UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

ATELIER CONDOMINIUM AND COOPER
SQUARE REALTY AS JOINT EMPLOYERS

And

SEBASTAIN CHRISTOPHER, AN INDIVIDUAL, CASE NOS. 2-CA- 39459;
2-CA- 40066

And

NAZMIR ALOVIC, AN INDIVIDUAL 2-CA-39575

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

On charges in, Case No. 2-CA-39459, filed by Sebastain Christopher ("Christopher"), ("an individual"), on August 26, 2009, and Case No. 2-CA-39575, filed by Nazmir Alovic ("Alovic"), ("an individual"), on November 10, 2009, and Case No. 2-CA-40066, filed by Christopher on August 12, 2010, the Region issued a Consolidated Complaint alleging that the Atelier Condominium and Cooper Square Realty, as Joint Employers, ("Respondent"), engaged in threats, discharges, filed a baseless retaliatory lawsuit and interfered with employees' exercise of their protected rights, in violation of Sections 8(a)(1)(3) and (4) of the Act. A hearing was conducted before Administrative Law Judge Mindy Landow ("ALJ Landow") on November 15 through 18, 2011.

On April 10, 2012, ALJ Landow issued a decision and recommended order ("ALJD"), in which she concluded that Respondent violated the Act by interrogating employees about their Union activities and the Union activities of others, threatening employees with unspecified reprisals if they supported the Union, discharging Alovic and Christopher because of their Union activities, and by filing and maintaining a baseless and retaliatory lawsuit. On May 22, 2012, Respondent timely filed exceptions to the ALJD with the Board. The undersigned hereby respectfully submits this answering brief to Respondent's exceptions.[1] Counsel for the Acting General Counsel ("GC") submits that Respondent's Exceptions are without basis in the record, are contrary to law, and should be dismissed in their entirety.

[1] All references herein will be identified as: General Counsel Exhibits as "GC Ex. _"; Respondent's Exhibits as "Resp. Ex. __", the hearing transcript as "Tr., __"; the ALJ's Decision and Recommended Order as "ALJD __"; and, Respondent's Brief in Support of Exceptions as "Resp. Br.__".

II. ARGUMENT

A. The Record Is Replete With Evidence of Animus

In its submission, Respondent claims that GC has failed to establish animus as an element of its case in chief, by ignoring or mischaracterizing the evidence. Even a cursory review of the ALJD disposes any serious consideration of this contention.

First, Respondent asserts that the Atelier has been a member of the Realty Advisory Board ("RAB") since 2007 based on an assent agreement and therefore, harbored no anti-Union animus. (Resp. Ex. 3; Tr 363: 8-15). To the extent that this purported business record can be relied on, Respondent's conduct overrides any pretense that it considered itself bound by this agreement. The uncontroverted record evidence demonstrates that in 2007, as soon as the building was fully staffed, Local 32BJ began to organize. In an effort to thwart that campaign, Respondent granted unfettered onsite access and assistance to Local 670 UFCW, and through a plethora of other illegal tactics, unlawfully recognized and entered into a collective-bargaining agreement with Local 670. (ALJD 34: 8; Tr.163; GC Ex. 7, 8). Respondent failed to explain the relevance of its alleged RAB membership in light of its undisputed assistance to Local 670 and its prior unlawful actions against employees who sought to join Local 32BJ. Indeed, the ALJ correctly found that Respondent's prior unlawful support for Local 670 in response to an initial Local 32BJ organizing campaign was itself evidence of animus. (ALJD 3: 10-23; 34: 8).

Second, Respondent's suggestion, that in November 2008, the Atelier Board was actively engaged in contract negotiations with Local 32BJ is simply false. (Resp. Br. 3; Resp. Ex 6). The notes from that November 2008 Board meeting demonstrate that Respondent representatives had not met with Local 32BJ and that Respondent still wanted to sign a contract with Local 670 in order to save money. (ALJD 4: 4-14; Resp Ex. 6). The ALJ correctly concluded that "viewing the evidence in the light most favorable to the Respondent, it appears that while Vice

President of Cooper Square Mark Kotler ("Kotler"), and quite possibly CSR (Cooper Square Realty), accepted the reality that Local 32BJ was a force that would have to be reckoned with, the Atelier Board members resisted dealing with the Union and decided to defer doing so, primarily for financial reasons." (ALJD 35:1-17).

Third, without favorable facts in the record to support its position, Respondent argues passionately that Local 32BJ's silence in the proceedings is significant. Respondent waxes that Local 32BJ's silence is deafening and the only rational conclusion as to its lack of participation in the trial was that it considered the discharges of Alovic and Christopher lawful. (Resp. Br. 39; 15-6). However, Respondent's argument fails for two fundamental reasons. First, there is nothing in the record to support the conclusion that Local 32BJ concluded the discharges were lawful. Second, and more importantly, it is completely irrelevant whether Local 32BJ thought the discharges were lawful. (ALJD 34: 38-45).

Moreover, the record firmly demonstrates independent 8(a)(1) violations through repeated unlawful interrogations of Alovic, Christopher, and Lulzim Alaj ("Alaj"), regarding their support for Local 32BJ. (ALJD 34: 6-16). These independent 8(a)(1) violations constitute evidence of animus even if Respondent's prior history is discounted.[2] Briefly, beginning in March 2009, with the onset of the Union campaign:

- Mehmedovic and Atelier Board President Daniel Neiditch ("Neiditch") interrogated Alaj about his union support. (Tr. 238).
- Neiditch repeatedly, interrogated Christopher regarding his support for the Union and told him that management did not want a Union, but told him management could get him a raise. (Tr 77-80).
- Mehmedovic and Neiditch interrogated Alovic about his and Christopher's union support and threatened him with unspecified reprisals by telling him to be careful. (Tr. 185). An Employer's warnings to "be careful" in context of a conversation about union activity "convey the threatening message that union activities would place an employee in jeopardy."[3]

[2] *See Austal USA, LLC*, 356 NLRB 65, slip op. at 1-2 (2010).
[3] *Gaetano, & Associates*, 344 NLRB 531, 534 (2005).

