UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALBERTSON'S, LLC.

and **Case 28-CA-023387**

YVONNE MARTINEZ, an Individual

and **Case 28-CA-023538**

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1564

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge William L. Schmidt, [JD(SF)-25-12] (ALJD), issued on May 24, 2012, in the above captioned cases. In his decision, the Administrative Law Judge (ALJ) properly found that Albertson's LLC (Respondent) violated the Act by: (a) soliciting complaints and grievances from employees in order to discourage them from supporting the United Food and Commercial Workers Union, Local 1564 (Union); (b) engaging in surveillance of employee union activities; (c) implicitly threatening employees by informing them that management was attempting to

make them quit; (d) suspending Yvonne Martinez because she engaged in activities on behalf of the Union; and (e) discharging Martinez because of her union activities.[1]

The ALJ erred in dismissing the Section 8(a)(1) allegations involving Respondent: (a) orally promulgating an overly broad and discriminatory rule prohibiting employees from engaging in Union activities; (b) soliciting grievances from employees with a promise to remedy them; (c) granting benefits to employees to dissuade them from supporting the Union; (d) interrogating employees; and (e) threatening employees with unspecified reprisals. The General Counsel takes exception to the ALJ failing to fully consider the record evidence in the dismissal of the allegations as described more fully below.

II. FACTS

A. Respondent's Reaction to Employee Union Organizing Efforts

1. Respondent's Initial Response in August 2010

Respondent held a series of captive audience meeting in response to reported organizing campaign activity involving the Union at Store 917. The first series of meetings were conducted in August 2010, followed by a series of meetings held by Director of Human Resources Mark Blankenship. (Tr. 1266, 1084, 1140) At trial, Blankenship admitted that he conducted the meetings at Store 917 to highlight and encourage employees to voice their work concerns to Respondent using Albertson's 1-800 hotline number. (Tr. 1139-40, 1200-1201) General Merchandise Manager Domequita Gutierrez testified she attended a meeting where Blankenship said he "guaranteed" employees a response if they called the hotline. (Tr. 1258-1259, 1270)

[1] References to the official transcript will be designated as (Tr.), with appropriate page citations. GCX___ refers to General Counsel's Exhibit followed by exhibit number and RX___ refers to Respondent's Exhibit followed by exhibit number. All dates are in 2010 unless otherwise stated.

2. Respondent's Response to the Reemergence of the Union Campaign in April 2011

Cashiers at Store 917 have a practice of "stepping out" from the register station to the aisle in the front end of the store during intervals between customers. (Tr. 567) During these intervals, cashiers, courtesy clerks, and other employees chat amongst themselves, sometimes about the union organizing drive. (ALJD at 23:39-42) Store Director Don Merritt confirmed at trial that employees talk about a wide range of subjects while around the checkout counters and admitted he did so himself. (ALJD at 23:39-43; Tr. 325–326) Merritt testified that he had observed groups of employees talking since January 2010, when he began working at store 917. However, employees "stepping out" to talk with each other was never an issue until Merritt saw a resurgence of union activity take place in store 917, while he was monitoring employees in their activity. (Tr. 351, 973-974)

Specifically, on April 24, 2011, local management reported to higher division officials that "Tallie and Ivan Perea, Ken Chavez and Joseph Chavez and Zack. All are pushing real hard on the sackers. They keep trying to corner the sackers and Tallie was seen by (Assistant Store Director) Jeromy (Chavez) handing one of the sackers Vincent something. Today on Sunday I was told that Ken tried to get Douglass in a corner of the front end also. They are getting aggressive now." (ALJD at 25:23-30; GCX 30)

The following month, Store Director Merritt began a practice of "breaking up picnics" at the front end of the store. (Tr. 351) A "picnic," as defined by Merritt, consisted of a group of employees talking to one another at the front end. (Tr. 1478) Merritt testified that he physically "broke up" picnics whenever he saw Cashier Talie Perea speaking with other employees at the front end. (Tr. 351-353) Around this same

time, Perea had a discussion with Merritt to complain about her work schedule. Merritt concluded the meeting with Perea by telling her he was the one who had originated the "no-talking thing." (Tr. 815)

Soon after Merritt reported the emerging union activity at Store 917, Merritt proposed and planned an employee appreciation barbeque party for the employees during a store managers' meeting. (ALJD at 18: 19-20; Tr. 1229) The meeting was hosted Store 917 on May 20, 2011. (ALJD at 18; Tr. 1228-1229) Respondent encouraged employees to attend the party while they were on the clock and paid for all of the food and supplies. (ALJD at 18; Tr. 716, 741) Although other store directors had hosted similar barbeque parties, Merritt admitted that he had never previously hosted such an event at Store 917 since the time he began working there in January 2010. (Tr. 1477, 1492)

