UNITED STATED OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SFTC, LLC d/b/a SANTA FE TORTILLA COMPANY, and YOLANDA GALAVIZ, an Individual. and COMITÉ DE TRABAJADORES DE SANTA FE TORTILLA	Case Nos. 28-CA-087842 28-CA-095332

BRIEF IN SUPPORT OF RESPONDENT SFTC, LLC'S LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Danny W. Jarrett
Jackson Lewis LLP
4300 San Mateo Blvd. NE
Suite B-260
Albuquerque, NM 87110

Jeffrey W. Toppel
Jackson Lewis LLP
2398 E. Camelback Rd., Suite 1060
Phoenix, Arizona 85016

Attorneys for SFTC, LLC

INTRODUCTION

Respondent SFTC, LLC d/b/a Santa Fe Tortilla Company ("SFTC" or "Santa Fe Tortilla") submits this brief in support of its limited exceptions to the Administrative Law Judge's Decision in the above-captioned matter. As will be explained below, Administrative Law Judge William Kocol ("ALJ Kocol") erred in concluding that SFTC "transferred" two employees, Yolanda Rivera ("Rivera") and Lillian Lopez ("Lopez") in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act" or the "NLRA") despite ample evidence that employees are regularly moved between SFTC's two tortilla lines, a lack of any evidence in the record demonstrating that the decision-maker knew of Rivera and Lopez's protected activity at the time the decision was made, as well as a record containing credible evidence of the non-discriminatory reasons for the decision to move them to the other production line, which were not shown to be pretextual. Moreover, the ALJ also erred in concluding that SFTC violated Sections 8(a)(1) and (3) of the Act by discharging two employees, Delfina Bruno ("Bruno") and Yolanda Galaviz ("Galaviz"), because they were involved in union and other protected activity despite evidence that Bruno and Galaviz engaged in a variety of egregious and unlawful conduct that lost the protections of the NLRA.

Because ALJ Kocol's Decision with regard to only the above-referenced issues is not based on a preponderance of the credible evidence in the record, and because it is unsound as a matter of law, SFTC excepts to each. The National Labor Relations Board (hereinafter referred to as "Board") should sustain SFTC's limited exceptions and reverse

the ALJ Kocol's Decision only as it relates to the findings and conclusions addressed by SFTC's exceptions.

STATEMENT OF PROCEEDINGS

As recounted by Administrative Law Judge William G. Kocol in his Decision,[1] and as more fully set forth in the record, this case arises from the following proceedings:

On August 20, 2012, Galaviz filed an unfair labor practice charge with Region 28 of the NLRB. 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 Act. 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 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.

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 at least twenty-five (25) separate types of misconduct. SFTC answered the Consolidated Complaint and denied the NLRB's allegations that it engaged in the various alleged unfair labor

[1] Citations to pages of the ALJ's Decision are indicated by the reference "(ALJD p. __, 1.__)." Citations to pages of the transcript of the hearing in this case are indicated by the reference "(TR _____)." References to Exhibits introduced at the hearing are as follows: General Counsel's exhibits "(GC Exhibit ___)"; and Respondent SFTC's exhibits "(R Exhibit ____)."

practices. A hearing was held on the Acting General Counsel's unfair labor practice claims before ALJ Kocol beginning on February 26, 2013 and concluding on March 5, 2013.

The ALJ's Decision was issued on June 25, 2013 dismissing nearly all of the unfair labor practice allegations contained in the Consolidated Complaint. Of the dozens of allegations that the AGC asserted, ALJ Kocol only found that SFTC committed the following two unfair labor practices:

> (1) By transferring Rivera and Lopez from the flour tortilla production line to the corn tortilla production line because they were involved in union and other protected concerted activities, SFTC violated Sections 8(a)(3) and (1). [ALJD at p. 11]
>
> (2) By discharging Bruno and Galaviz because they were involved in union and other protected concerted activities, SFTC violated Sections 8(a)(3) and (1). [ALJD at p. 15]

For the reasons explained below, SFTC takes exception to ALJ Kocol's findings regarding these unfair labor practice allegations.

SFTC'S POSITION

POINT I

(Exceptions 1-16, 29)

ALJ Kocol's conclusion that SFTC "transferred" Rivera and Lopez because they were involved in union and other protected activities is contrary to the evidence in the record. As will be explained below, there is substantial evidence in the record demonstrating that, since 2003 and continuing currently, SFTC regularly and "constantly" moved its production employees between the corn and flour production

lines, that this regular movement amongst the two lines was not a "transfer," and that there was little difference in the work performed on the two lines. Moreover, and perhaps most significantly, the record is devoid of any evidence establishing that the individual who made the decision to move Rivera and Lopez to the corn tortilla line in August 2012, Arlette de la Mora, had any knowledge that either Rivera or Lopez had engaged in any protected conduct.