In April:

- Mehmedovic interrogated Alovic again, accusing him of bringing in the Union, asking him if he signed a card, and asking him for names of his co-workers who signed cards. (Tr. 186).

In June, upon receipt of the Local 32BJ petition:

- Mehmedovic interrogated Alovic about the petition. (Tr. 188-9).
- Mehmedovic interrogated Alaj about his and his co-workers union sympathies. Mehmedovic insisted that Alovic and Christopher were the ring leaders. (Tr. 239).

Respondent attempts to undercut the ALJ's findings regarding the conduct summarized above by arguing that: (1) the ALJ erred in its credibility determinations and (2) other employees testified that they were not interrogated regarding their support of Local 32BJ.

As to the first argument, the ALJ cites Board precedent that general denials will not ordinarily suffice to refute specific and detailed testimony from an opposing side's witness. (ALJD 26: 34-43).[4] Respondent merely solicited broad denials from its witnesses; however, Respondent's witnesses failed to rebut the detailed descriptions of GC's witnesses, including time, place and dates of numerous unlawful interrogations. (ALJD 28: 22-29).

Respondent's second argument, that other employees testified to not being unlawfully interrogated is of no moment. The Board has long recognized that an employer's failure to retaliate against all union supporters does not preclude a finding of unlawful motivation against a particular union supporter. (ALJD 35: 19-25).[5] Here, it is unrebutted that Alovic and Christopher were the leaders of the Local 32BJ organizing drive, so it stands to reason that they would be the targets of coercive interrogations. (ALJD 35: 24-5). Therefore, the Board should affirm the ALJ's findings of independent 8(a)(1) violations.

[4] *See e.g., Williamson Memorial Hospital,* 284 NLRB 37, 39 (1987); *Emerson Elec. Co. v. NLRB,* 649 F.2d 589, 592 (8th Cir. 1981).
[5] *See Volair Contractors Inc*., 341 NLRB 673, 676 fn. 17 (2004).

Finally, the timing of the discharges is further evidence of Respondent's anti-Union animus. Even where "the circumstances surrounding the discharge of several union supporters seems otherwise innocent" (which this does not), "significant weight may be given to the timing of the decision and its implementation."[6] In the instant case, the undisputed evidence shows that Alovic and Christopher were discharged within weeks after the presentation of Local 32BJ's petition to the Board of Managers. (ALJD 34: 18-26; Tr. 76; 187-88).

Based on all of the above, Respondent's exception, that it did not harbor animus towards Alovic and Christopher's activities on behalf of Local 32BJ, is without merit and the Board should affirm the ALJ's finding of animus.

B. <u>Respondent Did Not Establish a Legitimate, Non-Discrimatory Reason for the Discharges.</u>

(1.) Sebastain Christopher

In its submission, Respondent states that Christopher was fired for returning to the Atelier while serving a disciplinary suspension so that he could perform a side job for a tenant. (Resp. Br. 16; Resp. Ex. 8). However, both the testimonial and documentary evidence demonstrate that Christopher was not on suspension when he returned to the Atelier that Saturday afternoon. (ALJD 14: 30-3; Tr 92-3). The facts are clear: the suspension letter issued to Christopher states that he was suspended without pay starting Wednesday, June 24, 2009, for two (2) days and shall return to duty on Sunday, June 28, 2009. (ALJD 14: 26-8; G.C. Ex 16). Christopher testified that Wednesday and Thursday were his regular scheduled work days; Friday and Saturday were his days off. That is why the suspension letter references his return to work on Sunday, as that would have been the first day he was scheduled to work after the two day suspension. (ALJD 14: 30-3; Tr. 92-3). Respondent offered no testimony or documentary evidence to rebut

[6] *Delchamps, Inc*., 330 NLRB 1310, 1322 (2000).

Christopher's assertion that he was on a scheduled day off on Saturday, June 27, 2009, the day he was fired for having allegedly returned to the Atelier while on suspension. Accordingly Respondent, in its submission, misrepresents the facts by stating that "Christopher does not dispute that he returned to the Atelier while serving a disciplinary suspension in order to perform a side job." (Resp. Br. 16, last paragraph). In fact, the opposite is true. Christopher offered unrebutted testimony that he was not on suspension when he returned to the Atelier to perform a side job. The documentary evidence, namely Respondent's suspension letter, buttresses Christopher's testimony. (ALJD 14: 30-3 & 41: 30-36; Tr. 92-3).

Further, Respondent's reliance on alleged prior misconduct is unsupported by its own witnesses. Christopher's termination letter references two other incidents of alleged misconduct that both occurred on April 29. (Resp. Ex. 8). In Christopher's termination letter, Mehmedovic wrote, "I have sat down and talked to you on several occasions . . . explained what is expected of you." (*Id*.). However, Mehmedovic failed to offer any testimony about any interactions she may have had with Christopher regarding work performance, or any verbal counseling of Christopher whatsoever. (ALJD 42: 19-30). Thus, Christopher's testimony that he was not spoken to or disciplined for any alleged prior misconduct is unrebutted in the record. (ALJD 42: 24-27). Accordingly, the ALJ properly concluded that these two additional assertions of misconduct, as set forth in Christopher's termination letter, are post hoc invented justifications. (ALJD 42: 26-30).

