UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

PACIFIC LUTHERAN UNIVERSITY, Employer, and SEIU LOCAL 925, Petitioner.	CASE 19-RC-102521 UNION'S STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW

SEIU Local 925 opposes the request for review filed by the Employer, Pacific Lutheran University (PLU). The request for review does not raise a substantial question of law or policy because the Region applied existing Board law with respect to jurisdiction, managerial status, bargaining unit composition, and the eligibility formula. With respect to jurisdiction, the Board would assert jurisdiction even under the standard set by the Court of Appeals for the D.C. Circuit. The Region's decision is not clearly erroneous on any substantial factual issue. The Employer's request for review asks the Board to ignore the overwhelming weight of the evidence that PLU does not have a religious character, does not hold itself out as a religious institution, and does not endow its contingent faculty with managerial status. The Employer's request for review asks the Board to ignore the significant evidence that all contingent faculty members share a sufficient community of interest to constitute a single appropriate unit. The Hearing Officer made no rulings which resulted in prejudicial error. Thus, under Section 102.57(c) of the

Board's Rules and Regulations, the Employer has not established compelling reasons for the grant of its request for review, and the Board should deny the Employer's request.

I. The Regional Director Correctly Asserted Jurisdiction over PLU, and the Employer Has Not Established a Compelling Reason for a Grant of Review on the Jurisdictional Issue.

Based on a careful review of all record evidence, the Regional Director correctly articulated his finding that PLU is not a church-operated institution within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and properly asserted jurisdiction over PLU. Moreover, the Regional Director found that even under the D.C. Circuit's standard, Board jurisdiction would be appropriate. Therefore, based on the record evidence and under the reasoning of *Catholic Social Services, Diocese of Belleville*, 355 NLRB No. 167, PLU's request for review should be denied.

PLU argues that since the Board accepted review in *Saint Xavier University*, Case No. 13-RC-22025, *Manhattan College*, Case No. 2-RC-23543, and *Duquesne University of the Holy Spirit*, Case No. 6-RC-08933, the Board must accept review in this case. Those cases, however, have fundamentally different facts and are not controlling.

In *Saint Xavier*, the day-to-day affairs are governed by its Board of Trustees, in conjunction with the University's President, who is also on the Board of Trustees. Each member of the Board of Trustees "must be committed to the practical implications of the University's Catholic identity". At least four members of the Board of Trustees must be Sisters of Mercy and the majority of the Board must be Catholic. Additionally, of nineteen Presidents, thirteen have been Sisters of Mercy and the current President is Catholic. The University also has many symbols throughout the campus that express its Catholic identity.

Manhattan College, a Catholic University, established by the Institute of the Brothers of the Christian Schools ("Christian Brothers") has Christian Brother members of the Board of Trustees sit on every major Board committee, including Finance, Student Life, Academic Affairs, and Admissions. Additionally, there are only two non-Catholics on the 38-person Board of Trustees, and 65% of the student body is Catholic.

In *Duquesne University*, the University attempted to withdraw its agreement to a stipulated election. The Board denied the University's request to withdraw and ordered the counting of the ballots in order to avoid a jurisdictional question that would be moot if the Petitioner lost the election. The Petitioner won the election. The Board is now being asked to order the Regional Director to hold an evidentiary hearing in order to answer the jurisdictional question on a fully developed record.

In the instant case, none of the above factual issues are present. There is no requirement that the president be a member of the Lutheran Church; he may be a member of another approved Christian denomination. ER Ex 3, 125; see P Ex 11 (website about current PLU President, Thomas Krise, who is Episcopalian). The president nominates all senior administrative officers, such as the provost, the vice presidents, and academic deans, as well as tenure-eligible faculty to the board for approval. ER Ex 3, 125. There are no religious requirements for any of the senior administrative officers. ER Exs 2-3. Notably, there are no religious requirements or standards for faculty who are hired to teach at PLU. ER Ex 1, 1-14; TR 303. Furthermore, there are no religious criteria advertised on faculty job postings. P Ex 14. Faculty employment contracts make no mention of any religious expectations or obligations, referencing generally the faculty handbook and the University's governing documents, which in turn contain no religious requirements. ER Exs 7-13. PLU faculty are not evaluated or promoted on the basis of any

