UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DON CHAVAS, LLC d/b/a
TORTILLAS DON CHAVAS

and **Case 28-CA-063550**

MARIELA SOTO, an Individual

and **Case 28-CA-067394**

ANAHI FIGUEROA, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

In this case, involving workers banding together to complain about the repeated sexual comments and gestures made by the owner's son, their pay, and working in extreme heat with little ventilation, Respondent's Exceptions to the Decision (ALJD) of Administrative Law Judge Christine E. Dibble (ALJ) are without merit and not supported by the record evidence.[1] The ALJ's findings that Respondent violated Section 8(a)(1) of the Act by: threatening employees with termination; transferring Mariela Soto from the day shift to the night shift (thereby causing her termination); and discharging Alan Pineda and Anahi Figueroa, are fully supported by the record. Also, the ALJ's finding that Respondent is an employer engaged in commerce, are firmly based upon the evidence presented at hearing. As such, these findings must be sustained.

Without merit are the myriad of Respondent's other objections to the ALJD, including that: the ALJD is invalid because the ALJ was appointed while the NLRB lacked a quorum; that

[1] Don Chavas, LLC d/b/a Tortillas Don Chavas is referred to as "Respondent." References to the hearing transcript are designated as (Tr.) with the appropriate page citation. References to the hearing exhibits of the Acting General Counsel and Respondent are referred to as (GC.) and (R.) respectively, with the appropriate exbhibit number.

the ALJ erred in making evidentiary rulings; and that the ALJ was biased or otherwise provided the Acting General Counsel (General Counsel) with advice. It is clear from a review of the entire record that, having been caught blatantly violating Federal labor law, Respondent is now desperately reaching for any means to escape responsibility. As the foregoing brief shows, Respondent's arguments are meritless. Accordingly, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.

II. QUESTIONS INVOLVED

1. Whether the decision by the United States Court of Appeals for the District of Columbia in *Noel Canning v . NLRB*, 705 F.3d 490 (DC Cir. 2013) makes the ALJ's decision is invalid, and prohibits the Board from considering this matter. (Resp't Br. at 14-16)

2. Whether the ALJ erred in determining that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Resp't Br. at 16-37) (ALJD at 3-4)

3. Whether the ALJ erred in finding that Mariela Soto was transferred to a different shift because of her concerted activities, which thereby caused her discharge, in violation of Section 8(a)(1) of the Act. (Resp't Br. at 44-46) (ALJD at 16-17)

4. Whether the ALJ erred in ruling that Respondent threatened to discharge, and then fired, Anahi Figueroa and Alan Pineda, for engaging in a work stoppage, in violation of Section 8(a)(1) of the Act. (Resp't Br. at 46-50) (ALJD at 18-20)

5. Whether the ALJ was biased or otherwise hostile to Respondent, thereby calling into doubt her credibility resolutions. (Resp't Br. at 50-55)

III. PRECEDURAL HISTORY

The hearing in this matter was conducted before the Honorable Christine E. Dibble on August 22-24, and October 1-3, 2012, in Tucson, Arizona. (ALJD at 1) In her decision, dated February 15, 2013, ALJ Dibble properly found that: (a) Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act (ALJD at 2-4); (b) Adrian Olguin, the son of Respondent's owner, is a statutory supervisor within Section 2(11) of the Act

and an agent of Respondent within Section 2(13) of the Act (ALJD at 4-6); (c) Respondent's employees engaged in concerted activities by complaining amongst themselves, and to Respondent, about the working conditions in the plant – excessive heat, broken equipment, lack of protective gear, inadequate pay, and sexual harassment (ALJD at 7-9, 16); (d) Anahi Figueroa and Alan Pineda engaged in a protected work stoppage and Respondent illegally threatened to discharge them if they did not return to work (ALJD at 11-12, 18-19); (e) Respondent illegally discharged Figueroa and Pineda because they engaged in a protected work stoppage (ALJD at 20-21); and (f) Mariela Soto was illegally transferred to a different work shift, thereby resulting in her discharge, because she engaged in protected activities. (ALJD at 15-17)

On March 15, 2013, Respondent filed 25 exceptions to the ALJD, and a brief in support.[2] In short, Respondent disagrees with virtually every part of the ALJ's decision except the finding that Figueroa's September 2011 shift transfer violated Section 8(a)(1) of the Act, and caused her termination.[3] Resp't Exceptions, p. 5 Also, Respondent did not take exceptions to the ALJ's finding that Adrian Olguin was Respondent's supervisor and agent, as defined in Section 2(11) and 2(13) of the Act. (ALJD at 4-6) As such, the Board should adopt these findings. See, *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (upon respondent's failure to file exceptions, the Board abides by Section 102.48 and adopts the ALJ's findings, conclusions, and recommendations); BOARD'S RULES AND REGULATIONS, § 102.46 (b)(2).

IV. BACKGROUND

A. Respondent's operations.

Respondent operates a wholesale and retail tortilla factory in Tucson, Arizona. The store is run at the front of the facility with the factory in the rear. Respondent's store is open to the

[2] Respondent's exception to the ALJ's evidentiary rulings (Exception #24), contains twelve sub-exceptions.
[3] Filed contemporaneously with this Answering Brief, the Acting General Counsel has filed Exceptions and a Supporting Brief to this finding.

public from 8:00 a.m. to 8:00 p.m. (ALJD at 2, 6) Respondent produces flour tortillas from its facility; the tortilla factory is open around the clock, and Respondent assigns its employees to work a morning or evening shift of twelve hours. (ALJD 6; Tr. 448) The morning shift begins at 4:00 a.m., and the evening shift begins at 4:00 p.m. Occasionally, Respondent adjusts the evening shift to begin at 2:00 p.m. or the morning shift to begin at 6:00 a.m. (ALJD at 6) Respondent assigns four employees to work a shift; two employees work a weekend shift – from Friday to Monday – to fill in for the employees taking a day off. (ALJD at 6; Tr. 489)

B. Management hierarchy.

Jesus Arturo Olguin (Olguin) is the owner of Don Chavas, and is involved in the day to day operations of the company. Olguin arrives to the factory around 7:00 a.m. and occupies most of his day delivering tortillas to Respondent's customers. (ALJD at 5, 7) In January 2011, Olguin's son, Adrian Olguin (Adrian), began working at the tortilla factory, and was the second highest person in command.[4] (ALJD at 5-7; Tr. 453, 553) The employees report to Adrian while Olguin is away from the store making deliveries, and considered him their supervisor. (ALJD at 5-7; Tr. 454) Adrian is also responsible for controlling the cash register at the store, and addressing customer complaints about purchases made at the store. (ALJD at 5-7; Tr. 455, 553-54) Adrian runs the operations by giving employees work instructions, accepting mail, and signing off on invoices for tortilla ingredients delivered to the factory. (ALJD at 5-7; Tr. 357, 456, 459, 554) Olguin leaves the country at least once a month, and Adrian is responsible for the factory in his absence. (Tr. 355)

[4] All dates are in 2011, unless otherwise noted

C. Shared complaints by the tortilla workers.

1. Complaints about shoddy equipment and excessive heat.

Throughout the summer of 2011, the tortilla factory had shoddy equipment that frequently broke down. On one occasion, a gas line to a grill began to leak. Anahi Figueroa, Alan Pineda, Mariela Soto and Francisco (whose last name is unknown) complained that the gas leak was causing the workers to have headaches. (ALJD at 8; Tr. 565–66) After complaining to each other about the problem, Soto asked Adrian to fix the gas burners on the grill, but it was never fixed. (ALJD at 8; Tr. 566)

