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**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 28**

<p>In Re the Matter of:</p> <p>MARIELA SOTO, an individual, AND ANAHI FIGUEROA, an individual,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, an Arizona limited liability company,</p> <p style="text-align: center;">Defendant.</p>	<p><b>Case No.: 28-CA-063550</b></p> <p style="text-align: center;"><b>28-CA-067394</b></p> <p style="text-align: center;"><b>REPLY IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE</b></p>
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Defendant DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS (“Don Chavas”) hereby submits its Brief in Support of Exceptions to the Decision of the Administrative Law Judge.

In its Answering Brief, General Counsel fails to alleviate any of the deficiencies in the ALJ’s decision. Respondent’s Exceptions should be granted for the following reasons.

**I. JUDGE DIBBLE’S DECISION IS INVALID *AB INITIO***

General Counsel’s response to Respondent’s argument that Judge Dibble’s appointment was invalid because it was accomplished by an unlawfully appointed Board is simply that the NLRB disagrees with the decision, publicly no less, as if that were sufficient to overcome binding federal court precedent. The Board’s recess appointments are invalid and the Board lacks the required quorum. Absent an

appellate court saying otherwise, that is the reality the Board and General Counsel must face. Because Judge Dibble was appointed by that Board, her appointment is unlawful. Her decision, therefore, is void *ab initio*. Nothing in General Counsel's Answering Brief disputes that point.

## **II. RESPONDENT'S ALLEGED UNFAIR LABOR PRACTICES DO NOT AFFECT INTERSTATE COMMERCE**

In its Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Respondent argued that the ALJ erred in finding statutory jurisdiction because the record showed that the test for the Board's jurisdiction was not met because Respondent's alleged unfair labor practices had no demonstrable adverse effect on interstate commerce.

To assert its statutory jurisdiction over a purely intrastate activity, the NLRB must demonstrate through clear findings of fact that the alleged unfair labor practices have produced to or tended to produce a substantial effect on interstate commerce. *Consolidated Edison, Co., v. NLRB*, 305 U.S. 197, 223-24 (1938); *NLRB v. Fainblatt*, 306 U.S. 601, 608 (1939); *NLRB v. Benevento*, 297 F.2d 873 (1st Cir. 1961); *US v. Lopez*, 514 U.S. 549 (1996). Here, the ALJ could not have made such a finding because Respondent's alleged unfair labor practices had no effect whatsoever on interstate commerce. Accordingly, the ALJ's finding is not supported by substantial evidence and the case must be dismissed in its entirety for lack of jurisdiction.

The record evidence demonstrates that during the months the alleged unfair labor practices occurred, the alleged unfair labor practices had no substantial adverse effects on Respondent's purchases from FSI nor on FSI's interstate purchases, in fact, they had no effect whatsoever. These are cold hard objective facts that cannot be swept aside or undermined by General Counsel's rote recitation of legal principles it does not fully understand.<sup>1</sup>

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<sup>1</sup> General Counsel recites the Supreme Court's holding in *Polish National Alliance* that congress may regulate local activities which in the interlacings of business adversely affect interstate commerce. *Polish National Alliance v. NLRB*, 322 U.S. 643, 648 (1944). General Counsel, however, conveniently ignores the fact that the Supreme Court's holding in *Polish National* was derived from *Fainblatt*. In *Fainblatt*, the court announced the test for the Board's statutory jurisdiction, and held that "the test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of

In response, General Counsel argues that the Board may assert jurisdiction over an enterprise even where the alleged unfair labor practices have no demonstrated effect on interstate commerce because of the aggregate effect of those alleged unfair labor practices. GCAB, p. 14, n. 10. General Counsel is wrong; this is not the proper test.

In *Reliance Fuel Corp. v. NLRB*, 371 U.S. 224 (1963), the court held that the Board may exercise jurisdiction over “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. *Id.* at 648 (1944) (emphasis added). Thus, while the Board may consider the aggregate affects, it must also consider the activities immediately before it, and **must** find that the intrastate activity had an actual adverse effect on interstate commerce. *Id.*

Because there is no evidence on the record to support a finding that Respondent’s alleged unfair labor practices substantially and adversely affected interstate commerce, the Board’s test for jurisdiction is not met. Accordingly, the ALJ’s erred in finding jurisdiction.