religious requirements or standards. ER Exs 1, 23-27; 6; TR 303. Aside from a chapel building located on campus and a bust of Martin Luther, there is no evidence of religious symbols or icons in the classrooms or in residential halls. TR 236, TR. 291:6-7. PLU has competitive admissions and does not have any quotas or standards regarding the admission of students who are members of the Lutheran Church. TR 326-27. In fact, only twenty to twenty-five percent of the student body identify themselves as Lutheran. TR 328; P Ex 6 ("Resources for High School Counselors"). In addition, a record was fully developed at the hearing in this case, unlike *Duquesne University*.

PLU's reliance on the fact that the Board has taken review in the above-cited cases is misplaced. *Duquesne University* is not applicable in that a hearing has not occurred, and the other two cases have facts clearly not present in the instant case.

The thrust of PLU's argument is that the Boards' substantial religious character test is unconstitutional under the holding of *Catholic Bishop*.[1] As clearly enunciated in the Regional Director's decision, the exercise of jurisdiction over PLU will not create "serious constitutional questions" of the type the Supreme Court sought to avoid in *Catholic Bishop*. The Supreme Court was concerned in *Catholic Bishop* with the Board's assertion of jurisdiction over religious schools given the central role of education in propagating and sustaining religious faith. The Court specifically observed, "parochial schools involve substantial religious activity and purpose." 440 U.S. at 503. Here, PLU's mission and curriculum plainly establish that PLU operates for the purpose of providing secular higher education opportunities, and not to propagate religious faith. The stated mission of PLU is "to educate students for lives of thoughtful inquiry, service, leadership and care—for other people, for their communities, and for

[1] PLU takes exception to the Regional Director's findings, but does not dispute the record evidence upon which the Regional Director relied. Instead PLU argues that the Regional Director should have come to a different conclusion.

the earth." This mission statement contains no religious references whatsoever, and mirrors the objectives of secular universities such as University of Washington, Washington State University, Central Washington University, and Western Washington University. P Ex 18. To fulfill this mission, PLU offers a range of bachelor's degrees, master's degrees, and certificates across its college of arts and sciences and its professional schools for arts and communication, business, nursing, and education and movement studies. P Ex 5, 51, 298. In fact, PLU students in the General Education Program are only required to take two religion courses, or 8 semester credits out of 128 total required to graduate. P Ex 5, 12-15. According to PLU's website, this requirement is intended "to ask students to engage in the academic study of religious, not in religious indoctrination." P Ex 20. One of the courses is required to be on Christian traditions, which "examines diverse forms of Christianity within their historical, cultural and political contexts," and one must be on global religious traditions, which "highlights PLU's commitment to local-global education through analysis of diverse religions, both here and abroad." P Ex 7 ("Department of Religion"). Courses that would meet these requirements include "American Church History," "Medieval Christianity," "The Religions of Korea and Japan," and "Sociology of Religion." P Ex 5, 33-34. Critically, faculty members of the religion department are not required to be members of the Lutheran Church. P Ex 20 ("Because of their advanced studies and teaching experience, PLU religion professors recognize that there are diverse and sometimes conflicting viewpoints on any given issue. Their purpose is not to take one side but to help you understand why people, in the past or the present, hold different religious convictions that shape their views of human life on this earth."). PLU students in the international honors program do not have to fulfill any religious education requirement. P Ex 7. Thus, the Regional Director

correctly found "no significant risk of constitutional infringement from exercising jurisdiction over the University" and the request for review should be denied.

PLU's assertion that it meets the D.C. Circuit's standard articulated in *University of Great Falls v. NLRB*, 278 F.3rd 1335 (2002), is also without merit.[2]

In *University of Great Falls*, the court of appeals held that the Board should decline to assert jurisdiction over an educational institution if it (1) "holds itself out to students, faculty and community as providing a religious educational environment"; (2) "is organized as a nonprofit"; and (3) "is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. . . ." 278 F. 3d at 1343 (citations and internal quotations omitted).