Based on the above, Respondent's asserted reasons for discharging Christopher are plainly false. As the ALJ noted, where "the evidence establishes that the reasons given for the Respondent's action are pretextual – that is either false or not in fact relied upon – the Respondent fails by definition to show that it would have taken the same action for those

reasons, absent the protected conduct."[7] (ALJD 42: 32-8). Accordingly, the Board should affirm the ALJ's finding that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Christopher for his union and other concerted protected activities.

(2) Nic Alovic

Respondent rests its argument on whether or not it discharged Alovic lawfully, in large part, on its plea that the Board overturn the ALJ's credibility findings. In its submission, Respondent argues that "corroborated, detailed evidence from disinterested witnesses . . . as well as, contemporaneous documentary evidence" show that Alovic engaged in the conduct for which he was discharged. (Resp. Br. 20). Unfortunately for Respondent, the record evidence shows that current employees testifying on behalf of their employer, whom the ALJ correctly points out are not disinterested witnesses, offered confusing testimony which was not corroborated by Mehmedovic or Neiditich, nor supported by contemporaneous documentary evidence.

In addressing the issue of whether Perez and Habib are disinterested witnesses, the ALJ explained that "common sense suggests that under the circumstances of this case, where the charging parties are individuals without any power or authority to protect these current employees, their pecuniary interests lie in supporting the account of events suggested by their employer." (ALJD 38: fn. 40).

Further, Respondent's claim that contemporaneous documentary evidence shows that Alovic engaged in misconduct on June 19 is unfounded in the record. In that regard, Lyndsey Perez ("Perez") noted that the concierge is responsible for keeping log books, which are a contemporaneous record of any incidents that occur during a concierge's shift. Perez explained that any conduct during a shift that requires an incident report also would be noted in the log

[7] *Rood Trucking*, 342 NLRB 895, 898 (2004), quoting *Golden State Food Corp*., 340 NLRB 382, 385 (2003) (finding it unnecessary to perform the second part of the Wright Line analysis).

book. (Tr. 290-2). However, Respondent did not introduce into evidence any logbooks for June 19 or elicit unequivocal testimony from Perez that she entered any notations regarding Alovic. (AJLD 11: 11-18). Therefore, it appears that the incident report that Respondent relies on as a contemporaneous record was more likely written after Alovic was discharged in an attempt to create *post hoc* reasons for his discharge. (ALJD 38: 34-5).

Finally, Respondent's witnesses did not corroborate each others testimony.[8] As an example, Perez testified that she called Neiditch and that he escorted an uncontrollable Alovic to the backroom. Perez further claimed that upon returning from the backroom, Alovic was cursing and slamming doors in front of Neiditch's clients. (ALJD 38: 26-9; Tr. 273). Contrary to Perez, Neiditch failed to testify that he was present for the alleged incident that triggered Alovic's discharge. Importantly, Neiditch does not corroborate that he escorted Alovic to the backroom or that Alovic misbehaved in front of his clients. Neiditich's testimony is that he only learned of Alovic's discharge when Mehmedovic called to inform him that she was going to terminate Alovic. (ALJD 38: 41-6; Tr 441-3).

Moreover, there is ample documentary evidence that Alovic's discharge is a departure from Respondent's practice of progressive discipline. (G.C. Ex. 24-6). Alovic's alleged misconduct on June 19, and his alleged prior misconduct, pales in comparison to concierge Blertha Behluli's ("Behluli") lengthy discipline record. (GC Ex. 26). For example, on February 12, Behluli told a tenant to "go fuck yourself" and had to be restrained as she tried to hit him. She was not fired. Behluli subsequently received a "second warning" on March 20 for handing out keys without having the tenant's signature. On May 7, she received a "final warning" for not

[8] *See Seattle Seahawks*, 292 NLRB 899, 925 (1989) ("in examining the relevant circumstances, it is sensible to consider the inconsistencies, contradictions, and inexplicabilities in Respondent's case. When one sees enough such anomalies in a party's story, one begins to question the fundamental reliability of the account the party is trying to put across").

being at her post and smoking in the employee cafeteria. On May 21, Behluli received another "final warning" for an incident on May 19 which included "us[ing] inappropriate language and causing a scene in the lobby." When asked to leave the lobby, Behluli, "refused and continued to carry on in an unprofessional manner and continued to curse while pacing back and forth in the lobby in a manner that was full of rage." She still was not terminated. Then, on May 28, Mehmedovic received an email from a tenant complaining that one of his guests overheard Behluli using racial epithets. Only then, was Behluli terminated. (ALJD 40: 1-14; G.C. Ex 26). The ALJ correctly found that the foregoing clearly demonstrated disparate treatment with respect to Alovic's comparatively mild, isolated alleged outburst. (ALJD 40: 16-23).

Further, Respondent's reliance on alleged prior misconduct in an attempt to paint Alovic as a problem employee is unsupported by its own witnesses. As with Christopher, Mehmedovic failed to testify to any of the other alleged prior conduct attributed to Alovic. Thus, the ALJ correctly concluded that Alovic's only prior discipline consisted of his January suspension and "the history of performance problems relied upon by Respondent is a *post hoc* justification, a piling on of false reasons for Alovic's discharge, which supports the conclusion that it was discriminatory." (ALJD 40:25-44).[9] Accordingly, the Board should affirm the ALJ's finding that Respondent discharged Alovic in violation of Section 8(a)(1) and (3) of the Act.