First, the record is replete with evidence that production employees at SFTC were regularly moved amongst its two tortilla production lines (corn and flour). Consistent with the testimony of supervisor Arlette de la Mora, several of the witnesses acknowledged that they were not hired to work on a particular line and that they had worked on both lines during their employment with SFTC, including at least one witness (Galaviz) who testified that she had worked on both lines on the same day on multiple occasions.[2] [TR 355:13-19; 388:21-389:1; 449:16-18; 468:8-17, 535:13-15]

Contrary to ALJ Kocol's finding, Rivera did not work "continuously" on the flour line prior to the move to the corn line in August 2012. Rivera specifically testified that she worked on the corn line prior to her assignment on the corn line in August 2012 and further testified that received training on the corn line at the start of her employment with the Company. [TR 502:11-21] She further testified that she never complained about her previous assignments to the corn line. [TR 503:5-20] Lopez – who is a much newer employee – testified that, even after the alleged "transfers" to the corn line, she continued

[2] Significantly, Rivera testified that, as of the time of the hearing in March 2013, she was working on the flour tortilla line. [TR 502:2-3]

to work some days on the flour line. [TR 545:2-12] This evidence, which was corroborated by Ms. de la Mora's testimony that she "constantly" moved employees between the two lines, clearly demonstrates that SFTC did not "transfer" either Rivera or Lopez to a particular line, but instead moved them to a new line as was common. [TR 825:22 – 826:11; 828:7-14]

Second, the evidence does not support ALJ Kocol's conclusion that the corn tortilla line was in any way more difficult. While several of the Comité members provided self-serving testimony that the corn line was faster than the flour line, SFTC's production supervisor, Ms. de la Mora, testified that the corn line was believed to be easier because the number of tortillas per bag is higher on the corn line. [TR 826:12-26] Although Lopez testified she believed the corn line was more difficult because it had a computer that she had not been trained to use, she subsequently acknowledged that use of the computer was not part of her responsibilities and she was only asked by a new supervisor to use it on some isolated occasion after her move to the corn line. [TR 545:20-546:10]

Third, and most significantly, ALJ Kocol improperly concluded that the decision-maker, Arlette de la Mora, had knowledge of the protected, concerted activities of Rivera and Lopez at the time she made the decision to move them to the corn line in August 2012, as required to make a *prima facie* showing under *Wright Line*.[3] In his decision, ALJ Kocol summarily concluded that "Lillian Lopez and Rivera engaged in union and

[3] *Wright Line*, 251 NLRB 1083, *enfd.*, 662 F.2d 899 (1st Circ. 1981), *cert. denied*, 455 U.S. 989 (1982).

protected concerted activity and *Santa Fe Tortilla obviously knew this.*" [ALJD at p. 10 (emphasis added)] In the decision, ALJ Kocol did not specifically find that de la Mora had knowledge of the protected conduct of either Lopez or Rivera (prior to the decision to move them to the corn line) or that there was any basis to impute such knowledge to Ms. de la Mora. This is significant in light of Ms. de la Mora's clear testimony 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)][4]

There is no evidence in the record to establish that Ms. de la Mora had any specific knowledge of either Rivera or Lopez' involvement with the Comité or their participation in any alleged protected, concerted activities. Nor is there evidence on which ALJ Kocol could have relied to impute this knowledge to Ms. de la Mora.[5] The Board has refused to impute knowledge from a supervisor to a decision-maker on

[4] In the decision, ALJ Kocol notes that it struck him "as unlikely that Lopez would be the beneficiary of de la Mora's beneficence on the heels of Lopez' criticism of de la Mora in the August 7 letter." [ALJD at pp. 10-11] However, the evidence in the record indicates that de la Mora was not told of any specific criticisms or even that there was a committee. [TR 296:5-12]

[5] There is also no evidence in the record to establish that any other supervisor was involved in the decision to move either Rivera or Lopez.

numerous occasions. *See e.g. Ellison Media Co.,* 344 NLRB 1112 (2005)("A manager's or supervisor's knowledge of an employee's protected concerted activities may be imputed to the employer, but is such knowledge is denied, and the denial is credible in the context of all of the circumstances of the case, knowledge of protected activity will not be imputed to the employer.)(citation omitted). *See also, Sears, Roebuck & Co. v. NLRB,* 349 F.3d 493 (7th Cir. 2003)(denying enforcement of Board's order against employer and finding that "[f]or purposes of the prima facie case under §§ 158(a)(1) and (a)(3), an employer can only be said to know of the employee's protected activities through the decisionmaker…As to Graettinger, the decisionmaker who fired Hepburn, nothing in the ALJ's opinion (or the record, as far as we can tell) provides any indication that he knew that Hepburn made any pro-union comments at the meeting.") Therefore, the Acting General Counsel failed to establish a key element of the Board's *prima facie* case under *Wright Line* – knowledge of the decision-maker of the protected, concerted activity.