PLU does not meet the first prong of the *Great Falls* test because it does not hold itself out as providing a religious educational environment. As the Board stated in *Catholic Social Services, Diocese of Belleville*:

> . . . we do not believe the court would find the first prong of its test satisfied absent communications to the public clearly stating that the Employer provides religious education of some form. Here, however, the Employer can point to nothing like the statement in the University of Great Falls' mission statement 'offer[ing] students a foundation for actively implementing Gospel values and the teachings of Jesus within the Catholic tradition.' 278 F.3d at 1345. Rather, the Employer and our dissenting colleague would have us comb through the employees' position descriptions and other nonpublic documents and make assumptions not supported by any direct evidence about how portions of those documents inform the care provided at the residence. But such inquiry, going beyond an examination of the Employer's public self-description, is inconsistent with the *Great Falls* court's intent to avoid 'intrusive inquiries.' 278 F.3d at 1342.

[2] PLU's lengthy description of its Lutheran heritage and concepts requires the type of "trolling" of its documents that PLU argues violates *Catholic Bishop*. The plain language of PLU's public documents is secular, not religious. Only by "trolling" into the intent behind the words is it remotely possible to find something that suggests a religious meaning.

It is clear from all the record evidence that the professed purpose of PLU and the function of the petitioned-for non-tenure-eligible contingent faculty is a secular one—to provide secular higher education, not a religious education.

The rationale for the D.C. Circuit's requirement that a school holds itself out as providing a religious educational environment is grounded in the theory that public representations will act as a "market check" on institutions that may not truly offer a religious educational environment. In *Carroll College*, the court noted that its mission statement expressly stated that the school will "demonstrate Christian values by . . . example." 558 F.3d 568, 572 (DC Cir. 2009). Carroll's board of trustees adopted a "Statement of Christian Purpose" which declared that the college's mission is to "provide a learning environment . . . congenial to Christian witness." *Id*. Here, PLU's stated mission is wholly secular and there is no evidence of such a religious statement issued by the Board of Regents. On widely accessible materials, such as its webpages and the course catalogue, PLU characterizes "Lutheran higher education" in terms of secular values and a historical tradition. PLU's webpage for prospective students makes clear that PLU's curriculum is secular, it is committed to academic freedom, and there are no religious expectations of students attending PLU. While PLU makes resources available on campus for Lutherans, such as chapel and a campus ministry, it also provides spaces for students of different faiths to practice their religion. P Ex 13.

Tellingly, in a 1999 lawsuit challenging the constitutionality of Washington state funds that were being granted to students who attended religiously-affiliated schools, PLU's then-President Anderson testified about PLU's non-sectarian qualities. TR 318-20. In contrast, PLU now asserts that it provides a religious educational environment for the purpose of being exempt from Board jurisdiction. The "market check" theory does not permit PLU to have it both ways; it

cannot be a non-sectarian institution on a Monday when it is seeking state funds and then decide it is a sectarian institution on Tuesday when it is attempting to avoid Board jurisdiction.

The record evidence clearly establishes that PLU does not hold itself out to students, faculty, and the public as a Lutheran religious institution. Therefore, even if the D.C. Circuit standard were applied, the Regional Director's decision should be sustained and the request for review denied.

II. The Regional Director Correctly Found that Full-Time Contingent Faculty Are Not Managerial Employees, and the Employer Has Not Established a Compelling Reason for a Grant of Review on the Managerial Issue.

There are 39 full-time contingent faculty members, each of whom has a one-year contract contingent upon student enrollment and departmental funding. For PLU to assert, before the Regional Director and before the Board, that PLU has given those individuals the authority to "manage" the University is absurd. As on the jurisdiction issue, the Regional Director carefully reviewed all the record evidence on managerial status and, citing the evidence and the appropriate Supreme Court and Board law, correctly articulated his finding that PLU's full-time contingent faculty are not managerial.