C. <u>No Record Evidence Supports a Dual Motivation for Alovic and Christopher's Discharge</u>

Respondent suggests that Christopher and Alovic were discharged for failing to continue to participate in an alleged real estate scheme whereby Neiditch claimed the exclusive right to sell all of the million dollar residences at the Atelier, while simultaneously straining to disavow

[9] *See ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Limestone Apparel*, 255 NLRB 722 (1981) *enfd.* 705 F.2d 799 (6th Cir. 1982). (finding pretext means that the reasons advanced by the employer did not exist or were not in fact relied upon, thereby leaving the inference of unlawful motivation).

that any such scheme exists. (Resp. Br. 11-12). Both things cannot be true. Respondent claims that because Christopher and Alovic stopped recommending clients to Neiditch, they were terminated. However, Respondent's own witnesses did not testify that this was the reason Respondent fired Christopher and Alovic. Notably, Neiditch never testified that a referral scheme existed or that he took retribution against Alovic and Christopher for refusing to participate in such a scheme. Respondent has not met its burden in proving a lawful motivation for Alovic and Christopher's discharge.

D. <u>The Board Should Affirm All of the ALJ's Credibility Determinations</u>

Many of Respondent's exceptions turn on the ALJ's credibility findings all of which were well founded in the record and based on first hand observation of the witnesses and should be affirmed by the Board.

The Board's established policy is to uphold a judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect.[10] In particular, the Board grants great weight to the trier of facts' credibility determinations insofar as they relate to witness demeanor, recognizing that the trier of fact has the advantage of observing the witness while he testifies.[11] Accordingly, the Board will not overrule an ALJ's credibility conclusions unless a clear preponderance of all of the evidence convinces the Board that the conclusions of the trier of fact are incorrect. Here, the record thoroughly supports the ALJ's credibility determinations.

(1) Respondent's Witnesses

Regarding the testimony of Mehmedovic, the ALJ found her to be "evasive and dissembling." (ALJD 28:42). The ALJ continues, that by way of example, when asked if she

[10] *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951).
[11] *Id.* at 544.

was familiar with Local 32BJ, Mehmedovic pointed to the fact that family members had been members of that union. (ALJD 28: 42 & fn. 31; Tr. 362-3). As the managing agent for Cooper Square, an entity with Union contracts throughout the city, Mehmedovic's response is at best, preposterously naïve and at worst, deceitful. Still more damaging is that Mehmedovic could not recall any specific details concerning the day that Alovic was fired. She testified that she knew it was in 2009, but could not recall the month. Her hazy recollection of who was at the meeting in which Alovic was fired is puzzling, especially given that she sat at counsel's table throughout all of the prior testimony in the case. (Tr. 380). Mehmedovic's lack of certainty on the key issues in this case stood in stark contrast to her sudden bursts of explanations on secondary parts. When Mehmedovic "actually did offer affirmative testimony regarding a discrete event it was presented in an exaggerated fashion that generally did not have the ring of truth." (ALJD 29: 1-2). For example, Mehmedovic claimed that she terminated Alovic in January 2009, which she subsequently reduced to a suspension at Neiditch's request. Mehmedovic testified to a conversation where she pleaded with Neiditch to fire Alovic, but Neiditch asked for another chance because of Alovic's handicap. (Tr. 387). To the contrary, Neiditch testified that he never was involved with issues regarding Alovic's conduct or performance prior to his discharge. (Tr. 442 ln. 21-23). Thus, Mehmedovic's testimony was so evasive, vague and contradicted by Respondent's own witnesses that the ALJ properly discredited her. (ALJD 29: 1-2).

Regarding the testimony of Neiditch, the ALJ found that his initial failure to appear as required by the GC's subpoena *duces ad testificandum* demonstrates a lack of regard for Board processes. (ALJD 29: 4-7). However, the ALJ did not rest her credibility determinations on that observation alone. The ALJ also found Neiditch to be "needlessly evasive on various occasions." (ALJD 29: 6-7). For example, in response to Neiditch's claim that he was unaware

that he was under subpoena to testify, GC sought to adduce evidence that the subpoena addressed to Dan Neiditich, rather than Daniel Neiditch, and delivered to the Atelier,[12] was properly served. In responding to this line of questions, the ALJ correctly noted Neiditch's unnecessary evasiveness: (ALJD 29: 7-12).

> **GC**: Isn't it fair to say that you're fairly well known in the building?
> **Neiditch**: I don't know what the definition of that is. By who? (Tr. 452: 7-9).

The ALJ correctly concluded, that "as there is no dispute that Neiditch lives, owns property, runs a real estate brokerage business from an office at and is president of the Board at the Atelier, such a response is frivolous." (ALJD 29: 11-13).

Furthermore, the ALJ noted that Neiditch's testimony as to the basis for including Christopher in the lawsuit, lacked specificity and, at times, bordered on "palpable scorn." (ALJD 29: 14). Specifically, the ALJ cites Neiditch's response to GC's questioning regarding why Christopher is named in the lawsuit.

> **Neiditch:** He's named here because we have reason to believe that he put up postings on that site.
> **GC**: What led you to that conclusion?
> **Neiditch:** Well, there was a posting up there with his name on it. And just elicit stuff that he was saying.
> **GC:** Do you have a copy of that document?
> **Neiditch:** Not on me, no. (Tr. 435: 3-11)

Neiditch's responses are unbelievable because evidence of a post with Christopher's name on it, if it exists, would almost certainly present a valid defense to the reasonableness of the lawsuit. Thus, Neiditch's testimony is essentially that he could have a defense to the charges against him, but he decided not to bring any evidence of such defense to the trial. Clearly, this does not make

[12] A return receipt for the subpoena shows that it was signed for by an employee of the Atelier. (Compare GC Ex. 14a,b and 15g).

sense. Therefore, the ALJ correctly concluded that Neiditch's testimony "was so nonspecific and vague that it convinced me that he had never actually seen any such defamatory material." (ALJD 52: 9-10).