II. ARGUMENT

A. The ALJ Erred by Failing to Find that Respondent Orally Promulgated and Maintained an Overly-Broad and Discriminatory Rule Prohibiting Employees from Engaging in Union Activity in May 2011 in violation of Section 8(a)(1) of the Act [Exception No. 1]

The General Counsel respectfully submits the ALJ erred in failing to find that Respondent orally promulgated an overly-broad and discriminatory rule prohibiting employees from engaging in union activity; in doing the ALJ erroneously held that the General Counsel's brief never referenced the relevant complaint paragraph for the allegation. (ALJD at 13: 12-15) To the contrary, the General Counsel properly addressed this allegation in her brief, under heading "Promulgation of Overly Broad Rules by 'Breaking up' Employees who speak with Perea." (General Counsel Brief at

24). The ALJ erred in dismissing the allegation by failing to consider the evidence and argument supporting it.

Contrary to the ALJ's assertions, record evidence supports a finding that Respondent violated Section 8(a)(1) of the Act by orally promulgating a "no talking" rule for employees working in the front end. An employer may lawfully forbid employees' union-related conversations during work time, only if the prohibition applies to all other subjects unrelated or disconnected with their work tasks. *Orval Kent Food Co.*, 278 NLRB 402, 405, 407 (1986) citing *Olympic Medical Corp*., 236 NLRB 1117, 1122 (1978), enfd. 608 F.2d 762 (9th Cir. 1979); *Laird Printing*, 264 NLRB 369, 374, 376 (1982) (A rule that is presumptively valid may still be unlawful when promulgated or enforced in a discriminatory fashion). The timing of an employer's imposition of a work rule can render it unlawful despite the employer's asserted legitimate defense. *Invista*, 346 NLRB 1269, 1271 (2006) (finding employer's prohibition of break room use unlawful because employer created the work rule during the union campaign).

Merritt enforced the "no talking" rule against Perea, a known union activist, to stop the union discussions with coworkers, activity management watched her and others engage in during the prior weeks. (GCX 30) Merritt told Perea that he originated the no talking rule, then later enforced the rule by separating employees he saw talking to Perea. (Tr. 351-353) Moreover, at trial, Respondent did not offer any evidence in support of its bare defense that the rule was promulgated to increase productivity on the front end. Indeed, Respondent tolerated other conversations unrelated to work during work time; as noted by the ALJ, the Store Director "confirmed employees talk about a wide range of

subjects around the checkout counters and admitted he did so himself." (ALJD at 23:41-42).

The timing of this rule in relation to the date that Merritt sent his report to upper division management also supports a finding that Respondent instituted the rule to inhibit employee unionization efforts. *Invista*, supra. The "no talking" rule censored the normal employee routine of "stepping out" on the front end, after Respondent saw that this activity was becoming conducive to employee unionization. This prohibition had a dual coercive effect of intimidating Perea's coworkers from openly speaking with her at the front end of the store, while at the same time, inhibiting Perea from openly discussing the Union. Accordingly, the General Counsel respectfully submits that the ALJ erred by failing to find that Respondent violated Section 8(a)(1) of the Act by orally promulgating an overly-broad and discriminatory rule that prohibited employees from engaging in Section 7 activity during an ongoing union organizing campaign.

B. The ALJ Erred by Failing to Find that Respondent Solicited Employee Complaints and Grievances and Promised to Remedy Them During Meetings held with Employees in October 2011, in Order to Dissuade Them from Supporting the Union [Exception No. 2]

The ALJ erred in dismissing the Section 8(a)(1) allegation involving Respondent's solicitation of grievances with a promise to remedy them by its urging employees to use its 1-800 hotline during a "small group" meeting with employees, all of which occurred during a time employees were actively organizing. (ALJD at 15: 38-40) The ALJ found that Respondent's officials "had not conducted similar meetings to this before. Generally, it had been communicated to its employees by way of the handbook . . by way of the posters around the store." (ALJD at 14:35-37) The ALJ also properly found that Respondent failed to show it had a pre-existing practice of hosting employee

meetings to review its 1-800 hotline with employees. (ALJD at 14:35-37) Notwithstanding, the ALJ dismissed the allegation, and erred by concluding there was an "absence of evidence that Respondent provided some explicit promise to resolve employee issues in a manner other than had always been its practice." (ALJD at 15: 38-40)

