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

ANSWERING BRIEF OF RESPONDENT SFTC, LLC'S IN SUPPORT OF 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

With her Cross-Exceptions, the Acting General Counsel (the "General Counsel") exaggerates the record to create a revisionist history of what occurred at SFTC in the months following the formation of a workers' committee, Comité de Trabajadores de Santa Fe Tortilla (the "Comité"), in August 2012. Contrary to the General Counsel's revisionist history, the entire record demonstrates time and time again that SFTC management was not hostile towards the Comité or its stated objective to create a "collective voice". Instead, as Administrative Law Judge William Kocol ("ALJ Kocol") correctly recognized in his decision, SFTC did exactly what the Comité asked for when it met with members of the Comité to attempt to address their concerns about the workplace. SFTC's response to the Comité and the issues raised by the Comité in a series of letters to SFTC management was both lawful and entirely appropriate under the circumstances.

Although the General Counsel repeatedly refers to the employees' efforts to form a *union*, there is absolutely no evidence in the record demonstrating that the employees at SFTC were seeking to establish the Comité as an exclusive bargaining agent of SFTC employees under Section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159. Rather, as Counsel for the General Counsel recognizes in her Answering Brief, the evidence presented at the hearing demonstrates that the Comité was formed by a handful of SFTC employees to create a "collective voice to defend the rights of the tortilla workers…" [Answering Brief at p. 3] As ALJ Kocol emphasized at various

points throughout his decision, this distinction is an important one under which all of the General Counsel's should be viewed:

> …this is a case where the employees outwardly expressed their concerns and asked that they be addressed and the employer asked about those concerns and promised to rectify them if appropriate. *The employees cannot voice concerns and ask that they be rectified and then complain when an employer does just that.*

[ALJD at p. 4 (emphasis added)] As will be explained below, ALJ Kocol correctly considered the General Counsel's allegations in the context of the Comité's objectives and properly concluded that SFTC's response to the Comité, with certain exceptions separately addressed by SFTC in its Limited Exceptions, were lawful.

Moreover, with respect to the numerous allegations of unlawful discrimination that ALJ Kocol dismissed, his decision was based largely on his specific credibility findings, which the Board should not disturb. As detailed below, ALJ Kocol properly dismissed the General Counsel's numerous allegations of discrimination against employees Luis Juarez[1] and Yolanda Rivera.

ARGUMENT

I. THE ALJ PROPERLY FOUND THAT SFTC DID NOT DISCRIMINATE AGAINST LUIS JUAREZ.

The General Counsel alleged that SFTC discriminated against Luis Juarez on three separate occasions in the weeks and months following the formation of the Comité. With

[1] Incredibly, the General Counsel continues to refer to "Luis Juarez" as "Jesus Saldana" despite Mr. Juarez's testimony under oath at the hearing that his "true" and "real" name was "Luis Juarez" and "Jesus Saldana" was only the name that he had used to obtain employment at SFTC. [TR 655:6-656:14] Counsel for the General Counsel seemingly wants to ignore the significance of this testimony on both Luis Juarez's credibility and the underlying allegations of discrimination. However, the Board should not ignore Mr. Juarez's testimony on this point.

respect to Luis Juarez, the General Counsel adopted a kitchen-sink approach in which it argued that *anything and everything* negative that happened to Mr. Juarez following the formation of the Comité was the result of a discriminatory animus. The General counsel adopted this approach despite the substantial evidence in the record of all of the many positive actions that SFTC took relating to Mr. Juarez, including but not limited to, its continuous accommodation of his medical condition.

