UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SFTC, LLC d/b/a SANTA FE TORTILLA COMPANY,

and **Case 28-CA-087842**

YOLANDA GALAVIZ, an Individual.

and **Case 28-CA-095332**

COMITÉ DE TRABAJADORES DE SANTA FE TORTILLA

SANTA FE TORTILLA COMPANY'S POST-HEARING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

OTHER STATUTES

RESPONDENT'S POST-HEARING BRIEF

Respondent SFTC, LLC d/b/a Santa Fe Tortilla Company (hereinafter "SFTC" or "Respondent") files its Post-Hearing Brief[1] and respectfully shows the following:

THE PARTIES

SFTC is a company based in Santa Fe, New Mexico that produces a variety of tortilla products, which it sells to various retailers throughout the country.

This matter was filed by the Acting General Counsel on behalf of Yolanda Galaviz ("Galaviz") and the Comité de Trabajadores de Santa Fe Tortilla ("CTSFT" or the "Comité"). Galaviz is a former SFTC employee who filed a charge with the National Labor Relations Board ("NLRB" or "the Board") alleging that she was terminated in violation of the NLRA. CTSFT is an alleged labor organization, which filed an unfair labor practice charge with Board.

INTRODUCTION

On October 31, 2012, the NLRB issued a Complaint and Notice of Hearing alleging SFTC violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA"). The hearing was originally scheduled to take place on January 8, 2013. However, prior to the hearing, another unfair labor practice charge was filed against SFTC alleging additional violations of the NLRA. Following investigation of this new charge, the NLRB dismissed some of the allegations contained in the new charge, but

[1] At the Hearing, Counsel for SFTC asserted SFTC's objection to these proceedings because the Board lacks a legally constituted quorum. SFTC reasserts that objection here pursuant to the D.C. Circuit of Appeal's decision in *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. 2013).

issued an Order Consolidating Cases, Consolidated Complaint ("Consolidated Complaint") and Notice of Hearing on January 31, 2013 adding a handful of additional allegations and claiming SFTC violated Sections 8(a)(1) and 8(a)(3) of the NLRA. A hearing was held on the Acting General Counsel's unfair labor practice claims before Administrative Law Judge William Kocol ("ALJ Kocol") beginning on February 26, 2013 and concluding on March 5, 2013.

The Acting General Counsel's theory appears to be quite simple: that following receipt by SFTC of a letter from the Comité on or about August 8, 2012, SFTC waged a ruthless campaign to retaliate against the identified members of the Comité. According to the Acting General Counsel's theory, nearly everything that was done by SFTC after its receipt of the Comité's August 7, 2012 letter was done by SFTC to interfere with the Section 7 rights of the members of the Comité. Despite this theory, the Acting General Counsel failed to introduce a shred of evidence to show that any member of SFTC's management had a negative animus towards the Comité or any of its members. To the contrary, the evidence in the record established clearly that SFTC was concerned with only one thing: responding to the workplace concerns that were raised by CTSFT in its letters to the Company.

While there is no question that CTSFT members Galaviz and Delfina Bruno ("Bruno") engaged in conduct protected by the NLRA, Counsel for the AGC failed to offer any evidence that it was this conduct that resulted in their terminations. Rather, the evidence demonstrates that SFTC terminated only these two employees – and not the numerous other employees who participated along with Galaviz and Bruno on the Comité

– because they engaged in a variety of egregious and unlawful conduct that lost the protections of the NLRA. Significantly, SFTC did not terminate – or otherwise penalize – the other employees whose names appeared as members of the Comité on the letters submitted to the SFTC.

As will be explained below, once we get beyond the allegations concerning Galaviz and Bruno's termination, the record is devoid of any evidence to support the Acting General Counsel's several other allegations of unfair labor practices. For example, there is absolutely no evidence to support the Acting General Counsel's allegations that SFTC interrogated employees, threatened employees with "unspecified reprisals," unlawfully solicited employee complaints and grievance, or promised to make certain changes *if* employees refrained from engaging in union or other concerted activities.

Moreover, the Acting General Counsel's multiple allegations of additional adverse employment actions ranging from the alleged suspensions of an employee named "Jesus Saldana" to claims that Yolanda Rivera ("Rivera") and Lillian Lopez ("Lopez") were unlawfully transferred to a different production line *ignore reality* and are not supported by the evidence in the record.

For the reasons explained below, the evidence is compelling and unequivocal that SFTC did not violate the National Labor Relations Act.

STATEMENT OF THE CASE

On January 31, 2013, the NLRB issued a Consolidated Complaint and Notice of Hearing alleging SFTC violated Section 8(a)(1) and (3) by engaging in all of the following:

(1) Interrogating its employees about their union and concerted activities and sympathies;

(2) By soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they refrained from engaging in union or other concerted activities;

(3) Promising to help its employees and effect changes if they refrained from engaging in union or other concerted activities;

(4) Threatening its employees with unspecified reprisals because they had engaged in union or other concerted activities;

(5) Threatening its employees with discharge because they had engaged in union or other concerted activities;

(6) Threatening to require its employees to document their medical conditions unless they refrained from engaging in union or other concerted activities;

(7) Promising to solve its employees' problems if they refrained from engaging in union or other concerted activities;

(8) Promising to improve its employees' working conditions if they refrained from engaging in union or other concerted activities;

(9) By telling employees that it would never be possible for CTSFT to meet with President Kenny Kalfin, informed its employees that it would be futile to select CTSFT as their bargaining representative;

(10) By telling employees that no one would assist them if they engaged in union or concerted activities, informed employees that it would be futile for them to select CTSFT as their bargaining representative;

(11) By telling employees that SFTC knew who had written one of CTSFT's letters, created an impression among its employees that their union and other concerted activities were under surveillance by SFTC;

(12) Promising its employees to help them receive raises if they refrained from engaging in union or other concerted activities;

(13) Promulgating an overly-broad and discriminatory rule prohibiting its employees from assisting other employees who engaged in union or other concerted activities;

(14) By telling employees that a meeting between CTSFT and Kalfin would never happen, informed its employees that it would be futile that it would be futile for them to select CTSFT as their bargaining representative;

(15) Transferring Lillian Lopez to the corn-tortilla line on about August 13, 2012;

(16) Transferring Yolanda Rivera to the corn-tortilla line on about August 13, 2012;

(17) Reducing the hours of employment of Lillian Lopez on about August 10, 2012;

(18) Reducing the hours of employment of Yolanda Rivera on about August 10, 2012;

(19) Discharging Yolanda Galaviz on about August 17, 2012;

(20) Discharging Delfina Bruno on about August 17, 2012;

(21) Suspending "Jesus Saldana" from work one and a half days without pay on about August 23, 2012;

(22) Suspending "Jesus Saldana" in October 2012 for eight days without pay;

(23) Suspending "Jesus Saldana" in December 2012 for about two weeks;

(24) Issuing a written warning to Yolanda Galaviz in September 2012; and

(25) Issuing a written warning to Yolanda Galaviz in November 2012.

SFTC answered the Consolidated Complaint and denied the NLRB's allegations that it engaged in the various alleged unfair labor practices. As will be explained below, the Acting General Counsel failed to provide sufficient evidence to support many of its unfair labor practice allegations and presented no evidence on several other of its claims.

ARGUMENT

I. THE ACTING GENERAL COUNSEL FAILED TO ESTABLISH ANY OF ITS ALLEGATIONS OF INDEPENDENT UNFAIR LABOR PRACTICES.

A. There is No Evidence to Support the Acting General Counsel's Allegations Concerning SFTC's Allegedly Unlawful Response to the Comité.

The Acting General Counsel makes several allegations concerning SFTC's purportedly unlawful response to the letters that the Comité began submitting to the Company in August 2012. According to the Acting General Counsel, SFTC allegedly engaged in all of the following unlawful conduct, through its supervisors, Gustavo Terrones and Alberto Jasso, after its receipt of the first letter from the Comité on or about August 8, 2012:

(1) Interrogated its employees about their union and concerted activities and sympathies;

(2) Solicited employees complaints and grievances, promised it employees increased benefits and improved terms and condition of employment if they refrained from engaging in union or other concerted activities;

(3) Promised to help its employees and effect changes if they refrained from engaging in union or other concerted activities[2];

(4) Threatened its employees with unspecified reprisals because they engaged in union or other concerted activities;

(5) Threatened its employees with discharge because they engaged in union or other concerted activities;

(6) Threatened its employees that it would file a lawsuit against its employees because they had engaged in union or other concerted activities;

(7) Promulgated an overly-broad and discriminatory rule prohibiting its employees from assisting other employees who engaged in union or other concerted activities; and

(8) Told employees that SFTC knew who had written one of CTSFT's letters, created an impression among its employees that their union and other concerted activities were under surveillance.

Based on the evidence presented at the Hearing, it is clear that each one of these allegations relate to the meetings that Mr. Terrones and Mr. Jasso held with employees to address the issues raised by the Comité in its August 7, 2012 letter. As explained below, the Acting General Counsel failed to offer sufficient evidence to support any of its allegations of unlawful interrogation, threats, promises or surveillance.

Significantly, although Counsel for the AGC conducted cross-examination of both Mr. Terrones and Mr. Jasso, she failed to elicit a single admission relating to any of the many allegations concerning the conduct of these two supervisors. In fact, despite

[2] In Paragraph 5(c)(3) of the Complaint, the Acting General also alleges a slight variation of this allegation claiming that SFTC "promised to solve its employees' problems if they refrained from engaging in union or other concerted activities."