Specifically, a management witness testified that Blankenship "guaranteed" employees an answer if they used the hotline; the testimony of Merchandising Manager Domequita Gutierrez establishes that Blankenship explicitly guaranteed that Respondent would answer their complaints if employees reported them to the hotline. (Tr. 1258-1259, 1270) The Board has long recognized that a statement made by high level management during organizational campaigns has a highly coercive effect on employees. See, *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996) ("when the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."); *Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996) (severity of misconduct is compounded by the fact most violations were committed by high ranking official "[t]his served to strengthen and amplify in the minds of employees the seriousness of the unfair labor practices.").

Blankenship, a high division corporate official, promised employees that Respondent would answer their hotline complaints, something Respondent had never previously advocated in person. (ALJD 14: 35) Having a high level management official direct employees to use the hotline during small-group meetings deviates entirely from Respondent's past practice of maintaining a 1-800 hotline and posting the number in an employee handbook. The General Counsel respectfully submits that the ALJ failed to

find that Blankenship's "guarantees," taken together with other violations at the time, establishes Respondent violated Section 8(a)(1) of the Act by soliciting employees to use the hotline and promising to remedy their grievances in order to dissuade their support for unionization.

C. The ALJ Erred in Finding that Respondent Did Not Violate Section 8(a)(1) by Granting Employees Benefits by Throwing Them a Barbeque Party to Dissuade Them from Supporting the Union. [Exception No. 3]

The General Counsel respectfully submits that the ALJ erred in failing to find that Respondent violated Section 8(a)(1) of the Act when it granted employees benefits in the form of providing them a barbeque party in order to dissuade them from supporting the Union. (ALJD at 18: 41-42) In dismissing this allegation, the ALJ overlooked the timing of Respondent's conduct in relation to the date Respondent observed a resurgence of union activity among its employees.

Promising and granting increased benefits after a union campaign commences is a hallmark violation of Section 8(a)(1) of the Act. As the Supreme Court has observed, "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); see also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087-89 (2004) ("the Board will draw an inference of improper motivation and interference with employee free choice where the evidence shows that employees would reasonably view the grant of benefit as an attempt to interfere with or coerce them in their choice of representative.") The promise or grant of benefits is not limited to wage increases to

establish a violation of Section 8(a)(1). *Evergreen America Corp.*, 348 NLRB 178, 180 (2006) (wage increases, improvements to sick leave and attendance policies, flexible work schedules, expansion of the dress policy, and permitting employees' guests to attend holiday party constituted unlawful benefits). By hosting a barbeque party at Store 917 in May 2011, Respondent similarly violated Section 8(a)(1) of the Act.

In his conclusion, the ALJ also failed to consider the timing of Respondent's conduct. More specifically, the ALJ overlooked the fact that the barbeque occurred weeks after Merritt labeled the union activity as "aggressive." (GCX 30) The ALJ did not address the fact that Merritt had previously reported that the union activity was slowing down, and that he later noted resurgence of union activity by some of the key employee Union supporters. (GCX 30) Furthermore, while Respondent had hosted similar barbeque parties at other stores in the past, the ALJ did not address, and did not consider, the fact that Merritt had waited nearly 15 months, since he started as a store director, before he organized a barbeque party at Store 917, and the party coincided with the resurfacing of employee union activity at the store.

To validate the promise of benefits, an employer must demonstrate a legitimate business reason for the timing of a promise or grant of benefits during an organizing campaign. Absent such a showing, the Board has held that it will infer improper motive and interference with employee rights. *Yale New Haven Hospital*, 309 NLRB 363, 366-367 (1992); *Pacific FM, Inc., d/b/a KOFA TV-20*, 332 NLRB 771, 773 (2000). See also *McAllister Towing & Transp. Co.*, 341 NLRB 394, 399 (2004). Furthermore, in *Onan Corp.*, 338 NLRB 913, 913-914 (2003), the Board held that the timing of granting of benefits may be unlawful even if the benefit would have been granted at a later time.

In dismissing the allegation, the ALJ assumed that Respondent acted lawfully, despite the ill timing of the conduct and the absence of any evidence that would explain why Merritt took 15 months to host an all expense paid employee appreciation barbeque party for its employees. The General Counsel respectfully submits that in doing so, the ALJ erred in failing to find that Respondent's conduct in sponsoring a barbeque party in the midst of a union organizing campaign violated Section 8(a)(1) of the Act.

