UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK PARTY SHUTTLE, LLC	§	
Employer,	§	
	§	
and	§	**Case No. 02-CA-073340**
	§	
FRED PFLANTZER,	§	
An Individual.	§	

RESPONDENT'S ANSWERING BRIEF
TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE FOR REGION 2

New York Party Shuttle, LLC ("NYPS"), Respondent in the proceedings before the Administrative Law Judge, answers herein to the General Counsel's cross-exceptions to the decision rendered on September 19, 2012.

I. INTRODUCTION

1. Respondent NYPS briefed the procedural history of the case and the underlying facts in detail in its Exceptions Brief, filed on October 17, 2012. Since that brief was served and filed, the General Counsel filed its own Cross-Exceptions on November 14, 2012, to which NYPS now responds.

II. THE GENERAL COUNSEL'S POINTS OF CROSS-EXCEPTION

2. The General Counsel filed three points of cross-exception to the Administrative Law Judge's Decision:

a. Seeking to augment a quote in the ALJ Decision taken from Hearing Exhibit GC-5 at Paragraph 5, the material to be added containing an acknowledgement of Mr. Pflantzer's eligibility for assignment to tours with NYPS when the business volume increased;

b. Seeking to correct the date of the Mr. Pflantzer's email and Facebook post as occurring on February 11, 2012; and

c. Challenging the conclusion that NYPS violated only Section 8(a)(3) of the National Labor Relations Act.

NYPS's responses to the General Counsel's points of cross-exception are set out in the following paragraphs.

III. SUMMARY RESPONDENT'S POSITION

3. As to the first two points of the General Counsel's cross-exceptions (Paragraphs 2.a & 2.b above), NYPS agrees that the record is as the General Counsel suggests regarding the full block quote and the date of Mr. Pflantzer's communication to other New York City tour guides. NYPS does not contest the General Counsel's request to reform the ALJ Decision incorporate the bolded language as shown at the bottom of page 2 in the General Counsel's Cross-Exceptions, and to correct the date of Mr. Pflantzer's email and Facebook post to read as February 11, 2012.

4. To be clear, NYPS consents to the augmentation of the block quote and correction of the date while expressly challenging the General Counsel's remarks as to the significance of these changes. As explained in NYPS's own Exceptions Brief, the record demonstrates that no employment action was taken in response to the February 11 communications. There is no causal connection and no pretext brought to light by the added language. The quote may well have been intentionally reduced by the Administrative Law Judge to eliminate material that has no effect on the result. Likewise, its reintroduction has no effect. As to date of the email and Facebook post, this is a plain error of a typographical nature, likely introduced by the mention of February 10 in the General Counsel's opening statement (Tr. at 7:24-25).

5. As to the third point of the General Counsel's cross-exceptions (Paragraph 2.c above), regarding violation of Section 8(a)(1), NYPS contends that this point is due to

be denied. The reasons are set out fully below; in summary, they are that Pflantzer's communication with third parties was not "concerted" nor was it for "mutual aid and protection" of NYPS employees, as these terms are defined in the case law.

IV. ARGUMENT & AUTHORITIES

6. The General Counsel urges for an added conclusion that NYPS violated Section 8(a)(1) of the National Labor Relations Act. Subsection (a)(1) defines as an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [their rights to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.]" NLRA § 7, 8(a)(1). As explained below, the record does not support a conclusion that NYPS violated this section, and therefore, the ALJ Decision should not be modified in this regard.

A. Pflantzer did not engage in "concerted" activity

7. For purposes of the Act, "concerted" activity is that which the employee engages in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 281 NLRB 882, 885 (1986). That standard is not satisfied here. Pflantzer acted alone in sending his email and making his Facebook post at issue. Pflantzer posted his rant about NYPS on a Facebook page that, by Pflantzer's own admission, did not include any NYPS employees (Tr. at 65:22-66:9, 66:21-67:2). The same communication was conveyed to a list of addresses that also did not include any NYPS employees (Exh. GC-3). By comparison, *Three D, LLC*, cited as authority by the General Counsel, involved interaction of two customers of the respondent employer, three current employees, and one former employee, all discussing company business. *Three D, LLC d/b/a Triple Play Sports Bar And Grille*, 2012 WL

76862, Case No. 34-CA-12915, JD(NY)-01-12 (January 3, 2012). The employees in *Three D* were discussing among themselves and with customers their concerns over the company's inaccuracies in figuring and remitting their state income tax withholdings. *Id.* There were concerns about the integrity of the business owners and discussion about involving the labor board to address their grievances. *Id.* In this case, by contrast, no other employees participated, authorized, or endorsed Pflantzer's communications, and Pflantzer did not seek to involve other NYPS employees, other than arguably to discourage non-employees from becoming NYPS employees.

8. The General Counsel also cites *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997). In *Timekeeping Systems*, the employer's management circulated a new vacation policy by email to the entire staff, in which the author invited comment and stated that employees would "actually get more days off each year, compared to our present system." 323 NLRB at 246-47. That statement was untrue, and employees had less flexibility in using their vacation days under the proposed new policy. *Id.* at 247. The charging party in the NLRB proceeding sent an email to all employees explaining the application of the new policy and demonstrating that it did not work to the employees' benefit. *Id.* The Board determined that the respondent employer had violated the employees' rights to engage in concerted activity by retaliating against the author of the email. *Id.* at 248. Two elements of distinction render the *Timekeeping Systems* analysis inapposite to this case. First, Pflantzer did not raise any concerns to fellow NYPS employees, but rather to outsiders of the company. Second, Pflantzer's communications were not aimed at collective action to remedy his concerns.

