manuszak]; Tr. 431, ll. 13-24 [Bixby]; Tr. 498, l. 12 – 499, l. 13 [Manuszak].)

Nor did the AGC fare any better in his attempt to establish a *prima facie* case for a violation of the Act based on Carrington's termination. The theory seems to be that his involvement in the massive theft of valuable trade secret and proprietary information was undertaken in support of Rubio's claim of alleged "discrimination" and that somehow transforms clearly criminal conduct into conduct worthy of Section 7's protection. If that was indeed the motivation behind Carrington's March email dump,[17] the problem is that no one who participated in the decision to terminate him for it had even the slightest awareness of a connection between Carrington and Rubio's allegations of discriminatory treatment. Carrington himself testified that he never filed any sort of discrimination complaint with FSA, and that he never told anyone in Management that he was supporting Rubio's allegations of discrimination. (Tr. 324, l. 20 – 325, l. 6 [Carrington].)

Moreover, in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), the United States Supreme Court held that, when an employee "attacks" his employer, whether or not the employee is engaged in "a concerted activity wholly or partly within the scope of those mentioned in § 7," the attack deprives the employee of Section 7's protection if it constitutes "insubordination, disobedience or disloyalty," which, the Court made clear, is "adequate cause for discharge." 346 U.S. at 477-78; *see also Endicott Interconnect Technologies, Inc. v. NLRB,* 453 F.3d 532 (D.C. Cir. 2006) (applying *Jefferson Standard* to deny enforcement

[17] As the ALJ astutely pointed out, Carrington took two days to accomplish the March email dump, which was more than adequate time to sort through them and transmit only those relating to Rubio's and his issues with working conditions. (J.D. at p. 14, l. 37 – p. 15, l. 19.) That he was not selective and neither he nor the AGC have ever even attempted to explain any relationship between the commercial information he transmitted and such issues, severely undercuts the claim that the transmission had anything to do with protected activity.

of Board's finding of § 8(a)(1) and (3) violation despite employee's "disloyal" derogatory comments about employer).

E. Even If Rubio And Carrington Engaged In Some Form Of Protected Activity, Their Acts Of Disloyalty And Criminal Conduct Forfeited The Act's Protections.

Surely, there can be no more disloyal act by an employee than the commission of a crime against his employer. Regardless of their motives, and regardless of whether they were engaged in some sort of otherwise protected concerted activity, if Carrington and Rubio transgressed the bounds of the criminal law in taking FSA's confidential trade secret and proprietary information, they placed themselves beyond the bounds of any protection accorded by the Act.

"Confidential business information has long been recognized as property." *Carpenter v. U.S.*, 484 U.S. 19, 26 (1987) (citations omitted). Whatever their status under Section 7 before they decided to help themselves to FSA's confidential business information, Carrington and Rubio lost the right to claim its protections upon doing so. See Texas Instruments, Inc. v. NLRB, 637 F.2d 822 (1981) (". . . [C]oncerted activity that violates state or federal law, that irresponsibly exposes an employer's property to possible damage or that constitutes insubordination or disloyalty may be oufn to fall ourside the scope of the NLRA even if undertaken in the interst of self-organization or collective bargaining.")

Regardless of their motive, Carrington's and Rubion's taking Respondent's trade secret and proprietary information effectively put them in the same category as they would have been in had they backed a truck up to the entrance to the building where FSA's offices are located and helped themselves to several thousands of dollars of office equipment. Clearly, the question of whether they committed crimes in which Respondent was the victim is indisputably pertinent to the question of whether the *Wright Line* analysis is ever reached.

The Economic Espionage Act makes it a federal felony for one with intent to convert a trade secret to "without authorization cop[y], duplicate[], download[], upload[] . . . replicate[], transmit[], deliver[], send[], mail[], communicate[], or convey[]such information" to the benefit of anyone other than the owner of the information. 18 U.S.C. § 1832(a)(2). "Trade secret" is defined for this purpose to include "all forms and types of financial, business, scientific, technical, economic, or engineering information . . . ." 18 U.S.C. § 1839(3). The record in this case leaves no room for doubt that Rubio and Carrington have engaged in conduct violating this criminal prohibition.[18]

Similarly, it is a felony under the federal Computer Fraud & Abuse Act for one, acting intentionally without authorization, or in excess of his authorization, to obtain information from a protected computer (which includes any computer used in interstate commerce), or intentionally to access a protected computer without authorization and cause resulting damage and loss. 18 U.S.C. § 1030(a)(5)(A). Here again, on this record, it is indisputable that Carrington and Rubio have also violated this proscription, making themselves subject to its criminal penalties.