Significantly, in dismissing the General Counsel's allegations relating to Luis Juarez, ALJ Kocol made detailed findings concerning the credibility of both Gustavo Terrones and Luis Juarez. In doing so, ALJ Kocol concluded that Mr. Terrones appeared to be a more credible witness than Luis Juarez. [*See* ALJD at pp. 4, 12] ALJ Kocol's decision to discredit the testimony of Luis Juarez is completely supported by the evidence in the record. Among the substantial evidence that supports ALJ Kocol's decision is Mr. Juarez's acknowledgment that he signed his NLRB affidavit, under oath, using the name "Jesus Saldana" despite the fact that "Jesus Saldana" was an assumed name and not his "real" or "true" name. [TR 655:6-656:14] As Counsel for the General Counsel readily points out in her Answering Brief in opposition to SFTC's Limited Exceptions, the Board has held that an administrative law judge's credibility determination will not be disturbed unless the clear preponderance of all relevant evidence shows that the determination is incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d. Cir. 1951). The General Counsel simply cannot demonstrate that the detailed credibility determinations on which ALJ Kocol predicated many of his findings regarding Luis Juarez were incorrect.

A. Luis Juarez's Alleged August Suspension.

While SFTC disagrees with ALJ Kocol's finding that it was hostile towards Luis Juarez's union activity, ALJ Kocol properly concluded that SFTC did not discriminate against Mr. Juarez when it requested he bring in a doctor's note prior to allowing him to return to work after learning for the first time that he could not work in cold conditions. Moreover, ALJ Kocol specifically credited Gustavo Terrones' testimony as to why he requested the doctor's note when he did. In doing so, the ALJ properly concluded that it was the information regarding Luis Juarez provided by the Comité in its August 7, 2012 letter that triggered Mr. Terrones' request for the doctor's note – not Luis Juarez' protected, concerted activity. Specifically, ALJ Kocol concluded:

> Then it learned that [Juarez] was complaining that Santa Fe Tortilla was not accommodating [Juarez] to a supposed restriction about working in cold temperatures. Remember, [Juarez] had not informed Santa Fe Tortilla *of this restriction*, so how could it know about it. Under these circumstances, Santa Fe Tortilla wisely decided to require a doctor's note to identify the restriction…

[ALJD at p. 13] The General Counsel has failed to establish that ALJ Kocol's credibility determination was incorrect based on a preponderance of evidence in the record or that he otherwise erred in reaching this conclusion.

Although the General Counsel argues that the timing of the request supports a finding of discriminatory animus, this argument should be rejected for obvious reasons. As explained above, the timing of the request was the result of Mr. Terrones first learning

of Mr. Juarez's problems working in cold conditions, which came in the Comité's first letter to the Company. The testimony of Mr. Terrones, which was specifically credited by ALJ Kocol, clearly explained that, prior to receiving the August 7, 2012 letter, Luis Juarez had "never approached [him] telling [him] that we were forcing him to carry out tasks or jobs that he could not carry out or do." [TR 137:14-138:3] Counsel for the General Counsel has not pointed to any evidence to contradict this testimony.

Moreover, the General Counsel's claim that SFTC's "attitude toward [Juarez] dramatically changed after the first Comittee letter" is entirely unsubstantiated and contradicted by Mr. Juarez's own testimony. As Mr. Juarez testified at the hearing, SFTC continued to accommodate his medical condition after learning on his participation in the Comité:

> 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] As such, the Board should affirm ALJ Kocol's dismissal of the General Counsel's allegation that SFTC unlawfully suspended Luis Juarez in August 2012.

B. Luis Juarez's Alleged December 2012 Suspension.

SFTC's request that Mr. Juarez provide it with a doctor's note in December 2012 was not "clearly illegally motivated," as the General Counsel argues, and the Board should affirm ALJ Kocol's decision to dismiss this allegation. As will be explained below, the General Counsel failed to produce any evidence to support the theory that SFTC's articulated concerns about the health risks associated with Mr. Juarez's condition were pretextual. In addition, ALJ Kocol properly concluded that the delay in Mr. Juarez's return to work was the result of SFTC's efforts to comply with its obligations under Federal immigration law and not discrimination.