Counsel for the AGC's multiple attempts to get Mr. Terrones to testify that he was "upset" about the Comité's letter, Mr. Terrones provided credible testimony that he did not feel betrayed by the letter, but that he was merely "surprised" about the allegations that he had mistreated "Jesus Saldana." [TR 125:10-24]

Moreover, both Mr. Terrones and Mr. Jasso also provided credible testimony that the sole purpose for their meetings with the employees following receipt of the first Comité letter was to attempt to address and resolve any concerns that the employees had regarding the workplace. Specifically, Mr. Terrones testified as follows:

> Q: (Counsel for SFTC): All right, and after the Company received this August 7th letter, isn't it true the Company launched an investigation into the allegations of the letter?
>
> A: (Mr. Terrones): *We talked to each one of the employees to find out what were their concerns or their complaints*.

[TR 116:3-7 (emphasis added)] Moreover, Mr. Jasso testified as follows:

> Q: (Counsel for SFTC): And what did Gustavo Terrones tell you about this letter?
>
> A: (Mr. Jasso): He didn't say nothing about the letter.
>
> Q: What did he say?
>
> A: *He wanted to personally meet with each employee so he could, to investigate what, what was the, what's the issues with the employees*.
>
> ***
>
> Q: And why did you meet with Juan Lopez?
>
> A: I didn't meet with him. I was there as a witness.

***

Q: Why, why was that meeting held?

A: He wanted, Mr. Gustavo Terrones wanted to know what concerns Mr. Juan Lopez had or what personal issues or, and *how he can help him solve those* –

Q: Okay. Go on.

A: -- *those issues*.

[TR 218:8-14; 229:10-19 (emphasis added)] In light of the Acting General Counsel's failure to offer evidence on several of its allegations, this testimony is significant.

1. SFTC did not engage in unlawful interrogation.

The Acting General Counsel failed to offer sufficient evidence that SFTC engaged in unlawful interrogation of its employees. It has been widely recognized that not all interrogation of employees violates the NLRA. *See e.g., Rossmore House,* 269 NLRB 1176, 1177 (1984). According to the Board, only questioning that, under the circumstances, reasonably tends to restrain or interfere with employees in the exercise of their rights guaranteed by Section 7 constitute a violation of the NLRA. *Burke Golf Equipment Corp. v. NLRB,* 284 F.2d 943 (6th Cir. 1960)(setting aside Board order finding unlawful interrogation where there was no history of antipathy by the employer to labor unions, the interrogator had a friendly relationship with employees and regularly visited with them). As will be explained below, the evidence in the record establishes that – under the circumstances – the meetings held by Mr. Terrones with employees could not have reasonably tended to restrain or interfere with the rights of SFTC employees (and, in fact, did not interfere with those rights).

At the Hearing, Counsel for the AGC asked Mr. Terrones point blank whether he asked certain questions of the employees that he met with following receipt of the letter and Mr. Terrones credibly denied interrogating any of the employees. Mr. Terrones was questioned extensively concerning his meeting with "Jesus Saldana" and denied questioning him on the various subject inquired about. For example, Mr. Terrones testified:

> Q: (Counsel for AGC): Okay, and you asked him if he was the one organizing the Committee, right?
>
> A: (Mr. Terrones): That is false.

[TR 121:9-11] Instead, Mr. Terrones testified that in response to the issues raised in the Comité's letter, he spoke to each of the employees asking them what changes they wanted to see. [TR 129:15-17] Significantly, there is also evidence in the record that, even before SFTC's receipt of the Comité's letters, Mr. Terrones *regularly* met with employees to discuss workplace issues with them. [TR 793:25-794:10]

Moreover, with respect to his meeting with Gustavo Abel Lopez, Mr. Jasso testified clearly that neither he nor Mr. Terrones interrogated Mr. Lopez regarding the Comité:

> Q: (Counsel for the AGC): Was the topic of Gustavo joining the committee discussed at all?
>
> A: (Mr. Jasso): No.
>
> Q: Did Mr. Terrones say anything to him about joining the committee?
>
> A: No.

[TR 227:7-12] Mr. Terrones also testified that he shut the door to his office during the meetings because there were several cubicles immediately adjacent to his office and he did not believe it was appropriate for the employees in those cubicles to hear their conversations. [TR 200:22-201:1]

The Acting General Counsel also failed to elicit testimony from any of the Alleged Discriminatees demonstrating that they were subject to unlawful interrogation by either Mr. Terrones or Mr. Jasso. To the contrary, their testimony confirmed the testimony of both Mr. Terrones and Mr. Jasso that the reason for the meetings with the employees was to give them the opportunity to discuss the concerns raised by the Comité in its letter about the workplace. For example, Ms. Galaviz specifically testified that, during her meeting with Mr. Terrones, he assured her that "there was no punishment" for raising issues at SFTC. [TR 335:9-16] Under these circumstances, there is simply no evidence in the record to support this allegation.

2. SFTC did not unlawfully solicit employee complaints or grievances.

It is well established that mere solicitation does not violate the act. *See Idaho Falls Consolidated Hospitals v. NLRB*, 731 F.2d 1384, 1386 (9th Cir. 1984) ("An expressed willingness to listen to grievances is not sufficient to constitute a violation.") (citing *NLRB v. K & K Gourmet Meats*, 640 F.2d 460, 467 (3d Cir. 1981)). Solicitation of employee grievances is only unlawful "where the solicitation is accompanied by the employer's express or implied suggestion that the grievance will be resolved or acted upon only if the employees reject" union representation, or in this case, stop their

participation in further protected, concerted activities. *Idaho Falls Consolidated Hospitals,* 731 F.2d at 1386 (citation omitted).

In the instant case, the Acting General Counsel has failed to offer any evidence to demonstrate that SFCT engaged in any type of unlawful solicitation. To the contrary, the record is clear that Gustavo Terrones, SFTC's Plant Manager, met with members of the Comité *in direct response to their letter setting forth certain concerns.* Moreover, the evidence in the record also demonstrates that Mr. Terrones regularly met with employees regarding workplace concerns prior to SFTC's receipt of the August 7, 2012 letter. [TR 793:25-794:10] The Acting General Counsel's solicitation allegation should be dismissed because there has been absolutely no evidence presented to establish that Mr. Terrones stated or implied that the Comité's concerns would only be resolved if its members refrained from continuing to engage in protected, concerted activities.

3. SFTC did not unlawfully promise to help its employees or make changes if they refrained from engaging in union or other concerted activities.

There is absolutely no evidence in the record to support the Acting General Counsel's allegation that SFTC made unlawful promises to its employees. To the contrary, Mr. Terrones testified *he did not, and could not, make any promises* concerning possible changes:

Q: (Counsel for AGC): You promised Mr. Saldaña that there would be changes in the future, right?

A: (Mr. Terrones): *I didn't promise* him. I told him that we would make an effort to address the claims that the -- the petitions that they were asking.

***

Q: Did you tell her that there might be a raise?

A: She had come to my office prior to ask for a raise. I told her that I would speak to Kenny to see what we could do because *I cannot promise a raise*, because that is not something that I approve.

[TR 130:1-5; 193:5-10 (emphasis added)] Nor did the Acting General Counsel offer any evidence to establish that either Mr. Terrones or Mr. Jasso made any purported promises of benefits that were either expressly or impliedly conditioned upon employees ceasing to participate in the Comité or in other protected, concerted activities.

4. There is no evidence in the record that either Mr. Terrones or Mr. Jasso threatened any employees.

The record lacks any evidence to support the Acting General Counsel's allegation that SFTC threatened any of its employees relating to their participation on the Comité or in protected, concerted activities. Mr. Terrones testified that he did not yell during any of his meetings with employees and did not even raise his voice. [TR 201:2-9] Significantly, there was no testimony from any of the employee witnesses suggesting that they were threatened in anyway by either Mr. Terrones or Mr. Jasso.

5. The Acting General Counsel failed to present any evidence to support several of its independent unfair labor practice allegations.

In addition, the Acting General Counsel did not present *any evidence* to support the allegations contained in the following paragraphs of the Consolidated Complaint: Paragraph 5(d)(4), (f)(2), (g)(4), (g)(5), and (h)(2).

B. The Record is Devoid of Any Evidence to Establish that SFTC Suspended "Jesus Saldana" in Violation of NLRA.

The Acting General Counsel alleges that SFTC *suspended* an employee going by the name of "Jesus Saldana" on three separate occasions in violation of Sections 8(a)(1) and (a)(3) of the NLRA. Specifically, the Acting General Counsel alleges that SFTC suspended "Jesus Saldana" on the following occasions[3]:

(1) On or about August 23, 2012, SFTC suspended "Jesus Saldana" from work one and half days without pay;

(2) About sometime in October 2012, SFTC suspended "Jesus Saldana" from work for eight days without pay; and

(3) About sometime in December 2012, SFTC suspended "Jesus Saldana" from work for about two weeks.

As will be explained below, there is absolutely no evidence in the record to support the Acting General Counsel's allegations that "Jesus Saldana" was suspended for an allegedly discriminatory reason.