As further evidence of Neiditch's evasiveness, the ALJ points to his equivocal responses regarding a detailed letter he wrote to the Atelier community immediately after Robert Morricone's suicide and upon viewing the posts that he claimed were defamatory in the lawsuit. (ALJD 29: 16-22; GC Ex. 28). The eloquent letter, which is quoted entirely in the ALJD, expresses both sadness regarding Morricone's passing and outrage concerning the postings.

> **GC**: I want you to -- isn't it true that when
> you first saw these websites, these posts, you
> wrote a letter to your fellow homeowners in an e-mail?
> **Neiditch**: Possibly but I don't recall. (Tr. 460: 22-5)

It strains credulity that Neiditch would not recall authoring such a letter, especially because it is the only letter he wrote as president of the Board regarding his superintendent's suicide, it is written days after the suicide, and the emotional but polished tone of the letter evidences a piece of writing that was well-crafted, and took time and thought to publish. However, Neiditch initially hedges on authoring the long, heartfelt letter, and only admits that he wrote it after being shown a copy of the letter on cross examination. (Tr 460). Clearly, Neiditch's initial response to GC's questions demonstrates his tendency to not answer questions head on and truthfully.

Therefore, based on all of the above, the record clearly supports the ALJ's credibility determinations and should be affirmed by the Board.

(2) *GC's Witnesses*

In its submission, Respondent argues that Alovic's testimony should be discredited completely because the ALJ found him to have contradicted his prior sworn statement (Resp. Br. 31-2). However, as the ALJ clearly explains:

> "I note that the relevant portions of Alovic's affidavit read into evidence by Respondent, apart from this one omission, otherwise corroborates his testimony about what was said to him on this occasion. Although I think it is entirely possible that Alovic may have understood Mehmedovic's comments to be tantamount to a threat of discharge, it is also possible that he elaborated this incident in his subsequent recollection based upon other comments Mehmedovic made at the time." (ALJD 32: 9-23).

Thus, Respondent's assertion that Alovic was found by the ALJ to have contradicted his own prior sworn statement is misleading.

Similarly, regarding Christopher, Respondent argues that he should be discredited because he was reprimanded by Judge Landow for being evasive in his answers. (Resp. Br. 32). However, again, Respondent's assertions, are not supported by the record. In fact, the ALJ in addressing this issue stated that:

> "I was obliged to give a specific instruction to Christopher to confine his answers to what was asked of him and further advised him that his refusal to do so could raise questions about his testimony. However, this was a cautionary instruction to a lay witness, who exhibited a measure of emotional distress during his testimony and who appeared to be reacting to the apparent implications of the questions asked of him rather than any sort of comment on his credibility in general." (ALJD 30: 38-43); (Tr. 144 ln 8-14).

In fact, the ALJ found Christopher to be a generally credible witness who exhibited a serious and thoughtful demeanor. (ALJD 30: 33-4). Thus, Respondent's argument that a judge's cautionary instruction to a lay witness is grounds for discrediting him completely is indefensible.

Regarding the testimony of Lulzim Alaj ("Alaj"), the ALJ correctly concludes that his testimony should be credited. The ALJ found Alaj to demonstrate an "impressive demeanor during his testimony: he was direct and forthright and his testimony contained specific details

relating to his encounters with the members of management at issue." (ALJD 29: 40-1 & 30:1). Moreover, Alaj is currently employed, appeared pursuant to subpoena and testified against the interests of his employer. (ALJD 29: 24-38).[13] Therefore, the Board should uphold the ALJ's finding that Alovic, Christopher and Alaj testified credibly.

E. The ALJ's Finding That Respondent's Lawsuit Is Unlawful Should be Affirmed.

(1) Mehmedovic and Neiditch were acting as agents of Respondents

As an initial matter, the lawsuit can be attributed to Respondent even though it was brought by two individual supervisors. In order to determine whether an individual supervisor's lawsuit is attributable to the employer, the Board looks to traditional agency principles.[14] A threat to sue or a lawsuit filed by a supervisor will be attributed to the employer when the threats constitute "a form of retaliation within the framework of [the supervisor's] responsibilities."[15] Factors considered by the Board in making its determination include: whether the employer has held out the supervisor as authorized to speak and act on its behalf;[16] whether the lawsuit directly relates to an employment matter and took place on company property;[17] and, whether the supervisor engaged in other coercive conduct in violation of Section 8(a)(1).[18]

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[13] *See Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003) (finding that when employees testify against the interest of their employer, they subject themselves to possibilities of recrimination and the perils would be even greater if such testimony was false).
[14] *See Braun Electric Co*., 324 NLRB 1, 2 (1997).
[15] *Consolidated Edison Co.*, 286 NLRB 1031, 1033 (1986)
[16] *Braun*, 324 NLRB at 2 ("a party may be bound by conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized or subsequently ratified"). Compare *Postal Service*, 275 NLRB 360 (1985) (employer not responsible for temporary, low-level supervisor's threat involving lawsuit to be filed on her own behalf regarding non-supervisory issues).
[17] *Braun*, 324 NLRB at 2 (finding that lawsuit filed by supervisor, as an individual, was attributable to the employer where the subject matter of the lawsuit was the alleged unlawful tape-recording of a conversation on employer property between the supervisor and union business agent and individuals who were attempting to apply for employment pursuant to the union's salting campaign).
[18] *See e.g. Consolidated Edison*, 285 NLRB at 1033 (finding that lawsuit attributable to employer where one day after threatening to sue employee in response to grievances filed against him, supervisor makes additional threats of "future unspecified reprisals"); *See also, Carborandum Materials Corp*., 286 NLRB 1321 (1987) (distinguishing,

Here, the two supervisors who filed the lawsuit were Condominium Board President Neiditch and Property Manager Mehmedovic, individuals who are stipulated supervisors in this matter, authorized to "speak and act" for Respondent. (ALJD 44: 32-3). Moreover, they are Respondent's highest ranking on site supervisors, directly responsible for managing the day-to-day operation of the building and supervision of its employees at the Atelier. Further, the Board designated Neiditch as its liaison to Local 32BJ for future contract negotiations. Therefore, the evidence shows that Neiditch and Mehmedovic are high ranking agents whom Respondent holds out to speak and act for it. (ALJD 44: 32-9).