When the temperatures inside the factory became excessively high, especially during the hot Arizona summer, employees – including Figueroa and Pineda – complained with each other that the temperatures were suffocating, that their skin was peeling, and they experienced pain while urinating. (ALJD at 8; Tr. 363-64, 487) Pineda asked Respondent to resolve these uncomfortable working conditions, and told Respondent that the heat inside the factory worsened his asthma.[5] (ALJD at 8) During the summer of 2011, Pineda suffered an asthma attack while working because of the excessive heat and smoke that had accumulated inside the building because of a defective extractor. (ALJD at 8; Tr. 430, 568)

2. Complaints about wages.

Employees, including Soto, Figueroa, and Pineda, were vocal and complained about Respondent's refusing to pay workers overtime, or the legally mandated minimum wage.[6] (ALJD at 8) Figueroa talked with her co-workers about the lack of overtime pay, and suggested

[5] Figueroa encouraged Pineda to ask Respondent for permission to take time off work to see a doctor because of his worsening asthma. (Tr. 488)

[6] Respondent's counsel conceded that, at times, Respondent did not pay its employees the minimum wage mandated by the State of Arizona. (Tr. 636-37)

to her co-worker Macario that they ask Olguin to pay them for the extra hours they worked so that they could earn more money. (ALJD at 8)

3. Complaints about time-off, and obscene behavior.

Figueroa and Soto also felt that Adrian was giving them a hard time whenever they requested time off from work. (Tr. 471, 571) They complained to each other that Adrian favored another worker named Lucia, and gave her time off whenever she requested it. (ALJD at 9) Both believed that Adrian favored Lucia because she welcomed his sexual advances, whereas they did not. (ALJD at 9) Figueroa, Soto, and Graciela "Chella" Fuentes also complained to each other that Adrian mistreated women at the factory by loudly making derogatory comments about their bodies while they worked; they did not like his obscene sexual behavior, which he did in their presence. (ALJD at 9; Tr. 387, 473 -74, 477, 480-83, 572–73) Soto encouraged Figueroa to complain to Olguin about the obscene gestures and the comments Adrian made about her while they were working. (ALJD at 9)

An example of Adrian's general attitude towards workers, and his abusive language, occurred in June 2011, when Soto asked him to find a replacement worker for Pineda, who had suffered an asthma attack, Adrian was upset and told her to "Call your own fucking family. . . call your aunts, call your cousin," and "wake up that whore, Anahi [Figueroa]." (Tr. 568-69) Soto told Figueroa, whom Adrian blamed for the incident, telling her that the problem was her "own fucking fault," because she was not at the factory when Soto called him. (Tr. 469)

D. Discrimination against Soto

Mariela Soto worked for Respondent as a tortilla maker from 2010 until July 4, 2011, and for brief intervals before 2010. (ALJD at 7) In 2011, she had been assigned to work the twelve-

hour morning shift (4:00 a.m.-4:00 p.m.), Friday through Monday.[7] (ALJD at 7)

Around June 19, Soto spoke with Olguin, in the tortilla factory, asking him for permission to take a day off on July 3 so she could take her children shopping for clothes. Olguin said he was not in charge of scheduling or time off, directing her to speak with Adrian. (ALJD at 10) A few days before July 3, Soto spoke with Adrian, telling him that she had already asked Olguin for permission to take a day off on July 3rd, but Olguin said that she needed to speak with him. (ALJD at 10; Tr. 577) Adrian denied the request (ALJD at 10), telling her that "he didn't want the same thing to happen that had happened with that whore, Anahi." (Tr. 578) Soto ended the conversation by telling Adrian she would be talking to Olguin about the matter. (Tr. 578)

1. Soto Complains to Olguin about Adrian's sexual advances and the difficulty in getting a day off.

On July 2, Soto spoke with Olguin, complaining to him that Adrian refused to give her the day off. (ALJD at 10; Tr. 578) Soto asked Olguin if "it was necessary . . . to allow myself to have my tits and my ass grabbed in order for me to able to have a day off." (Tr. 578) Olguin replied that this was not necessary and approved Soto's request to take July 3 off as an authorized absence. (ALJD at 10; Tr. 578) In his son's defense he said "we all know how Adrian" is. (Tr. 579)

2. Adrian confronts Figueroa and Soto about their complaints.

On Monday, July 4, Soto arrived to work at her scheduled time to begin her 4:00 a.m. shift. (ALJD at 10) A coworker named Francisco greeted her at the factory door telling her that she was not scheduled to start her shift until 6:00 a.m., and she couldn't come into the factory until then; Adrian stood behind Francisco laughing. (ALJD at 10) Nobody had previously

[7] At hearing, Soto and Figueroa referred to this as a "shift cover," a term that refers to a shift from Friday to Monday. (Tr. 451, 515)

notified Soto of this change. (ALJD at 10) Later, as Soto waited outside the factory to begin her 6:00 a.m. shift, she started crying and Adrian mocked her. (Tr. 580)

That same day, as Adrian, Francisco, Figueroa and Soto were working, Adrian confronted Soto and Figueroa. (Tr. 580) Soto was sitting down when Adrian announced that he didn't "give a fuck" if he was "sued for sexual harassment." (ALJD at 10; Tr. 581) Adrian then directed a string of profanities towards Soto and Figueroa, because of their complaints that he had subjected them to unwanted sexual advances. (ALJD at 10) The incident ended when a coworker named Betty told them to stop because customers in the retail area could hear Adrian shouting. (ALJD at 10; Tr. 581) Soto finished her work shift and then left work for the day. (ALJD at 10)

3. Respondent transfers Soto to the evening shift.

Soto's next scheduled work day was Friday, July 7; Soto was scheduled to work her normal shift. (ALJD at 10; Tr. 582) At some point before July 7, Olguin called Soto's aunt telling her to inform Soto that Respondent had changed her work shift from 4:00 a.m. – 4:00 p.m. to 2:00 p.m. – 4:00 a.m. (ALJD at 10) Soto called Olguin back and told him not to change her to the night shift because she didn't have anyone to take care of her children (who were 5 and 11 years old), as their father worked at night. (ALJD at 10) Olguin refused to change his decision, and Soto accused him of transferring her to the night shift as retaliation against her for making sexual harassment complaints against Adrian. (ALJD at 10) In reply, Olguin leveled various profanities at her, and hung up the phone. (ALJD at 10; Tr. 583-84) Soto did not return to work as she had nobody to care for her children at night. July 4, 2011 was her last day of employment with Respondent. (ALJD at 10)

E. Figueroa and Pineda concertedly walk out of the factory due to the excessive heat and were subsequently fired.

Alan Pineda worked for Respondent on three different occasions as early as 2010; his more recent employment was from February 2011 until September 2011. (ALJD at 7; Tr. 352-53) Since February 2011, Pineda worked from 4:00 a.m. – 4:00 p.m. six days a week. (ALJD at 7) Anahi Figueroa was hired by Respondent in February 2011, and was assigned to work Friday through Monday, from 4:00 a.m. – 4:00 p.m. (ALJD at 7) She was assigned to work this shift until she was fired in September 2011. (ALJD at 7; Tr. 450–52)

On September 4, Figueroa, Pineda and Graciela "Chella" Fuentes reported to work at 4:00 a.m.; however, the fourth employee scheduled to work that day did not show up. (ALJD at 11; Tr. 366, 488-89) They assessed the situation, and determined that, with just three workers, each one would have to spend too much time in the hottest part of the factory, near the wheel and griddle. (ALJD at 11) Therefore, they decided to call Adrian to ask that a fourth worker be sent to help them; meanwhile they went to work cooking tortillas while waiting for the fourth worker to arrive. (ALJD at 11) While working, the employees talked about the excessive heat they were being exposed to because of the longer time they had to spend working the grill; it reached 106 degrees that day in Tucson, a record high.[8] (Tr. 369) The workers agreed that it was too hot for the three of them to work under these conditions, especially for Pineda, who suffered asthma attacks from the excessive heat exposure. (Tr. 368, 489, 438)

Around 7:00 a.m. they stopped making tortillas and Pineda again telephoned Adrian to find out if he had sent a fourth person to work the shift. (ALJD at 11; Tr. 490) Pineda told

[8] The General Counsel asks that the Board take administrative notice of the temperature in Tucson, Arizona on September 4, 2011, as recorded by the National Oceanic and Atmospheric Administration, National Climatic Data Center: http://www ncdc.noaa.gov/extremes/records/daily/maxt/2011/09/04?sts[]=AZ#records_look_up (last visited on March 26, 2013). See *Doran v. Contoocook Valley School Dist.*, 616 F.Supp.2d 184, 194, fn. 8 (D N.H. 2009) (court takes judicial notice of NOAA temperature data, noting that courts can take judicial notice of weather).