### **III. THE *SIEMON*’S STANDARD WAS NOT MET BECAUSE \$50,000.00 DID NOT CROSS STATE LINES.**

Respondent argued in its Brief in Support of Exceptions that even if the ALJ was correct in finding statutory jurisdiction, she erred in finding discretionary jurisdiction because the *Siemon*’s standard was not met. The *Siemons* standard requires a showing of “outflow or inflow **across State lines** of at least \$50,000.00.” *Siemons Mailing Service*, 122 NLRB 81 (1958) (emphasis added).

Respondent argued that \$50,000.00 did not cross state lines because FSI, the supplier, no doubt purchased the supplies from out of state producers for prices well below that which they were sold for.

The amount that actually crossed state lines, the amount which is relevant to the *Siemon*’s standard, was

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**a relationship of the employer and his employees to the commerce such that . . . the unfair labor practices have led or tended to lead to a ‘labor dispute burdening or obstructing commerce.’** (emphasis added)

not satisfied. Respondent attempted to question FSI on this matter but was prevented from doing so by the ALJ. TR 197:17-25; 199:7-18.

In response, General Counsel argues that it is the price Respondent paid for the goods that satisfies *Simeon's* requirement of \$50,000.00 crossing state lines. In Respondent's Brief, Respondent outlines the numerous ways in which the \$50,000.00 amount is satisfied under the *Siemon's* standards. Without belaboring the issue, under the indirect and direct outflow methods, and the direct inflow method, the manner in which the \$50,000.00 amount is calculated is based on the actual amounts crossing state lines. *Siemons* requires \$50,000.00 to **actually cross state lines**. No matter how many times and different ways General Counsel recites its economic data, because it has not proven that \$50,000.00 actually crossed state lines, the *Siemon's* standard is not met. Because the record evidence does not reflect \$50,000.00 actually crossing state lines, the ALJ's decision is not supported by substantial evidence and the Board must exercise its discretion and decline to assert jurisdiction over Respondent.

Additionally, as Respondent noted in its brief, the Board has from time to time adjusted its jurisdictional standards to reflect the changing economic realities. In the modern economy, the Board's \$50,000.00 jurisdictional standard represents an amount that is de minimis. Millions of dollars worth of commerce cross state lines each day. To base jurisdiction over an enterprise, a wholly intrastate one at that, based on its inflow or outflow in a twelve-month period of \$50,000.00 is to deal with trifles in the context of the modern economic world.

#### **IV. RESPONDENT ESTABLISHED ITS DEFENSE UNDER *WRIGHT LINE***

Respondent argued in its Brief that the ALJ improperly discredited Respondent's defense that it would have transferred Soto's shift even in the absence of Soto's alleged concerted activity by discrediting, mischaracterizing, and drawing inferences directly contrary to Jesus Olguin's testimony.

Under Wright Line, the General Counsel must first show by a preponderance of the evidence that protected activity was a motivating factor in the employer's adverse action. 251 NLRB 1083, 1089 (1980). If this is established, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *See, e.g., SFO Good-Nite Inn, LLC*, 352 NLRB No. 42, slip op. at 2 (2008).

The record evidence clearly establishes that Respondent would have changed Soto's shift even if the alleged concerted activity had not occurred. Olguin testified at length about how he determined that Soto and Figueroa were causing production to drop. TR 302:7-25; 303:1-2; 804:22-24; 806:12-23. The ALJ nevertheless improperly discredited Olguin's testimony that he determined that Soto's and Figueroa's shift were producing less tortillas than the other shift because Olguin failed to produce documents showing a decline in production and failed to produce corroborating witnesses. ALJD 11:37-38. The ALJ, however, is not free to disregard this testimony for those reasons. Testimony is "direct" evidence and is considered reliable and credible where no adverse credibility finding is made. *See Xiaoguang Gu v. Gonzalez*, 454 F.2d 1014, 1025 (9th Cir. 2006) citing *Smolniakova v. Gonzalez*, 422 F.3d 1037, 1038 (9th Cir. 2005). Moreover, there is no requirement that testimony must be corroborated to be credible. *Marchese Metal Industries*, 302 N.L.R.B. 565, 570 (1991). Finding no other properly considered indicia of unreliability, the ALJ was not free to ignore this material and uncontradicted testimony. *NLRB v. Cleveland Trust Co.*, 214 F.2d 95, 98 (6th Cir. 1954); *Medline Industries, Inc. v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979).

