

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

**MILUM TEXTILE SERVICES CO.**

**and**

**Cases 28-CA-20898  
28-CA-20906  
28-CA-20973  
28-CA-21050  
28-CA-21203**

**UNITE HERE!**

**ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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The Exceptions filed by Respondent Milum Textile Services Co. to the Decision of Administrative Law Judge Mary Miller Cracraft (ALJD) are without merit and not supported by the evidence.<sup>1</sup> The ALJ's findings that Milum violated Section 8(a)(1) of the Act by filing and maintaining a baseless and retaliatory Federal District Court lawsuit against UNITE-HERE! is fully supported by the record. Accordingly, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order.

**I. Procedural History**

On December 30, 2011, the National Labor Relations Board (Board) issued its decision in this matter, finding that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) by: suspending an employee for wearing a union button; firing two employees because of their union activities; promising and/or granting employees benefits; promulgating and maintaining rules prohibiting employees from wearing union

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<sup>1</sup> Milum Textile Services Co., will be referred to as "Respondent" or "Milum." UNITE HERE! will be referred to as "Union." Reference to the underlying trial Exhibits of the General Counsel, Union, and Respondent will be designated as "GC," "U," and "R" respectively, and references to the underlying trial transcripts will be designated as "Tr." The ALJD, JD(SF)-26-12, can also be found at 2012 WL 1951390.

buttons; creating the impression of surveillance; threatening to reduce employees' wages; interrogating employees; and instituting and maintaining an action for a temporary restraining order (TRO), based upon the filing of a lawsuit in Federal District Court (District Court), that was baseless and retaliatory. See *Milum Textile Services Co.*, 357 NLRB No. 169 (2011). Because of Milum's sever and pervasive violations, as a remedy, the Board issued a bargaining order, pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), requiring Respondent to meet and bargain with the Union as the exclusive bargaining representative of Milum's production employees.

With respect to the lawsuit upon which the TRO was based, Respondent continued to prosecute the matter until May 26, 2006, when it obtained voluntary dismissal of the suit, without prejudice. *Milum Textile*, supra. slip op. at 19. Regarding the unfair labor practice allegations that the filing and continued maintenance of the suit, even after the TRO was dismissed by the District Court, violated Section 8(a)(1) of the Act, the Board did not make a legal finding. Instead, the Board remanded this claim back to the Administrative Law Judge (ALJ) to determine whether the Acting General Counsel (General Counsel) carried his burden of proving baselessness and retaliatory motive under the standards set forth in *Allied Mechanical Services, Inc.*, 357 NLRB No. 101 (2011).

On January 20, 2012, ALJ Mary Miller Cracraft issued a Briefing Schedule, setting February 24, 2012, as the filing date for briefs on the remanded issues. See Exhibit A. Days later, on January 30, 2012, Respondent filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit seeing review of the Board's decision.<sup>2</sup>

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<sup>2</sup> See *Milum Textile Services Co. v. NLRB*, No. 12-1062 (DC. Cir. filed January 30, 2012). Respondent re-filed its Petition for Review on May 30, 2012, after its original petition was dismissed by the court as premature. See *Milum Textile Services Co. v. NLRB*, No. 12-1235 (DC. Cir. filed May 30, 2012). Respondent's re-filed petition is currently pending.

Thereafter, Respondent filed a variety of Motions, both with the Board and the ALJ, seeking to either reopen the record or suspend/postpone the remand briefing to the ALJ.<sup>3</sup> In one motion, dated February 17, 2012, Respondent sought to reopen the record before the ALJ for the purpose of calling “Daisy Pitkin to the stand to elicit complete testimony, [and] based upon Ms. Pitkin’s testimony, to call other individuals who may have knowledge of the basis of the union’s claims and the basis [sp] therefore” and then possibly introduce nebulous “additional documentary evidence . . . in addition to the documentary evidence that the administrative law judge specifically refused and rejected during the initial hearing.” See Exhibit C, at 2. The ALJ properly denied Respondent’s Motion. See Exhibit D. Thereafter, on May 30, 2012, the ALJ issued her detailed decision finding that Respondent violated Section 8(a)(1) of the Act by filing and maintaining its baseless and retaliatory lawsuit against the Union.

On June 27, 2012, Respondent filed two exceptions to the ALJD, along with a supporting brief. Respondent first excepts to the ALJ’s finding that the General Counsel met his burden of proving that the filing and maintenance of the Federal court lawsuit was baseless. Respondent then excepts to the ALJ’s finding that the filing and the maintenance of the lawsuit was retaliatory. In its two-page Exceptions, Respondent asserts that “Milum takes exception to each of the ALJ’s underlying findings and conclusions.” Resp’t Exceptions, at 1, 2. However, in its Exceptions Respondent does not, as required by the Board’s Rules and Regulations: identify that part of the administrative law judge’s decision to which objection is made; designate by precise citation of page the portions of the record relied on; or

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<sup>3</sup> In an unpublished Order dated March 23, 2012, the Board denied Respondent’s Motion to reopen the record to introduce evidence regarding: (1) the passage of time since the underlying unfair labor practices; (2) employee turnover; and (3) the alleged absence of any unfair labor practice charges since October 2007. See Milum Textile Services Co., 28-CA-20898 et. al. (Unpublished Order dated March 23, 2012); See also, Exhibit B.

concisely state the grounds for the exception. See Section 102.46(b)(1). Instead, Respondent states that the basis of each exception “is set forth in full in the supporting brief filed simultaneously herewith.” *Id.* In its brief, Respondent then attempts to argue that virtually every finding of fact and conclusion of law made by the ALJ was error. Because Respondent’s Exceptions do not comport with the Board’s Rules and Regulations, and should be stricken. Notwithstanding, the General Counsel will address Respondent’s arguments as set forth in its brief below.

## **II. Background**

### **A. Respondent’s Operations and the Union’s Organizing Drive**

Respondent operates a commercial laundry in Phoenix, Arizona, laundering both restaurant and healthcare linens, and provides pickup and delivery services to its area customers, including hospitals and restaurants. *Milum Textile*, supra. slip op. at 18. Craig Milum serves as Respondent’s President and CEO, and has done so for about 24 years. *Id.* (Tr. 32)

One of Respondent’s employees first contacted the Union in early 2005, and in the months preceding the official launch of its organizing campaign, the Union was in regular contact with a core group of workers. (Tr. 906-07, 1622) The Union’s campaign was coordinated by organizing director Daisy Pitkin, and was officially launched during the weekend of February 24, 2006. (Tr. 878, 1620, 1622) Organizers visited employees, speaking to them about working conditions, educating them about the Union, and asking if they would like to sign a petition to join the Union and authorize the Union to bargain on

their behalf. (Tr. 860); (GC. 28, 127) Ultimately 42 of Respondent's approximately 70 employees signed the petition which stated:

WE DEMAND TO JOIN WITH UNITE HERE AND 40,000 UNION  
LAUNDRY WORKERS ACROSS THE COUNTRY!

I hereby accept membership in UNITE HERE, the international laundry workers' union, and authorize UNITE HERE to represent me in negotiations with my employer about wages, hours and all other conditions of employment.

*Milum Textile*, supra. slip op. at 8 n.27, 18. On March 3, the Union sent a letter to Craig Milum informing him of the organizing drive. Respondent's workers ultimately delivered the Petition to Craig Milum during a work stoppage on March 4. *Id.*

Beginning on March 10, 2006, the Union started publicizing its organizing drive, along with employee complaints about their working conditions, to the public; the Union created a website called "milumexposed" on which safety and employee issues were discussed. *Milum Textile*, supra. slip op. at 18. In early March, relying upon reports from employees, along with findings made by governmental regulatory agencies, the Union sent letters to some of Respondent's customers alerting them to Respondent's unacceptable health and safety practices. *Id.*; (GC. 8 – attached letters); (Tr. 1693, 2252-54) Relying upon this same information, on April 24 the Union issued a press release repeating its criticism of Respondent's health and safety practices, and publicizing a report on these practices which was to be released on April 27. *Milum Textile*, supra. slip op at 2, 18-19; (GC. 8 – attached press release); (Tr. 2256) The press release also alerted the public that the Union's president and Respondent's employees would present this report to restaurants using Respondent's services, along with the customers of those restaurants, and that Respondent's employees would speak about their working conditions. *Id.*

On April 27, the Union issued its report, including an analysis discussing the standards needed to protect linens from exposure to microbial contamination, and explaining various working conditions described by Respondent's employees that lead to a danger of cross contamination. (R. 29; GC. 5) That same day, Respondent's employees spoke to members of the public, and the Union's president met with one of Respondent's customers. (GC. 42)

**B. Respondent's Lawsuit and Motion for a Restraining Order**

On April 3, 2006, Respondent filed a charge against the Union with the NLRB seeking an injunction, alleging that the Union's customer letters constituted a secondary boycott. *Milum Textile*, supra. slip op. at 2. On April 26, while the charge was still pending, Respondent filed a complaint against the Union in District Court alleging five causes of action: illegal secondary boycott; intentional interference with economic relations; intentional interference with prospective economic advantage; libel; and fraud. *Id.* The lawsuit alleged that the Union made knowingly false statements with malice and that Respondent suffered damages as a result. The complaint sought a permanent and temporary injunction enjoining the Union

and any affiliated persons or entities from directly or indirectly sending or transmitting via any medium any unsolicited letters or documents to Plaintiff's customers or the customers of Plaintiff's customers, or verbally contacting or communicating with Plaintiff's customers or the customers of Plaintiff's customers.