In analyzing allegations such as these, the Board typically applies the *Wright Line* framework. Under the *Wright Line* test, the Acting General Counsel must first show that the "protected activity was a motivating factor in the adverse employment decision." *Frazier Indus. Co., Inc. v. NLRB*, 341 U.S. App. D.C. 393, 213 F.3d 750, 755 (D.C. Cir. 2000) (internal quotation marks omitted). If this prima facie showing is made, the burden shifts to the employer to demonstrate that "it would have made the adverse decision even

[3] On or about February 25, 2013, Counsel for the Acting General Counsel filed a Notice of Intent to Amend the Consolidated Complaint to add the two allegations described below concerning SFCT's purported suspension of "Jesus Saldana" in October and December 2012. At the Hearing, ALJ Kocol accepted these amendments.

had the employee not engaged in protected activity." *Vincent Ind. Plastics, Inc. v. NLRB.,* 341 U.S. App. D.C. 99, 209 F.3d 727, 735 (D.C. Cir. 2000) (citing *Wright Line, A Div. of Wright Line, Inc.,* 251 N.L.R.B. 1083, 1089, 1980 WL 12312 (1980)). As will be explained below, even if the Acting General Counsel could establish that "Jesus Saldana" was subject to an adverse action (which SFTC contends it cannot demonstrate with respect to its August and December suspension allegations), the Acting General Counsel has failed to offer any evidence that any of the three alleged suspensions was motivated by an unlawful animus.

As an initial point, to the extent the Acting General Counsel points to the testimony of "Jesus Saldana" to support its allegations concerning his suspension, his testimony must be discredited. As demonstrated at the Hearing, "Jesus Saldana" boldly lied *under oath* when he signed his affidavit with the NLRB under the name "Jesus Saldana." Despite signing an affidavit in which he identified himself *under oath* as "Jesus Saldana," he subsequently testified at the Hearing – *also under oath* – that his real name is *Luis Juarez*. Specifically, Luis Juarez testified as follows:

Q: In preparation of your testimony today, did you review any documents?

A: Yes.

Q: What documents are those?

A: The letters and my testimony.

Q: That would be the affidavit that you prepared for the National Labor Relations Board?

A: That is so.

Q: *Did you understand that that document was a document that you were signing under oath?*

A: *That is so*.

Q: *And that you were subject to the penalty of perjury if you lied in that document?*

A: *That is so.*

Q: Mr. Juarez, you testified that your true name is Luis Juarez, correct?

A: Yes.

Q: The affidavit you filled you, identified yourself -- you identified yourself as Jesús Rogelio Saldana. Is that correct?

A: That is so.

Q: So you lied about your name in your affidavit?

A: No.

Q: But you just testified that your real name is Luis Juarez.

A: That is so.

Q: That name does not appear in your affidavit, correct?

A: Because I was using the name of Jesús Saldana at work, that's why.

Q: It's a yes or no answer. Did your name -- did the name, Luis Juarez, appear anywhere in your affidavit?

[Objection omitted]

A: I don't recall.

[TR 655:6-656:14 (emphasis added)] Mr. Juarez appeared both nonchalant and unapologetic about his blatant misrepresentation under oath. However, this representation goes to the very core of his credibility and should be considered by the ALJ in assessing his credibility in this proceeding. *See, Metro Truck Body, Inc.*, 223

N.L.R.B. 988, n. 8 (1976)(Noting that former employee was "considered an unreliable witness" where his testimony contained "several self-contradictions and uncredited statements and further, his admission to working for Respondent 2 years under a false name and false social security number casts doubt upon his truthfulness.")

1. SFTC did not suspend "Jesus Saldana" in August 2012, but merely asked that he provide SFTC a doctor's note concerning his physical restrictions.[4]

There is absolutely no evidence to support the Acting General Counsel's allegation that "Jesus Saldana" was even suspended by SFTC in August 2012. However, even if the Acting General Counsel could establish that "Jesus Saldana" was suspended (which it cannot do), there is no evidence in the record to demonstrate that he was suspended because he engaged in concerted activities or to discourage him from engaging in such activities in the future.

Based on the evidence introduced at the Hearing, it appears that the Acting General Counsel's underlying theory is that SFTC "suspended" "Jesus Saldana" when it requested, in August 2012, that he provide a doctor's note indicating what, if any, physical restrictions he had on his ability to perform his job as a result of his existing medical condition.[5] The Acting General Counsel, however, failed to produce *any*

[4] In its Complaint, the Acting General Counsel also alleges that SFTC "threatened to require its employees to document their medical conditions unless they refrained from engaging in union or other concerted activities." [Complaint at ¶ 5(b)(6)] It appears that this allegation is related to SFTC's purported suspension of "Jesus Saldana" in August 2012, so SFTC addresses these two allegations together in this section.

[5] At the Hearing, counsel for the AGC articulated this theory when she stated: "Judge, the requirements of the -- I think the witness just testified that the employee was not allowed to

evidence – either in the form of testimony or documents – to demonstrate that "Jesus Saldana" was actually suspended in August 2012. To the contrary, the uncontroverted testimony of Plant Manager Gustavo Terrones demonstrates that "Jesus Saldana" was not suspended, but that SFTC merely required him to provide it with a doctor's note in August 2012 stating what, if any, physical restrictions he had on his ability to perform his job as a result of his disclosed medical condition. Specifically, Mr. Terrones testified:

> Q: (Counsel for the AGC): Now, you told Mr. Saldaña that unless he had this doctor's note he could not -- he could not be at work, right?
>
> A: I told him that he could not enter the production area until I knew specifically what his restrictions were.
>
> Q: So you told him not to return to work without the letter from the doctor, right?
>
> A: I don't remember the exact words, but I told him I needed a restriction note before he could go back to work.

[TR 137:2-10] There is no evidence in the record suggesting that Mr. Terrones told "Jesus Saldana" that he could not work for any certain period of time. Based on the testimony above (and elsewhere in the record), it is clear that had "Jesus Saldana" left work the day Mr. Terrones had made the request and obtained the requested doctor's note that evening, he would have been able to return to work immediately without missing any work. There is simply no basis for the Acting General Counsel's allegation that SFTC *suspended* "Jesus Saldana" in August 2012.

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return to work until he had his medical note. That is what the General Counsel's theory is on the suspension." [TR 141:3-6]

Moreover, the Acting General Counsel has also failed to produce any evidence to demonstrate that this purported suspension was based on an unlawful motive. The Acting General Counsel appears to argue that an unlawful motive should be inferred from the timing of SFTC's request for the doctor's note concerning "Jesus Saldana's" physical restrictions, which it claims was made for the first time after SFTC's receipt of the Comité's first letter in August 2012. However, the Acting General Counsel's theory ignores reality and is not supported by the undisputed evidence in the record. Once again, Gustavo Terrones offered credible testimony to explain why SFTC requested "Jesus Saldana" provide it with documentation of his physical restrictions for the first time when it did:

> Q: (Counsel for the AGC): Why did you wait until after the Committee had sent letters to ask Mr. Saldaña for a note from his doctor?
>
> A: Because Mr. Saldaña never approached me telling me that we were forcing him to carry out tasks or jobs that he could not carry out or do, and this was a way in order to be able to protect him, in order not to be able to put him out to do things to carry out that he could not do.
>
> Q: You had previously made accommodations for him because of his medical condition without a note, right?
>
> A: Yes, because he never said we were making him do things that he could not do.
>
> Q: Okay, but you did accommodate his work schedule without him having a note, right?
>
> A: *Yes, because it was only work hours. It was not the actual job functions that he was carrying out.*
>
> ***

Q: Mr. Terrones, so it was only after the Committee letter that you demanded a note from Mr. Saldaña before he could return to work, right?

A: I asked him for a note with his restrictions so he could come back to work within the factory.

Q: And that wasn't until after you learned of the Committee letters, correct?

A: It wasn't until after he accused me of having forced him to do work that he couldn't do.

***

Q: (Counsel for SFTC): When is the first time that you learned Mr. Saldaña had any restrictions on the work that he could perform for the company?

A: When they had the first meeting from the committee, and I spoke to him. He told me that he was being sent to do jobs that he could not carry out.

[TR 137:14-138:3, 141:13-21; 802:7-25 emphasis added)]

As the evidence in the record clearly demonstrates, Mr. Terrones asked "Jesus Saldana" for a doctor's note describing any physical restrictions that he may have after Mr. Terrones learned *for the first time* – as a result of the issues raised by the Comité in its first letter – that "Jesus Saldana" may need certain accommodations to his working conditions. While Counsel for the AGC will attempt to make much of the fact that SFTC previously accommodated "Jesus Saldana" without requiring him to provide it with a doctor's note, her argument fails to recognize an important distinction between the previous accommodations requested by "Jesus Saldana" and the issues raised by the

Comité regarding "Jesus Saldana" in its August 7, 2012 letter. As Mr. Terrones explained during his testimony, prior to August 2012, SFTC provided "Jesus Saldana" with numerous accommodations *to his work schedule,* but SFTC had not been asked prior to its receipt of the first Comité letter to modify "Jesus Saldana's" job responsibilities or the conditions in which he worked. [TR 137:14-138:3] Although his testimony was confusing on the issue, "Jesus Saldana" ultimately admitted that he had not requested an accommodation relating to his sensitivity to cold conditions prior to August 2012. [TR 663:1-3]

Finally, the ALJ should also not ignore the clear and undisputed testimony from "Jesus Saldana" that SFTC *consistently* accommodated his medical condition both before and after its receipt of the various letters from the CTSFT. Specifically, "Jesus Saldana" testified to the following:

> Q: (Counsel for SFTC): Over the last year, hasn't the company provided you with numerous accommodations that have allowed you to continue to keep working while you received treatment for your medical condition?
>
> A: Yes.
>
> ***
>
> Q: Isn't it true, Mr. Juarez, that the company has never denied any of your requests to take time off to attend a doctor's appointment?
>
> A: The company did offer me to give me time off in order for me to go to my treatments.
>
> Q: They've never denied any request to take any days off, correct?
>
> A: That is so.