In response, General Counsel attempts to supplement the ALJ's decision by citing a litany of cases which are factually and legally inapposite, arguing that the ALJ properly found that Respondent's illegal motives in transferring Soto were revealed by his failure to produce documents.<sup>2</sup> GCAB at 20.

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<sup>2</sup> General Counsel cites several cases which are wholly inapplicable in Respondent's case. *Cooke's Crating*, 289 NLRB 11 (1988); *Teddi of California*, 338 NLRB 1032 (2003); and *Galesburg Construction*, 267 NLRB 551, 552 (1983). In each of these cases, the ALJ inferred that where an employer failed to produce documents **in its control** which would directly

This argument is meritless and warrants no further consideration.<sup>3</sup> If the ALJ had indeed made this inference, then like the ALJ's in the cases cited, she most certainly would have said as much. Because she did not, and because there is nothing in her decision from which this reasoning can be inferred, General Counsel's argument does nothing to support the ALJ's improper ruling with regard to this testimony. Lacking any other proper basis to discredit this testimony, the mere fact that Olguin did not produce documents or a corroborating witness is insufficient to find this testimony incredible or unreliable. Accordingly, the Board should disregard the ALJ's finding and accept Olguin's testimony as credible and reliable.

The ALJ also summarily and baselessly discredited Olguin's testimony concerning his presence at the factory by drawing inferences directly to the contrary of that testimony after producing a tongue-in-cheek mischaracterization of it. Olguin testified that he routinely witnessed Soto and Figueroa socializing at work when he would pick the tortillas up in the morning. TR 302:7-25; 303:1-2. Soto corroborated this account and testified that she regularly saw him there around 8 in the morning. TR 551:2-10.

Despite this testimony, the ALJ concluded that Olguin could not possibly have witnessed them socializing with enough frequency because he was rarely at the factory. ALJD 11:40-47. To support her analysis, the ALJ discredited Olguin's testimony that he did not hear other employees socializing about non-work related matters by completely mischaracterizing Olguin's testimony by finding that

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support its defense, its failure to do so was because the documents would reveal information harmful to the employer's case. That scenario is not present here. Olguin testified that the documents no longer existed, not that they were in his control and that he simply refused to produce them. If the documents did exist, he most certainly would have produced them. In any event, the ALJ never made such a finding.

<sup>3</sup> General Counsel also argues that the production numbers could have decreased because of irregularities with the machinery. GCAB, p. 21. Unfortunately, General Counsel never raised this argument during its case in chief or in its Post-Trial brief. Additionally, the ALJ never made such a finding. Now, late in the day, General Counsel is attempting to argue a new theory by injecting and interposing its reasoning into the ALJ's decision. Accordingly, the Board should not consider these arguments either. *See* C.F.R. 102.46.

Olguin first testified that he was literally never at the factory and then changed his testimony to indicate that he was there regularly, findings which defied both common sense and the record. ALJD 11:40-47.<sup>4</sup>

General Counsel argues that the ALJ correctly found Olguin's testimony concerning his presence at the factory to be contradictory and unreliable because Olguin stated he was "never there. [He was] always working by delivering. GCAB at 22; TR 272:12. General Counsel, as the ALJ did, completely ignored the rest of the record and would have the Board believe that Olguin is capable of delivering tortillas without ever picking those tortillas up from the factory. The absurdity of this position is fully revealed after consideration of the record.<sup>5</sup> The ALJ erred and improperly interpreted Olguin's testimony by accepting the literal truth of one single statement and ignoring all of the relevant testimony that follows immediately after it. *See Nagoulko v. INS*, 333 F.3d 1012, 1017 (9th Cir. 2006) (court refused to accept literal meaning of witness's testimony where record and actions of the witness unambiguously indicated that a non-literal meaning must have been intended).