Additionally, there is also no evidence in the record to support ALJ Kocol's conclusion that SFTC was "hostile" to the union or protected activities of Lopez and Rivera. As ALJ Kocol concluded through his dismissal of many of the unfair labor practice claims, including those relating to Gustavo Terrones' meetings with both Rivera and Lopez [ALJD at pp.6, 7], there was no evidence that SFTC had any general hostility towards the Comité or its members. His reliance on SFTC's "transfer" of these two employees to the corn line to demonstrate "hostility" is circular reasoning, which should be rejected by the Board.

Finally, ALJ Kocol's decision to discredit Ms. de la Mora's testimony concerning the reasons for her decision to move Rivera and Lopez to the corn line, at the time she chose to, does not comport with the evidence. As explained, in footnote 4, his belief that it was unlikely Ms. de la Mora would help Lopez "on the heels of Lopez' criticism" of Ms. de la Mora fails to recognize the fact that there was no evidence that Ms. de la Mora was aware of such criticism. Additionally, in light of the substantial evidence in the record that these moves were frequent, ALJ Kocol's view concerning a lack of evidence that Lopez was previously been counseled concerning her performance issues is irrelevant. There was no evidence at the Hearing that the "constant[]" movement of employees amongst the two lines only involved employees who had been formally counseled. Moreover, his decision also fails to consider the evidence that Rivera previously worked on the corn line and was specifically trained on the corn line at the start of her employment.

Finally, ALJ Kocol's decision to order a "make-whole remedy" for Rivera and Lopez is not supported by the evidence in the record. As he noted his decision, managing member Kenny Kalfin provided credible testimony "concerning how the hours of all employees fluctuate based on the orders from customers" and that they did so "both before and after the August 7th letter." [ALJD at p. 12] Moreover, in light of the testimony from Lopez that she continued to work certain days on the flour tortilla line following her move to the corn tortilla line, there is no basis for an award of a "make-whole remedy" on these allegations.

For all of these reasons, the Board should reverse ALJ's findings that SFTC violated the NLRA when it "transferred" Rivera and Lopez in August 2012.

POINT II

(Exceptions 18-28)

ALJ Kocol also erred in concluding that SFTC terminated employees Galaviz and Bruno for engaging in conduct protected by Section 7 of the NLRA. In reaching his decision, ALJ Kocol failed to consider 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.* In light of his decision to dismiss most of the Acting General Counsel's allegations, ALJ Kocol's failure to even recognize the fact that these two employees were the only two members of the Comité terminated is perplexing. The evidence in the record clearly fails to establish 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 an initial point, there is no basis for ALJ Kocol's statement in his decision that Mr. Kalfin "admitted that Santa Fe Tortilla discharged Galaviz and Bruno because they engaged in union and other concerted activity." [ALJD at p. 15] Not only is there evidence to the contrary, but when questioned by Counsel for the Acting General Counsel, Mr. Kalfin clearly stated that he welcomed the type of conduct in which the Comité sought to engage. Specifically, Mr. Kalfin testified: "I *welcome* people joining committees and forming organizations and talking about their concerns." [TR 102:25-103:8] He also specifically denied that he considered either Galaviz or Bruno's

participation on the Comité in his decision to terminate their employment. [*Id.*] This is consistent with the critical fact – not mentioned anywhere in the ALJ Kocol's decision – that although several employees participated in various forms of protected, concerted activity, only Galaviz and Bruno were terminated. Importantly, there is no evidence in the record to establish that either Galaviz or Bruno were "leaders" on the Comité and Galaviz specifically claimed that she was not one of the leaders of the Comité. [TR 368:4-6]

Moreover, ALJ Kocol failed to properly consider the evidence contained in the record demonstrating that the conduct that Galaviz and Brunon engaged in went beyond the protections contained in Section 7 of the NLRA. 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 was based lost the protections of Section 7 of the NLRA.

Although ALJ Kocol's decision did not identify the analytical framework that he applied in reaching his conclusion regarding the termination allegations, the framework established by the U.S. Supreme Court in *NLRB v. Burnup & Sims*[6] should be applied. 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 carries this burden, the respondent may rebut the Acting General Counsel's case by showing that it held an honest belief that the employee 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*.

As explained above, contrary to ALJ Kocol's findings, Mr. Kalfin did not admit to terminating Galaviz or Bruno for an improper purpose. Significantly, ALJ Kocol credited Mr. Kalfin's testimony on more than one occasion elsewhere in his decision [ALJD at p. 10]. Regarding 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?