Under the Arizona Criminal Code, a person commits theft if "without lawful authority, the person knowingly . . . [c]onverts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited , authorized term or use . . . ." A.R.S. § 13-1802(A)(2). Where the property converted has a value of $1,000 or more, the theft constitutes at least a Class 6 felony. A.R.S. § 13-1802(G). The

[18] The legislative history of the Economic Espionage Act makes it indisputably clear that one of the principal Congressional aims behind the legislation was to address the problem of theft by employees of proprietary information belonging to their employers. "A great deal of the theft is committed by disgruntled individuals or employees who hope to harm their former companies or line their own pockets." H.R. Rep. 104-788, 1996 U.S.C.C.A.N. 4021, 4023 (1996).

record in this case establishes beyond a doubt that FSA's property has been converted in violation of this statute.

Computer tampering, also a Class 6 felony under the Arizona Criminal Code, is defined to include conduct in which one "who acts without authority or who exceeds authorization of use . . . [to] knowingly access[] any computer, computer system or network or any computer software, program or data that is contained in a computer, computer system or network." A.R.S. § 13-2316(A)(8). That Carrington and Rubio transgressed the prohibition in this statute is also very clear.

Arizona's version of the Uniform Trade Secrets Act ("UTSA") defines trade secrets to include information that "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." A.R.S. § 44-401(4)(a). Misappropriation of trade secrets includes "[d]isclosure or use of a trade secret of another without express or implied consent . . . [that] was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use . . . ." A.R.S. § 44-401(2)(b)(ii). It is clear that misappropriation of trade secrets as defined in the UTSA is also subject to criminal remedies, including those for theft set forth in A.R.S. § 13-1802. *See* A.R.S. § 44-407(B)(3) (criminal remedies not supplanted by USTA). There can be no legitimate debate that the materials stolen from FSA by Carrington and Rubio fit the definition of trade secrets under Arizona law.

These violations of federal and State criminal law were compounded by the failure of Carrington and Rubio to return the materials they had stolen immediately upon their receipt of the letter from FSA's General Counsel demanding that they do so. Even worse is Carrington's email response to that letter fraudulently representing that all such information had been

removed from his computer and he had retained none of it. (RX5.) The AGC has made no attempt to address the criminal nature of Carrington's and Rubio's conduct.

Finally, the AGC's claim on behalf of Rubio is beset with further problems arising from her campaign of lies to Aparicio seeking to induce her to leave FSA's employ. First, the Board has made it clear that an employee's lies and deliberate deception, even when part of the *res gestae* of protected activity, will cause him to lose the Act's protection. *See Ogihara America Corp.*, 347 NLRB 110, 112-113 (2006). Moreover, even straightforward attempts to induce a fellow employee to leave his current employment to take a job with another employer constitute acts of disloyalty that exceed the protections of the Act. *See Abell Engineering & Manufacturing, Inc.*, 338 NLRB 434, 435 (2002).

F. **Even If Carrington And Rubio Had Engaged In Protected Activity And Had Not Forfeited The Act's Protections By Engaging In Serious Criminal Misconduct, FSA Firmly Established That It Would Have Terminated Them In Any Event.**

If Carrington and Rubio had engaged in protected concerted activity, and they had not placed themselves beyond the Acts protections by their criminal conduct, Respondent has carried its rebuttal burden under *Wright Line*, showing that their employment would have been terminated as a result of Carrington's unauthorized disclosure of confidential trade secret and proprietary information, and Rubio's solicitation of such disclosures, regardless of any protected concerted activity. Manuszak gave uncontroverted testimony that, in the only other instance in which an employee transmitted FSA's proprietary information outside the Company, the employee making the unauthorized disclosures was terminated. (Tr. 500, ll. 2-22 [Manuszak].) That FSA takes such disclosures very seriously has thus been established beyond doubt, as has the fact that employees who make such disclosures can expect to be terminated. Accordingly, Carrington's termination in this case cannot be found to have violated the Act, irrespective of

whether any of his conduct would otherwise have been subject to the Act's protections and the people who made the termination decisions had known of such protected conduct. Similarly, even if Rubio's termination had violated the Act, she forfeited any right to a remedy under the Act by her post-discharge involvement in criminal conduct. *See Hawaii Tribune-Herald*, 356 NLRB No. 63, slip. op. at *2-*3 (2011).

V. CONCLUSION

For all the foregoing reasons, the AGC's Cross-Exceptions should be overruled and the portions of the ALJ's decision to which they are addressed should be confirmed and adopted by the Board.

DATED: June 19, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Response to Charging Party Paul Carrington's Exceptions to the Decision of Administrative Law Judge was served on the following parties to this matter, their counsel of record, the Regional Director of the National Labor Relations Board Region 28, and the Administrative Law Judge, on this 19th day of June, 2012, by the NLRB's e-filing system:

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