The complaint also sought money damages, costs, and attorney's fees.<sup>4</sup> *Id.* In support of the lawsuit, Respondent attached two customer letters and the April 24 press release. (GC. 8)

With the complaint, Respondent also filed a motion for a TRO, based exclusively on Section 303 of the Labor-Management Relations Act (LMRA), which makes it unlawful for a

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<sup>4</sup> On April 28, 2006, Region 28 dismissed Respondent's charge against the Union, and the dismissal was upheld by the NLRB Office of Appeals on June 7. *Milum Textile Services Co.*, slip op. at 2 n. 6

union to engage in conduct prohibited by Section 8(b)(4) of the Act. *Milum Textile*, supra. slip op. at 2. The TRO sought to enjoin the Union from “picketing and distributing leaflets” to the customers of Milum’s customers and from distributing “false materials.” In support of the TRO, Respondent relied exclusively upon an affidavit from Craig Milum, in which he analyzed the allegedly false statements in each document the Union disseminated to the public. (GC. 11)

At the hearing on the TRO, Respondent conceded that it could not obtain an injunction under Section 303, but argued, for the first time, that an injunction was appropriate under its independent state tort law claims, even though none of these claims were ever referenced in its motion. (GC. 12) The District Court denied the TRO, finding Respondent’s secondary boycott allegation was preempted. (GC. 12) The District Court also found that, to the extent any of Milum’s claims were not preempted, they arose out of a labor dispute, requiring Milum to prove malice and actual damages; the court found that Respondent had offered no proof of either. *Milum Textile*, supra. slip op. at 2. Despite the court’s clear and unequivocal ruling, Respondent maintained its lawsuit against the Union, including the secondary boycott claim until May 26, 2006, when the District Court dismissed Respondent’s lawsuit, with prejudice, at Milum’s request.

### **III. The Board’s Decision in Allied Mechanical and It’s Remand in This Matter**

#### **A. Allied Mechanical**

*Allied Mechanical Services, Inc.*, 357 NLRB No. 101 (2011) presented the question of whether an employer violated Section 8(a)(1) of the Act by filing and maintaining an unsuccessful lawsuit against two different labor unions, which included four counts. Three of the allegations were based upon the secondary boycott provisions of the Act, while one

alleged a breach of contract claim. *Id.* slip op. at 2. The unions moved to dismiss the matter pursuant to Fed. R. Civ. P. 12(b)(6), and the district court granted the motion; the dismissal of the complaint was affirmed on appeal. *Id.* slip op. at 2-3, 3 n.8.

To determine whether the lawsuit violated Section 8(a)(1), the Board first independently analyzed each separate count in the employer’s lawsuit to determine whether the lawsuit lacked a reasonable basis. *Id.* slip op. at 7-10. Finding that each allegation was baseless, the Board then enumerated the type of evidence needed to prove that a baseless lawsuit was brought with a retaliatory motive. *Id.* slip op. at 10-11. The Board also held that a retaliatory motive may be inferred from, among other things, the fact that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the union-defendant and particularly toward its protected activity; and that the suit lacked obvious merit. *Id.* On the basis of its analysis, the Board found that each of the employer’s allegations were baseless, retaliatory, and a violation of Section 8(a)(1). *Id.*

**B. The Board’s Remand**

Here, the Board remanded the question of whether the General Counsel sustained his burden of showing that Respondent’s filing and maintenance of the lawsuit against the Union “was baseless, and if so, that it was retaliatory.” *Milum Textile*, supra. slip op. at 6.

Regarding the General Counsel’s burden, the Board stated the:

General Counsel had to prove that the Respondent, when it filed its complaint or during the time before it voluntarily dismissed the action, did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its cause of action.

*Id.* slip op. at 7. The Board further explained the General Counsel “must prove not simply that summary judgment would have been granted had the Union moved for it prior to the

voluntary dismissal, but that the Respondent would not have been able to present a colorable argument to the grant of summary judgment at that time.” Id.

Switching to the ALJ’s requirement to analyze the evidence, the Board stated:

in order to determine if the General Counsel has carried this burden, a judge must determine the elements of the causes of action that the General Counsel has placed at issue and then evaluate the evidence offered by the General Counsel to prove that the Respondent did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action.

Id. Here, the Board held that the General Counsel presented “substantial evidence” relevant to the truth of the allegedly defamatory statements, the lack of actual malice on the part of the Union in publishing the statements, and the lack of actual damage suffered by the Respondent as a result of the statements. Id. However, because the ALJ did not evaluate the evidence accordingly, the Board remanded the matter to the ALJ with directions to allow the parties to file additional briefs addressing the question of whether the General Counsel carried his burden of proving baselessness and retaliatory motive under the Board’s clarified standards. Id. slip op. at 7-8.

### **C. The ALJ’s Decision**

In her decision, the ALJ first found that the lawsuit filed by Respondent was baseless. In so doing, she reviewed each specific cause of action set forth in the lawsuit, finding that the General Counsel showed Milum did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove the elements of each allegation. ALJD slip op. at 5-7, 9-12. The ALJ also found that the lawsuit was filed and maintained for a retaliatory motive. ALJD slip op. at 13-14. Finally, although the ALJ had previously denied Respondent’s February 27, 2012, motion to reopen the record, See Exhibit D, the ALJ accepted the assertions made in Respondent’s motion as a declaration

pursuant to Fed. R. Civ. P. 56(d), and again properly denied the motion. The ALJ found that none of Respondent's proffered evidence would require a different result, and that reopening the record would improperly allow Respondent an opportunity to try to introduce evidence that it had the opportunity to introduce, but did not do so, during the underlying hearing.

#### **IV. The ALJD is Fully Supported by the Record Evidence**

##### **A. The ALJ Properly Denied Respondent's Motion to Reopen the Record**

Although it is unclear from the exceptions and supporting brief, Respondent seems to claim that the ALJ erred in denying its February 27, 2012, motion to reopen the record.<sup>5</sup> In the event the Board finds that this matter is properly before it on exceptions, any such claim by Respondent must be dismissed, as the ALJ properly denied Respondent's motion.

In its motion, Respondent asked that the ALJ reopen the record to permit Respondent to "offer testimony and evidence regarding the remanded issue that it was specifically precluded from doing during the initial hearing." See Exhibit C, at 1. Specifically, Respondent complained that the trial ALJ: (1) "precluded Respondent's counsel from questioning union organizer Daisy Pitkin (Pitkin) regarding whether the union had any evidence that supported the union's written claims and the issue of malice;" and (2) sustained the General Counsel's objections to the introduction of any evidence "that was in his opinion outside the four corners" of the District Court Complaint. *Id.* at 2. Accordingly, Respondent sought to reopen the record and be "permitted to not only call Daisy Pitkin to the stand to elicit complete testimony, but based upon Ms. Pitkin's testimony, to call other individuals who may have knowledge of the basis of the union's claims and the basis therefore." *Id.* Furthermore, Respondent wanted the opportunity to possibly introduce vague "additional

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<sup>5</sup> In its Exceptions Respondent states that it "takes exception to . . . the ALJ's treatment of the Motion to Reopen" and then alludes in its brief that either the ruling was error, or that the ALJ ignored the proffered evidence. See Resp't Exceptions, at 1; Resp't Exceptions Br., at 7-11, 22.

documentary evidence . . . in addition to the documentary evidence that the administrative law judge specifically refused and rejected during the hearing.” Id.

1. The ALJ properly denied Respondent’s motion to reopen the record as it did not comport with the Board’s rules.

Although not one of the reasons relied upon by the ALJ, the ALJ nonetheless properly denied Respondent’s motion as it did not comport with the Board’s Rules and Regulations. A motion to reopen the record after decision by the Board is controlled by Section 102.48(d) of the Board’s Rules and Regulations. *R.L. Polk & Co.*, 313 NLRB 1069, 1071 (1994) (ALJ applies Section 102.48(d)(1) in deciding whether to reopen the record); *ADB Utility Contractors, Inc.*, 353 NLRB 166, 195-96 (2008) (two member Board decision) aff’d 355 NLRB No. 172 (2010) (ALJ uses Section 102.48(d) and the Board’s commentaries about those provisions as a guide in deciding whether to reopen the record). *Raven Ser. Corp.*, 331 NLRB 651, 657 (2000) (same). In determining whether to reopen the record, the ALJ must determine whether the conditions of Section 102.48(d) have been met. *R. L. Polk & Co.*, supra.