Adrian that it was too hot to work with three people on the shift and impossible for them to continue working. (ALJD at 11) Adrian said that he was on his way to the factory, and at about 7:30 p.m., he arrived at work. (ALJD at 11; Tr. 440)

When Adrian arrived at the factory he started yelling at the workers to make tortillas. (ALJD at 11) Pineda again complained to Adrian that they needed another worker to help them, because they had been working short-handed for several days. (ALJD at 11) Adrian replied that they would not get a fourth worker to help, as the person he called would not answer the phone. (ALJD at 11) Pineda and Adrian continued arguing about the need for a fourth worker on the shift. (ALJD at 11) Finally, Adrian told Pineda to "go to hell," said that Pineda was a "crybaby," and to "get the hell out of there." (ALJD at 11) Adrian then told them that he was not going to bring a fourth worker and that if they didn't want to work with just three workers they could "go fuck off." (ALJD at 12, n. 16) Figueroa and Pineda then walked out of the factory together. (ALJD at 12)

After the workers walked out, Adrian called Olguin in Mexico to inform him about what had occurred that morning at the factory. (ALJD at 12) About a half-hour after Pineda and Figueroa walked off the job, Olguin called Figueroa from Mexico. (ALJD at 13) Olguin told Figueroa that, if she did not return to work immediately, she would be fired. (ALJD at 13) Figueroa replied "okay, that's fine," and did not return to work. (ALJD at 13) Olguin also called Pineda that day, instructing him to return to work or he would be terminated. (ALJD at 13) Pineda asked if Olguin was going to get the fourth person to work the production line. (Tr. 374, 443) However, Olguin said that he did not know what was going on there, or if Adrian was going to find someone else, but that it was up to Adrian to fix the problem. (Tr. 443-44) Pineda

did not return to work because Respondent could not assure him to his satisfaction that a fourth worker had been procured to assist them with the work. (ALJD at 13)

F. Respondent transfers Figueroa from the morning to the night shift when she returns to work at the end of September.

About two weeks after Figueroa walked out of the factory, Olguin called her, asking if she wanted to return to work. Figueroa agreed, and went back to work on her old shift, working from 4:00 a.m. – 4:00 p.m., from Friday to Monday. (ALJD at 13) This was the same schedule she had previously worked at the factory throughout her employment (except for a brief period when her mother was ill). (ALJD at 13)

One day, shortly after she had returned to work, Figueroa was packaging tortillas into one-dozen packets, when Adrian started unpacking the packages Figueroa had just completed because a client had asked for a three-dozen pack. (ALJD at 14) Because Adrian had never previously taken apart the tortillas she had packaged, Figueroa complained to Olguin about Adrian's conduct, saying that it was not the proper procedure. (ALJD at 14; Tr. 500-01) Olguin responded that not even he could control Adrian's behavior. (ALJD at 14)

Figueroa was not scheduled to work until the following Friday, so on Thursday she called Respondent to ask if she should report to work the following day at 4:00 a.m. or 6:00 a.m. (ALJD at 14) Olguin told Figueroa to report to work at 6:00 a.m. the next day. (ALJD at 13) Figueroa reported to work at 6:00 a.m., as instructed by Olguin, and parked her car in the parking lot the across the street from the tortilla factory. (ALJD at 14; Tr. 503) However, as she was parking her car, Jesus Arvizu (another employee) shouted to her to go home because Adrian had transferred her to the night shift. (ALJD at 14)

Figueroa walked into the factory where Arvizu repeated himself; she therefore decided to call Olguin. (Tr. 503) Arvizu told Figueroa that Olguin was not in Arizona, and would not

answer her calls. (Tr. 504) Figueroa tried calling Olguin several times that day, but he did not answer. (ALJD at 14) Eventually, at some point Figueroa called Olguin and Adrian answered. Figueroa asked Adrian why he had changed her to the night shift when he knew that she could not work the evenings because of her daughters, and that she did not have child care at night. Adrian replied that he did not know, as it was his father's decision. (ALJD at 14; Tr. 506) Olguin refused to reverse the decision, therefore Figueroa did not return to work. (ALJD at 14)

V. ARGUMENT

A. The decision by a Federal Court is not a basis for the Agency to suspend all its activities.

Respondent correctly points out that the Board appointed Judge Dibble in July 2012, after the President's January 2012 recess appointments to the Board. It is also correct that in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the D.C. Circuit held that that the President's January 2012 appointments to the Board were not valid. However, the Board has publicly stated that it disagrees with the D.C. Circuit's *Noel Canning* decision, and on March 12, 2013, the Board announced that it, in consultation with the Department of Justice, intends to file a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, 705 F.3d 490, 505-506 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is

ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act." The appointment of Judge Dibble is in accordance with the Board's judgment on these matters.

B. The ALJ properly determined that the Board has jurisdiction over Respondent.

In its Exceptions, Respondent argues that the ALJ erred in finding that the Respondent is an employer engaged in commerce, within Section 2(2), 2(6) and (7) of the Act. In so doing, Respondent seeks to have the Board apply its jurisdictional standards narrowly, thereby going back to a restrictive view of the Board's ability to prevent unfair labor practices affecting commerce. See e.g., Resp't Br. at 16-17, 21. However, Respondent's desire to return to a *Lochner*-era jurisprudence goes contrary to findings of the Board, and the Supreme Court, for the past 75 years.[9] The ALJD properly, and succinctly, sets forth the Board's jurisdictional requirement, and in accordance with the record evidence, accurately finds that Respondent in an employer engaged in commerce within the meaning of the Act. (ALJD at 2-4)

The Supreme Court has "consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). As noted by the ALJ, Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be "merely local but in the interlacings of business across state lines adversely affect such commerce." (ALJD at 3) (quoting *Polish National Alliance of United States of North America v. NLRB*, 322 U.S. 643, 648 (1944)). Rather than enter into a debate with Respondent as to the propriety of the 19th Century or 20th Century view of Commerce Clause jurisprudence, the General Counsel will address the substantial record evidence that supports the ALJ's

[9] *Lochner v. New York*, 198 U.S. 45 (1905)

jurisdictional findings, which conform to the Board's well established jurisdictional requirements.[10]

The Complaint, as amended, alleges that, among other ways, the Board has jurisdiction through indirect inflow; specifically that Respondent purchased an received goods valued in excess of $50,000 at its Tucson facility from other enterprises located within the State of Arizona which, in turn, purchased and received these goods directly from points outside the State of Arizona. (ALJD at 2; GC. 1(a), 1(z)) In determining whether the indirect inflow jurisdictional standard is met, the Board combines the value of goods and materials received directly from out-of-State sources (direct inflow) with the value of those received indirectly (indirect inflow). *Brass Rail Inc.*, 110 NLRB 1656, 1658-1659 (1954).[11]

Here, the evidence shows that Respondent's purchases from one source alone, Food Source International (FSI), are enough to meet the Board's indirect-inflow standards. Westin Huber, the Operations Manager for FSI testified that FSI, which has an office in Tempe, Arizona, supplies products to Respondent that originate from outside the State of Arizona. (Tr. 122-23) The record evidence (ALJD at 3; Tr. 140-173; GC. 12, 13), as depicted in Figure 1 below, shows that from August 2011 through July 2012, Respondent purchased over $50,000 worth of products from FSI which originated from outside the State of Arizona.