Further, Mehmedovic and Neiditch identified themselves in the complaint in their professional agent capacity as the President and Property Manager of the Condominium Association and provided Atelier as their address. Thus, Mehmedovic and Neiditch are identified in the lawsuit in their agency capacity, not as two aggrieved individuals. (ALJD 44: 40-1).

Furthermore, the documentary evidence supports the conclusion that Neiditch and Mehmedovic were acting as agents of Respondent when they filed the lawsuit. On July 6, Mehmedovic in an email to Cooper Square and Atelier agents declared "**we** need to act on this immediately."[19] On July 7, Neiditch, as Board President, in an email to his fellow homeowners, declared that the alleged defamatory statements are **building concerns**.[20] (ALJD 45: 33-7).

In addition, the alleged defamatory statements that are the subject of the lawsuit are based on events that occurred on Respondent's property. The ALJ explains that "it is apparent that the state court complaint, by its terms, references the internal dispute occurring among the owners

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Postal Service, 275 NLRB 360 (1985), because supervisor made other threats to employee in addition to the threat to sue).

[19] Emphasis added

[20] Emphasis added

and residents relating to short term rentals, the damage such practices has on the reputation and standards of the building, and the unhappiness of certain owners who sought to avoid the rules imposed by the Board (of which Neiditch was president) to curtail such activities." (ALJD 45: 26-31).

Indeed, the sole basis for naming Christopher in the lawsuit was his employment relationship with Respondent. "Otherwise, he would have had no nexus to any of the events forming the backdrop for the lawsuit." (ALJD 46: 7-10). Moreover, Neiditch and Mehmedovic, as agents of Respondent, engaged in coercive 8(a)(1) conduct specifically against Christopher. (ALJD 46: 10-4). Therefore, Neiditch's and Mehmedovic's only connection to Christopher is through his work at the Atelier and their demonstrated animus towards his Union activities.

In its submission, apart from Respondent's mere assertion that its agents were acting as individuals, no evidence supports this convenient claim. There is no evidence that Respondent communicated to Neiditch or Mehmedovic or otherwise disavowed their conduct. To the contrary, their attorney is in house counsel to Atelier. Thus, Respondent filed a lawsuit through its agents. The overwhelming evidence and lack thereof to the contrary strongly supports this conclusion. Accordingly, the ALJ correctly found "that there is simply no 'compelling contrary evidence' that Neiditch, as an elected president of the condominium board, or Mehmedovic as the highest-ranking onsite manager were not acting in an agency capacity with regard to the lawsuit against Christopher." (ALJD 46: 44-9). Based on all of the above, the Board should affirm the ALJ's conclusion that the lawsuit was filed by Respondent.

(2) The lawsuit is baseless

In *Bill Johnson's,*[21] the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: 1) lacks a reasonable basis in law or fact; and 2) was commenced with a retaliatory motive. In *BE & K,*[22] the Board clarified that there are no circumstances in which a reasonably based lawsuit could be an unfair labor practice, regardless of the motive for initiating the lawsuit.

A lawsuit can be deemed objectively baseless when its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits."[23] The analysis requires "[an examination of] the plaintiff's evidence to determine whether it raises any material questions of fact."[24] At the same time, the Board's inquiry need not be limited to the bare pleadings.[25] For example, in *Geske v. NLRB*, the Seventh Circuit made clear that if a plaintiff fails to provide the Board with evidence to support its suit, the Board may proceed to find that the suit is baseless.[26] Specifically, the court "[held] that in cases . . . in which the plaintiff in a state lawsuit provides no evidentiary basis for that suit and fails to describe what evidence he expects to obtain through discovery and to explain why he has been unable to obtain that evidence, the Board may properly enjoin the prosecution of that suit prior to discovery."[27]

The instant lawsuit has no basis in fact, and no reasonable plaintiff could expect to succeed on the merits. Specifically, the lawsuit alleges that Christopher made certain defamatory statements about Respondent on a website established for condominium residents. However,

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[21] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 748-9 (1983).
[22] *BE & K Construction, Co*., 351 NLRB 451 (2007).
[23] *Id.* at 457.
[24] *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7thCir. 1997).
[25] *Bill Johnson's*, 461 U.S. at 744-6.
[26] *Geske*, 103 F.3d at 1376.
[27] *Id.*

even assuming that the statements were defamatory, the Employer has offered no evidence, in its filings with the court or in the instant record, to support its claim that Christopher authored those statements. Respondent's only evidence attributing Christopher to the defamatory statements is Neiditch's vague testimony that one of the posts had Christopher's name in it. Neiditch did not provide any documentary evidence to corroborate this assertion. Notably, the complaint does not allege that Christopher's name appeared on one of the postings. Thus, Neiditch's testimony that Christopher's name appeared on an alleged defamatory posting is not credible, because if such posting existed with Christopher's name, it is inexplicable why Respondent would not include the statement in their complaint and/or allege that fact in its complaint. As the ALJ explained, Neiditch's testimony, regarding an alleged defamatory post with Christopher's name on it, "was so nonspecific and vague that it convinced me that he had never actually seen any such defamatory material." (ALJD 52: 9-10). Therefore, there is simply no credible record evidence linking Christopher to any of the alleged defamatory statements.