Once again, ALJ Kocol made specific findings relating to the reasons for SFTC's request for a doctor's note from Luis Juarez in December 2012 and properly concluded that SFTC's request was made for a legitimate, non-discriminatory reason. In doing so, ALJ Kocol once again based his findings on an assessment of the credibility vis-a-vis the two critical witnesses – Gustavo Terrones and Luis Juarez. Ultimately, ALJ Kocol

determined that SFTC had a legitimate reason for its request for a new doctors' note from Luis Juarez in December 2012 as he had informed the company that he was about to begin a new treatment regimen for his cancer that would require him to wear a medical device containing potentially hazardous chemicals while on the production floor. [ALJD at p. 18-19]

In arguing that the December 2012 suspension was unlawful, the General Counsel focuses its argument on its claim that SFTC's rejection of a note submitted in the name Luis Juarez was discriminatory. However, it is undisputed that Mr. Juarez had applied for employment using the name "Jesus Saldana" and that the name "Jesus Saldana" appeared in SFTC's employment records. [TR 655-56] The General Counsel's argument is predicated on the unsubstantiated testimony of Luis Juarez that he had informed certain SFTC supervisors that he wanted to "change his name" from Jesus Saldana to Luis Juarez. In making this argument, Counsel for the General Counsel takes extreme liberties with the evidence in the record. Contrary to her argument, there is no undisputed evidence in the record to establish that Gustavo Terrones and Arlette de la Mora knew that Jesus Saldana also was known by Luis Juarez. The evidence that Counsel for the General Counsel relies on is the testimony of Luis Juarez – a witness that ALJ Kocol discredited on multiple occasions in his decision. [Answering Brief at p. 40] Moreover, as ALJ Kocol properly points out, even if he accepted Mr. Juarez's testimony that he had previously informed SFTC that he was using a false identity, SFTC was presented with a far different situation when Mr. Juarez "presented something in writing in another name." [ALJD at p. 19]

The evidence in the record supports the legitimate, non-discriminatory reason provided by SFTC for its request for a new medical note from Luis Juarez in December 2012, as well as the reason for the delay in permitting Mr. Juarez to return to work. The General Counsel failed to demonstrate that ALJ Kocol erred in dismissing this allegation.

C. Luis Juarez's Suspension in October 2012.

There is simply no evidence in the record to establish that SFTC's suspension of Luis Juarez was discriminatory. ALJ Kocol properly credited the testimony of Arlette de la Mora concerning Luis Juarez's continued refusal to comply with SFTC's packing procedures and his complete disregard for the instructions of his supervisor, which he accurately concluded constituted "repeated, brazen insubordination." [ALJD at p. 17] Tellingly, the General Counsel wants to simply disregard the substantial evidence in the record that, in the two-month period between SFTC's discovery of Luis Juarez' participation on the Comité and his October 2012 suspension, SFTC continued to provide "Jesus Saldana" with numerous accommodations for his medical condition.

The General Counsel's attempt to demonstrate that SFTC treated "Jesus Saldana" more harshly than other employees because he engaged in protected activity should be rejected. The General Counsel has not established the existence of any appropriate comparators. As noted above, none of the other employees to which Counsel for the General Counsel seeks to compare Luis Juarez engaged in the same type of "repeated, brazen insubordination" that Mr. Juarez was found to have participated in October 2012. Furthermore, Gustavo Terrones clearly testified that he considered Mr. Juarez's history of

misconduct in reaching his decision to suspend Mr. Juarez for five days. [TR 740:4-10, 774:6-16]

ALJ Kocol properly dismissed the General Counsel's allegation that SFTC's October 2012 suspension of Luis Juarez was discriminatory.

II. ALJ KOCOL PROPERLY DISMISSED THE GENERAL COUNSEL'S ALLEGATIONS REGARDING YOLANDA RIVERA'S SUSPENSIONS.

A. Rivera's Alleged September 2012 Written Warning.

As an initial point, other than Yolanda Rivera's testimony, there was no additional evidence introduced at the Hearing to establish that Ms. Rivera actually received a written warning for the absence that occurred on or about September 29, 2012.[2] [ALJD at p. 16] However, even if the Board was to accept Ms. Rivera's testimony that she was disciplined for the September absence, it should still affirm the dismissal of this allegation.