[10] Respondent improperly claims that "there is no relationship between Respondent and the charging parties to interstate commerce," so that the unfair labor practices found by the ALJ would affect commerce, and that "disruption in respondent's production would have no effect whatsoever on interstate commerce." Resp't Br. at 29, 32. However, the Supreme Court has noted that, whether or not individual practices may be deemed by Congress to affect interstate commerce "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the board. Appropriate judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance*, 322 U.S. at 648.

[11] In making this calculation, the Board also includes the cost of insurance premiums paid to out of state companies when calculating inflow. *Jack L. Williams, DDS*, 219 NLRB 1045, 1045 (1975).

Figure 1

Food Source International Sales to Don Chavez that Originated From Out of State Suppliers	
Month	$ Amount
Aug-11	2,538.00
Sep-11	3,473.00
Oct-11	3,501.50
Nov-12	4,847.50
Dec-12	2,922.00
Jan-12	4,497.00
Feb-12	3,199.00
Mar-12	3,225.00
Apr-12	5,150.00
May-12	6,873.00
Jun-12	6,339.00
Jul-12	5,190.50
Total	$51,755.50

The fact that this twelve-month period (from August 2011 to July 2012) does not exactly match the twelve-month period alleged in the Complaint (from August 31, 2011 to August 31, 2012) is immaterial for purposes of establishing jurisdiction, as there has been no evidence, or assertion, that Respondent's operations substantially changed during the one month differential.[12] See, *Barton Brass Works & Precision Machined Parts Co.*, 78 NLRB 431, 432 (1948) (Board's jurisdiction over an employer does not turn upon the applicable commerce facts during a given month, week, or day, but is governed by a representational period); *NLRB v. Tex-O-Kan Flour Mills Co.*, 122 F.2d 433, 436 (5th Cir. 1941). Moreover, even if the $2,538 from August 2011 is deducted, for the period of September 1, 2011 through July 31, 2012, Respondent

[12] In fact, in its Exceptions Brief, Respondent asserts that, from July 2011 to September 2011, Respondent's purchase of supplies did not change in any material way. Resp't Br. at 7.

still purchased $49,217.50 in goods from FSI that originated from out of State of Arizona. When added to Respondent's other purchases, as outlined below, the Board's commerce standards are again easily met.

Along with purchasing various baking materials from FSI, Respondent also purchased plastic bags from A&P Paper and Plastic Supplies (A&P), which originate from the State of California. (ALJD at 4; GC. 20, 36; Tr. 625-638) During the period alleged in the Complaint, from September 1, 2011, through August 31, 2012, the record evidence, as set forth in the below chart in Figure 2, shows that Respondent purchased $6,286.40 worth of goods from A&P that originated from the State of California. (ALJD at 4)

Furthermore, the record evidence shows that Respondent maintains a life insurance policy with American Family Insurance on Jesus Olguin, Respondent's owner, that is paid directly through the company bank card. (ALJD at 4; Tr. 615-16) The company also maintains property and casualty insurance on Respondent's property, also through American Family Insurance, which is similarly paid through the company bank card. (Tr. 616-17) The evidence shows that American Family Insurance is located in the State of Wisconsin, and Respondent's insurance premium statements come directly from Wisconsin. (ALJD at 4; GC. 19) Respondent's bank card payments to American Family Insurance for these premiums are in the record as GC. 34. As shown in Exhibit A, attached hereto, during the period of September 1, 2011 through August 31, 2012, Respondent paid $5,028.40 in property/casualty premiums, and $1,939.56 in life insurance premiums to American Family through Respondent's bank card. (ALJD at 4; GC. 34)

Figure 2

A & P Paper & Plastic Supplies From Out of State	
Month	$ Amount
9/6/2011	247.50
9/19/2011	371.25
10/10/2011	371.25
11/7/2011	618.75
11/28/2011	618.75
12/1/2011	618.75
12/5/2011	148.50
12/12/2011	148.50
12/29/2010	371.25
1/16/2012	371.25
3/5/2012	495.00
4/9/2012	371.25
4/23/2012	371.25
5/3/2012	371.25
5/29/2012	544.40
6/27/2012	247.50
Total	$6,286.40

Also, the record evidence shows that Respondent made multiple gasoline purchases using the company bank card for the company vehicles. Because the State of Arizona does not refine any gasoline within the State, all such purchases would constitute indirect inflow. (Tr. 617-18; GC. 35) As shown in Exhibit B, Respondent purchased $7,941.58 in gasoline from September 1, 2011 through August 31, 2012, using the company bank card. There is simply no need to further set forth the additional thousands of dollars worth purchases made by Respondent

during this period, either directly or indirectly, to establish the Board's jurisdiction, as Figure 3 shows that the Board's jurisdictional standards have been easily met.[13]

Figure 3

Supplier	$ Amount 9/1/11 to 8/31/12
FSI	49,217.50
A & P Paper	6,286.40
Am. Fam. Prop. & Cas. Ins.	1,939.56
Am. Fam. Life Ins.	5,028.40
Gasoline Purchases	7,941.58
Total	$70,413.44

Accordingly, ample evidence supports the ALJ's finding that the Board has jurisdiction to address Respondent's serious unfair labor practices, and that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

C. The ALJ properly found that Respondent violated Section 8(a)(1) by transferring Mariela Soto, thereby causing her discharge.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980) enf'd. 662 F.2 899 (1st Cir. 1981), the General Counsel has the burden of establishing that an employee's protected activity was a motivating factor for an adverse employment action. The ALJ correctly found that the General Counsel met this burden in connection with the constructive discharge of Mariela Soto, who complained with her co-workers about excessive heat in the factory, and the sexual harassment

[13] Because the $50,000 standard is easily met here, there is no reason to address Respondent's erroneous argument that the "value" of goods that actually crossed state lines should be the wholesale, not retail, value of the products. Nonetheless, the ALJ properly used the price Respondent paid for the goods it purchased in her jurisdiction calculations. For example, 18 U.S.C. § 2314 makes it a crime to transport "in interstate or foreign commerce" any goods "of the value of $5,000 or more." In determining when the Federal Government has jurisdiction to prosecute such a crime, the "general test for determining the market value of stolen property is the price a willing buyer would pay a willing seller either at the time and the place the property was stolen or at any time during the receipt or concealment of the property." *U.S. v. Perry*, 638 F.2d 862, 865 (5th Cir. 1981). That is, he price at which the wholesaler would sell them. Id. That is the price the ALJ used here, the price that FSI and A&P were selling their products to Respondent.

that Adrian perpetrated towards women in the factory. Respondent was aware of her concerted activity, harbored animus against her complaints, and Respondent's reasons for transferring her to the afternoon shift are pretext.

1. The ALJ correctly found that Respondent transferred Soto to the afternoon shift knowing it would cause her to resign, in violation of Section 8(a)(1) of the Act.

The record amply supports the ALJ's finding that Soto complained with her co-workers about the conditions in the factory, including Adrian's inappropriate sexually advances. (ALJD at 8, 9, 16; Tr. 571, 576, 472 - 483) The record is also clear that Respondent knew that Soto complained with her co-workers about shoddy equipment in the factory, and that she complained to Olguin about Adrian's conduct. (ALJD at 8, 10; Tr. 272 – 273; 577 - 578) See *Phoenix Transit System*, 337 NLRB 510, 512 (2002) (finding employee complaints about sexual harassment were protected, concerted activities). On July 4th, Adrian harbored significant animus toward Soto because she complained to his father of his obscene behavior, a topic of common concern among the female workers, and one that they had complained about. (ALJD at 7-9; Tr. 387, 473 -74, 477, 480 - 83, 572 – 73) On that day, Adrian walked into the factory and declared to Soto and Figueroa that "he did not give a fuck if he was sued for sexual harassment," and directed a string of profanities towards them because of their sexual harassment complaints. (ALJD at 10; Tr. 484, 580 - 582) Such conduct leveled against employees who had engaged in concerted complaints certainly supports a finding of animus. *CWA Local Union No. 3410*, 328 NLRB 920, 922 (1999) (animus shown, in part, where respondent makes derogatory statements, including profanity, about the person engaged in protected activity).