In its request for review on this issue, PLU distorts the record and asks the Board to ignore the facts which are determinative of the outcome of the issue, in part by failing to acknowledge that tenured and tenure-track faculty possess markedly different characteristics in terms of authority and actual participation in faculty governance,[3] and in part by making sweeping generalized statements about faculty governance which are contradicted by specific testimony. For example, despite the evidence to the contrary, the Employer asserts that the PLU

[3] As the Regional Director points out, in *NLRB v. Yeshiva*, 444 U.S. 672 (1980), the Court suggested that in some contexts a rational line could be drawn between tenured and untenured faculty members. The issue of whether PLU's tenured and tenure-track faculty are managerial was not before the Regional Director.

faculty assembly exercises authority over all of the academic matters described in *Yeshiva*; yet even to the extent that the faculty assembly does have veto power over certain faculty committee recommendations, the full-time contingent faculty are a minority of the voting members,[4] and the Employer did not identify a single contingent faculty member who ever attended a faculty assembly meeting let alone voted on a committee recommendation that concerned a managerial subject. As the Regional Director noted, PLU's full-time contingent faculty do not sit on the faculty committees where "in practice [the] power resides." Rather, PLU's contingent faculty are merely "not barred" from participation on purely advisory committees that include administrators and students.

Similarly, the Employer asserts that some academic decisions are made at departmental levels, but there is zero evidence in the record that full-time contingent faculty have ever been included in any departmental decision-making that reached a managerial level. At most, the record establishes that all faculty are invited to "take part in discussions" at the departmental level. [E.g., TR 72]

The Employer asserts that the Regional Director incorrectly applied the burden of proof, that the Union had the burden to show "that administrators are relied upon for their independent review and recommendation regarding academic matters." Under the Employer's cited case, *Lewis and Clark College*, 300 NLRB 155 (1990), that burden would be present only if the Employer had established that the full-time contingent faculty actually possess the authority and exercise the authority to make managerial decisions. Only then does the burden shift to show that the administrators exercise independent review. The Employer did not establish that the

[4] As noted by the Regional Director, the Board looks to whether proposed bargaining unit members make up majority or minority representation on governance bodies. *University of Great Falls*, 325 NLRB at 95, aff'd 331 NLRB 1663 (2000) refused to enforce on other grounds, 278 F.3d 1335 (D.C. Cir. 2002).

contingent faculty have authority over anything other than the content of their courses and the evaluation of their students. Those authorities do not lead to managerial status under *Yeshiva*.

The Regional Director is correct that the Employer has not met its burden of showing that full-time contingent faculty possess and exercise discretion of the nature which would defeat their collective bargaining rights. The Regional Director's decision in this regard applied existing Board law and is not clearly erroneous on any substantial factual issue. The Employer has not established a compelling reason for the Board to take review of this issue.

III. The Regional Director Did Not Erroneously Include Employees in the Bargaining Unit, and the Employer Has Not Established a Compelling Reason for the Grant of Review on the Bargaining Unit Determination.

The Employer asks the Board to reject the Regional Director's detailed and careful analysis of the law and evidence on community of interest factors and to find that it was error for the Regional Director to include all PLU contingent faculty in the same bargaining unit. The Employer first asserts that full-time contingent faculty should not be included in a bargaining unit with part-time contingent faculty, citing *New York University*, 205 NLRB 4 (1973). The Regional Director correctly rejected that Employer argument, and the Employer merely re-raises it in the request for review. As the Regional Director stated, the basis of the Board's decision in *New York University* was that the full-time faculty were the tenured and tenure-eligible faculty, while the part-time faculty were not tenure eligible. Thus, the significance of being full-time or part-time in that case was that the two groups did not share the "critical" factor of eligibility for tenure. In the present case, the Regional Director correctly noted, all contingent faculty share the critical factor of not being eligible for tenure, a factor from which multiple other terms and conditions of employment flow.

Second, in what the Regional Director correctly calls the Employer's "inconsistent arguments" which are "neither supported by the record nor by Board law," the Employer asks the Board to divide the contingent faculty into subgroups on the basis of each individual term or condition of employment. Under the Employer's proffered analysis each individual contingent faculty member would be placed in multiple subgroups, depending on the circumstances of his or her individual appointment. Under the Employer's analysis, for example, benefitted and non-benefitted contingent faculty in the same divisions and departments would not be in the same unit; music department contingent faculty who teach piano across the street from campus would not be in the same unit as music department faculty who teach music theory on campus; nursing contingent faculty who teach off-campus would not be in a bargaining unit with nursing contingent faculty who teach on-campus; contingent faculty in a single department who are expected to have terminal degrees would be in a different unit than contingent faculty in the same department who are not expected to have terminal degrees; contingent faculty who are paid through "pooled funds" would not be in the same unit as contingent faculty paid by budgeted funds; contingent faculty who also teach at other facilities would not be in the same unit as contingent faculty who only work at PLU; a contingent faculty member who teaches a course for a faculty member who is on sabbatical would be in one unit for that course and in a different unit while teaching a course necessary to meet enrollment demands. The list goes on and on.