D. The ALJ Erred by Failing to Find that Respondent's Conduct During its Preparation to these Unfair Labor Practices Constituted Violations of Section 8(a)(1) of the Act [Exception No. 4, 5]

The General Counsel respectfully submits the ALJ erred when he found that Respondent's admitted failure to review the *Johnny's Poultry* safeguards with its employees did not constitute a violation of Section 8(a)(1) of the Act. (ALJD at 35:37) In his analysis, the ALJ appropriately found that Respondent held four interview sessions with Dairy Clerk Sebastian Martinez (Martinez), while preparing its defense to the unfair labor practice allegations in this case. (ALJD at 34: 15-18) However, in dismissing the allegation, the ALJ erred in his legal conclusion that Respondent's in-house counsel Danny Ma and defense attorney Glenn Beard did not violate Section 8(a)(1) of the Act by failing to give any assurances to Martinez during their final two trial preparation sessions with him on September 21, and November 1, 2011.

1. Facts

a. <u>Respondent's Trial Preparation in May 2011</u>

In May 2011, Respondent summoned Martinez to its first of several trial preparation sessions. Ma and Associate Relations Manager Angel Seydel met Martinez in the scan room at Store 917, and Ma told Martinez that his participation was voluntary,

and he could end the session if the felt the question were going too in depth. (ALJD at 29; Tr. 1170) During this session, Ma asked the Martinez questions about the three store meetings wherein the Respondent had allegedly committed unfair labor practices. (Tr. 1174) Attorney Tom Stahl held a second trial prep session with Sebastian in the store director's office at Store 917 on May 26, 2011. (ALJD at 31: 36; Tr. 1191) The ALJ found that Stahl had reviewed the appropriate *Johnny's Poultry* safeguards with the Martinez before asking the employee questions about the power point meetings and the Catalina coupons policy. (ALJD at 34: 18-20)

b. Merritt Summons Martinez to the Rodey law firm on September 21, 2011

In later months, Merritt acted as a conduit to obtaining employees to testify on Respondent's behalf. Just prior to the third meeting on September 21, 2011, Martinez was working in the dairy department at Store 917 when he was approached by Store Director Merritt. (Tr. 1177) Merritt instructed Martinez to meet with Respondent's legal counsel by saying, "You need to go down there." (Tr. 1177) Martinez unequivocally expressed his desire not to participate in Respondent's defense by telling Merritt that he no longer wanted to participate in helping with this endeavor because he needed to stay at the store. (Tr. 1178) Merritt disregarded Martinez' words and repeated, "You have to be there. You have to stop doing what you are doing, and you have to go down there and meet with them." (Tr. 1178) Merritt further elaborated, "If you don't go they're still going to charge Albertsons for the time that you're supposed to visit with them." (Tr. 1178) At trial, Martinez explained, "I had to go against my will." (Tr. 1179)

Ma and Beard were present at the Rodey law firm attorney's offices in the Bank of Albuquerque building, located in downtown Albuquerque, New Mexico. (ALJD at 32:

45-46) Stahl may have been in and out during the meeting. (ALJD at 33: 33-34) At the law office, Glenn Beard and Ma met with Martinez in an office with the door shut. (Tr. 1179-80) As Martinez arrived he explained that it was important he get back to the store. (Tr. 1180-1181) Ma told Martinez that he had texted Merritt, and said, "I texted Don, confirmed that you'll have no retaliation or rebuttal for being here, being present with me." (Tr. 1181-1182) Ma did not say that there would be no reprisals taken against Martinez for not participating in the meeting. (Tr. 1182) Beard admitted that he did not review the *Johnnie's Poultry* safeguards with Martinez before beginning the interview, and that he used an outline of the subjects that Stahl had prepared during the prior session with the employee. (Tr. 1180-1181)

c. Beard Disregards the *Johnnie's Poultry* Assurances when he met Martinez on November 1, 2011

Beard met with Martinez one final time, on November 1, 2011, again at the Rodey law firm offices, in the Bank of Albuquerque building, before Martinez testified. (Tr. 1179) Beard admitted that, at this meeting, he did not review the *Johnnie's Poultry* safeguards with Martinez. (ALJD at 34: 20-21) The ALJ noted that Beard covered the same subjects that had been covered before, with one exception. (ALJD at 34: 3-4) The ALJ found that Beard asked the Martinez about his report to the Assistant Store Director about seeing a non-employee union organizer in the store, and whether he had heard the Store Director speak with that organizer afterwards. (ALJD at 34: 4-7) Respondent had not previously reviewed these subjects with the Martinez during the previous meetings.