Additionally, it is well settled that the timing of an employer's action in relation to known protected activity can supply reliable and competent evidence of unlawful motivation. *Davey*

Roofing, Inc., 341 NLRB 222, 223 (2004). Here, Soto's last day of work was July 4, the same day that Adrian exhibited knowledge that she had complained about is sexual behavior; timing alone supports a finding that Respondent's discriminatory animus was a motivating factor in her transfer. Id. (timing of layoffs, coming one day after union rally and the same day employer received a union petition, supports a finding of unlawful motivation); *ABC Specialty Foods, Inc.*, 234 NLRB 475, 479 (1978) (timing of discharges and reprimand, occurring the same day the union made its initial contact, is evidence of animus). Therefore, the Board should adopt the ALJ's finding that Soto's transfer, coming just days after Adrian's outburst of rage against Soto and Figueroa because of their concerted complaints, established the General Counsel's burden. (ALJD at 17)

a. Respondent's claim that Soto's socializing decreased production is pretext.

Respondent argues it would have transferred Soto to the afternoon shift absent her protected activity because of socializing during work. However, the ALJ properly dismissed this claim on objective grounds that are fully supported by the record. Olguin failed to substantiate his assertions that Soto was transferred to increase her productivity and restore production numbers in the morning shift. (ALJD at 17) He testified that employees from the 4:00 a.m. shift recorded the production numbers on a sheet of paper. (Tr. 805 - 806) However, Respondent failed to produce these records, or the testimony of workers who conducted the count, revealing that Respondent's true illegal motive for transferring Soto was her protected activity. *Galesburg Construction*, 267 NLRB 551, 552 (1983) (Board approved the trial judge's observation that he, "infer[red] from Respondent's failure to produce documents in its control and which were vital to prove its defense that the records did not support Respondent's position."); *Cooke's Landing*, 289 NLRB 1100, fn. 8 (1988) (party's failure to produce documents led to inference that "such

evidence would be harmful to its case"); *Teddi of California*, 338 NLRB 1032 (2003) (rejection of testimony where party failed to produce documentation to support that account). Thus the ALJ properly discredited Olguin's testimony as pretext. (ALJD at 17, 11 fn. 13; Tr. 806) Similarly unreliable is Olguin's claim that he personally counted all the tortillas (Tr. 803), as he could not identify any change in the production numbers that allegedly existed in May 2011.[14] (Tr. 846-48) Also, Respondent's witness Jesus Arvizu, whose credibility is discussed in Section IV(E) below, could not remember what dates in 2011 he purportedly reported problems on the production line. (Tr. 749)

Finally, even if there was evidence presented that Soto had been socializing with her coworkers, which there was not, there is no evidence that this conduct resulted a production decrease. Olguin testified that production could be affected by irregularities with the machinery. (Tr. 808) Coincidentally, Olguin noticed a decrease in production starting in May 2011; this time frame that overlaps with employee complaints about the machinery in the factory.[15] (Tr. 267, 272) Respondent simply failed to show that any purported production decrease was caused by Soto, rather than some other issue such as the shoddy equipment in the factory. In sum, the evidence supports a finding that Respondent's purported reason for Soto's transfer is pretext reason, and the Board should adopt the ALJ's findings, and dismiss Respondent's exceptions.

b. Respondent knew that transferring Soto would cause her to resign.

Significantly, Respondent did not file an exception to the ALJ finding that Olguin knew Soto had children and could not work a night shift.[16] (Tr. 305) Instead, in Exceptions 8, 10, 15 –

[14] A finding of pretext is further supported by the fact that Olguin waited until after Adrian confronted Soto about the sexual harassment complaints on July 4 to transfer her, when the production issues allegedly existed since May 2011. (Tr. 809)
[15] The company's receipts show that Respondent purchased new equipment and replacement parts for the equipment in the factory in 2011. (Tr. 32-33; 278-279; GC 22)
[16] As such, this finding should be adopted by the Board. Board's Rules & Regulations, §§102.46 (b)(2); 102.48.

17, Respondent argues the ALJ erred by finding that Respondent knew the shift transfer would force Soto to resign because Olguin offered to alternate Soto between the afternoon and morning shift. (Resp't Br. at 45) No such evidence exists. A review of the record reveals that Olguin did not offer to alternate Soto between the night shift and the morning shift during their July telephone call when he told her she would be working the night shift. (Tr. 816 – 818, 582 - 583) Even if Olguin had offered to alternate Soto between the morning and night shift, Soto objected to the transfer, and it was clear to Olguin that she could not work nights. (Tr. 305) The evidence fully supports the ALJ's decision that Olguin insisted on transferring her to a night shift knowing she had to care for her children at night. (ALJD at 17-18; Tr. 305; 582-584). See *American Licorice, Co.*, 299 NLRB 145, 148-149 (1987); *Baker, Harold W., Co.*, 71 NLRB 44, 60-61 (1946). As discussed above, Respondent failed to prove it would have transferred Soto absent her concerted activity. Accordingly, Respondent's exceptions should be dismissed, and the Board should adopt the ALJ's conclusion that Respondent knew transferring Soto to a shift that she could not work would result in her termination.

c. The ALJ correctly found that Olguin's testimony regarding his presence at the factory as contradictory and unreliable.

Respondent's claim that the ALJ erred in discrediting Olguin's testimony that Soto was transferred because of her socializing with Figueroa is without merit. Resp't Br. at 38. Respondent makes a bare argument that "[n]othing in Olguin's testimony or in the record as a whole supports a finding that [Olguin] infrequently observed the two socializing." Resp't Br. at 42 However, a review of the record proves otherwise, as Olguin himself testified that, with respect to the factory "I am never there. I am always working by delivering." (Tr. 272) (ALJD at 11, n. 13). Certainly, Olguin's statement that he is "never" at the factory supports the ALJ's

finding that he infrequently observed the two socializing, and serves as a sound basis for the ALJ to dismiss as pretext his proffered reason for Soto's transfer.

In sum, the record evidence supports the ALJ's findings that Respondent illegally transferred Soto to the night shift, aware that she was unable to work because of her children, in violation of Section 8(a)(1) of the Act, and that this transfer caused her discharge.

D. The ALJ properly found that Respondent threatened to fire, and then discharged Pineda and Figueroa in violation of Section 8(a)(1).

1. The ALJ correctly found that Olguin threatened to fire Figueroa and Pineda during their work stoppage.

The ALJ's decision that Olguin threatened to fire Figueroa and Pineda is fully supported by the record. It is well settled that the test for a violation of 8(a)(1) is whether, considering all circumstances, the employer's statements had a reasonable tendency to restrain, coerce, or interfere with employees rights under Section 7 of the Act. *American Tissue Corp.*, 336 NLRB 435, 441 (2001) citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946); *Mediplex of Danbury*, 314 NLRB 470, 472(1994); See also *New Brunswick Hospital Center*, 265 NLRB 803, 310 (1982).

Here, after Figueroa and Pineda left the factory, Olguin telephoned both, informing them that, if they did not return to work they would be fired. (ALJD at 13) Considering all the circumstances, the ALJ properly found that this statement constituted an illegal threat of discharge. *Leslie Metal Arts Co., Inc.*, 208 NLRB at 325-327 (1974) (statement to employee to return to work immediately or face disciplinary action an illegal threat).