The ALJ also improperly found that Respondent constructively discharged Soto by transferring her to another shift. The ALJ ignored uncontradicted material testimony from Jesus Olguin that he offered to alternate them on the evening shift. TR 818:5-10. Additionally, both Soto and Figueroa testified that they had worked the evening shift in the past while Olguin either owned or managed the factory, Figueroa even requested that shift. TR 511:16-23; 592:11-12. The evidence, therefore, does not establish that Respondent constructively discharged Soto.

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<sup>4</sup> The relevant portion of the record reads as follows:

**12 A I am never there. I am always working by delivering.**

13 Q Okay, but you do come back to the factory after you make

14 the deliveries, right?

15 A I leave the containers, the boxes, and then I retire.

16 Q And you talk to your employees in the process of leaving

17 these containers, don't you?

18 A When they talk to me, I answer them.

**19 Q And during one of your returns to the factory is when one**

**20 of the workers told you that they were having problems** -- that

21 there was a problem with the extractor, right?

**22 A Yes.**

<sup>5</sup> *See supra*, note 5.

General Counsel's response is simply that Olguin did not offer to alternate shifts during the July 2011 phone call when he told her that she would be working the night shift. GCAB at 22. Olguin testified that he did offer this compromise, testimony which was never contradicted by the rest of Olguin's testimony or any of the charging parties'. General Counsel's argument is meritless.

Accordingly, the ALJ's finding that Respondent had not carried his burden of proving that Soto's shift would have changed in the absence of any concerted activity is not supported by substantial evidence and the Board should not adopt her findings in this regard. Additionally, the ALJ erred in finding that Respondent constructively discharged Soto because the record establishes that Olguin offered to compromise with the girls and knew that they had both worked the evening shift in the past.

#### **V. RESPONDENT WAS NOT ACCORDED FAIR TREATMENT BY THE ALJ**

The instances of ALJ bias are too numerous to recount again here in full. Respondent will, therefore, focus on the most glaring examples, those occasions where the ALJ's admittance of inadmissible evidence contradicted Respondent's central defenses, *see US v. Melendez-Rivas*, 566 F.3d 41, 51 (1st Cir. 2009), those occasions where the ALJ allowed General Counsel to admit hearsay evidence but refused to extend the same treatment to Respondent, and the most egregious example of bias, the ALJ advising General Counsel of what to appeal in her decision.

First, the ALJ erred in finding that Respondent illegally threatened and then ultimately discharged Pineda and Figueroa for going on strike. The ALJ discredited Jesus Olguin's testimony that a fourth worker had arrived because he did not observe first-hand the workers presence at the factory, and discredited Jesus Arvizu's corroborating testimony based on inadmissible character evidence.

General Counsel argues that the misdemeanor conviction and evidence of prior arrests used to discredit Jesus Arvizu's testimony is admissible pursuant to FRE 613(b). General Counsel, however, is patently wrong. The *Federal Rules of Evidence* permit impeachment of a witness with any felony conviction, but a misdemeanor conviction can only be used for impeachment purposes if it can be

readily determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness. FED. R. EVID. 609(a); *US v. Robinson*, 286 Fed. Appx. 216, 220-21 (5th Cir. 2008). This rule also applies to impeachment by introduction of a prior inconsistent statement. *See US v. Barnes*, 622 F.2d 107 (5th Cir. 1980) (evidence of misdemeanor conviction not involving dishonesty or false statement not admissible pursuant to FRE 613). Impeachment through evidence of prior arrests is **never** admissible to impeach a witness. *US v. Garcia*, 531 F.2d 1303, 1306 (5th Cir. 1976), *see US v. Savoca*, 151 F. App'x 28, 30 (2d Cir. 2005) (evidence of prior arrests admissible if **party** offers evidence of his good character); *Jackson v. Crews*, 873 F.2d 1105 (8<sup>th</sup> Cir. 1989); *US v. Hodnet*, 537 F.2d 828 (5<sup>th</sup> Cir. 1976); *Board of Publication of the Methodist Church*, 129 NLRB 17 (1957).