- a. Respondent’s motion was untimely

Section 102.48 of the Board’s Rules and Regulations reads, in part, as follows:

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. . . . A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section shall be filed within 28 days, . . . except that a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence.

Here, Respondent waited forty-three days after service of the Board's decision on January 5, 2012, to file its Motion, well outside the 28 days contemplated by the rules, and only one-week before briefs were due on the remanded issues. Respondent has never presented any reasons as to why the 28-day period provided for in the Board's rules should have been extended, and never made a showing of excusable neglect or prejudice. Furthermore, Respondent has never claimed that, since the original hearing, it has "discovered" additional evidence. As such, Respondent's motion was untimely and was properly denied. See *UFCW Local 1996*, 338 NLRB 1074, 1074 (2003) (Motion for reconsideration filed more than 28 days allowed for by the rules denied where the charging party failed to make a showing of excusable neglect, lack of prejudice, or why the period provided for by the rules should be extended).

- b. Respondent's motion failed to state what testimony witnesses would give, and why, if credited, such testimony would warrant a different result.

In its motion, Respondent stated that it sought to recall as a witness Daisy Pitkin, "to elicit complete testimony" and based upon that testimony to call other witnesses, and introduce other documentary evidence. See Exhibit C at 2. However, Respondent never specified what testimony Pitkin, or any other anonymous witness, would give, and did not claim that this testimony would somehow warrant a different result. Through its motion, Respondent was simple seeking an opportunity to conduct discovery, and as such, Respondent's Motion was deficient and was properly denied. Board's Rules § 102.48(d)(1); *Lockheed Martin Astronautics*, 332 NLRB 416 (2000).

In *Lockheed Martin Astronautics*, the Board denied a motion to reopen the record to receive the testimony of a witness because the respondent did not specify what testimony the

witness would give, other than in general terms, and did “not claim that his testimony would require a different result.” 332 NLRB at 416 n. 2.<sup>6</sup> Such is the case here. Because Respondent did not specifically state, or even explain, that the additional testimony and evidence it sought would result in a ruling in its favor, or that the additional evidence “if adduced and credited . . . would require a different result,” the ALJ properly denied Respondent’s motion. See, Board’s Rules § 102.48(d)(1); *Int’l Longshoremen’s Ass’n*, 323 NLRB 1029, 1031 (1997) (charging party’s motion to reopen the record to admit documents denied where, in part, the charging party failed to state that the admission of the additional documents would result in a different ruling).

2. Respondent was given the opportunity during the underlying hearing to introduce the testimony and documents it sought to introduce through its motion to reopen the record.

Contrary to Respondent’s claim, the trial ALJ did not preclude Respondent from questioning Pitkin with respect to the “union’s written claims and the issue of malice.” Exhibit C, at 2. Instead, Respondent was given every opportunity to present such relevant evidence, but chose not to do so during the underlying hearing. As such, ALJ Cracraft properly denied Respondent’s motion, finding that Respondent was attempting to introduce evidence it could have introduced during the underlying hearing, but chose not to.

- a. The trial ALJ allowed Respondent to ask Pitkin about statements in the documents attached to the District Court complaint, and gave Respondent the opportunity to recall Pitkin to elicit further testimony.

At trial, Respondent was allowed to ask Pitkin specifically about the documents Respondent had attached to its District Court complaint, and which formed a basis of the

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<sup>6</sup> In accepting the remand from the Board in *ADB Utility Contractors, Inc.*, the ALJ specifically relied upon *Lockheed Martin Astronautics* in denying the employer’s motion to reopen the record. *ADB Utility Contractors, Inc.*, 353 NLRB at 196.

lawsuit. (Tr. 1687-1700) As such, Respondent cannot now claim it was prejudiced, or that it otherwise needs to reopen the record to elicit further testimony with respect to these documents.

As to other evidence surrounding the merits of Respondent's lawsuit against the Union, the trial ALJ ruled that, before allowing Pitkin (a Union official) to testify about the merits surrounding Respondent's District Court lawsuit, Respondent would first be required to present direct evidence from Respondent's officials regarding Respondent's basis for the lawsuit against the Union. (Tr. 1658-64) Such a ruling is only reasonable, as it was Respondent who filed the suit against the Union, and Respondent, not the Union, was in possession of the evidence surrounding the merits of the allegations in its lawsuit.

The trial ALJ noted that Pitkin could be recalled by Respondent as a witness after Respondent presenting such direct evidence. If Respondent first presented such evidence, he would then "determine with the hearing evidence that she [Pitkin] ought to respond to questions so that we would then have to engage in some mini trial, if not a major trial, of the underlying lawsuit, well, then that will be the time to bring her back on." (Tr. 1659)

Notwithstanding the trial ALJ's instructions, Respondent never attempted to recall Pitkin to elicit such testimony. Because Respondent was given the opportunity at trial to present the testimony it sought to elicit from Pitkin in its motion to reopen the record, but chose not to do so, there is no reason in law or equity that would support reopening the record now. *ADB Utility Contractors, Inc.*, 353 NLRB at 196 (ALJ denies motion to reopen the record, as respondent had the opportunity to present the underlying evidence at trial but chose not to).

- b. Respondent was allowed to preserve the record by introducing whatever documentary evidence it deemed relevant, and having any such rejected exhibits placed in the rejected exhibit file.

Notwithstanding its assertions, at trial Respondent was not restricted from introducing documentary evidence “outside the four corners” of the District Court complaint. Exhibit C, at 2. Instead, the record shows that opposite was true. While the trial ALJ properly ruled that Respondent’s proffered evidence was irrelevant, because the allegations of the District Court complaint were specific and referred to the documents attached to the complaint, he made every effort to allow Respondent to attempt to introduce its documentary evidence, and place any rejected exhibits in the rejected exhibit file. The trial ALJ specifically urged Respondent to do so in order to protect the record, and said that he was “happy to receive them [Respondent’s proffered exhibits] – and reject them and place them in the same rejected exhibit folder.” (Tr. 2036-38) In fact, Respondent placed twenty-two exhibits into the rejected exhibit file.<sup>7</sup> Any claim that Respondent was precluded from presenting evidence on the filing and maintaining of the lawsuit is specious. The trial ALJ allowed Respondent every opportunity to present its evidence, and to preserve the record, and Respondent did so. Respondent should not now, at this late date, be given another opportunity to supplement the record and present evidence that, at the time of trial, it had every opportunity to present, but chose not to, and the ALJ properly denied Respondent’s motion accordingly. *Lockheed Martin Astronautics*, 332 NLRB at 416 n. 2; *ADB Utility Contractors, Inc.* 353 NLRB at 196.

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<sup>7</sup> See Resp’t Rejected Exhibits 11, 12, 13, 15, 18, 20, 22, 23, 25, 26, 27, 30, 31, 32, 33, 35, 36, 51, 52, 53, 66, and 67.

- c. Respondent did not file exceptions to the ALJ's evidentiary ruling, and therefore has waived the right to now challenge these rulings through a motion to reopen the record.

The Board's Rules and Regulations are clear, "[a]ny exception to a ruling . . . which is not specifically urged shall be deemed to have been waived." Board's Rules § 102.46(b)(2). Furthermore, "[n]o matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding." Board's Rules § 102.46(g). Regarding a party's claim that an ALJ's evidentiary ruling was error, in order to preserve such matter for review, the party must first file timely exceptions to those evidentiary ruling. Cf. *Wal-Mart Stores, Inc.*, 348, NLRB 833, 834 (2006) (the General Counsel filed timely exceptions to the ALJ's evidentiary ruling, thereby preserving the issue for Board review).

In its motion to reopen the record, Respondent asserted that the record must be reopened to allow testimony which the trial ALJ, through his rulings, precluded Respondent from entering into evidence. Exhibit C, at 1-2. However, Respondent never filed exceptions to any of the trial ALJ's evidentiary rulings. See Resp't Original Exceptions, dated November 30, 2007. As such, Respondent failed to preserve this matter for review. Because Respondent did not file exceptions to any of the trial ALJ's evidentiary rulings on the matters Respondent sought to introduce into evidence through its motion to reopen the record, the motion was properly denied. Board's Rules § 102.46(g).

3. The ALJ properly denied the Motion, as it is the General Counsel's burden to support his allegations, and reopening the record would result in needless litigation

As the Board noted, with respect to the remanded issues surrounding Respondent's lawsuit, the burden of proof is on the General Counsel "to prove each element of an unfair

labor practice.” *Milum*, supra. slip op. at 6. The Board has long noted that, to sustain an allegation the burden of proof always rests on the General Counsel,

[t]his burden never shifts to the Respondent and no onus is imposed on Respondent to disprove any of the allegations pleaded in the complaint. The General Counsel must sustain [his] burden of proof with affirmative evidence and the discrediting of any of Respondents’ evidence does not, without more, constitute affirmative evidence to support the General Counsel’s obligation to prove [his] case.