To support its position, Respondent disputes the finding that the walk out constituted protected concerted activity. (Resp't Br. at 49) However, the Supreme Court, in *NLRB v. Washington Aluminum Co.*, 370 US 9 (1962), rejected a similar argument and overturned the

Fourth Circuit's holding that a walk out was not protected because workers left their place of employment "without affording the company an opportunity to avoid the work stoppage by granting a concession to a demand." Here, despite Respondent's argument, Olguin admitted that he knew Pineda and Figueroa walked out of the factory because of the excessive heat and short staffing on September 4. (Tr. 3144 – 315) As such, the record supports a finding that their walk out was protected concerted activity, and that Olguin illegally threatened Figueroa and Pineda with discharge. (ALJD at 18; Tr. 366, 488, 370, 368, 489, 438, 371) See *Vic Tanny International*, 232 NLRB 353, 354 (1977) enfd. 622 F.2d 237 (6th Cir. 1980) (three fitness instructors who walked off their jobs to protest their employer's decision to require them to pick up payroll checks and supplies at its headquarters 14 miles away were engaged in protected activity) ; *St. Louis Bagel Bakers*, 224 NLRB 307, 312-313 (1976) (employees actions protected when they concertedly stopped working because of their complaints regarding the mechanical condition of a machine had not been remedied to their liking); *Imperial Bedding Co.*, 216 NLRB 934, 938 (1975) enfd. 519 F.2d 1073 (1975) (employees engaged in protected strike by refusing to work in protest of a coworkers suspension); *Leslie Metal Arts Co., Inc.*, 208 NLRB 323, 325-327 (1974) (employee walkout protected).

Respondent's exceptions 22 – 23, that the ALJ committed reversible error by dismissing Olguin's testimony on this issue – claiming that he never threatened either with termination – is a glaring oversight of the ALJ's detailed discussion of the witnesses' demeanor and the record. (Resp't Br. at 49 – 50) In resolving the conflicting testimony, the ALJ considered the demeanor she observed when Pineda and Figueroa testified, and compared it to Olguin's demeanor during his testimony. (ALJD at 18 – 19, 13, fn. 18 – 21) See *Standard Dry Wall Products*, 91 NLRB

544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951) (a credibility resolution will not be disturbed unless the clear preponderance of all relevant evidence shows that it was incorrect).

The ALJ also considered the circumstances surrounding Olguin's phone calls to Pineda and Figueroa in her decision that it was unlikely Olguin told Pineda and Figueroa that he sent a fourth person to work the shift, as he claimed in his testimony. *Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (in addition to demeanor, credibility resolutions can also be based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole).

Here, The ALJ noted that, when Adrian arrived at the factory, he told Pineda and Figueroa he would not find a fourth worker, and if they did not want to work like that they could "fuck off," indicating that it was unlikely that he had found another employee to work the morning shift with them. (ALJD at 12, fn. 16, 18) (Tr. 442, 444 - 445, 495) Moreover, Olguin was in Mexico at the time, and had no first-hand knowledge of whether a fourth person arrived at the factory on September 4. (ALJD at 12, fn. 17) (Tr. 823) Respondent also failed to prove that a fourth worker actually arrived to work on September 4, which further undercuts Olguin's purported version of events. As discussed further below, the ALJ properly also dismissed testimony from Respondent's witness, Jesus Arvizu, who tried to claim that he was the fourth worker, based on his upon his demeanor while testifying, and her consideration of all the evidence in the record. (ALJD at fn. 17) Therefore, the ALJ's credibility determinations are supported by the record, and are valid. The Board should adopt her findings of fact, and conclusions of law, and find that Respondent violated Section 8(a)(1) by threatening Pineda and Figueroa with discharge if they did not abandon their work stoppage and return to work. (ALJD at 19)

2. The ALJ was correct in finding Respondent fired Figueroa and Pineda in violation of Section 8(a)(1).

The record fully supports the ALJ's conclusion that Pineda and Figueroa walked out of the factory because of the excessive heat and short staffing on September 4; Respondent knew they walked out to protest these conditions; and Respondent harbored animus towards their protected activity. (ALJD at 20) Furthermore, Olguin's threat to fire Pineda and Figueroa, discussed above, is sufficient evidence of Respondent's animus against their protected activity. *Health Care Corp.*, 334 NLRB 903, 906 (2001) (independent violations of Section 8(a)(1) constitute evidence of animus toward protected activity).

When Olguin told Pineda and Figueroa that, if they did not report back to work right away they would be fired, or alternatively could not work for Respondent anymore, Respondent illegally discharged both workers. *Leslie Metal Arts Co., Inc.*, 208 NLRB at 325. When determining whether or not a striker has been discharged, the Board examines whether the employer's words or actions "would logically lead a prudent person to believe his [or her] tenure has been terminated." *Leiser Construction LLC*, 349 NLRB 413, 416 (2007) petition for review denied 281 Fed. Appx. 781 (10th Cir. 2008). "To determine what a prudent person would logically believe as to his employment status, it is necessary to consider the entire course of relevant events from the employee's perspective." Id. Moreover, if an employer's words or actions "created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer." *Kolka Tables*, 335 NLRB 844, 846-847 (2001) (quoting from the judge's decision in *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982)).

Applying these principles, the relevant facts show that Respondent's conduct would logically lead Figueroa and Pineda to believe that they had been fired. There is no other way to define the plain meaning of the words "if you don't show up for work your fired." At the very least, Olguin's words created ambiguity and confusion, and the results of that ambiguity must fall on Respondent. *Pride Care Ambulance*,356 NLRB No. 128 slip op. at 3 (2011) (employer's comments to strikers that "if you don't come back to work now you don't have jobs to come back to," that they could consider themselves "terminated" and "could look for other jobs" constituted an illegal discharge). As such, the ALJ properly found that Respondent discharged both Pineda and Figueroa for engaging in protected concerted activities in violation of Section 8(a)(1). (ALJD at 20-21)

As a defense, Respondent argues that the ALJ erred in dismissing testimony from Olguin that Adrian said he had secured a fourth worker, claiming that Pineda and Figueroa somehow lost their protected status (voluntarily quit) when they refused to return to work when the fourth worker arrived. Resp't Br. at 9-10. However, whether a fourth worker actually did, or did not, arrive to work that day is irrelevant. In *Washington Aluminum Co.*, 370 US at 14, the Supreme Court found that the language in Section 7 is "broad enough to protect concerted activities whether they take place before, **after**, or at the same time such a demand is made." (emphasis added) Thus, even if Pineda and Figueroa had walked off the job after a purported fourth worker had arrived, to protest having only three workers earlier in the day, their actions would have been protected. As such, the Board should adopt the ALJ's findings and conclusions, that Respondent violated Section 8(a)(1) of the Act by discharging Pineda and Figueroa, and dismiss Respondent's exceptions.

E. The ALJ was objective, unbiased, and her credibility resolutions should be adopted.

Respondent's claim that the Board should ignore the ALJ's credibility resolutions because she was not objective, and biased or hostile towards Respondent is unsupported by the record evidence. In order to overturn the ALJ's credibility resolutions, Respondent would need to show that that "the clear preponderance of all the relevant evidence" shows that the ALJ's credibility resolutions were incorrect. *Standard Drywall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). This is a "high standard" *Fantasia Fresh Juice Co.,* 339 NLRB 928, 928 (2003), and is one that Respondent cannot meet. Instead, as the Tenth Circuit noted when it found baseless similar allegations of bias against a Board ALJ by the losing party, "what forms the basis for this contention appears to have been an active, but proper involvement of the ALJ in clarifying facts during testimony of both petitioner's and respondent's witnesses." *Electromedics, Inc. v. NLRB,* 947 F.2d 953 (10th Cir. 1991) (Table) 1991 WL 225898, 3. There is simply "no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses." *Radisson Muehlebach Hotel*, 273 NLRB 1464, 1465 n. 2 (1985). The "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Such is the case here, and Respondent's accusations are without merit.