[6] *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964)

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] Also, consistent with the other evidence in the record, Mr. Kalfin vehemently denied that he considered Galaviz or Bruno's participation in the Comité as part of his decision to terminate their employment and he further testified that *he welcomed employees to join committees to discuss their concerns*. [TR 102:25-103:8] Rather than specifically discrediting Mr. Kalfin's testimony, ALJ Kocol improperly concluded that Mr. Kalfin *admitted* to terminating Galaviz and Bruno for an unlawful purpose. Mr. Kalfin simply did not make such an admission.

Moreover, ALJ Kocol's decision to discredit the testimony of Gustavo Abel Lopez is also suspect. Unlike the Charging Parties, Mr. Lopez had no motivation to lie under oath at the Hearing. At the time of his testimony, Mr. Lopez was no longer employed by SFTC. Mr. Lopez testified emphatically 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. 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] ALJ Kocol's decision to discredit Mr. Lopez's testimony because "he was a newly-hired employee who obviously had second thoughts about signing the letter" does not make sense in light of the fact that he was a former employee at the time of his

testimony. [ALJD at p. 14] Moreover, although ALJ Kocol decided to discredit portions of Galaviz's testimony regarding her meeting with Gustavo Terrones ("Terrones") and Alfredo Jasso ("Jasso") regarding the August 7 letter [ALJD at p. 9], he inexplicably accepted her denial that she forged Mr. Lopez's name on the letter. He did so despite Galaviz's less convincing testimony that she witnessed Mr. Lopez actually 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?

(Objection omitted)

A: He also approached.

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

(Interpretation omitted)

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

[TR 358:10-21] As the record clearly demonstrates, other than the evidence presented concerning the employee complaints received by SFTC regarding 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.

Moreover, in his decision, there is nothing indicating that ALJ Kocol considered whether Galaviz and Bruno's conduct fell outside the limitations, recognized by the Board, 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 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.*

Moreover, ALJ Kocol failed to properly consider Galaviz's own testimony concerning her efforts to obtain signatures from other employees, including Edgar Lopez, and her admission 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 was engaging in this conduct along with Galaviz. [TR 93:2-4]

Additionally, as demonstrated by the testimony of Gustavo Terrones and Kenny Kalfin, SFTC established that it had an honest good-faith 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. Although ALJ Kocol relied on the fact that SFTC did not conduct a thorough investigation of the complaints made against Galaviz and Bruno, such an investigation was not necessary in order to establish a good-faith belief. 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.

For the reasons stated above, as well as the credible evidence in the record, ALJ Kocol erred in concluding 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.

POINT III

(Exception 17)

ALJ Kocol also erred in finding that SFTC was "hostile" towards the "union activity" of Luis Juarez (also known as Jesus Saldana). [ALJD at p. 13] Although this erroneous finding does not impact SFTC's other exceptions, it may impact future proceedings. There is absolutely no evidence in the record to support this finding and it conflicts with several of ALJ Kocol's other findings in his decision. Significantly, ALJ Kocol dismissed all of the numerous claims relating to Luis Juarez and recognized that SFTC had gone out its way to accommodate Juarez during his employment.

CONCLUSION

The Board should sustain SFTC's limited exception to ALJ Kocol's decision and dismiss all of the allegations contained in the Consolidated Complaint.

DATED: July 23, 2013

JACKSON LEWIS LLP

By /s/ Jeffrey W. Toppel

Danny W. Jarrett
4300 San Mateo Blvd. NE
Suite B-260
Albuquerque, NM 87110

Jeffrey W. Toppel
2398 E. Camelback Rd., Suite 1060
Phoenix, Arizona 85016

Attorneys for SFTC, LLC

I hereby certify that a copy of the BRIEF IN SUPPORT OF RESPONDENT, SFTC, LLC'S LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE IN Cases 28-CA-087842 and 28-CA-095332 was served by **E-Gov, E-Filing, E-mail and U.S., Mail on July 23, 2013 as follows:**

Via E-Gov, E-Filing* to*:

Gary Shinners, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board 28
1099 14th Street NW, Room 11602
Washington, DC 20570-0001

Via U.S. Mail to:

Yolanda Galaviz
4650 Airport Road, Apt. 205
Santa Fe, NM 87507-2850

Comite de Trabajadores de Santa Fe Tortilla
2000 Hopewell Street, Apt. 103
Santa Fe, NM 87505-3545

Via Electronic mail to:

Sophia Alonso
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
421 Gold Avenue, SW, Suite 310
Albuquerque, New Mexico 87103-0567

/s/Debbie Mattatall

4812-3431-8100, v. 1