9. As noted above, besides the fact that the communications at issue were unilateral and include no participation, involvement, or authorization of other employees, Pflantzer's communications were not addressed to any actual NYPS employees at all. The General Counsel tries to argue around this fact by pointing to a broad definition of the class of "employees" to whom communications by the charging party are relevant. In support of that argument, the General Counsel cites *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) and *Reliant Energy*, 357 NLRB No. 172, 2011 WL 7121891, Case No. Cases 31-CA-25155 (December 30, 2011). *Eastex* actually addresses communications by employees of the respondent employer to other employees of that employer through printed material prepared by the local labor union. *Eastex,* 437 U.S. at 564-67. Similarly, Reliant Energy was a case of the ordered removal of an employee of a subcontractor. *Reliant Energy*, 357 NLRB No. 172. While not the respondent's own employee, the charging party was doing the respondent's work on the respondent's premises, and discussing unionizing efforts with employees on location. *Id.* Therefore, it is no leap of logic to concluded that either of these were communications among "employees". Pflantzer, on the other hand sent communications about NYPS to outsiders away from the workplace, with no collective effort or purpose as to fellow employees. Unlike the *Reliant Energy* scenario, there is no involvement of City Sights in NYPS's business. Rather, City Sights, like Pflantzer is a competitor of NYPS. On consideration of the General Counsel's own precedent, Pflantzer's communications did not constitute concerted action.

B. Pflantzer's communications were not for "mutual aid and protection".

10. Pflantzer's communications were not for the purpose of improving working conditions or other aspects of employment at NYPS. The courts have held that "mere talk" of working conditions only qualifies as protected Section 7 activity when it is "looking toward group action." *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964). The circumstances surrounding Pflantzer's one communication (transmitted through two media) disprove an effort at group action.

11. The opinion of the Board in *Cadbury Beverages, Inc.*, 324 NLRB 1213 (1997) has no bearing on this case, as the matter was not about employee communications at all. Rather, the issue decided was whether the charging party's termination for taking time off from work to attend an arbitration hearing in a union matter was a Section 8(a)(1) violation. Similarly, the employee conduct at issue in *Jhirmack Enterprises*, 283 NLRB 609 (1987) was traditional workplace dealings and in no way analogous to the situation presented in this case. The charging party in *Jhirmack Enterprises* was terminated for two distinct acts: informing a fellow employee that his job performance at was criticized at a company meeting, and complaining to management about supervisors favoring certain employees. Nothing comparable to either of these cases occurred with NYPS involving Pflantzer. There was no union involvement, no collective action, and no workplace dispute among employees or between employees and management. Therefore the General Counsel's case law in no way informs the analysis of the issues presented.

12. Also, Pflantzer never raised his complaints to NYPS management, nor were the statements addressed to actual NYPS employees. The circumstances attendant to Pflantzer's communications show that there was no effort at improving the station of

NYPS employees, being that not one of many employees was included, even the employees with whom Pflantzer claims to have held union discussions. Also, during the entirety of his employment, Mr. Pflantzer never once complained to a manager about any of these issues. These circumstances, coupled with Pflantzer's operation of a competing tour business reveal his real motivations. The communications conveyed though the email and social media post were aimed at disparaging NYPS, Pflantzer's competitor at that point, without concern for any NYPS employees.

C. Regardless of whether Pflantzer's activity was protected, NYPS did not violate Section 8(a)(1) in the discharge.

13. Under the analysis established by the Supreme Court in *NLRB v. Burnup & Sims*, an employer violates Section 8(a)(1) when: 1) the discharged employee was engaged in protected activity at the time of their purported misconduct; 2) the employer knew of the protected activity; 3) the basis for the discharge was the employee's alleged misconduct in the course of their protected activity; and 4) the employee was not actually guilty of the misconduct. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Allowing for the sake of argument that the record supports factors 1 through 3 as listed above, factor 4 is not satisfied: Pflantzer was indeed guilty of misconduct as to NYPS. Pflantzer runs a competing tour business in New York City (Tr. at 81:9-14). He advertised his business on TripAdvisor.com, the same as NYPS (*Id.* at 81:8-16), and that operates under a trade name confusingly similar to two of NYPS's tours (*Id.* at 83:13-14, 86:11-17; 87:13-14). Pflantzer's statements were made to further Pflantzer's interests and to defame a direct competitor to his own tour company.

V. CONCLUSION

14. Pflantzer's email and Facebook post did not constitute concerted activity, as the communications were sent by Pflantzer alone to individuals with no connection with NYPS other than as competitors. The tone of the message makes clear that Pflantzer's purpose was not targeted toward the mutual aid and protection of NYPS employees. Importantly, Pflantzer is himself a competitor of NYPS. Considering the above, there is no basis for a conclusion of an independent violation of Section 8(a)(1).

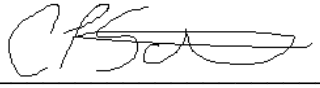
VI. PRAYER

WHEREFORE, Respondent New York Party Shuttle, LLC respectfully prays that the Board deny the General Counsel's third point of cross-exception the Decision of the Administrative Law Judge.

December 6, 2012

Respectfully submitted,

SCHMIDT LAW FIRM, PLLC

By: 

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 6th day of December 2012 in the manner indicated below.

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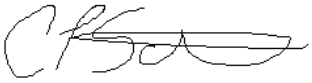

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