The Regional Director rejected this scattershot approach designed to deny statutory employees the exercise of rights guaranteed to them under the National Labor Relations Act. Instead, the Regional Director correctly found that all contingent faculty are "readily identifiable as a group" and that they share a sufficient community of interest to constitute a single bargaining unit. The Employer, in its request for review, asserts that the Regional Director based

this conclusion on a single community of interest factor: that all contingent faculty "teach." In this regard, the Employer again raises *Goddard College*, 216 NLRB 457 (1975) and again asserts that under *Goddard College* the fact that faculty "teach" is not controlling in a bargaining unit determination. The Union has two responses on this point. First, even a cursory reading of the Regional Director's decision shows that the Regional Director did not find a bargaining unit of PLU contingent faculty to be appropriate solely on the basis that they all teach. Second, the Employer refuses to read and consider that three years after the *Goddard College* decision upon which it so relies, the Board issued a second *Goddard College* decision, *Goddard College*, 234 NLRB 111 (1978). In the second *Goddard College* case, the Board found that a bargaining unit comprised of the college's entire graduate core faculty was appropriate despite differences in terms and conditions of employment even greater than those the Employer asserts exist at PLU. Reading those cases together, as the Regional Director did, it is clear that the Employer mistakenly relies on the 1975 *Goddard College* language quoted in its request for review to support its argument.

Despite the Employer's best efforts to obfuscate them, the record facts before the Regional Director clearly support the Regional Director's decision. The Employer's contingent faculty, in its various "employment models," work across PLU's schools and divisions, all of which are headquartered at the PLU Tacoma campus; they all have campus or studio space and a PLU email address and phone number; they are part of the same administrative structure and report up through layers of administration; they sign one of two standard employment contracts depending on whether they work at least a .5 FTE and are therefore eligible for benefits; those who receive benefits receive the same benefits as each other; they are paid on the basis of the credit hours assigned to their teaching responsibilities; they are hired on the basis of their special

expertise and teach regularly scheduled classes set forth in the PLU course book; they are all required to be available to students outside of class time; they all teach to the same secular mission statement and are part of PLU's "community of scholars"; they are all subject to the same faculty handbook provisions and numerous employment policies; they share the faculty characteristics described in the faculty handbook in that they enjoy academic freedom and the responsibility for designing their curriculum and deciding their teaching methods; and, like the faculty in the unit found appropriate in *New York University*, they share the critical characteristic of not being eligible for tenure. As in the 1978 *Goddard College* case, the "differences" that the Employer focuses on do not offset the factors which identify the bargaining unit as one comprised of the entire PLU contingent faculty.

The Regional Director correctly relied on record facts and applied existing Board law to determine that PLU's contingent faculty members have a distinct community of interest and a separate identity apart from other employees of PLU and constitute an appropriate bargaining unit. The Employer has presented no compelling reason that the Board should grant review on this issue.

IV. The Regional Director Correctly Fashioned an Eligibility Formula Consistent with Board law.

As the Regional Director clearly recognized, the Board adopts an eligibility formula that is inclusive, not exclusive. In *Juilliard School*, 208 NLRB 153 (1974), cited in *Trump Taj Mahal Casino*, 306, NLRN 294 (1992), the Board determined that ''casual'' employees who would not have been eligible under a standard formula worked on a repetitive basis and had a continuing interest in employment. Therefore, the Board devised an inclusive – not exclusive – eligibility formula to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment. In

crafting the eligibility formula in this case, the Regional Director correctly noted that for a number of the contingent faculty their employment may be episodic since they may teach courses once per year, or once every other year depending upon curricular needs. PLU's assertion that only those contingent faculty employed at the time of the election should be eligible to vote fails to address the episodic nature of the contingent faculty employment and must be disregarded.