Q: Since August 2012, you've taken several days off to attend medical appointments, correct?

A: Yes, because they would offer me those days so that I could have my treatment done.

***

Q: Following that meeting, did he continue to provide you with accommodations relating to your medical condition?

A That is so.

[TR 658:20-24, 660:2-5] In light of the substantial evidence in the record that SFTC continued to provide "Jesus Saldana" with numerous accommodations in the weeks after learning of his participation on the Comité, the Acting General Counsel's claim that SFTC sought to retaliate against him by suspending him in August 2012 simply does not make sense.

2. There is no evidence in the record to support Acting General Counsel's allegation that SFTC suspended "Jesus Saldana" in October 2012 because he engaged in conduct protected by the NLRA.

The Acting General Counsel alleges that SFTC's suspension of "Jesus Saldana" in October 2012 violated the NLRA. As an initial point, the October 18, 2012 suspension was given to "Jesus Saldana" over two months after SFTC learned of his participation on the Comité and during a period, as described above, in which SFTC continued to provide "Jesus Saldana" with numerous accommodations for his medical condition. The Acting General Counsel has failed to establish that the October 2012 of "Jesus Saldana" was done for an unlawful reason.

The overwhelming evidence in the record demonstrates that SFTC suspended "Jesus Saldana" for a legitimate, non-discriminatory reason: his failure to follow proper packing procedure and his refusal to listen to the instructions of his supervisor, Arlette de la Mora (i.e. insubordination). At the Hearing, Gustavo Terrones provided credible testimony concerning the reason for the October 18, 2012 suspension:

> Q: (Counsel for the AGC): I would now like you to turn to General Counsel's Exhibit 23. This is suspension paperwork for Jesús Saldaña in October, correct?
>
> A: (Gustavo Terrones): Correct.
>
> Q: You considered his failure to use to two hands a production violation, correct?
>
> A: That's correct.
>
> ***
>
> Q: (Counsel for SFTC): Just to clarify, what was the reason for the company's decision to suspend Mr. Saldaña in October 2012?
>
> A: That aside from being advised by supervisors to use both hands in order to seal, he continued to disobey her and ignore her and continued just sealing with one hand.
>
> Q: Any other reason?
>
> A: No, it's just because he wasn't following the policies, but he was also being insubordinate to his supervisor.
>
> Q: In reaching the decision to suspend him, did you consider past incidents involving Mr. Saldaña?
>
> A: Yes.

[TR 740:4-10, 774:6-16]

Moreover, Ms. de la Mora provided additional testimony about the incident involving "Jesus Saldana." According to Ms. de la Mora, "Jesus Saldana" not only violated SFTC procedure for sealing the tortilla packages, but he also ignored her when she asked him to "please" seal with both hands and then yelled at her when she asked him to rotate to another position. [TR 837:18-838:10] Although Ms. de la Mora acknowledged that she had seen other employees using one hand to seal tortilla packages, she testified that those employees "immediately" stopped doing so when she brought the issue to their attention. [TR 838:15-17] She further testified as to the reason for SFTC's policy requiring the use of two hands to seal the tortilla packages and that employees were specifically trained on the proper sealing technique in the weeks prior to the incident involving "Jesus Saldana":

> Q: (Counsel for SFTC): Did you specifically train employees with respect to using both hands to seal packages?
>
> A: (Arlette de la Mora): Yes.
>
> Q: What did you tell them with respect to that?
>
> A: I explained to them why and I told them it was important to place both hands down. One, in order to express the air from the bags so that it would be sealed properly. And so that when it arrives to the person who would be packing them into boxes, that person would not be struggling in order to put them into the boxes.

[TR 830:23-831:7]

Significantly, at the Hearing, "Jesus Saldana" *admitted* that he did not listen to Ms. de la Mora when she asked him *twice* to use both hands to seal the tortilla packages. [TR 628:13-16, 670:11-14] "Jesus Saldana" also acknowledged that he underwent training

"approximately 20 days before" the October 18, 2012 incident during which he was specifically trained on SFTC's policy requiring production workers to use two hands to seal the tortilla packages. [TR 631:9-14]

At the Hearing, counsel for the AGC offered evidence sought to demonstrate that the five day suspension issued to "Jesus Saldana" in October 2012 was harsher than discipline issued to other employees for allegedly similar misconduct. However, as Mr. Terrones explained during his testimony, none of the other employees were similarly situated because the "Jesus Saldana" suspension was based not only on his failure to follow proper policy, but also on his blatant disregard of the directives from his supervisor, Arlette de la Mora, and a history of other incidents, which were detailed by Mr. Terrones during his testimony. [TR 740:4-10; 768:7-769:12; 771-772; 774:6-16] The Acting General Counsel's attempt to demonstrate that SFTC treated "Jesus Saldana" more harshly than other employees because he engaged in protected conduct should be rejected. Not only does the evidence regarding these other comparators fail, but such an argument also ignores the uncontroverted evidence that in the period since SFTC learned of "Jesus Saldana's" participation on the Comité, the Company continued to provide him with numerous accommodations for his medical condition. This allegation should be dismissed.

3. SFTC did not suspend "Jesus Saldana" in December 2012, but merely required him to provide it with a valid doctor's note describing whether he had additional work restrictions as a result of his new medical treatment.

Once again, the Acting General Counsel failed to offer *any* evidence to support its allegations (1) that "Jesus Saldana" was suspended in December 2012, and (2) even if it could establish that he was suspended, that the suspension was for an unlawful reason. The Acting General Counsel's allegation appears to relate to the time that "Jesus Saldana" was forced to miss in December 2012 because he was unable to produce a doctor's name under the name that he had provided to SFTC – "Jesus Saldana" – clearing him to work while undergoing chemotherapy for cancer.

According to "Jesus Saldana," in early December 2012, he had informed Mr. Terrones that he was starting the second stage of chemotherapy and radiation for cancer. [TR 633:12-633-25] Mr. Terrones also testified that, during this meeting, "Jesus Saldana" informed him that he would need to "carry a little bag … with a port that was attached to his chest." [TR 803:1-6] Mr. Terrones further testified that, based on the information provided by "Jesus Saldana" concerning his treatment, he was concerned for Mr. Saldana's own safety on the production floor, as well as the safety of SFTC's products if they became exposed to the contents of the bag that "Jesus Saldana" would be carrying on his body. [TR 803:23-804:9] As he testified, Mr. Terrones had required other employees to provide SFTC with a doctor's note where there were concerns about the employee's safety in the workplace. [TR 804:10-805:4] Therefore, Mr. Terrones

asked "Jesus Saldana" to bring in a doctor's note indicating what his restrictions were once he started the new treatment. [TR 634:1-3]

The testimony concerning what occurred after Mr. Terrones requested the doctor's note is undisputed. Shortly after Mr. Terrones made his request, "Jesus Saldana" returned with a doctor's note that was not made out for "Jesus Saldana," but for an individual named "Luis Juarez." [TR 633:8-11, GC Ex. 19] Upon receipt of the note for "Luis Juarez" – an individual not employed by SFTC – Mr. Terrones informed "Jesus Saldana" that he could not accept the doctor's note and that he needed to provide SFTC a note from his doctor under the name he had provided to the Company at the start of his employment. [TR 634:11-19] After "Jesus Saldana" returned with yet another doctor's note made out for "Luis Juarez," SFTC – which now had constructive knowledge that its employee had an alternative identity[6] – provided him with a letter on December 19, 2012 giving him forty-five (45) days to verify that he had a valid Social Security Number in the United States. [TR 636:1-637:10, GC Ex. 21] As "Jesus Saldana" testified at the Hearing, upon expiration of the forty-five (45) day period in the December 19, 2012 letter, SFTC provided him with yet another opportunity to provide verifying information rather than terminate his employment. [TR 644:11-15, GC Ex. 22]

[6] Although the Acting General Counsel offered testimony of "Jesus Saldana" that some of SFTC's supervisors had information concerning his alternative identity of "Jesus Saldana," the testimony was not clear. Moreover, there is no evidence in the record indicating that SFTC had received any earlier documentary evidence that "Jesus Saldana" was using an alternative identity to trigger SFTC's obligations to verify his identity pursuant to its obligations under the Immigration Reform and Control Act of 1986 ("IRCA").

Contrary to the Acting General Counsel's allegations, there is absolutely no evidence to demonstrate that the period of work that "Jesus Saldana" missed while he was attempting to obtain a doctor's note indicating his new work restrictions constituted a suspension. As Mr. Terrones credibly testified, the requirement that "Jesus Saldana" provide SFTC with a doctor's note was based on his desire to protect both "Jesus Saldana" and SFTC's products from potentially unsafe exposure to the contents of the device "Jesus Saldana" was required to wear during his chemotherapy treatment. This requirement was consistent with SFTC's practice for other employees who had health conditions that increased their risk for a workplace injury. Moreover, there is also not a shred of evidence in the record to support the Acting General Counsel's assertion that SFTC's refusal to initially accept the doctor's note made out to "Luis Juarez" – an individual not employed by SFTC – was in anyway discriminatory. To the contrary, the evidence is clear that SFTC's actions were taken in order to ensure the Company's compliance with its obligations under U.S. immigration laws.