Moreover, there is no credible evidence that Respondent investigated whether or not Christopher authored any of the alleged defamatory statement. (ALJD 52:19-21). Certainly, Neiditch and Dweck's vague statement that there was an investigation, without explaining what the investigation entailed or revealed, is not sufficient to establish that Respondent investigated Christopher's participation in the alleged defamatory statements. Thus, the ALJ concluded "that little, if any, investigation took place and Respondent has no knowledge that Christopher participated in any allegedly defamatory commentary in any way whatsoever." (ALJD 52: 31-3).

Furthermore, there is no reason to believe that Christopher would have posted statements in an online forum created by residents. Specifically, the complaint itself indicates that the

online forum was established by residents in response to a new rule requiring minimum lease terms for residents. However, there is no evidence that Christopher "has any connection to or involvement in the intra-building dispute over hotel-style rentals and the animus that engendered among Atelier residents and members of the Board." (ALJD 53: 33-5). Christopher was a maintenance employee of the Condominium Association, not a resident. No evidence connects him to the underlying resident dispute.

In sum, there is no evidence to suggest that Christopher had access to the alleged unlawful website, let alone posted comments in online discussions. Thus, even assuming defamatory statements were made, there is no reasonable basis to support a cause of action against Christopher. Therefore, the Board should affirm the ALJ's finding that "the General Counsel has established that Respondent did not have, and could not reasonably believe it could acquire through discovery, the evidence required to prove the essential elements of its cause of action against Christopher." (ALJD 53: 38-41).

(3) The lawsuit is retaliatory

The evidence demonstrates that the lawsuit was commenced with a retaliatory motive. The Board has held that evidence of retaliatory motive consists of such factors as the baselessness of the lawsuit,[28] a request for damages in excess of mere compensatory damages,[29] and prior animus towards the defendant in the lawsuit.[30] The Board also considers timing when determining whether a lawsuit was filed for retaliatory purposes.[31]

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[28] *Phoenix Newspapers*, 294 NLRB 47, 49 (1989).
[29] *H.W. Barss*, 296 NLRB 1286, 1287 (1989).
[30] *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325, 326 (1990).
[31] *See e.g. Vanguard Tours*, 300 NLRB 250 (1990)(finding that employer's continuation of lawsuit after strike ended was retaliatory even though suit may not have been retaliatory from its inception).

Applying these factors, the evidence establishes a retaliatory motive. As discussed above, the lawsuit was baseless on its face inasmuch as Respondent has no evidence to connect Christopher to the alleged defamatory statements. Indeed, the retaliatory nature of the lawsuit is highlighted by the arbitrariness of the named defendants accused of authoring those statements. Initially, Respondent included tenants of the condominium association, individuals who arguably were more likely to have made the statements at issue, several internet companies, and Christopher. After that suit was dismissed, the second lawsuit filed in June 2010, which is the subject of the instant complaint, named only three ex-employees as defendants. Respondent inexplicably dropped the defendant residents. Further, the three ex-employees named in the June 2010 complaint, had unfair labor practice charges pending with the NLRB against Respondent. Thus, Respondent's choice in filing a complaint and only naming employees who were participating in Board processes is evidence of a retaliatory motive.

Further, the timing of the lawsuit suggests a retaliatory motive. The Employer's first lawsuit was filed in July 2009 at the height of the Union's organizing campaign, and on the heels of the discharges of lead organizers, Alovic and Christopher. The June 2010 lawsuit was filed after the Regional Director issued the instant complaint with respect to Christopher's discharge.

Furthermore, the June 2010 lawsuit seeks excessive damages, despite the fact that the websites containing the alleged defamatory statements had been shut down for over a year. With respect to damages, Respondent's complaint demands in excess of $180 million ($12 million for each of the first fifteen causes of action and $10 million for the sixteenth cause of action). Despite this extraordinary request, Respondent offered no indication of what, if any, damages it suffered as a result of the alleged defamatory statements. In *Bill Johnson's,*[32] the Court recognized that the chilling effect of a state lawsuit upon an employee's willingness to engage in

[32] 461 U.S. at 741

protected concerted activity is multiplied where the complaint seeks damages in addition to injunctive relief.

Therefore, taking all factors into account: "the timing of Respondent's state court lawsuit; the meritless nature of the complaint allegations insofar as they relate to Christopher; the request for excessive damages; Respondent's history of animus toward Local 32BJ; the independent violations of Section 8(a)(1) found herein; the unlawful discharges and the other evidence and testimony adduced in this record" the conclusion that Respondent filed the lawsuit with a retaliatory motive is amply supported by the record. Accordingly, the Board should affirm the ALJ's finding that the state court lawsuit was retaliatory. (ALJD 55: 46-52).

(4) The charge alleging a Bill Johnson's *violation was filed two months after the lawsuit*

Section 10(b) is an affirmative defense and the party asserting such a defense bears the burden of proof.[33] As such, it must be pled in the answer or raised before the hearing closes. However, here because "Respondent's 10(b) defense was not pled in the answer or articulated by Respondent during its opening statement at the hearing, and was not raised by Respondent prior to the filing of its post hearing brief, this defense was not raised in a timely manner and, therefore, has been waived." (ALJD 47: 1-9). [34] Therefore, the Board should affirm the ALJ's finding that Respondent waived its 10(b) defense.

Even assuming that Respondent did not waive its Section 10(b) defense, the filing of the June 2010 lawsuit is not a continuation of the July 2009 lawsuit. Instead, the July 2009 and June 2010 lawsuits are two distinct actions. First, the July 2009 lawsuit was filed by three Plaintiffs, including the estate of Morricone. In contrast, the June 2010 lawsuit was only filed by

[33] *See Leach Corp*., 312 NLRB 990, 991-2 (1993) *enfd.*, 54 F.3d 802 (D.C. Cir. 1995).
[34] citing *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005); *Dayton Newpapers, Inc*., 339 NLRB 650, 653 fn. 8 (2003), *enfd. in part*, 402 F 3d 651 (6th Cir. 2005).