The Regional Director then fashioned a formula consistent with the teachings and holdings of *C.W. Post Center of Long Island University*, 198 NLRB 453, 454 (1972):

> …a regular pattern of continuing employment in past academic years can be indicative of the type of expectation of future employment necessary to establish a continuing interest in the unit. Adjunct professors not teaching during the semester in which the election is conducted may have an even greater interest than their counterparts who happen, by chance, to be on payroll status at that particular time….efforts should be made to prevent an arbitrary distinction which enfranchises adjuncts who happened to be teaching at the time of the elections while disenfranchising all others.

For the reasons stated above, the Regional Director applied an appropriate eligibility formula that is inclusive, not exclusive. Therefore, review should be denied.

V. The Hearing Officer Properly Admitted the AAUP Survey,[5] and That Ruling Cannot Be a Basis For a Grant of Review.

The Hearing Officer properly admitted the AAUP survey pursuant to the Board's Hearing Officer Guide and the Board's Rules and Regulations.

Representation case hearings are investigatory proceedings. It is not required that the rules of evidence and trial procedure be strictly followed. See Section 102.66(a), Rules and Regulations. Hearsay evidence may be received into evidence at the hearing in the discretion of the hearing officer. As noted in *Northern States Beef*, 311 NLRB 1056 fn. 1 (1993),

[5] P Ex 22

administrative agencies ordinarily do not invoke technical rules of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies.

Furthermore, PLU misstates the reliance of the Regional Director on the survey. For example, PLU asserts that the Regional Director, solely on the basis of the survey, improperly found significant interchange which favored the petitioned for unit. The Regional Director, in fact, stated:

> Here, the **record** (emphasis added) reveals that contingent faculty may move from one type of contract and one method of payment to another from year to year or even be paid according to multiple methods during a single semester. Much as a factory employer might shift shipping employees to production lines as needed, the University shifts its contingent faculty to different types of classes and different teaching loads as enrollment demands. Employees may receive benefits one year and not the next. Thus, there is interchange among the types of contingent faculty. This significant interchange was **borne out** (emphasis added) by the survey…

Clearly the Regional Director relied on the record as a whole and appropriately used the survey only as additional confirming evidence. Moreover, PLU had full opportunity at the hearing to rebut any and all of Petitioner's evidence, including the information in the survey. However, even now, PLU is not arguing that the information is not accurate, only that the survey should not have been admitted.

Petitioner's survey was properly admitted and appropriately cited and thus cannot be a basis for granting PLU's request for review.

VI. The Election Should Be Held as Directed by the Regional Director.

The Regional Director properly asserted jurisdiction, found an appropriate unit, and ordered an election. Thus, there is no basis for staying the election. The prompt resolution of questions concerning representation is a primary objective of the Act.[6]

[6] The Board's Casehandling Manual (Part Two—Representation Proceedings) Section 11300.

VII. Conclusion.

Under the Board's Rules and Regulations, Section 102.67(c), "The Board will grant review [of a Regional Director's Decision and Direction of Election] only where compelling reasons exist therefor." The Employer has not established a compelling reason for a grant of review. The Employer has not shown that the Regional Director's Decision contains a substantial question of law or policy raised by the absence of, or departure from Board precedent. Rather, the Regional Director applied existing Board law on jurisdiction, managerial status, bargaining unit composition, and employee eligibility. Additionally the Regional Director accurately determined that the Board has jurisdiction over PLU under the Employer's asserted D.C. Circuit standard. The Employer has not shown that the Regional Director's Decision is clearly erroneous on a substantial factual issue. Rather, the Regional Director's careful and thorough recitation of the facts accurately reflects the record, while the Employer's asserted facts distort and ignore the evidence. The Employer has not established a compelling reason for the Board to grant review. The Union asks that the Board deny review.

DATED this 28th day of June, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of June, 2013, I electronically filed with the NLRB via e-file the Union's Statement in Opposition to Request for Review and served the document as follows:

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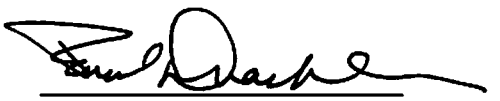

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