Once again, the Acting General Counsel completely ignores the fact – which "Jesus Saldana" repeatedly acknowledged during his testimony at the Hearing – that SFTC continued to go out of its way to accommodate "Jesus Saldana" and these accommodations continued unabated after the Company learned of his involvement on the Comité. SFTC's continued willingness to accommodate "Jesus Saldana," coupled with the complete lack of any evidence of a negative animus towards him or the Comité, compels dismissal of this allegation.

C. The Acting General Counsel Failed to Demonstrate that Yolanda Rivera Was Unlawfully Disciplined.

Once again, the Acting General Counsel failed to produce any evidence to support its allegations that SFTC unlawfully disciplined Yolanda Rivera on two occasions following the Company's receipt of the Comité's letters beginning in early August 2012. Specifically, the Acting General Counsel alleges SFTC unlawfully disciplined Rivera on the following two dates

(1) On or about September 29, 2012,[7] SFTC issued a written warning to Rivera;

(2) On or about November 26, 2012, SFTC issued a written warning to Rivera;

As will be explained below, the Acting General Counsel's allegations regarding the discipline of Yolanda Rivera should be dismissed.

1. The alleged September 29, 2012 written warning.

In the Complaint, as amended at the Hearing, the Acting General Counsel alleges that SFTC issued a written warning to Yolanda Rivera on or about September 29, 2012 because she participated in the CTSFT or otherwise engaged in protected, concerted activities. [Complaint at ¶¶ 6(i), (k), and (l)] The Acting General Counsel did not introduce the purported written warning that SFTC gave to Ms. Rivera, but relied entirely on Ms. Rivera's testimony concerning the incident to support this allegation. Significantly, even if the ALJ were to accept Ms. Rivera's testimony concerning this purported discipline, the Acting General Counsel's allegation still fails.

[7] At the Hearing, the Acting General Counsel amended Paragraph 6(i) of the Complaint to change the date to "about September 29." [TR 696:5-8]

At the Hearing, Ms. Rivera testified concerning her conversation with her supervisor, Mariela Campos, regarding the purported September 29, 2012 written warning. Based on this testimony, it is clear that, even if Ms. Rivera was given a written warning relating to her absence (a fact which remains unproven), it was not given to her for a discriminatory reason:

Q: (Counsel for AGC): Okay. Ms. Rivera, I want to direct your attention to September 29th. Were you scheduled to work that day?

A (Yolanda Rivera): Yes.

Q: What time were you scheduled to work?

A: That day I was set up for the 5:00 a.m.

Q: Did you, did you report to work that day?

A: No.

***

Q: Okay. Okay. And what was your next scheduled day?

A: Monday.

***

Q: Okay. And did you report to work that day?

A: Yes.

Q: Did you receive a write-up that day?

A: Yes.

Q: Okay. And who gave you the write-up?

A: Mariela Campos.

Q: And how did that happen?

A: She gave me that paper. She told me I had to sign that warning because I had not shown up to work.

***

Q: Okay. And did you respond?

A: I told her why was she giving it to me since I had informed her.

Q: Okay. Did you sign the write-up?

A: Yes, I signed the paper and I gave it to her.

Q: Okay. Did you receive a copy of the write-up?

A: No.

Q: *Did she explain why you were getting the write-up?*

A: *She told me that I had, that she had to write it up because I wasn't feeling well to go to work but in order to go out dancing that I was feeling well enough.*

[TR 487:8-489:4 (emphasis added)] It is undisputed that it was her supervisor, Mariela Campos, who gave her the discipline relating to her September 29, 2012 absence. However, Ms. Campos did not testify at the Hearing and the Acting General Counsel failed to offer any evidence to establish that Ms. Campos knew about Ms. Rivera's participation in the CTSFT or that she had any knowledge that Ms. Rivera had engaged in any other protected, concerted activities. Moreover, as Ms. Rivera testified at the Hearing, Ms. Campos provided her with a legitimate, non-discriminatory reason for the discipline: the discovery that even though Ms. Rivera was absent from work on September 29, 2012, she was apparently well enough to go dancing on that day. [*Id.*] Ms. Rivera did not deny this fact at the Hearing.

The Acting General Counsel attempted to support this allegation by showing that SFTC treated Ms. Rivera differently for her September 2012 absence than it had treated her for absences occurring prior to its receipt of the Comité's August 2012 letters. However, as Ms. Rivera's own testimony reveals, Ms. Campos specifically explained to her why she was writing her up for the September 29, 2012 absence: because although Ms. Rivera had missed work on that day, she apparently was feeling well enough to go dancing. [TR 489:1-4] Ms. Rivera did not present any testimony to demonstrate that there were similar issues surrounding her earlier absences. Therefore, the other absences cannot serve as proper comparators.

Finally, not only did the Acting General Counsel fail to produce the alleged written warning, it also failed to produce any evidence to demonstrate that the purported written warning had an adverse effect on Ms. Rivera's terms and conditions of employment. There is simply no evidence in the record to support this allegation.

2. The December 2012 written warning.

The undisputed evidence in the record establishes that SFTC issued a written warning to Yolanda Rivera on November 26, 2012 because the sleeves of her sweater were down near her wrist in violation of both SFTC's production guidelines and General Manufacturing Practices ("GMP"). [TR 492:16-24, GC Ex. 17] As a food production facility, SFTC was required to comply with certain practices to ensure sanitation on the production floor in order to prevent contamination of its products. [TR 791:17-792:7; 831:13-832:23] As part of its efforts to maintain a sanitary environment, SFTC required its employees – including Rivera – to review and familiarize themselves with various

policies. [*Id.*] In November 2012, SFTC provided Rivera with a document outlining these policies, which she reviewed and signed. [TR 509:16-24, 510:12-21, Respondent Ex. ("R. Ex.") 1] Among the guidelines provided to Rivera was a policy relating to the length of the sleeves employees could wear under their robes on the production floor. The policy provided (as interpreted at the Hearing):

> Sweaters, jackets or sweatshirts are not allowed in the work area…The people that are use sweaters should fold the sleeves back to the same level as the sleeves from the robe.

[TR 511:2-11, R. Ex. 1]

Significantly, Ms. Rivera *admitted* during her testimony that on the date she received the discipline her sleeves were down near her wrists. [TR 493:10-17] Moreover, Arlette de la Mora, the production manager responsible for enforcing SFTC's sanitation and safety policies, provided credible testimony concerning her observations of Ms. Rivera on November 26, 2012. According to Ms. de la Mora:

> [Ms. Rivera's] sleeves were below the robe. On three different occasions, I had asked her previously to please comply with the norms, the regulations, that she had to have that sweater underneath and up above the robe. She didn't pay any attention to me, and that's when I had to discipline her for that.

[TR 833:2-9] Significantly, Ms. de la Mora only issued the written discipline to Ms. Rivera after she warned her on multiple occasions regarding her failure to comply with SFTC's written policy – a fact that Ms. Rivera also admitted on cross-examination. [TR 833:2-9, 512:20-24]

Moreover, the Acting General Counsel's effort to demonstrate that SFTC treated Ms. Rivera more harshly than other employees failed miserably. Although Ms. Rivera

testified that she had seen another production worker (Noemi) whose shirt sleeves were longer than her uniform sleeves, she acknowledged that she did not know whether this employee had been disciplined. [TR 514:17-24] Significantly, on rebuttal, Ms. de la Mora testified concerning two other employees that she had disciplined for engaging in the same misconduct, *including the employee identified by Ms. Rivera*. [TR 833:9-13, 834:10-836:21, R. Exs. 2, 3]

The Acting General Counsel has failed to produce sufficient evidence to demonstrate that SFTC's November 26, 2012 discipline of Ms. Rivera – which was given to her nearly two and a half months after SFTC received its first letter from the Comité – was done for an unlawful purpose.

D. There is Absolutely No Basis for the Acting General Counsel's Allegation that SFTC Transferred Yolanda Rivera and Lillian Lopez Because of Their Participation on the Comité or in Protected, Concerted Activities.

As noted throughout this Brief, the Acting General Counsel's position appears to be that – following receipt of the August 7, 2012 letter from the Comité – SFTC took every opportunity it could to retaliate against the employees who participated on the Comité. The Acting General Counsel, however, proceeds with this "kitchen sink" approach despite the lack of any evidence to demonstrate that SFTC's management had hostility towards the Comité or its members. Consistent with this approach, the Acting General Counsel alleges that SFTC *transferred* two members of the Comité, Lillian Lopez and Yolanda Rivera, from the flour-tortilla line to the corn-tortilla line in retaliation for their participation on the Comité and/or protected, concerted activities. In

even asserting this allegation, it becomes abundantly clear that the Acting General Counsel did little to investigate the realities of the workplace in which it claims these various unfair labor practices occurred.

The record contains significant evidence to demonstrate that production workers at SFTC are regularly moved between the corn and flour tortilla lines and that some employees work on both lines in a given week. Significantly, Arlette de la Mora, who is the manager responsible for scheduling production employees for each production line testified as follows:

> Q: (Counsel for SFTC): Are there weeks in which production employees will be assigned to work on both the flour and corn tortilla lines?
>
> A: Yes.
>
> Q: Why do you move production employees between the two lines?
>
> A: It's so that they can learn on both lines, and we also have to create a balance on the corn line. For example, we have to have two experienced employees in the corn line and two new employees on the corn line.
>
> Q: Do you expect the company's production employees to be able to work on both lines?
>
> A: Yes.
>
> Q: Do you train your production employees to work on both lines?
>
> A: Yes.
>
> ***
>
> Q: When you move employees from one line to another, do you consider that to be a transfer?
>
> A: What do you mean transfer?

Q: Do you view it as a permanent move?