*Page Avjet, Inc.*, 278 NLRB 444, 450 (1986). To require otherwise, particularly with respect to issues involving the application of *BE&K Construction Co. v. NLRB*, 536 US 516 (2002), encourages needless and costly litigation. See *Milum*, supra. slip op. at 6 (requiring Respondent to disprove allegation “might encourage a plaintiff in the position of Respondent to continue to litigate in court in order to conduct discovery and obtain evidence needed to demonstrate that its initial filing was not baseless rather than voluntarily dismiss or withdraw its complaint”).

As such, in the current posture of the remanded issues, allowing Respondent to reopen the record would only encourage costly and unnecessary litigation on issues that are irrelevant as to whether the General Counsel can prove each element of the alleged unfair labor practices. In proving his case, the General Counsel is limited by the evidence produced at trial; here, the General Counsel is only relying upon the evidence and testimony admitted into the record to show that Respondent’s filing and maintaining the District Court lawsuit constitutes an unfair labor practice. The quantum of such evidence either does, or does not, sustain a violation.

Allowing Respondent to reopen the record, and conduct discovery on a lawsuit that was withdrawn six years ago, encourages the waste of resources, particularly where the General Counsel is not relying upon any such unintroduced evidence to prove a violation.

The evidence Respondent now seeks to introduce is simply irrelevant to the General Counsel's burden, as "discrediting any of Respondents' evidence does not, without more, constitute affirmative evidence to support the General Counsel's obligation to prove [his] case." *Page Avjet, Inc.*, 278 NLRB at 450 (1986). There is "a strong policy favoring an end to litigation" which cannot be overcome by the insubstantial evidence Respondent seeks to now introduce. *R.L. Polk & Co.* 313 NLRB at 1070, 1076. Such endless litigation was never envisioned by the Supreme Court in *BE&K Construction Co.*, nor by the Board in its remand. Accordingly, the ALJ properly denied Respondent's motion to reopen the record.

**B. Out of an abundance of caution, the ALJ properly considered, and rejected, the evidence Respondent proffered to introduce in its motion to reopen the record as a Rule 56 statement.**

Respondent complains that the ALJ treated its motion to reopen the record as a declaration pursuant to Fed. R. Civ. P. 56(d). Making various and convoluted arguments, Respondent asserts it "believed that the only way that it could introduce new evidence was through the filing of [a] motion to reopen the record," and later states that its February 27 motion to reopen the record "meets the requirement" of a Rule 56(d) affidavit, "as it specifically states that Milum has or could obtain such additional evidence" to substantiate its case. Resp't Exceptions Br., at 7.

Out of caution, the ALJ assumed that Milum's motion to reopen the record "meets the requirements" of a Rule 56(d) affidavit, just as Respondent asserts in its brief. The ALJ then considered Respondent's proffered evidence, and as set forth above, properly rejected it. Respondent cannot claim that the ALJ erred in considering its motion as a Rule 56(d) affidavit in one sentence, and then claim the motion "meets the requirements" of a Rule 56(d)

affidavit in another. As such, Respondent's argument is a red herring, and should be denied as meritless.

**C. The ALJ Properly Found that Respondent's Lawsuit was Baseless**

In determining whether Respondent's lawsuit lacked a reasonable basis, the Board analyzes each separate allegation. *Allied Mechanical*, 357 NLRB No. 101 slip op. at 7-8, 12. A violation exists if any one individual allegation in the lawsuit is baseless, and was filed and maintained for a retaliatory motive. *Id.* Cf. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1367 (9th Cir. 1990) (frivolous claims in pleadings may be the subject of Rule 11 sanctions even though they are included in a pleading containing other non-frivolous requests for relief). Here, the ALJ properly found that the General Counsel sustained his burden and proved that Respondent did not produce, and could not acquire, evidence to prove the essential elements of each separate cause of action: (1) Illegal Secondary Boycott; (2) Intentional Interference with Economic Relations; (3) Intentional Interference with Prospective Economic Advantage; (4) Libel; and (5) Common Law Fraud. (GC. 8)

1. First Cause of Action: Illegal Secondary Boycott

In its first cause of action, Respondent alleges that the Union engaged in an illegal secondary boycott, and Milum suffered damages as a result. (GC. 8 p. 4-5) However, the record shows that Milum did not, and could not reasonably believe it would have obtained evidence through discovery to prove, essential elements of this cause of action. While Milum's complaint provides no detail on the basis of this allegation, Respondent's theory is explained in its brief supporting the TRO. See G.C. 10 (TRO Memorandum) Specifically, according to Respondent, the Union violated Section 8(b)(4)(ii)(B) of the Act by "intentionally distributin[ing] false and materially misleading letters and fliers to [Milum's]

customers to cease doing business with [Milum]. TRO Mem., at p. 5. While Respondent stated that it “anticipated picketing” it provided no basis for this statement. In fact, the Union never picketed any of Respondent’s customers, nor did they engage in any conduct that could have been construed as picketing. Instead, the only factual basis for Respondent’s secondary-boycott allegation was the Union’s press releases and letters to Milum’s customers. *Id.* (alleging the Union’s reason for disseminating letters and fliers is to cause Milum’s customers to cease doing business with Respondent); *Id.* at 6 (alleging that Union’s press releases are evidence of the Union intent to enmesh neutrals into the dispute); *Id.* (press releases, and anticipated picketing, constitute secondary boycott). Because the Union never engaged in any illegal secondary activity, Respondent could never have procured evidence proving this violation.

The law is clear, issuing press releases and writing letters are conduct protected by the First Amendment of the Constitution, and may not form the basis for a secondary boycott allegation, or a Section 303 cause of action.<sup>8</sup> As the Supreme Court noted in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Buildg. & Trades Council*, 485 US 568 (1988), peaceful, non-obstructive, non-picketing communications are protected by the First Amendment and cannot violate Section 8(b)(4)(ii)(B) of the Act. In *DeBartolo*, a labor organization leafleted businesses in a shopping mall where a department store had hired a general contractor, who in turn hired a non-union subcontractor, against whom the union had a dispute. The leaflets called for a consumer boycott against the various mall tenants; the union leafleted at all four mall entrances for about three weeks. *Id.* at 571. The Supreme

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<sup>8</sup> Section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C § 187 allows a party to sue for damages sustained as a result of a union’s violation of Section 8(b)(4) of the Act. Section 303 restricts plaintiffs to those “who shall be injured in [their] business or property” by reason of any violation of Section 8(b)(4). *Teamsters, Local 20 v. Morton*, 377 U.S. 252, 260 (1964).

court held that “mere persuasion” is qualitatively different from picketing, and concluded that, because handbilling was “mere persuasion,” not “intimidate[ion] by a line of picketers,” prohibiting handbilling raises constitutional questions of considerably greater gravity than limiting picket lines. *Id.* at 580. Therefore, the *DeBartolo* Court interpreted Section 8(b)(4) not to apply to the peaceful distribution of handbills. *Id.* at 588. This principle is not limited to leafleting, but extends to other peaceful, non-picketing forms of communications. See *Sheetmetal Workers Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) (funeral march street theater); *Carpenters Local 1506*, 355 NLRB 159 (2010) (banners). This is so even if the communications are deemed misleading; in this case the Union’s communications were not. See *Hospital & Service Employees Union, Local 399*, 293 NLRB 602 n.5 (1989); *Carpenters Local 1506*, *supra.* at n.21 (even assuming a phrase was misleading, there is no colorable argument that misleading speech is coercive).

Here, the Union’s press releases and letters to Respondent’s customers did not threaten picketing; they did not threaten anything. While they may have been unsettling, the content of the Union’s communications, as speech protected by the First Amendment, would not permit a court to find them as constituting illegal secondary coercion. Within the labor context, seeking to exert social pressure on a secondary target through handbilling is constitutionally protected. *Metropolitan Opera Ass’n, Inc. v. HERE Local 100*, 239 F.3d 172, 175 (2d Cir. 2001) (leafleting in front of the Opera [secondary target] and sending letters to the Opera’s directors and donors was protected speech). Because the Union’s press release and letters could not be considered “coercive,” there was no basis for Respondent’s first cause of action, alleging an illegal secondary boycott, and Milum could not have

reasonably believed that it could have obtained evidence through discovery supporting this claim.