Finally, and perhaps most incredibly, General Counsel's argument requires accepting the absurd proposition that a misdemeanor conviction and evidence of an arrest is "extrinsic evidence of a prior inconsistent statement." Neither a criminal conviction nor evidence of an arrest are "statements" within the meaning of the Federal Rules of Evidence.

Accordingly, the ALJ discredited Arvizu's corroborating testimony and in turn discredited Olguin's testimony that a fourth worker had arrived after admitting inadmissible character evidence.<sup>6</sup> That admittance severely prejudiced Respondent's central defense that Pineda and Figueroa were not engaged in concerted activity after being informed that the fourth worker had arrived.

Additional improper evidentiary rulings also serve to highlight the ALJ's bias. On two occasions, Respondent was prevented from introducing statements made by the charging parties against the charging parties during the trial, evidence which under the FRE 801(d)(2) is non-hearsay.<sup>7</sup> The ALJ, however, sustained General Counsel's hearsay objections each time. Respondent's Brief in Support of

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<sup>6</sup> It should be noted that Respondent attempted to question the charging parties on their visa status, but was prevented from doing so by the ALJ. As demonstrated here, she nevertheless allowed General Counsel to introduce evidence of Jesus Arvizu's visa status.

<sup>7</sup> Yolanda Gonzalez was questioned regarding statements made to her by Figueroa. TR664:4-12; 667:7-23. Jesus Olguin was questioned concerning statements made to him by Alan Pineda. TR 872:6-7; TR 827:1-8.

Exceptions outlines the numerous other occasions in which Respondent was prevented from introducing hearsay while General Counsel was permitted to introduce identical hearsay evidence over Respondent's objections. Respondent sought to illustrate how the ALJ clearly favored General Counsel with her evidentiary rulings, not to debate the propriety of each and every instance as General Counsel appears to believe. Respondent simply asks for what any litigant is entitled to, fair treatment. A review of the record and of Respondent's Brief in Support of Exceptions demonstrates that inequality inherent in the ALJ's hearsay rulings.

Perhaps the most glaring example of ALJ bias and hostility towards Respondent is illustrated in the ALJ's decision itself. The single issue in which the ALJ ruled in favor of Respondent is punctuated by the ALJ advising General Counsel of how it could overcome her ruling, providing General Counsel with its theory on appeal.<sup>8</sup> General Counsel gladly accepted the ALJ's assistance and in fact used this theory in support of its cross-exceptions.

Based on these and other numerous examples highlighted fully in Respondent's initial brief, the ALJ's hostility and bias affected her credibility determinations which cannot be said to be objective, especially in light of the numerous instances where she ignores material and uncontradicted testimony as well as mischaracterizing other portions of testimony. Accordingly, none should be adopted.

## **VI. CONCLUSION**

For the foregoing reasons, Respondent's exceptions should be granted.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of April, 2013.

MUNGER CHADWICK, P.L.C.

/s/ John F. Munger  
John F. Munger  
Attorneys for Defendant.

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<sup>8</sup> The ALJ found that Figueroa did not engage in concerted activity because her complaints related only to herself. ALJD 21:25-30. Nevertheless, the ALJ added that "General Counsel could possibly overcome this deficit by presenting persuasive evidence that, upon her return, Respondent continued to harbor discriminatory animus against Figueroa such that her transfer and subsequent termination were motivated by her prior concerted protected activity (activity that occurred before her discharge on September 4). ALJD 21:30-35.

**CERTIFICATE OF SERVICE**

RE: MARIELA SOTO, an individual, AND, ANAHI FIGUEROA, an individual,  
*Plaintiffs*  
vs.  
DON CHAVAS, LLC d/b/a TORTILLAS DON CHAVAS, an Arizona limited  
liability company, *Defendant*  
CASE NO.: 28-CA-063550 / 28-CA-067394

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I hereby certify that a copy of **DEFENDANT’S REPLY IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the above referenced case was served VIA EMAIL or REGULAR MAIL on this 12th day of April, 2013, on the following:

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