For example, Respondent asserts that the ALJ was assisting the General Counsel in responding to objections made by Respondent, by advising the General Counsel to "add two words," after Respondent objected that the question was "vague and ambiguous." Resp't Br. at 53 (citing Tr. 378) While this instance did occur, the transcript is full of occasions when the opposite occurred; the ALJ assisted Respondent in replying to objections made by the General

Counsel. Thus, after the ALJ sustained an objection based upon lack of personal knowledge, as to how a certain piece of equipment could increase or decrease in speed, the ALJ gave Respondent's counsel a hint that, just because someone works the equipment, doesn't mean they know "how it works." (Tr. 736) Later, when an objection was sustained based upon the lack of foundation, the ALJ instructed Respondent's counsel as to the specific foundational elements he needed to establish.[17] (Tr. 727) There are various other examples of the ALJ trying to assist Respondent's counsel in asking proper questions to overcome evidentiary objections. (Tr. 396, 591-92, 398-99, 401, 407, 416, 418) In one instance, after the General Counsel's objections, Respondent's inability to establish that the witness had personal knowledge, the ALJ asked the question herself, asking the witness "Do you know whether or not the people that you were replacing were from the morning or evening shifts," and then hinted to Respondent that he could overcome such objections in the future by adding the words "[d]o you know" to the questions. (Tr. 516) Clearly, the ALJ was not biased, but instead was properly trying to control the proceedings, and clarifying facts from all the witnesses, whether they were the Respondent's or the General Counsel's.

It also appears that some of Respondent's complaints about hostility and bias stem from Respondent's errors in interpreting the Rules of Evidence, rather than defects in the ALJ's rulings. For example, Respondent complains that the General Counsel was allowed to ask Pineda questions about what was told to him by Adrian Olguin, over Respondent's hearsay objections. Resp't Br. at 51. However, Adrian Olguin is an admitted supervisor and agent of Respondent.[18] Under Fed. R. Evid. 801(d)(2)(D), a statement by a party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of

[17] The fact that Respondent did not accept the ALJ's hints and suggestions in these instances is irrelevant.
[18] Respondent did not take exceptions to the ALJ's finding that Adrian Olguin was Respondent's supervisor and agent.

the relationship, and offered against the party, is not hearsay, but an admission of the party. *Sunset Bay Associates*, 944 F.2d 1503, 1517-1519 n. 12 (9th Cir. 1991). Thus, statements made by Adrian Olguin to the various discriminatees in this matter were not hearsay, and the ALJ's rulings were proper; Respondent is simply confused about the hearsay rules.

This confusion is further amplified by Respondent's complaint that the ALJ sustained the General Counsel's hearsay objection when Respondent's counsel asked Jesus Olguin, Respondent's owner, about statements made to him by Adrian Olguin, about what Adrian told his father the day Pineda and Figueroa walked-out.[19] Resp't Br. at 52 (citing Tr. 819). Because Olguin's statement was clearly hearsay, particularly with respect as to whether a fourth worker actually showed up at the factory (Tr. 822-23), and did not fall within one of the hearsay exceptions, the ALJ properly sustained the General Counsel's initial objection.

Respondent also complains that the ALJ sustained objections with respect to its attempt to elicit testimony from Jesus Olguin with respect to his telephone call to Alan Pineda. Resp't Br. at 49 n. 34. However, a review of the record shows that the General Counsel's foundational objections were properly sustained. (Tr. 824-25) First, the very basic foundational requirement, that Jesus Olguin recognized the voice of the person he was speaking to on the telephone as the voice of Pineda, was never established by Respondent. Fed. R. Evid. 901(b)(5); See, e.g., *U.S. v. Recendiz*, 557 F.3d 511, 527 (7th Cir. 2009) (to satisfy the requirements of Rule 901(b)(5), the "basic requirement of familiarity" with the voice can needs to be established and can be done so by lay opinion testimony). Accordingly, the ALJ's ruling was proper, as "strict compliance" with the authenticity rules are required. *U.S. v. Perlmuter*, 693 F.2d 1290, 1292 (9th Cir.1982). Certainly, this is not evidence of bias.

[19] Notwithstanding, the ALJ allowed the witness to later answer the exact same question, thus ameliorating any perceived error. (Tr. 819-820)

Perhaps the best example of Respondent's confusion about the evidentiary rules is the complaint that the ALJ allowed the General Counsel to introduce evidence to show that Respondent's witness, Jesus Arvizu, was imprisoned and then deported twice during 2011. Resp't Br. at 9 n. 2, 43-44, 46-51. Respondent was relying upon Arvizu's testimony to support its contention that Soto's July 4 transfer was unrelated to her concerted complaints, but instead was made because she would socialize with Figueroa when they worked the same shift. Resp't Br. at 40. Specifically, Olguin testified that Arvizu told him that production was short because Soto was socializing, and Arvizu (who could not recall the exact date) testified that he was concerned with Soto's inefficiency on the production line. Resp't Br. at 40 (citing Tr. 813, 729).

On cross-examination, in trying to determine when exactly Arvizu worked at Respondent's facility, in relation to Soto's transfer, the General Counsel asked Arvizu the following:

	Q:	Mr. Arvizu, in 2011, what months did you work at Don Chavas?
[Arvizu]	A	In 2011, the entire year.
	Q	You worked the entire year?
	A	Yes.
	Q	Well, isn't it true that you were in jail twice for part of 2011?
	A	No.

After Arvizu testified that he worked at Respondent's factory during the entire year of 2011, the General Counsel introduced into evidence GC 37-40 showing that Arvizu had been jailed, and then departed from the United States, twice in 2011. First, on March 25, Arvizu was sentenced to 30 days imprisonment, and was then deported to Mexico. (GC. 37-40; 766-67) Arvizu was then again arrested and sentenced to another 30 days in prison on June 8, and was then again deported to Mexico. (GC. 37-40; Tr. 771-72)

As such, Arvizu's plea agreements, and related documents, were introduced into evidence not pursuant to Rule 609 (impeachment by evidence of conviction of a crime), as Respondent

contends, but to attack Arvizu's credibility for having lied about working at Respondent's facility during the entire year of 2011 – particularly during the time frame when he allegedly reported that Soto was socializing just before her transfer on July 4, 2011. Clearly Arvizu did not work for Respondent during this time frame, as he was either in jail or in Mexico.

Fed.R.Evid. 613(b) provides for impeachment of a witness with "[e]xtrinsic evidence of a prior inconsistent statement" if "the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon." *U.S. v. Lester* 238 Fed.Appx. 80, 83 (6th Cir. 2007) Such is the case here. Accordingly, the General Counsel properly introduced this extrinsic evidence to impeach Arvizu's prior inconsistent statements, and the evidence in GC. 37-40 was properly admitted by the ALJ. Again, this incident highlights Respondent's misunderstanding of the application of the Rules of Evidence, a misunderstanding that leads Respondent to claim that the ALJ was biased, where no such bias existed.

VI. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1) of the Act, as set forth in the ALJD, and Respondent's exceptions should be rejected. The Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order. It is further requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondent's numerous violations of the Act.

Dated at Phoenix, Arizona, this 29th day of March 2013.