Finally, Respondent's secondary boycott allegation is also baseless because it was preempted. *Bill Johnson's Restaurants, Inc. v. NLRB* 461 U.S. 731, 738, n.5 (1983). On April 3, 2006, Respondent filed a charge with the Regional Office alleging the Union's communications violated Section 8(b)(4)(ii)(B) of the Act. While the charge was still being investigated, on April 26, Milum filed its complaint with the District Court seeking, in part, a permanent injunction, enjoining the Union from sending letters or documents, or contacting and communicating with, Milum's customers, or the customers of Milum's customers. Two days later the Region dismissed the charge. Because Respondent's District Court lawsuit sought to have the Union enjoined for engaging in an alleged secondary boycott, it was clearly preempted, and therefore baseless, as it concerned a matter within the Board's exclusive jurisdiction. See *San Antonio Community Hosp. v. So. Cal. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997) (NLRA preempts injunctions for secondary activity; injunctive relief possible only for defamation claims if "actual malice" standard is met); see also Norris LaGuardia Act, 29 U.S.C. § 104 (limiting courts from enjoining activities "involving or growing out of any labor dispute").

2. Second & Third Causes of Action: Intentional Interference with Economic Relations and Prospective Economic Advantage

Milum's second and third causes of action, for intentional interference with economic relations and intentional interference with prospective economic advantage, were preempted by Section 303 of the LMRA when they were filed, since they alleged as their basis the same secondary activities as Milum's secondary boycott claim. *Teamsters Local 20 v. Morton*, 377 U.S. 252, 257 (1964) ("the provisions of § 303 mark the limits beyond which a court,

state or federal, may not go in awarding damages for a union's secondary activities"); *San Antonio Community Hosp.* 125 F. 3d at 1235. Because the Union's letters and press releases cannot violate Section 8(b)(4)(ii)(B), or be the subject of a Section 303 action, Milum's tortious interference causes of action based on this same theory were preempted. *Teamsters Local 20*, 377 U.S. 252, 259-60 (1964) ("If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.").

Even if Respondent's tortious interference causes of action had not been preempted by Section 303, they would have been preempted by the Act. As the Board made clear in this proceeding, "tortious interference claims arising out of labor disputes are wholly preempted, or at least, preempted absent outrageous or violent conduct." *Milum Textile*, 357 NLRB No. 169 slip op. at 4 (2011) citing *In re Sewell*, 690 F.2d 403, 408 (4<sup>th</sup> Cir. 1982); *Wilkes-Barre Publ. Co., v. Newspaper Guild of Wilkes-Barre*, 647 F.2d 372, 381-82 (3d Cir. 1981). No "outrageous" or "violent" conduct was pled in the complaint, nor did any exist.

Finally, Respondent's tortious interference claims involve the Union's handbilling, and its protected First Amendment speech, and as such are subject to the same First Amendment actual malice/actual damages requirements as Milum's libel claim, discussed below. *Medical Lab. Mgmt. Consultants v. American Broadcasting Cos., Inc.*, 306 F.3d 806, 821 (9th Cir. 2002). *See also Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) ("claims . . . for tortious interference with business relationships [under Arizona law] . . . are subject to the same first amendment requirements that govern actions for defamation");

*Beverly Hills Foodland v. UFCW Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (plaintiff required to meet the actual malice standard for state tort claims which are based upon the same conduct or statements as its defamation claims). Because Milum could not prove actual malice or actual damages, the tortious interference claim was frivolous as well. Moreover, as the Board and the Eighth Circuit noted, peaceful handbilling is protected speech under the First Amendment and cannot be restrained based upon a tortious interference claim. *Id.* at 197; *Milum Textile*, *supra*. slip op. at 4 n.11. Accordingly, the record evidence supports the ALJ's finding that Respondent's second and third causes of action were baseless.

### 3. Fourth and Fifth Causes of Action: Libel and Fraud

Under *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) a public official or public figure plaintiff seeking damages for defamatory statements must prove, by clear and convincing evidence, that the defendant acted with actual malice, i.e., the defendant made the defamatory statement with knowledge of its falsity or with reckless disregard of whether it was true or false. *Id.* at 279-280; *see also Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342-343 (1974). Such reckless disregard is a subjective standard that is measured by whether "the defendant in fact entertained serious doubts as to the truth of [its] publication," not by whether a reasonably prudent person would have published the statement or would have investigated before publishing it. *Harte-Hanks Communications v. Connaughton* 491 U.S. 657, 688 (1989); *see St. Amant v. Thompson* 390 U.S. 727, 731 (1968).

The *New York Times* "actual malice" standards apply to statements made during a labor dispute. *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966); *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Ross v. Duke*, 116 Ariz. 298, 300, 569 P.2d 240, 242 (Ct. App. 1976). "[A]ny publication made during the course of union

organizing efforts, which is arguably relevant to that organizational activity, is entitled to the protection of *Linn*,” even if it is not made during a representation election campaign, and regardless of whether the publication concerns efforts leading to recognition or post-recognition organizing activity. *Austin*, 418 U.S. at 279.

Finally, under the *New York Times* standard, a plaintiff must suffer “actual damages” and may not rely on any common-law preemption of harm, or presumed damages. *Linn*, 383 U.S. at 61-65 (plaintiff must provide explicit proof of injury, not just a presumption of damages). Under the *New York Times* standard, a plaintiff must prove each of the following elements: (1) a false statement of fact; (2) knowledge of the falsity or reckless disregard of whether the statement is true or false; and (3) actual, as opposed to presumed, damages. *Beverly Health & Rehab. Svcs., Inc.*, 336 NLRB 332, 333 (2001). Unless each of these elements is proven, labor dispute statements are protected under the Act, and the lawsuit is preempted. *Beverly Health & Rehab. Svcs., Inc.*, 331 NLRB 960, 963 (2000) reconsideration denied 336 NLRB 332 (2001). Here, Respondent did not have, and could not reasonably have believed it would have obtained through discovery, evidence necessary to prove the essential elements of its libel cause of action.

a. Actual Damages

Respondent did not, and could not, prove actual damages. Because Respondent alleges that the Union disparaged its product—laundered linen, Milum’s claim is for “trade libel” as opposed to defamation. *Gee v. Pima County*, 612 P.2d 1079, 1079 (Ariz. App. 1980) (“[T]he action is one either for libel or trade libel. The latter involves the intentional publication of an injurious falsehood disparaging the quality of another’s property with resulting pecuniary loss.”); *Aetna Cas. & Sur. Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346,

351 (9th Cir. 1988) (“Trade libel and product disparagement are injurious falsehoods that interfere with business. Unlike classic defamation, they are not directed at the plaintiff’s personal reputation but rather at the goods a plaintiff sells or the character of his other business.”).

Under Arizona law, an action for trade libel must allege and prove *special damages*—i.e. that the allegedly libelous statements caused *pecuniary damage* to the corporation. *Gee*, 612 P.2d at 1080 (“The action was subject to summary judgment in any event, because appellants failed to allege special damages or to show actual malice.”); *Morley v. Smith*, CV 04 1874 PCT ECV, 2007 WL 1876382 (D. Ariz. June 27, 2007) (“A claim for trade libel requires a plaintiff to prove that the defendant intentionally published an injurious falsehood disparaging the quality of the plaintiff’s property and that such publication resulted in pecuniary loss to the plaintiff.”), *aff’d sub nom. Morley v. Peel-Pohto*, 309 F.Appx. 100 (9th Cir. 2009); see *Aetna Cas. & Sur. Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988) (The cause of action for trade libel thus requires: (1) a publication, (2) which induces others not to deal with plaintiff, and (3) special damages).

Vague allegations that a defamatory statement has injured a company’s reputation, without evidence the statement directly caused actual economic loss, do not sustain a claim of trade libel. Unlike general damages, which include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering,” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), special damages are “the loss of something having economic or pecuniary value.” Restatement 2d Torts § 575, comment b; *Tackett v. Delco Remy Div. of Gen. Motors Corp.*, 937 F.2d 1201, 1206 (7th Cir. 1991) (“‘The ‘special damage’ required in defamation cases must be some material or pecuniary injury. Injury to

reputation without more, humiliation, mental anguish, physical sickness these – do not suffice.”) (quoting C. McCormick, Damages § 114 (1935)).

“A bare allegation of the amount of pecuniary loss is insufficient for the pleading of a trade libel claim.” *New.Net, Inc. v. Lavasoft*, 356 F.Supp.2d 1090, 1113 (C.D. Cal. 2004) quoting *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F.Supp.2d 1035, 1047 (C.D. Cal. 1998). Rather, “[i]t is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.” *Beijing Tong Ren Tang (USA), Corp. v. TRT USA Corp.*, C-09-00882 RMW, 2010 WL 890048 (N.D. Cal. Mar. 8, 2010) quoting *Erlich v. Etner*, 224 Cal.App.2d 69, 73, 36 Cal. Rptr. 256 (1964).

Moreover, special damages of this sort may not be presumed, regardless of whether the defendant acted with actual malice. See, e.g., *Robertson v. McCloskey*, 680 F. Supp. 414, 415-16 (D.D.C. 1988) (“The common law only allowed a presumption of harm with respect to general damages, not special damages; with respect to the latter, specific evidence demonstrating the financial harm resulting from the libel is required before compensation for economic harm can be awarded.”). Accordingly, had Respondent been able to prove that the Union acted with actual malice in making its statements, which it could not have done for the reasons discussed below, it would have been unable to recover absent evidence of actual, pecuniary losses, as a direct result.