Respondent's agents Mehmedovic and Neiditich. Second, the July 2009 lawsuit named several internet companies and Atelier residents as defendants, while the June 2010 only named three ex-employees as defendants. Finally, the July 2009 lawsuit was dismissed by court order. After the dismissal, Respondent filed a new lawsuit, with a new caption, new index number, new defendants and new plaintiffs. This evidence clearly shows that in June 2010, a new and separate, legal action was filed by Respondent. Accordingly, Christopher's unfair labor practice charge, which was filed on August 12, 2010, is not time barred.

Therefore, the ALJ concluded, based on the factors discussed above, "Respondent has failed to meet its burden to show that the lawsuit filed in June 2010 was a mere continuation of the prior lawsuit, rather than a separate and distinct legal action." (ALJD 47: 32-5). Accordingly, the Board should affirm the ALJ finding that the charge filed by Christopher alleging that the lawsuit was unlawful, is timely.

(5) Respondent was not faced with a Hobson Choice

In its submission, Respondent argues that the ALJ erred in holding that Respondent's lack of production in response to GC's subpoena *duces tecum*, regarding documents relating to the lawsuit, showed a lack of an investigation and basis for the lawsuits. (Resp. Br. 39). In that regard, Respondent asserts that GC should have served a subpoena personally on Neiditch and Mehmedovic rather than on Cooper Square and the Atelier. By serving the entities and not the individuals, Respondent was placed in a Hobson's Choice: "collect information from the Mehmedovic and Neiditch in order to comply with the subpoena and thereby give the appearance that they possess documents relating to the lawsuit, thereby aiding the proof of agency status, or honestly state that they have no such documents and suffer the presumption, as imposed by the

ALJ that no such documents exist because of a later-in-time determination that agency status is present." (Resp. Br. 39).

GC served a subpoena *duces tecum* on Respondent for documents relating to the lawsuit and any investigation of the alleged defamatory statements and not on Mehmedovic and Neiditich as individuals because Respondent was responsible for the lawsuit. However, the fact that GC did not subpoena Mehmedovic and Neiditch as individuals in no way prevented Respondent from introducing relevant documents into evidence. Respondent could have proffered or offered or adduced any document that related to the lawsuit through Neiditch or Mehmedovic and further argued that they were not precluded to do so because GC's subpoena was served on Respondent and not the individuals. To be clear, that issue is not presented here. Respondent did not attempt to introduce any documentary evidence relating to the lawsuit through its witnesses. Furthermore, there is no testimony that any documents that would be responsive to GC's subpoena, had it been served on Neiditch and Mehmedovic as individuals, exist. Therefore, the ALJ was correct in concluding that either the documents relating to GC's subpoena do not exist, or that to the extent they do, such evidence would not support Respondent's contentions. (ALJD 52: 25-6).

(6) The ALJ's order to enjoin the baseless retaliatory lawsuit should be affirmed

In its submission, Respondent argues that the ALJ's decision to enjoin its unlawful lawsuit raises constitutional issues. (Resp. Br. 28). However, this argument is of no moment. The holding in *Bill Johnson* is clear, "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with a retaliatory motive."[35] (ALJD 48: 10-3). Thus, the ALJ's order to enjoin the lawsuit is squarely within the framework established by the Court.

[35] 461 U.S. at 744.

Respondent further argues that the General Counsel has failed to follow its own internal guidelines for the investigation of allegedly retaliatory lawsuits, by not holding this charge in abeyance, citing memoranda from the Office of the General Counsel. (Resp. Br. 27). However, this argument fails for three fundamental reasons. First, the decision of how to process a charge is within the discretion of the General Counsel. Second, memoranda issued by the General Counsel do not constitute precedential authority and are not binding on the Board.[36] (ALJD 48: 40-7). Third, GC did follow its own internal guidelines. GC Memo 02-09 states that charges should be held in abeyance where the lawsuit is arguably reasonably based. Here, as discussed above, there is no basis for the lawsuit against Christopher. Therefore, this charge was not held in abeyance because the lawsuit was not arguably reasonably based.

Therefore, the ALJ's finding that there is no constitutional impediment, or consideration of public policy that precludes her from considering the issues relating to the defamation lawsuit on their merits should be affirmed by the Board. Based on the reasons articulated above, and in the ALJ's decision, the Board should affirm the ALJ's order to enjoin Respondent's baseless retaliatory lawsuit. (ALJD 49: 3-5).

III. REMEDY AND CONCLUSION

It is respectfully urged that the Board affirm the Administrative Law Judge's rulings, findings and conclusions, and adopt the recommended Order. Respondent should be ordered to cease and desist from interrogating employees about their Union activities and the Union activities of others; threatening employees with unspecified reprisals if they supported the Union; discharging employees for engaging in union or other concerted, protected activities; instituting or maintaining any baseless and retaliatory lawsuit to retaliate against employees for

[36] *See Fun Striders*, 250 NLRB 520, 520 fn. 1 (1980)(finding advice memorandum does not constitute precedential authority)

participating in an investigation before the National Labor Relations Board or other concerted protected activities. Respondent should further be ordered to offer Christopher and Alovic full reinstatement to their former jobs and make them whole for any loss in earnings and other benefits that they suffered as a result of Respondent's discrimination against them, and post the Notice to Employees attached to the ALJ's decision. The GC respectfully requests that the Board grant any other relief it deems appropriate in this matter.

Dated: June 26, 2012
New York, New York

Respectfully submitted,

/s/ David Gribben

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2012, I caused the foregoing Memorandum of Law to be served by electronic mail as follows:

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