2. The ALJ Erred by Finding that the Store Director did not threaten employees with unspecified reprisals if employees refused to participate in Respondent's defense to the alleged unfair labor practices in this case [Exception No. 4]

The General Counsel respectfully submits the ALJ erred by failing to find that Store Director Merritt's conduct constituted an implied threat of unspecified reprisals if employees refused involvement in Respondent's defense in violation of Section 8(a)(1) of the Act. (ALJD 35: 26-37) Although the ALJ found that Merritt acted as a conduit and that he became "heavy handed" when Martinez resisted going to the September 21 meeting, he dismissed this allegation. (ALJD at 35: 32-33) The ALJ erred in basing his decision on his conclusion that "Martinez' reluctance then had nothing to do with his willingness to cooperate," rather than analyzing Merritt's conduct, which is the appropriate standard. (ALJD at 35: 33-35)

The Board applies an objective test to determine whether an employer has violated the Act through interference, restraint, and coercion, under Section 8(a)(1) of the Act. The Board in *Double D Construction Group*, 339 NRLB 303, 304 (2003), explained that the test "of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." Another factor the Board considers in a determining an unlawful statement is the context of other conduct. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Here, Merritt, who at the time had been unlawfully spying on employees union activity, unduly compelled Martinez to testify in Respondent's defense, even after Martinez said that wanted to stay at the store. Merritt's repeated statements that Martinez "had to" meet with the defense attorneys are aggressive instructions that an employee, who like Martinez, was working at the time, could not and did not feel free to reject.

Merritt's conclusion that Respondent would be paying the defense attorneys whether or not Martinez participated implied that the employee's refusal to participate in Respondent's defense would result in financial damage. (Tr. 1178) In addition to Merritt's aggression toward the Martinez, the fact that this behavior was manifested by the highest ranking official at the store, towards an employee performing his work tasks in the dairy department, could have led Martinez to believe he would be punished with insubordination or other reprisals if he did not cooperate in Respondent's defense. As such, the General Counsel respectfully submits the ALJ erred in not finding that Store Director Merritt did not threaten employees with unspecified reprisals if they refused to participate in Respondent's defense to the alleged unfair labor practices in this case in violation of Section 8(a)(1) of the Act.

3. The ALJ erred in not finding that Ma and Beard coerced the employee to assist in Respondent's defense during interviews on September 21 and November 1, in violation of Section 8(a)(1) of the Act [Exception No. 5]

The ALJ erred in finding that the trial preparation sessions that Ma, Seydel, and Stahl held with Martinez in May 2011, were sufficiently close in time and similar to the sessions Respondent held with him in September and November 2011, to excuse or mitigate Beard's obligation to review the *Johnnie's Poultry* safeguards with him. (ALJD at 34: 29-32) The Board has held an employer cannot rely on prior assurances to justify its failure to provide an employee with the requisite safeguards when the prior safeguards were not sufficiently close in time. In *Le Bus*, the Board, in overturning the ALJ's decision, held an employer is obligated to review the affirmative assurances with an employee even though the employer has previously reviewed the assurances with the employee, unless the employer establishes the series of interviews are close in time, and

that all interviews encompassed the same subject matter. *Le Bus*, 324 NLRB 588 (1997); *In Re Palagonia Bakery, Co.*, 339 NLRB 515 (2003).

The ALJ properly cited *Le Bus* in finding that the *Johnnie's Poultry* exception was inapplicable to this case; however the ALJ erred in finding that Beard was excused from repeating the assurances with the employee. (ALJD at 34: 25-32) The instant case is analogous to *Le Bus*. Respondent's prior interviews with Martinez in early May 2011, and on May 26, 2011, did not absolve Ma and Beard from their obligations to review the assurances with Martinez in the September and November 2011 meetings. The facts establish that nearly four months lapsed from the date that Stahl secured Martinez' voluntary participation at the May 26, 2011 meeting and the date Merritt coerced Martinez to visit with Ma and Beard in September 2011. In addition to the four-month lapse, the location, agents, and subject matters between the interviews differed from the prior interviews in May 2011. Unlike the sessions in May 2011, held at Store 917, the meetings in September and November 2011, took place at the law offices of the Rodey law firm in a downtown Albuquerque office building. Moreover, the agents conducting the meetings differed; Stahl held the May 26, 2011 meeting whereas Glenn Beard and Danny Ma led the meeting nearly four months later. The ALJ neglected to consider these differences in his conclusion that the May 2011 meeting assurances justified Beard's omissions; as such, the ALJ erred in finding that the prior meetings were closely related occasions.