Thus, under this well-established law, it is clear that Milum had no reasonable basis for bringing its libel cause of action against the Union, and no amount of discovery would have made the claim any less frivolous. This is especially true given Respondent's admissions, in the record, that Respondent's business suffered no damages because of the Union's protected conduct. See GC. 78, attached Tucson Weekly article (Craig Milum quoted as saying "business hasn't been hurt" by the Union's actions); GC. 83, attached letter (Craig Milum writing to one of his customers stating that Respondent's weekly sales had increased and that "the union has been unsuccessful in getting our customers to change" laundries).

Without proof of special damages, Milum's libel claim could not proceed. And as the Board pointed out, proof of any such damages would have been within Milum's sole possession. *Milum Textile*, 357 NLRB No. 169, slip op. at 7 ("a reasonable plaintiff would be in possession of evidence of the actual damages it would have had to prove at trial under *Linn*"). Yet, at no point during any of the underlying proceedings—not in its District Court complaint, its TRO motion, after the TRO was denied, or during the NLRB proceedings—has Milum put forward *any* evidence that it suffered pecuniary harm as a result of the Union's publicity campaign.

Moreover, while evidence of damages, an essential element of Respondent's claim, was within Milum's exclusive possession, it failed to present any such evidence to either the District Court or the Board. Significantly, Respondent's District Court complaint was dismissed on May 26, 2006; the record in the underlying Board proceeding before the ALJ did not close until April 11, 2007, and briefs were filed on June 15, 2007, over one-year later. *Milum Textile*, supra. slip op. at 17. Had Respondent suffered any special damages, it clearly

would have been in the possession of this evidence one-year after the lawsuit was dismissed. Respondent did not introduce any such evidence, because no such evidence exists.

b. Actual Malice

Even if Milum had any evidence of special damages—which it did not—it would have failed to prove that the Union acted with actual malice in publishing truthful statements about Milum’s health and safety record.

“The standard of actual malice is a daunting one,” *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996), that focuses solely on the defendant’s subjective state of mind at the time of publication. *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485, 512 (1984). The plaintiff must prove that the defendant was actually aware the contested publication was false or that the defendant made the publication with reckless disregard of whether it was true or false. *Linn*, 383 U.S. at 61; *New York Times*, 376 U.S. at 279-280. Such reckless disregard means the defendant entertained serious doubts as to the truth of the publication, i.e., that the defendant had a “high degree of awareness” of its “probable falsity.” *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989); *St. Amant*, 390 U.S. at 731. It is not measured by what a reasonably prudent person would have published, or would have investigated before publishing. *Harte-Hanks Communications v. Connaughton*, 491 U.S. at 688; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice. *St. Amant*, 390 U.S. at 733. “Mere negligence does not suffice” *Masson v. New Yorker Magazine, Inc.* 501 U.S. 496, 510 (1991), nor does “gross or even extreme negligence.” *McCoy v. Hearst Corp.* 42 Cal.3d 835, 860 (1986).

Furthermore, the plaintiff must prove actual malice by “clear and convincing” evidence—a standard of proof that imposes a “heavy burden . . . far in excess of the preponderance sufficient for most civil litigation.” *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997). Milum would not have been able to meet this standard because the Union’s statements were demonstrably true. At best, Milum’s challenges to the Union’s statements amount to hair-splitting that does not come close to meeting the *Linn/New York Times* standard.

Respondent appended a document entitled “Analysis of False Statements” to its TRO papers, containing six points, outlining Milum’s position on why the Union’s statements were false. (GC. 11, Exhibit C) However, the Record evidence shows that Respondent’s challenges were baseless, and that the Union’s statements were, in fact, true.

Statement One: Respondent asserted that the Union’s claim that “[e]mployees report instances in which Milum has mixed restaurant linens with medical linens in the washers. Medical linens are often contaminated with blood feces or other bacteria” was false. *Id.* However, the evidence shows that this statement is true. Union organizer Daisy Pitkin testified, un rebutted, that Milum’s workers had reported to her and to other Union staff that they had experienced Milum mixing restaurant and medical linens.<sup>9</sup> (Tr. 1691-93; 2253-56). In fact, this was corroborated by several of Respondent’s employees who testified *on Milum’s behalf* during the underlying hearing. (Tr. 1532-33) Specifically, Respondent’s witnesses Patricia Goebel, and Milum Production Supervisor Jaime Chavez admitted that they find

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<sup>9</sup> Respondent’s claim that the ALJ improperly relied upon Pitkin’s testimony because it constituted hearsay is specious. The testimony in question was elicited by Respondent, during Pitkin’s cross-examination, and Respondent never objected to the testimony as being hearsay. (Tr. 1691-93, 2253-56) It is well settled that, if no objection is made to the introduction of hearsay testimony, the objection is waived and the evidence may be relied upon. *Meyers Transport of New York, Inc.*, 338 NLRB 958, 968-69 (2003); *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1343 (5th Cir. 1993) (Employer waived hearsay objection by failing to raise it during the administrative hearing.)

restaurant linens mixed-in with hospital linens during the sorting process. (Tr. 1532-33; 1754). Milum’s objections to this statement are simply generalized contention about how it tries to run its business. See, e.g., Analysis of False Statements, at 2 (“As a result of all of these requirements, Milum must maintain strict control over, as well as to maintain consistent execution of, it’s laundering processes.”). Moreover, even if the Union’s statement could be shown to be untrue, which it can’t, there is no evidence that the Union published it with a “high degree of awareness” of its “probable falsity.” *Harte-Hanks Communications*, 491 U.S. at 688. There is no evidence that the Union was not honestly relying upon the observations of Milum workers, which were reported to the Union.

Statement Two: Respondent asserted that the Union’s claim that “[g]overnment investigators in 2002 found dirty and dangerous conditions—that may produce linens that could be a risk to your business” was false. *Id.* This statement contains two assertions: (1) that government investigators in 2002 found dirty and dangerous conditions, and (2) that those conditions “may produce linens that would be a risk to your business.” The first statement was true, while the second statement is one of the Union’s opinion, not fact, and so is not actionable. See *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995). Notwithstanding, even if both were considered statements of fact, they are both true and were not made with actual malice.

Milum does not deny that two government investigators—OSHA and Arizona Department of Environmental Quality (ADEQ)—found violations in 2002. OSHA cited Milum in 2002 for its failure to properly train workers on blood borne pathogens. (GC. 61 pp. 9-14) This certainly qualifies as a “dangerous” condition for workers.

Respondent's assertion that the ALJ improperly relied upon the 2002 OSHA Report in GC. 61, claiming it was offered into evidence only for a limited purpose, and that the report contains hearsay, is unavailing. The trial ALJ properly admitted GC. 61, and it was properly considered. Moreover, even if the report had not been admitted into evidence, the Board can take judicial notice of United States Department of Labor (DOL) citations and related information recorded on the DOL's website, as set forth in GC. 61; the General Counsel asks the Board take such judicial notice of GC. 61 in the event any weight is given to Respondent's argument. *Denius v. Dunlap*, 330 F.3d 919, 926–27 (7th Cir.2003) (taking judicial notice of information on the website of a government agency); *In Re Katrina Canal Breaches Consolidated Litigation*, 533 F.Supp.2d 615, 631-33 & nn. 14-15 (E.D. La. 2008) (collecting cases indicating that federal courts may take judicial notice of governmental websites, including court records); *Williams v. Long*, 585 F.Supp.2d 679, 686-88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating); *Neighbors v. Mortgage Electronic Registration Systems, Inc.*, 2009 WL 192445, 3 (N.D. Cal. 2009) (court takes judicial notice of documents on file with county recorder's office, citing Fed. R. Evid. 201(b)). Finally, the information contained in GC. 61 is not improper hearsay, as it falls within the public records exception of the hearsay rule. *Williams v. Long*, 585 F.Supp.2d 679, 689-691 (D. Md. 2008) (printed webpage from state department of labor website considered self-authenticating official publication and is admissible into evidence under the public records exception of the hearsay rule); Fed. R. Evid. 803(3).

Regarding the second citation in 2002, ADEQ cited Respondent for a variety of violations, and the photographs accompanying the violations show that Respondent uses the

same bins for both soiled and clean linen. (GC. 139 p. 10) Craig Milum even testified that the same bins are used for transporting both clean and soiled linens. (Tr. 1909) This certainly qualifies as a “dirty” condition. While the Union did not purport to quote the government inspectors directly, its characterizations of the government investigations are not inaccurate. Moreover, even if the statements were found to be inaccurate, the Union’s statements could not be found to have been made with awareness of their falsity.