[Objection omitted]

A: *No, I change them out constantly*. I leave them there for awhile and then I change them back.

[TR 825:22 – 826:11; 828;7-14 (emphasis added)] Consistent with this testimony, several of the workers who testified acknowledged that they have been moved amongst the two lines, including Delfina Bruno who testified that she had been moved to the corn-tortilla line on July 17, 2012 – weeks before the Comité was formed and submitted its first letter to SFTC. [TR 659:14-18; 448:16-17] Even Lillian Lopez – one of the individuals that the Acting General Counsel alleges was retaliated against by being transferred to the corn line – testified that she has worked on both the corn and tortilla production lines in certain weeks. [TR 545:1-12] Moreover, there was also uncontroverted testimony that production workers were not hired to work on a particular line. [TR 448:3-6; 502:7-10]

Significantly, the only evidence that was presented at the Hearing concerning the reason for the move of Rivera and Lopez from the flour line to the corn line in August 2012 came from Arlette de la Mora. As an initial point, it is important to note that Ms. de la Mora testified that she only had *limited knowledge* concerning the Comité and did not participate in any of the meetings with the members of the Comité. Specifically, Ms. de la Mora testified:

Q: (Counsel for the AGC): And Mr. Jasso told you that the Company had received letters from Comité de Trabajadores de Santa Fe Tortilla, correct?

A: I can't say yes. That is, I mean, they told me but they didn't explain to me, *they just said that there was a letter that had been issued by a group of employees and expressing their disappointment, but they didn't tell me if it was a committee or something*.

[TR 296:5-12 (emphasis added)] There is no evidence in the record to establish that Ms. de la Mora had any knowledge of either Rivera or Lopez' involvement with the Comité or their participation in any alleged protected, concerted activities.

Moreover, Ms. de la Mora presented credible testimony concerning the legitimate, non-discriminatory reason for her decision to move Rivera and Lopez's to the corn-tortilla line at some point over the last few months:

Q: (Counsel for SFTC): Did you assign Lilian López to work on the corn line at some point in August 2012?

A: I don't recall if it was exactly in August, but she was working on the corn line some months ago.

Q: Why was she assigned to work on the corn line, do you recall?

A: The truth is *because she was having trouble on the flour line*. She couldn't handle it. She would have a lot of the tortillas fall to the floor. So I tried to move her over to the corn line because it's a little bit easier to see if she could work there better.

Q: What about Yolanda Rivera? Did you assign her to work on the corn line for a portion of August 2012?

A: Yes, she also a couple of months ago there.

Q: Why was that?

A: Because some people left that used to work on the corn line, *so she had experience in packing on the corn line. So I had to send her over to the corn line packing to help me out with that*.

[TR 827:13-828:6 (emphasis added)] Other than the fact that the move came sometime after SFTC began receiving letters from the Comité (about which Ms. de la Mora testified she knew little), the Acting General Counsel failed to present any evidence to establish that the decision to move them was in anyway discriminatory or retaliatory.

Additionally, the Acting General Counsel bears the burden to establish that SFTC's conduct might reasonably tend to coerce or intimidate employees in exercise of their statutory rights. Based on the evidence in the record, the Acting General Counsel also cannot demonstrate that a move to the corn-tortilla line would reasonably tend to coerce or intimidate employees. Not only did Ms. de la Mora testify concerning the frequency of these moves, she also testified that many production workers find the corn-line to be easier than the flour-line because the flour-line – which has smaller bag counts of tortillas – is quicker than the corn-line. [TR 826:15-25] Additionally, the pay was the same for both production lines. [TR 504:7-10] Finally, the Acting General Counsel incredibly presented little evidence to show why work on the corn-line was believed to be more difficult than on the flour-line. Ms. Lopez testified that she found it more difficult because she was asked to program a printer by her supervisor, Cynthia Dominguez, on a handful occasions, but admitted that it was not a regular part of her job. [TR 531:19-532:3; 545:20-546:10] She also indicated that she was not trained to work on the corn-line, but acknowledged that she never asked any supervisor for any kind of training. [TR 546:18-547:12]

In light of the substantial and uncontroverted evidence that production workers were regularly changed -- or in the words of Ms. de la Mora "constantly" moved – among

the two production lines, the Acting General Counsel's allegations should be dismissed. This is particularly true since the record is also devoid of any evidence that the decision-maker, Arlette de la Mora, had specific knowledge of either Ms. Rivera or Ms. Lopez's involvement on the Comité or had any hostility towards the group. Nor is there any evidence in the record to support a finding that a move to the corn-line might reasonably tend to discourage continued participation in the Comité. There is simply no basis to sustain this allegation.

E. The Acting General Counsel Has Failed to Present Any Evidence to Support Its Allegation that SFTC Discriminatorily Reduced the Hours of Lillian Lopez, Yolanda Rivera or Juan Lopez.

The Acting General Counsel also alleges that SFTC reduced the hours of three of the employees whose names appeared on the Comité's letters to SFTC. According to the Acting General Counsel's allegations, SFTC began reducing the hours of employment of employees, Lillian Lopez, Yolanda Rivera, and Juan Lopez on August 10, 2012. [Complaint at ¶¶ 6(c), (d), and (e)] Once again, the Acting General Counsel failed to present *any* evidence to demonstrate that any reduction of hours that these employees may have experienced in the period after August 10, 2012 was *because of their participation on the Comité or in other protected, concerted activities.* In contrast, however, SFTC presented substantial, credible testimony that *the hours of all production employees regularly varied* based on the Company's production needs and tended to be lower during the winter months. Moreover, SFTC also presented testimony demonstrating that the production schedule for the corn-line was impacted by construction of a new corn chip line that was only feet away from the corn-tortilla line.

The evidence in the record clearly demonstrates that the hours that the production employees worked at SFTC *varied on a week to week basis*. As was explained through the credible testimony of both Gustavo Terrones and Arlette de la Mora, the production schedule was determined *each week based on the number of orders that the Company received, which regularly varied*:

> Q: (Counsel for SFTC): Does the number of orders that you receive vary week by week?
>
> A (Gustavo Terrones): They're almost always different. They're approximate, they are -- sometimes they're close but they do vary always.
>
> Q: What impact does that have on the schedules of the employees assigned to those lines?
>
> A: Well, we determine the number of hours that they're going to work according to the number of orders that we have.
>
> Q: Mr. Terrones, is there a period of time during the year in which the company tends to get less customer orders than other periods of time?
>
> A: It always varies, but in general, the industry is a little bit slower during the winter months.

[TR 799:25-800:12] Moreover, Ms. de la Mora[8] – the individual responsible for creating the schedule for SFTC's production employees – testified as follows:

> Q: (Counsel for SFTC): With respect to your responsibilities relating to the scheduling of production, are you responsible for

[8] As explained in the previous Section, there is no evidence in the record to demonstrate that Ms. de la Mora had knowledge of the participation of Lillian Lopez, Juan Lopez, or Yolanda Rivera in the Comite. In fact, the only evidence in the record concerning Ms. de la Mora's knowledge concerning the Comite demonstrates that she had little knowledge of the Comité and its activities.

creating the production schedule on both flour and corn tortilla lines?

A: (Arlette de la Mora): Yes.

Q: *How do you determine the production schedule for each line?*

A: *Based upon the order placed for productio*n, that's -- I base it upon that, that's how I make the work schedule.

***

Q: *Does the production schedule vary from week to week?*

A: *Yes*.

Q: Why is that?

[Objection omitted]

A: *Because the orders vary according to the customers, so work production schedule and the employee schedules vary.*

[TR 823:13-21; 824:8-14 (emphasis added)] As Ms. de la Mora then went on to explain, the number of days that SFTC runs its production lines varies week to week based on the number of orders the Company receives for that week from its over 150 different customers:

Q: What is the process that you follow for determining the employee schedules?

A: On Thursdays, if we're going to be working on Fridays, I start to create my work schedule on Fridays. If not, then I would begin to create a work schedule for Monday that would run from Monday to Thursday.

Q: Are there weeks in which you do not have any production on Friday?

A: Yes.

Q: Are there weeks in which you add production days during the week?

[Objection omitted]

A: Yes, if there's more orders that are placed, you have to add another day.

[TR 781:14-20; 825:2-16] In addition, both Mr. Terrones and Mr. Kalfin testified that there are certain times of the year in which SFTC gets more orders and other times, such as the fourth quarter of the calendar year (September-December), in which SFTC tends to get less orders from customers. [TR 783:3-8] As Mr. Kalfin clearly explained, since SFTC runs entirely on demand, it runs the production lines less in those months in which SFTC gets less order. [TR 783:9-17]

In addition to the evidence regarding the impact of the weekly orders on SFTC's production schedule, SFTC also presented testimony concerning construction that was occurring in the factory beginning in mid-July 2012. SFTC's managing member, Kenny Kalfin, testified regarding the Company's construction of a new corn chip line that impacted SFTC's ability to run its corn tortilla line over a nearly two-month period covering August and September. [TR 784:9-785:9] According to Mr. Kalfin, the construction of the chip line caused SFTC to shut down the corn line "intermittently" and resulted in the Company rearranging its production schedule. [TR 789:11-15] These interruptions impacted *all* of the employees working on the corn tortilla line – not just the Alleged Discriminatees.

The evidence in the record demonstrates that the reduction in the number of hours that production employees worked in the period at issue impacted all workers.