Respectfully submitted,

/s/ Sophia Alonso
/s/ John T. Giannopoulos

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, Cases 28-CA-63550, et al. was served by E-Gov, E-Filing, and E-Mail on this 29th day of March, on the following:

Via E-Gov, E-Filing:
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EXHIBIT A

PROPERTY & CASUALTY INSURANCE

Date	$ Amount	
9/15/2011	$205.62	American Family
9/19/2011	$87.00	American Family
9/22/2011	$149.25	American Family
10/17/2011	$205.62	American Family
10/17/2011	$201.28	American Family
10/17/2011	$150.52	American Family
10/18/2011	$87.00	American Family
10/24/2011	$2.00	American Family
11/15/2011	$205.62	American Family
11/17/2011	$87.00	American Family
11/22/2011	$151.25	American Family
11/30/2011	$110.00	American Family
11/30/2011	$101.00	American Family
12/15/2011	$205.62	American Family
12/19/2011	$259.20	American Family
12/22/2011	$140.50	American Family
1/17/2012	$465.62	American Family
1/17/2012	$259.20	American Family
1/24/2012	$140.50	American Family
2/15/2012	$118.75	American Family
2/17/2012	$259.20	American Family
2/22/2012	$140.50	American Family
3/15/2012	$118.75	American Family
3/19/2012	$259.20	American Family
3/22/2012	$140.50	American Family
4/17/2012	$259.20	American Family
4/17/2012	$118.75	American Family
4/24/2012	$140.50	American Family
4/17/2012	$118.75	American Family
4/24/2012	$140.50	American Family
Total	**$5,028.40**	

LIFE INSURANCE

Date	$ Amount	
12/22/2011	$75.26	American Family (WI) Life Prem
12/30/2011	$100.64	American Family (WI) Life Prem
1/24/2012	$75.26	American Family (WI) Life Prem
2/1/2012	$105.50	American Family (WI) Life Prem
2/1/2012	$100.64	American Family (WI) Life Prem
2/22/2012	$75.26	American Family (WI) Life Prem
3/1/2012	$105.50	American Family (WI) Life Prem
3/1/2012	$100.64	American Family (WI) Life Prem
3/22/2012	$75.26	American Family (WI) Life Prem
3/30/2012	$105.50	American Family (WI) Life Prem
3/30/2012	$100.64	American Family (WI) Life Prem
4/24/2012	$75.26	American Family (WI) Life Prem
5/2/2012	$105.50	American Family (WI) Life Prem
5/2/2012	$100.64	American Family (WI) Life Prem
5/23/2012	$75.26	American Family (WI) Life Prem
5/31/2012	$105.50	American Family (WI) Life Prem
5/31/2012	$100.64	American Family (WI) Life Prem
6/22/2012	$75.26	American Family (WI) Life Prem
7/2/2012	$105.50	American Family (WI) Life Prem
7/2/2012	$100.64	American Family (WI) Life Prem
7/24/2012	$75.26	American Family (WI) Life Prem
Total	**$1,939.56**	

EXHIBIT B

Don Chavas' Bank of America Business Account Debits

Date	$ Amount		Date	$ Amount		Date	$ Amount	
9/12/2011	$97.26	Valero	2/14/2012	$64.80	Valero	5/21/2012	$90.00	Shell Service
9/13/2011	$89.96	QT	2/14/2012	$51.98	Valero	5/21/2012	$67.04	Shell Service
9/16/2011	$60.05	Circle K	2/17/2012	$75.00	Circle K	5/22/2012	$66.20	Shell Service
9/19/2011	$92.58	QT	2/17/2012	$41.00	QT	5/24/2012	$43.76	Circle K
9/22/2011	$47.01	QT	2/17/2012	$19.83	QT	5/24/2012	$45.27	Shell Service
9/23/2011	$100.00	QT	2/17/2012	$70.00	Valero	5/29/2012	$40.00	Circle K
9/26/2011	$50.00	Circle K	2/21/2012	$90.06	Arco Paypoint	5/29/2012	$90.00	Shell Service
9/28/2011	$85.90	QT	3/1/2012	$30.08	Shell Oil	5/30/2012	$50.35	Arco Paypoint
10/3/2011	$20.06	Shell Oil	3/2/2012	$50.00	Circle K	6/1/2012	$79.46	Costco Gas
10/3/2011	$83.84	Shell Service	3/5/2012	$78.20	Costco Gas	6/4/2012	$55.89	Circle K
10/11/2011	$94.23	QT	3/7/2012	$80.35	Arco Paypoint	6/4/2012	$57.86	Costco Gas
10/11/2011	$87.05	Shell Service	3/7/2012	$98.11	Costco Gas	6/7/2012	$90.00	Shell Service
10/24/2011	$94.55	QT	3/12/2012	$100.00	Arco Paypoint	6/8/2012	$44.36	Shell Service
10/24/2011	$85.54	Shell Service	3/19/2012	$75.00	Circle K	6/14/2012	$75.00	Circle K
10/31/2011	$68.28	Costo Gas	3/19/2012	$77.43	Shell Service	6/15/2012	$50.01	Shell Oil
11/2/2011	$90.00	Shell Service	3/23/2012	$74.68	Circle K	6/18/2012	$40.10	Circle K
11/10/2011	$83.63	QT	3/27/2012	$66.25	Shell Oil	6/19/2012	$30.35	Arco Paypoint
11/14/2011	$84.73	QT	3/28/2012	$75.00	Circle K	6/19/2012	$77.31	Shell Service
11/23/2011	$44.04	Chevron	4/2/2012	$100.00	QT	6/20/2012	$90.00	Shell Service
11/28/2011	$60.28	Circle K	4/2/2012	$70.02	Shell Oil	6/26/2012	$96.17	Arco Paypoint
11/28/2011	$79.83	QT	4/6/2012	$100.00	Arco Paypoint	6/27/2012	$38.14	Costco Gas
12/5/2011	$50.00	Circle K	4/9/2012	$67.63	Circle K	7/2/2012	$90.00	Shell Service
12/9/2011	$51.60	Shell Service	4/11/2012	$75.00	Circle K	7/5/2012	$53.67	Shell Service
12/14/2011	$63.80	QT	4/11/2012	$100.00	QT	7/6/2012	$30.13	Shell Service
12/16/2011	$30.17	Circle K	4/12/2012	$90.00	Shell Service	7/9/2012	$88.89	QT
12/20/2011	$57.02	Shell Service	4/18/2012	$10.12	Circle K	7/9/2012	$62.71	Shell Service
12/27/2011	$83.71	Shell Service	4/23/2012	$15.12	QT	7/12/2012	$70.35	Arco Am/Pm
12/27/2011	$74.06	Shell Service	4/24/2012	$90.00	Shell Service	7/12/2012	$23.98	Shell Service
12/28/2011	$78.49	Costo Gas	4/26/2012	$90.00	Shell Service	7/16/2012	$54.56	Circle K
1/9/2012	$75.00	Circle K	4/26/2012	$20.13	Shell Service	7/17/2012	$40.74	Shell Service
1/13/2012	$92.51	Arco Paypoint	4/30/2012	$90.00	Shell Service	7/17/2012	$26.58	Shell Service
1/13/2012	$83.13	QT	4/30/2012	$68.92	Shell Service	7/23/2012	$87.16	Arco Am/Pm
1/13/2012	$66.06	QT	5/7/2012	$90.00	Shell Service	7/23/2012	$54.90	Shell Service
1/20/2012	$82.61	Arco Paypoint	5/7/2012	$61.25	Shell Service	7/23/2012	$18.03	Shell Service
1/24/2012	$74.10	Shell Service	5/10/2012	$90.00	Shell Service	7/24/2012	$22.46	Circle K
1/25/2012	$57.13	Valero	5/14/2012	$64.05	Shell Service	7/25/2012	$60.56	76/Circle K
1/30/2012	$66.04	Shell Service	5/14/2012	$15.12	Valero	7/27/2012	$32.18	76/Circle K
1/31/2012	$90.64	Valero	5/15/2012	$30.80	Circle K	7/30/2012	$65.60	76/Circle K
2/3/2012	$58.00	Costco Gas	5/15/2012	$90.00	Shell Service	7/30/2012	$46.27	Circle K
2/6/2012	$50.00	Circle K	5/15/2012	$52.59	Shell Service	7/30/2012	$14.02	Shell Service
2/10/2012	$50.00	Circle K	5/16/2012	$50.11	Chevron			
Total Column	$2,932.89		Total Column	$2,748.63		Total Column	$2,260.06	
Total All	**$7,941.58**							