Nor is it untrue that failing to train workers on blood borne pathogens and using the same bins for dirty and clean linens “may produce linens that would be a risk to your business.” As Milum admits, restaurants are very sensitive about the cleanliness of their linens. See, e.g., Analysis of False Statements. If a restaurant discovered that it was using linens produced by workers who, in the past, had not been adequately trained on how to avoid the spread of blood borne pathogens and that Respondent had, in the past, used the same bins for both dirty and clean linens, it would clearly create risks for the business, including the risk that consumers would not want to eat at a restaurant using those linens.

Statement Three: Respondent asserted that the Union’s claim that “Milum jeopardized the separation of soiled and clean linen by using the same bins for both. ADEQ. Notice of Violation” is untrue. However, Milum does not dispute that ADEQ issued it a citation in 2002 noting this issue. The notice of violation states: “Blue containers on the right side of the truck are used for transporting clean laundry to and soiled laundry from contracted facilities.” (GC. 139 p. 10) Craig Milum even testified this statement was true. (Tr. 1909) While Respondent claims that ADEQ does not have the “authority to regulate commercial laundries,” this is irrelevant. Milum admits that ADEQ has authority to regulate the transport of linens,

and the Union's statements did not say that the notice of violation applied to Milum's linen processing plant itself.<sup>10</sup>

Statement Four: Respondent states that the Union's claim "Milum did not train workers on quality control procedures" is false, but again the record evidence shows this statement is true. Specifically, the 2002 ADEQ violation states that Respondent failed to maintain an emergency procedure for handling spills or accidents. (GC. 139 pp. 11-12). Moreover, in May 2006, Respondent received a number of citations from the Arizona OSHA involving five serious and four non-serious violations, based upon inspections that occurred during April 2006. (GC. 137-138). These violations included the failure to provide readily accessible handwashing facilities to employees who are exposed to blood borne pathogens; the failure to provide employees with appropriately-sized protective gloves; the failure to decontaminate the soil sort area conveyors or floor after contact with blood or other potentially infectious material; the failure to timely provide Hepatitis B vaccinations to employees exposed to potentially infectious material; the failure to provide blood borne pathogen training in all appropriate languages; the failure to review or update Respondent's exposure control plan; the failure to use the appropriate air compression levels for cleaning machines; and the failure to provide other certain required training.<sup>11</sup> (GC. 137-138) Even if one argues that these citations do not prove that Respondent fails to "train workers on quality control procedures," the Union's statements cannot be found to have been made with awareness of their falsity.

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<sup>10</sup> Respondent admits that ADEQ has "the authority to regulate medical waste transportation and treatment companies." See Analysis of False Statements, at p. 5.

<sup>11</sup> Ironically, these violations were reported during the very period that Respondent's District Court lawsuit was pending. (GC. 138)

Statement Five: Respondent states that the Union’s claim “Milum has shown a disregard for Blood Borne Pathogens Exposure Control Standards. AZ OSHA,” is false. However, Milum does not dispute that OSHA cited it for “serious” violations of OSHA’s Blood Borne Pathogens standards. Nor could it, since these violations are a matter of public record.<sup>12</sup> Instead, Milum argues that the situation was resolved in 2002 and that “the letter is falsely accusing Milum of being in violation of the law *at this time.*” But the Union’s letter clearly stated that the violations were from government inspections in 2002. (GC. 11, attached documents) Next, Milum claims that that violation did not affect the “quality or cleanliness of the linens.” However, the Union did not claim that it did. *Id.* Finally, Milum claims that the violation was not “willful” and there were not multiple instances of violations that would rise to the level of a “disregard” for the standards. However, the letters attached to Craig Milum’s affidavit never use the word “disregard.” (GC. 11) Even if they did, this hair-splitting over the Union’s choice of words to describe Milum’s “serious” violation of OSHA safety standards cannot rise to the level of actual malice, even if the term “disregard” were deemed to be inaccurate.

Statement Five: Milum asserts that the Union’s claim “Milum Exposed is dedicated to informing the public of important issues in infection control” is untrue. Respondent’s challenge to this self-statement of purpose was clearly frivolous. This is a true, non-misleading sentence of purpose. The Union did not hide or mislead concerning its identity, and its letter clearly states that Milum Exposed is an “independent website in the public interest by UNITE HERE.” (GC. 11, attached documents) . In any case, there is no basis for saying that the Union’s own statement *about itself* could defame Milum.

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<sup>12</sup> [http://www.osha.gov/pls/imis/establishment.violation\\_detail?id=305634743&citation\\_id=01008A](http://www.osha.gov/pls/imis/establishment.violation_detail?id=305634743&citation_id=01008A)

In sum, there is no evidence supporting actual, much less special, damages, an essential element of Milum's libel claim. Even if Milum had any evidence of pecuniary loss, the Union's statements were true and not made with actual malice. Under these circumstances, the Board should sustain the ALJ's findings that Respondent's causes of action for libel and fraud were baseless.<sup>13</sup>

**D. Respondent's Lawsuit Was Retaliatory**

Ample evidence supports a finding that Respondent's lawsuit was filed and maintained for a retaliatory motive. Milum's serious and pervasive unfair labor practices, so serious that a *Gissel* bargaining order was warranted, supports a finding that the lawsuit was filed for a retaliatory motive. *Allied Mechanical*, 357 NLRB No. 101, slip op. at 10. Similarly, the fact the lawsuit sought an award of money damages from the Union, based on its statutorily protected conduct, also supports a finding of retaliatory motive. *Id.* at 11. Finally, all the conduct noted by the Board to support a finding that the TRO was retaliatory, is similarly applicable here, with respect to the filing and maintenance of the lawsuit. *Milum Textile*, 357 NLRB No. 169 slip op. at 6 (listing Respondent's various conduct which supports a finding of animus, including calling the Union "cockroaches," "monsters," and referring to the Union's organizing campaign to an organized crime shakedown). Accordingly, the General Counsel asks that the Board sustain the ALJ's find the filing and maintenance of Respondent's lawsuit was retaliatory.

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<sup>13</sup> Because Respondent's Fifth Cause of Action, Common Law Fraud, is premised on the same conduct upon which its libel claim is based, and Milum cannot show actual malice, this cause of action is similarly baseless. See *Beverly Hills Foodland*, 39 F.3d at 196. (plaintiff required to meet the actual malice standard for state tort claims which are based upon the same conduct or statements as its defamation claims).

## V. CONCLUSION

Based on the foregoing, and the record evidence considered as a whole, the ALJ properly found that Respondent violated Section 8(a)(1) by filing and maintaining a baseless and retaliatory federal district court lawsuit against the Union, as set forth in the ALJD. Milum's exceptions are without merit and should be rejected by the Board; instead the Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order.

Dated at Phoenix, Arizona, this 11<sup>th</sup> day of July 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF, Cases **28-CA-20898** et al., was served by E-Gov, E-Filing, E-Mail, on this 11<sup>th</sup> day of July 2012, on the following:

***Via E-Gov, E-Filing:***

The Hon. Mary Miller Cracraft  
Associate Chief Administrative Law Judge  
901 Market Street #300  
San Francisco CA 9410

***Via E-Mail:***

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES

MILUM TEXTILE SERVICES CO.

and

Case 28-CA-20898  
28-CA-20906  
28-CA-20973  
28-CA-21050  
28-CA-21203

UNITE HERE!

BRIEF SCHEDULING ORDER

Pursuant to the Board's remand in Milum Textile Service Co., 357 NLRB No. 169, slip opinion at 6-8 (Dec. 30, 2011), briefs on remand are hereby due at close of business, Friday, February 24, 2012.

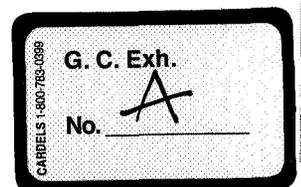
Dated: January 20, 2012  
San Francisco, CA



Mary Miller Cracraft, Associate Chief  
Administrative Law Judge

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES

MILUM TEXTILE SERVICES CO.

and

Case 28-CA-20898  
28-CA-20906  
28-CA-20973  
28-CA-21050  
28-CA-21203

UNITE HERE!

ORDER DENYING RESPONDENT'S MOTION  
TO SUSPEND THE BRIEFING SCHEDULE ON REMAND

Briefs on remand in the above-captioned case are currently due on February 24, 2012. Pursuant to Respondent's Motion to Suspend the Briefing Schedule, I heard argument on February 15, 2012. Respondent asserted that the NLRB would lose all jurisdiction of this case on March 2, 2012, when the record is filed with the United States Court of Appeals for the District of Columbia Circuit pursuant to a January 30, 2012, Petition for Review of the Board's decision in Milum Textile Services, 357 NLRB No. 169 (December 30, 2011). Thus, Respondent argued, it would constitute a useless act and a waste of administrative and private resources to file briefs on the remanded issue on February 24 when the Board would lose jurisdiction of the entire matter one week later. Counsel for the Acting General Counsel as well as counsel for the Charging Party oppose the motion to postpone the briefing schedule on remand. These counsel argue that the remanded issue remains before the NLRB notwithstanding an appeal, relying on *George Banta, Inc., Banta Div. v. NLRB*, 686 F.2d 10, 16 (DC Cir. 1982) (absent a remand, the Board may not reopen a case or make additional rulings once a court of appeals obtains exclusive jurisdiction by virtue of the filing of the record on appeal).