Significantly, the Acting General Counsel did not elicit testimony to establish any comparators to the group of Alleged Discriminatees (Lillian Lopez, Juan Lopez, and Yolanda Rivera). Although the Acting General Counsel subpoenaed the time records of all SFTC's employees and it introduced these records at the Hearing, it failed to offer any testimony to identify those workers who could be considered similarly, situated employees to the Alleged Discriminatees. The Acting General Counsel cannot merely compare these employees to all of the other employees in the production department. As Mr. Terrones testified at the Hearing, the production department employs workers in a number of different positions who having differing responsibilities and different hours:

> Q: (Counsel for SFTC): When we're talking about production employees, what positions does the company have in the production department?
>
> [Objection omitted]
>
> A: (Gustavo Terrones): There's the flour and the corn mixers, there's the flour operator, there are the people who are the packers. There are those who are in charge of the boxes and the trays. There's the person that's at the scales. Then there's the supervisors and the assistant supervisors.
>
> Q: With respect to the groups that you just identified, do the hours that these individuals work differ?
>
> [Objection omitted]
>
> A: Yes, generally, *they do work different hours*, but the operators stay a little longer in order to be -- take garbage out and clean the machines.

[TR 794:21-795:11 (emphasis added)] Moreover, there was evidence presented that Ms. Rivera missed at least one day of work in the period after August 10, 2012. [TR 490:7-13] Of course, any comparison of total weekly hours amongst similarly, situated

employees (none of which have been identified at this point) must take into account hours missed because time taken off by the employee for illness or personal matters.

The evidence further demonstrates that these employees worked less than forty (40) hours per week during certain pay periods *prior to SFTC's receipt of the first letter from the Comité*. For example, Ms. Rivera acknowledged that she worked *less than forty (40) hours* during the week of August 2-9, 2012:

> Q: (Counsel for SFTC): For example, the week, your first letter to the Committee was sent on August 7th, is that correct?
>
> A: (Yolanda Rivera): Uh-huh, yes.
>
> Q: And that was during the work week of August 2nd through August 9th?
>
> A: Yes.
>
> Q: Isn't it true that during that week you worked less than 40 hours per week?
>
> A: Yes.

[TR 507:4-12] Ms. Lopez also testified that she worked less than forty (40) hours per week when she started at SFTC in April or May 2012 because "there was very low, there was very little work." [TR 548:14-19] Finally, Mr. Lopez testified that he had worked less than forty (40) hours at certain points *prior to August 2012*. [TR 582:23-25]

Although Ms. Rivera insisted that she has not worked over 40 hours in a week *since August 2012,* her testimony is contradicted by the documentary evidence in the record. [TR 508:12-14] Contrary to her testimony, the payroll records[9] provided for Ms.

[9] At the Hearing, Counsel for the Acting General Counsel called Aleta Paiva to authenticate the payroll documents produced by SFTC pursuant to the Acting General Counsel's subpoena duces tecum. [TR 814 – 822]

Rivera demonstrate that she has worked *over 40 hours* in at least three weekly pay periods since August 2012:

- Pay period of August 10 – 16, 2012: 40.45 hours.
- Pay period of August 17 – 23, 2012: 43.90 hours.
- Pay period of December 14 – 20, 2012: 46.22 hours.

[GC Exs. 55, 57] Similarly, while Ms. Lopez testified that she "now" only works between "20, 27 up to 35" hours, her payroll records demonstrate that there have been multiple weeks since August 10, 2012 in which she has worked well in excess of 35 hours per week:

- Pay period of September 28 – October 4, 2012: 41.18 hours;
- Pay period of October 12 – 18, 2012: 42.35 hours.

[GC Ex. 55] The same is true for Juan Lopez who worked over fifty (50) hours the week of October 19 – 25, 2012.[10] [GC Ex. 55]

As the evidence in the record clearly demonstrates, there is absolutely no merit to the Acting General Counsel's allegations that SFTC reduced the hours of employees, Yolanda Rivera, Lillian Lopez, or Juan Lopez. To the extent that these employees experienced any reduction in the number of hours that they worked in the period after August 2012, the evidence clearly establishes that these reductions were the result of changes to SFTC's operational needs and not based on a discriminatory animus.

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[10] Mr. Lopez's employment was terminated in December 2012 after he missed work and he did not call in to inform his supervisor of his absence. [TR 567:24-568:3]

II. SFTC TERMINATED GALAVIZ AND BRUNO FOR ENGAGING IN CONDUCT THAT WENT BEYOND THE PROTECTIONS OF THE NLRA.

The Acting General Counsel alleges SFTC terminated employees Galaviz and Bruno for engaging in conduct protected by Section 7 of the NLRA. These allegations should be considered based on the totality of the evidence in the record – most notably, *the lack of any evidence in the record that SFTC or its managers harbored any hostility towards the Comité or its members.* Moreover, in light of the fact that these two employees were the only two members of the Comité terminated, it does not make any sense for the Acting General Counsel to suggest that Galaviz and Bruno's participation on the Comité – or in some other more subtle form of protected, concerted activity – was the reason for their termination.

As will be explained below, the Acting General Counsel failed to meet its burden of proof to support this allegation. Rather, the evidence in the record establishes that Galaviz and Bruno were terminated for engaging in conduct that -- although for the "mutual aid or protection" of employees – lost its protection under Section 7 because of the manner in which it was engaged.

Section 7 of the NLRA protects the rights of employees "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." Protected, concerted activities are those pursued by employees in a peaceful manner in the exercise of their Section 7 rights. Therefore, to be protected under Section 7, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection."

In determining the scope of the protections afforded by Section 7, the Board has long recognized the need to balance those protections against the legitimate interests of employers. *See, e.g., Republic Aviation Corp*., 324 U.S. 793 (1945). In the instant case, the evidence clearly established that the conduct on which the decision to terminate Galaviz and Bruno lost the protections of Section 7 of the NLRA.

A. The Applicable Framework.

The proper framework under which to analyze the Acting General Counsel's termination allegations is the framework established by the U.S. Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Under the *Burnup & Sims* framework, the Acting General Counsel bears the threshold burden of establishing that an employee had engaged in protected activity and that the disciplinary action resulted from conduct associated with that activity. *Id*. Once the Acting General Counsel has carried this burden, the respondent may rebut the Acting General Counsel's case by showing that it held an honest belief that the employee had engaged in misconduct during the course of that protected activity. *Id*. Proof that the respondent held such an honest belief defeats the government's case unless the Acting General Counsel then can prove that the employee actually did not engage in the misconduct. *Id*.

B. The Acting General Counsel failed to meet its threshold burden because the conduct for which SFTC terminated Galaviz and Bruno lost the protections of the Act.

Under the *Burnup & Sims* framework, the Acting General Counsel bears the initial burden to establish that Galaviz and Bruno: (1) engaged in protected activity and (2) that the disciplinary action resulted from conduct associated with that activity. The only

evidence in the record for the reason for the termination of Galaviz and Bruno came from the credible testimony of the decision-maker, Kenny Kalfin. Concerning the termination of Galaviz, Mr. Kalfin testified:

Q: (Counsel for the AGC): Who made the decision to fire Yolanda Galaviz?

A: (Mr. Kalfin): I did.

Q: Why?

A: I believe she had committed a crime. She was intimidating her fellow workers and lying to her fellow workers.

Q: What crime did she commit?

A: I believe she counterfeited documents.

Q: You believe she had counterfeited --

A: That she had forged -- that she had forged somebody's signature on a document.

***

Q: Okay, how many days before did you decide to terminate Ms. Galaviz before the actual dates?

A: Before?

Q: Before you actually terminated, how much time in advance did you decide that you would terminate her?

A: I didn't decide until I heard all of the issues that were -- when we confronted her.

Q: Okay. What were the issues?

A: Forgery of a document with a fellow employee's signature, intimidating employees, lying to her fellow employees, harassing employees, asking them to sign blank documents and misrepresenting what the content of the document would be when it would be completed.

[TR 72:11-20; 74:3-15] He also testified concerning his decision to terminate Bruno's employment:

Q: And who made the decision to fire Yolanda Galaviz -- Delfina Bruno?

A: I did.

Q: Okay. Why did you decide to fire Delfina Bruno?

A: We were told that she was along with Yolanda Galaviz intimidating and harassing workers.

[TR 92:24 – 93:4] Consistent with the other evidence in the record, Mr. Kalfin vehemently denied that he considered Galaviz and Bruno's participation in the Comité as part of his decision to terminate their employment and further testified that he welcomed employees joining committees to discuss their concerns. [TR 102:25-103:8] Mr. Kalfin was a credible witness whose testimony should not be doubted.

According to Mr. Kalfin, he based his decision to terminate Galaviz and Bruno on complaints that SFTC had received from some of its employees, including on a statement that he reviewed from an employee, Gustavo Abel Lopez, indicating that he had not signed one of the Comité letters that bore his name. [TR 73:4-6; 75:1-12] Mr. Abel Lopez – who is no longer employed by SFTC and, therefore, has no motivation to lie under oath – testified consistent with the statement that he had provided to SFTC.

Although it is not entirely clear what the Acting General Counsel's theory is

concerning the Galaviz and Bruno terminations, what is clear is that any argument that SFTC terminated these two employees merely because they participated on the Comité lacks merit. The Acting General Counsel failed to offer any evidence to suggest why SFTC would have singled out these two employees for termination when it received the letter, which was signed by eight employees (although SFTC subsequently discovered that one of the signatures on the August 7, 2012 letter was a forgery). Other than the evidence presented concerning the employee complaints received by SFTC concerning Galaviz and Bruno, the Acting General Counsel did not offer any evidence to explain why Galaviz and Bruno would have been selected for termination while the other members of the Comité were spared. Significantly, there is no evidence in the record to suggest that either Galaviz or Bruno were leaders of the Comité or, more importantly, that SFTC perceived them to be leaders of the Comité.