Respondent's conduct is evaluated by an objective standard, from the perspective of the employee, and is unlawful if the employee would reasonably conclude from the statement he is being coerced to participate; therefore, the employees' subjective

understanding of a patently coercive interview is irrelevant. *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995). Under an objective standard, the employer violates the Act when it creates an ambiguous context from which the employee might infer that his participation was voluntary rather than reviewing the affirmative assurance with the employee. *Wxgi, Inc.*, 330 NLRB 695 (2000).

Here, the ALJ failed to apply the objective test to resolve whether Respondent's conduct violated Section 8(a)(1) of the Act. In rendering his decision, the ALJ reliance on Martinez' subjective state of mind is misplaced. First, the ALJ reasons that, although Martinez expressed reluctance to testify, his concerns pertained to being absent from the store rather than his willingness to voluntarily testify. (ALJD 34:12-13) In reaching this conclusion, the ALJ erred in finding that Martinez understood that there would be no retaliation if he declined to participate in later meetings (ALJD at 30: 38-43); Martinez never testified as such. Then, later in the ALJD, the ALJ evaluated the reason that Martinez did not want to participate in the trial preparation session on September 21, 2011, as a basis to dismiss the allegation that Ma's and Beard's conduct violated the Act. The ALJ's analysis that Martinez "regularly and voluntarily" spoke to the Store Director, and was identified as a "trustworthy employee favorably predisposed to [Respondent's] viewpoint" is irrelevant. (ALJD at 28: 20-21) An employee's identity as a company ally is not a factor dispositive in determining whether an employer complied with the *Johnnie's Poultry* obligations. See *Le Bus*, supra (holding the employer was not excused from its affirmative obligation because the employee was a company ally).

In the instant case, Respondent interfered with the Section 7 rights of its employees by failing to assure Martinez that he was free to refuse to participate in the trial preparation meetings and would be free of any reprisals. The ALJ's finding that Ma interceded when Martinez said he wanted to return to the store does not mitigate the coercive element inherent in these interviews. Ma assured Martinez that he texted the Store Director and that Martinez' absence would not be a problem. (ALJD at 34: 38-40) Ma's statements are not equivalent to assuring Martinez that he could decide against participating free of retaliation. Rather, Ma's words and actions reinforced to the employee that he controlled whether Martinez would be disciplined and could similarly impose discipline if he chose to refuse testifying for the company.

Moreover, Merritt's earlier telling Martinez that he "had to stop doing what he was doing and go down there" constituted coercive behavior that the employee could hot have felt free to respond to the questions by Ma or Beard or believe his participation was voluntary. *In Re Palagonia Bakery, Co.,* 339 NLRB at 527 (finding a violation despite the attorney having reviewed *Johnnie's Poultry* assurances because the employer told the employees they had to testify and failed to give the employees assurances at that time). Because these interviews occurred alongside on-going unlawful surveillance by Respondent's in store management, an unlawful scheme directed by high division corporate official Danny Ma, Ma himself harbored union animus when he solicited complaints and grievances from employees the month before he summoned Martinez to the first interview in May 2011, and this only added to the need for the assurances to be given to Martinez. Respondent violated Section 8(a)(1) of the Act by failing to give them to him.

Based on the foregoing, the General Counsel respectfully submits the ALJ erred in not finding that Beard's and Ma's failure to assure Martinez that he could walk away from the September 2011 interview and the subsequent November 2011 interview free of reprisals violated Section 8(a)(1) of the Act.

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed additional violations of Section 8(a)(1) above, while it affirms the ALJ's other finding of violation of Section 8(a)(1) and (3)[2].

Dated at Albuquerque, New Mexico, this 21st day of June 2012.

Respectfully submitted,

//s/ Sophia Alonso
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[2] General Counsel, pursuant to Section 102.94 (a) of the Board's Rules and Regulations respectfully requests that the Board give priority consideration to this matter based upon the Section 10(j) restraining order which has been issued in Overstreet v. Albertson's, LLC, 2012 WL 1970781 (D.N.M. 2012, May 31, 2012).

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in ALBERTSON'S, LLC., Cases 28-CA-023387 et al. was served by E-Gov, E-Filing, E-Mail, and regular mail on this 21st day of June 2012, on the following:

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