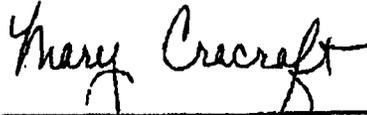
Despite the arguments above, I note that on February 2, 2012, Respondent filed a Motion to Reopen the Record with the Board requesting an opportunity to submit additional evidence on an issue unrelated to the remand in this case. This Motion to Reopen the Record is treated in the same manner as a Motion for Reconsideration. See NLRB Rule 102.48(d)(1). Thus, in my view, the entire matter will remain pending at the Board until the Board has ruled on the Motion to Reopen the Record. Under these circumstances, it would be premature

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to consider the Respondent's Motion to Suspend the Remand Briefing Schedule and it is, accordingly, denied.

**SO ORDERED.**

Dated: February 16, 2012  
San Francisco, CA



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Mary Miller Cracraft, Associate Chief  
Administrative Law Judge

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

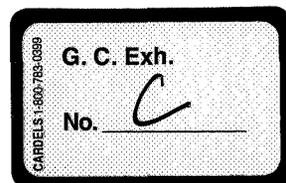
**MILUM TEXTILE SERVICES CO.,  
and  
UNITE HERE!**

**Cases    28-CA-20898  
          28-CA-20906  
          28-CA-20973  
          28-CA-21050  
          28-CA-21203**

**RESPONDENT'S MOTION TO REOPEN THE RECORD  
AND MOTION FOR ACCELERATED RULING**

NOW COMES Milum Textile Services Co. (hereinafter "Respondent") and respectfully moves the Administrative Law Judge to reopen the record regarding the remanded issue to permit the Respondent to offer testimony and evidence regarding the remanded issue that it was specifically precluded from doing during the initial hearing before Administrative Law Judge Joseph Gontram. Respondent further moves for an accelerated ruling in this case due to the impending briefing schedule.

The Board issued its Decision and Order in this case, and as part of its decision remanded the issue of whether the General Counsel carried the burden of proving baselessness and retaliatory motive under the standard set forth in *Allied Mechanical Services*, 357 NLRB No. 101 (2011), to the Administrative Law Judge for further consideration. The Board specifically stated that "nothing in our remand order precludes the parties from moving the judge to reopen the record." *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. 8, fn. 25.



It is undisputed that the Administrative Law Judge who presided at the initial hearing specifically excluded testimony and evidence offered by the Respondent regarding the remanded issues, i.e., the truth or falsity of the union's statements, the existence of malice on the part of the union, and the damage suffered by the Respondent as a result of the statements. Specifically, the Administrative Law Judge precluded Respondent's counsel from questioning union organizer Daisy Pitkin regarding whether the union had any evidence that supported the union's written claims and the issue of malice. As Judge Gontram stated the testimony and evidence was excluded because in his opinion the evidence would "exclusively come from Mr. Milum," [Tr. p. 1658, lines 15-16], and that the administrative law judge was not going to conduct a "mini-trial" regarding the underlying federal court lawsuit. [*Id.*, p. 1659, lines 1-12] Similarly, the Administrative Law Judge sustained the General Counsel's objections to the introduction of any evidence that was in his opinion outside the four corners of the Complaint filed in the United States District Court. Therefore, in order to defend its position with respect to the remanded issue, the Respondent must be permitted to not only call Daisy Pitkin to the stand to elicit complete testimony, but based upon Ms. Pitkin's testimony, to call other individuals who may have knowledge of the basis of the union's claims and the basis therefore. Furthermore, additional documentary evidence may be introduced in addition to the documentary evidence that the administrative law judge specifically refused and rejected during the initial hearing.

Member Hayes specifically confirmed the fact that the Respondent was precluded from offering testimony and evidence regarding these matters that are critical to the remanded issue. *Milum Textile Services Co*, 357 NLRB No. 169, slip op. 15. Further, as Member Hayes stated, the Respondent was not even on notice during the administrative hearing regarding this issue, and that "a remand that does not require consideration of the clearly relevant evidence the trial

judge improperly excluded would make a mockery of due process.” *Id.* at 16. Therefore, it would be a denial of Respondent’s due process rights to force Respondent to retry issues but not permit it to make a full and complete record.

It is important to note that the reopening the record will cause the Respondent to incur substantial and potentially unnecessary duplicative costs in the event that the United States Circuit Court of Appeals for the District of Columbia rejects the Board majority’s approach. Unfortunately, the Respondent has no choice but to move to reopen the record in order to defend itself with respect to the remanded issue. It would clearly be a denial of due process for the Respondent to be denied the right to reopen the record to establish a full and complete record when the Respondent was specifically precluded from eliciting testimony and producing evidence regarding the remanded issue during the initial hearing by the administrative law judge.

Based upon the foregoing, Respondent respectfully requests that the Motion to Reopen the Record with respect to the remanded proceedings and that the Motion for Accelerated Ruling be granted.

Dated this 17<sup>th</sup> day of February 2012.

Respectfully submitted,

MILUM TEXTILE SERVICES CO.

By its attorneys,

s/ Laurie A. Laws

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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MILUM TEXTILE SERVICES CO.

and

UNITE HERE!

Case Nos. 28-CA-20898  
28-CA-20906  
28-CA-20973  
28-CA-21050  
28-CA-21203

ORDER DENYING MOTION TO REOPEN RECORD  
ORDER GRANTING MOTION TO POSTPONE BRIEFING ON REMAND

Background

In *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. 6, 8 (Dec. 30, 2011), the Board (Chairman Pearce and Member Becker, Member Hayes dissenting) remanded a portion of this proceeding for further briefing and decision:

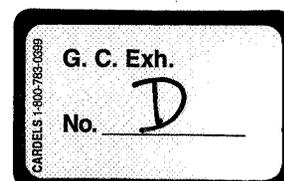
As to the filing of the district court complaint itself and the maintenance of the complaint for a limited duration until it was voluntarily dismissed without prejudice shortly after the court denied the TRO motion and prior to any discovery, we remand to the judge to determine whether the General Counsel sustained his burden of showing that the action was baseless, and if so, that it was retaliatory.

... [W]e remand this portion of the case to the judge with directions that she permit the parties to file additional post-trial briefs, addressing the question of whether the General Counsel carried his burden of proving baselessness and retaliatory motive under these clarified standards. [footnote omitted]

The Board noted that the judge had appropriately allocated the burden of proof on the baselessness and retaliatory issues to the General Counsel. *Id.* The Board also opined that nothing in the remand precluded the parties from moving to reopen the record. *Milum*, slip op. 8 at fn. 25. Following an all-party telephone conference, briefing on remand was set for February 24, 2012.

Respondent's Motion to Reopen Record

By motion of February 17, 2012, Respondent moved to reopen the record in order that it be permitted to offer testimony and evidence on the remanded issue. Specifically, Respondent referenced testimony regarding the truth or falsity of the Union's statements, the existence of malice on the part of the Union, and the damage suffered by the Respondent as a result of the statements. Such testimony and evidence, Respondent asserted in its motion to reopen the record, had been specifically precluded



during the underlying hearing which occurred in March and April 2007. The Charging Party and General Counsel oppose this motion to reopen arguing that Respondent was not in any way precluded from introducing the disputed evidence during the underlying hearing and, in any event, the motion to reopen is untimely and fails to set forth extraordinary circumstances warranting reopening of the record.

Having considered these pleadings and the record as a whole, I find that Respondent was not precluded from presenting the evidence it now believes is grounds for reopening the record. Moreover, as the opposing parties note, Respondent did not specifically take exception to any of the rulings of the administrative law judge which it now asserts prevented introduction of the evidence. Finally, Respondent has failed to set forth other circumstances, extraordinary or otherwise, warranting reopening of the record. Thus, I deny Respondent's motion to reopen the record.

**Charging Party's Motion to Postpone Briefing on Remand**

By motion of February 21, 2012, the Charging Party moved to postpone briefing on remand from the current date, February 24, 2012, to two weeks later: March 9, 2012. As reason for this request, the Charging Party noted that extensive briefing on other post-remand issues took time away from briefing the merits on remand. In fact, a motion to reopen the record on an issue unrelated to this remand is currently pending before the Board as well as the motion to reopen the record on remand considered above. All parties have thoroughly briefed the motion to reopen before me which required extensive reference to the lengthy record below. Having considered this motion, it is granted for good cause shown. Accordingly, briefs on remand are hereby due on Friday, March 9, 2012. No further extensions will be granted absent extraordinary circumstances.



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