It has long been recognized that there are limitations on the protections of Section 7 of the NLRA. Both the Board and Courts alike have held that "flagrant conduct of an employee, even though occurring in the course of [protected] activity, may justify disciplinary action by the employer." *Allied Aviation Fueling of Dall. LP,* 490 F.3d 374, 379 (5th Cir. 2007)(quoting *Boaz Spinning Co. v. NLRB,* 395 F.2d 512, 514 (5th Cir. 1968). As the U.S. Supreme Court has recognized, employees "are not at liberty to intimidate or coerce other employees. When employees resort to that kind of activity, they take a position outside the protection of the statute and accept the risk of discharge upon grounds aside from the exercise of the legal rights which the Act protects." *Paramount Mining Corp. v. NLRB,* 631 F.2d 346, 348 (4th Cir. 1980)(citing *NLRB v.*

Fansteel, 306 U.S. 240 (1939). Moreover, the Board has held that "where an employee is discharged for conduct that is part of the *res gestae* of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service." *Guardian Indus. Corp.*, 319 NLRB 542, 549 (1995)(quoting *Consumers Power Co.,* 282 NLRB 130, 132 (1986).

As an initial point, there can be little doubt that forgery – even in the course of otherwise protected activity – loses the protection of the Act. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. V. NLRB,* 514 F.3d. 574, 580 (6th Cir. 2008). In *Int'l Union,* the Sixth Court of Appeals enforced a Board order dismissing allegations that a union supporter was terminated in violation of Sections 8(a)(1) and (a)(3) of the NLRA. In doing so, the Court upheld the Board's determination that an employee who had deliberately falsified the name of a co-worker on a letter to the company lost the protections of the Act because his conduct was "sufficiently egregious." *Int'l Union,* 514 F.3d at 584. According to the Court, the determinative question is whether an employee's conduct is "sufficiently egregious" to cause him to lose the protection of the Act and deliberately falsifying a co-worker's name certainly rose to that level. *Id.*

In the instant case, the record is replete with evidence demonstrating that Galaviz and Bruno engaged in conduct that well beyond the protections of Section 7. As Mr. Kalfin testified at the Hearing, SFTC terminated Galaviz, in part, because she committed a crime by forging the signature of Gustavo Abel Lopez. [TR 72:14-20] Mr. Abel Lopez

testified at the Hearing that the signature appearing on the August 7, 2012 letter was not his and he did not authorize anyone to sign the letter on his behalf. [TR 677:6-8; 707:24-708:3] In fact, in response to a question about the August 7, 2012 letter from ALJ Kocol, Mr. Abel Lopez went further to testify that he "didn't even know when they created this letter" and that he "wasn't even there when they created this letter." [TR 708:6-9] This testimony is significant because it directly contradicts the testimony provided by Galaviz concerning the meeting at which the August 7, 2012 letter was signed. When questioned on cross-examination regarding Mr. Abel Lopez's presence at the meeting, Ms. Galaviz's testimony was conflicting, *but she insisted that she witnessed Mr. Abel Lopez sign the document*:

Q: (Counsel for SFTC): Isn't it true that all of the employees who signed that letter did not sign that letter at the same time?

A: (Ms. Galaviz): It's not true that we didn't sign it?

Q: At the same time.

[Objection omitted]

A: We all signed it.

Q: My question was, isn't it true that the employees who signed it, did not sign it at the same time?

[Objection omitted]

A: We all signed it at the same time.

Q: Each one of the individuals who are identified on GC-2, General Counsel Exhibit 2, signed it the same time?

A: One by one.

Q: Does that include --

JUDGE KOCOL: In other words, Ms. Galaviz, you saw all of the other employees put their signatures on that paper?

A: I saw them all come in, approach to sign.

Q: (Counsel for SFTC): And does that include Gustavo Abel Lopez?

A: He also approached.

Q: Just to clarify, you say, "approached," *but did you actually see him sign, Mr. Abel Lopez sign the document?*

A: *Well, it was already signed. Yes, he did sign it.*

Q: That doesn't really answer the question. *Did you see him actually sign the document?*

A: *Yes*.

[TR 357:19-358:24 (emphasis added)] Bruno also testified that Mr. Abel Lopez was present at the meeting and she claimed that he was in agreement to be a member of the Comité which Mr. Abel Lopez insisted he was not. [TR 427:6-8; 429:10-14] For obvious reasons, the testimony of Galaviz and Bruno concerning the meeting should be discredited. Moreover, in light of her conflicting testimony, Galaviz's denial that she forged the document must be called into serious doubt.

Moreover, as Mr. Kalfin testified, SFTC had received complaints from other employees regarding the conduct of both Galaviz and Bruno. The Acting General Counsel introduced evidence concerning these complaints and elicited testimony from Mr. Kalfin regarding his reactions to those complaints. [TR73:15-25, GC Ex. 9] Significantly, Galaviz testified concerning her efforts to obtain signatures from other employees, including Edgar Lopez, and admitted that she found a piece of paper "wrote a couple of words" on it and then had Edgar Lopez sign it even though she insisted during

her testimony that she "wasn't going to use those signatures for anything." [TR 322:1-16] Not only does this testimony represent a tacit admission that she was misleading employees in order to obtain their signatures, it also confirms that she was engaging in the type of solicitation described in the complaints received by SFTC from her co-workers. As Mr. Kalfin testified, SFTC also received information that Bruno had been engaging in this conduct along with Galaviz. [TR 93:2-4]

In light of the testimony above, there should be no question that Galaviz and Bruno were terminated for conduct that went beyond the protections of Section 7 of the NLRA. Therefore, the Acting General Counsel has failed to satisfy its threshold burden of establishing that Galaviz and Bruno had engaged in protected activity and that the disciplinary action resulted from conduct associated with that activity. In the instant case, Galaviz and Bruno's terminations were based on conduct that clearly lost the protections of the Act.

C. Even if the Acting General Counsel could satisfy its initial burden under *Burnup & Sims* (which it cannot do), SFTC established that it had an honest belief that Galaviz and Bruno engaged in misconduct during the course of their protected activity.

As demonstrated by the testimony of Gustavo Terrones and Kenny Kalfin, SFTC established that it had an honest belief that Galaviz and Bruno engaged in misconduct by forging the signature of a co-worker on the August 7, 2012, obtaining signatures under false pretenses, and otherwise unlawfully coercing their co-workers. Based on her examinations at the Hearing, counsel for the Acting General Counsel will undoubtedly attempt to make much of the fact that SFTC did not conduct any type of comprehensive

investigation into this misconduct. However, all that is required to satisfy this burden is that SFTC present some evidence that it had a "reasonable basis to believe" that misconduct occurred. *See, e.g., NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495, 498 (5th Cir. 1966)(report of employee to company provides basis for "honest belief" which is entitled to "*prima facie*" validity by Board); *Marshall Eng'd Prods. Co.,* 351 N.L.R.B. 767 (2007)("honest belief" based upon preliminary investigation); *Contempra Fabrics, Inc.,* 341 N.L.R.B. 851, 852 (2005)("Although the employee's report to management may have been a subjective response, it gave the Respondent a reasonable basis for believing that a threat had occurred.")

In the instant case, the record contains evidence concerning at least four separate complaints that were made concerning the conduct of Galaviz and Bruno. [TR 199:9-15; 200:6-13] In light of this evidence, SFTC has satisfied its burden to demonstrate that it had a honest belief that the misconduct occurred.

D. The Acting General Counsel failed to prove that the misconduct on which SFTC relied for the terminations of Galaviz and Bruno did not occur.

Under the *Burnup & Sims* framework, once SFTC established that it had an "honest belief" that the Alleged Discriminatees engaged in "sufficiently egregious" misconduct, the burden shifts back to the Acting General Counsel to prove that the misconduct did not occur. *Burnup & Sims*, 379 U.S. at 23. The Acting General Counsel has not satisfied its ultimate burden in this case. Other than Galaviz's denial that she forged Mr. Abel Lopez' signature, which should be discredited for the reasons explained above, the Acting General Counsel failed to offer sufficient, credible evidence to

demonstrate that the misconduct attributed to Galaviz and Bruno did not occur. Significantly, the Acting General Counsel did not offer testimony from any of the witnesses who provided written statements to SFTC to attempt to demonstrate that their articulated complaints were false or coerced. In light of the number of witnesses that the Acting General Counsel subpoenaed for testimony at the Hearing, the absence of these witnesses is significant.

For the reasons stated above, as well as the credible evidence in the record, the Acting General Counsel has failed to satisfy its burden to prove that Galaviz and Bruno were terminated in violation of Sections 8(a)(1) or 8(a)(3) of the NLRA and these allegations should be dismissed.

CONCLUSION

The record simply does not support the various allegations of unlawful conduct asserted by the Acting General Counsel in its Complaint. Incredibly, despite nearly five days of testimony, there was absolutely no evidence introduced at the Hearing to demonstrate that SFTC, or its supervisors, had any type of negative animus towards the Comité or its members. To the contrary, the evidence demonstrates that SFTC continued to treat employees the same both before and after its receipt of letters from the Comité and that it was determined to attempt to address the concerns raised by the Comité in its letters. The Acting General Counsel's efforts to paint SFTC as a company determined to rid itself of the Comité and its members just does not comport with the evidence contained in the record.

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