The General Counsel offered no evidence whatsoever that Mariela Campos – the supervisor who purportedly issued the written warning – was aware of Ms. Rivera's protected, concerted activity. Ms. Campos did not testify at the Hearing and there was no testimony from any other witness concerning Ms. Campos' knowledge. As explained above, knowledge of the decision-maker is a critical element that the General Counsel must prove in order to establish its *prima facie* case under *Wright Line.* Instead, ALJ Kocol relied on SFTC's knowledge of Ms. Rivera's union activity in finding that the

[2] Although Counsel for the General Counsel refers to the discipline as the "September 29 suspension" on page 48 of her Answering Brief, Ms. Rivera testified it was a write up. There is no evidence that it was a suspension.

General Counsel established a *prima facie* case. However, in doing so, ALJ Kocol allowed the General Counsel to side-step its initial burden under *Wright Line*. As both the Board and the courts have consistently recognized, "institutional knowledge" of protected, concerted activity alone is not sufficient to establish a *prima facie* case under *Wright Line*. Specifically, the Seventh Circuit Court of Appeals denied enforcement of a Board order and stated:

> [R]egarding imputation, courts have generally rejected the NLRB's attempts to simply attribute a foreman or supervisor's knowledge of an employee's union activities to the company. *Automatically imputing such knowledge to a company improperly removes the General Counsel's burden of proving knowledge.*

Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB, 219 F.3d 677, 685 (7th Cir. 1985)(emphasis added). There is simply no evidence in the record to establish that Mariela Campos had any knowledge of Ms. Rivera's protected, concerted activity prior to issuing her the purported write-up.

Moreover, ALJ Kocol properly found that SFTC met its burden to demonstrate that it would have disciplined Ms. Rivera even in the absence of her protected, concerted activity. In doing so, ALJ Kocol relied on Ms. Rivera's own testimony concerning the reason that she was given for the purported write-up. As Ms. Rivera explained at the Hearing, she was given the discipline not because she was absent, but instead because, even though she had called in sick, Ms. Campos discovered that she still was able to go dancing the evening of her absence and enjoy a three-day weekend. [TR 487:8-489:4; ALJD at p. 17] The General Counsel did not offer any evidence of other employees who engaged in similar misconduct and did not receive similar discipline. Because the

General Counsel did not offer sufficient evidence of pretext, and ALJ Kocol's conclusion was well ground in the evidence, Board should affirm dismissal of this allegation.

B. Rivera's November 2012 Discipline.

ALJ Kocol also properly dismissed the General Counsel's claim that SFTC discriminated against Ms. Rivera when it disciplined her in November 2012 for numerous violations of the Company's policy, which prohibited employees from wearing long sleeves that would fall below the sleeves of the employee's robe. Significantly, the undisputed evidence in the record demonstrated the Company's policy was communicated to Ms. Rivera prior to the discipline and that she had received multiple warnings concerning her conduct before her supervisor wrote her up. [TR 511:2-11, 833:2-9, 512:20-24, R. Ex. 1]

To rebut the legitimate, non-discriminatory reason provided by SFTC, the General Counsel argues that Ms. Rivera was treated less favorably than other employees who had also wore long sleeves to work. With respect to three employees – Lorena, Celia, and Marilyn – the General Counsel argues that SFTC's failure to produce written disciplines for these employees demonstrates disparate treatment. However, as Ms. Rivera admitted at the Hearing, SFTC only gave her the written discipline after she had been warned several times that she was violating the Company's policy. There was no evidence introduced by Counsel for the General Counsel that each of these other individuals had violated the policies numerous times. Therefore, those employees are not proper comparators and should not be considered. Moreover, with respect to the two other

employees who did receive discipline for the same policy violation (Diana Castaneda and Ruth Piche), the General Counsel's attempt to downplay and distinguish their violations is disingenuous and should be rejected. Both Castaneda and Piche are proper comparators. The fact that their disciplines occurred after the filing of Ms. Rivera's unfair labor practice charge is of little relevance. Once again, ALJ Kocol properly dismissed this allegations based upon the evidence presented in the record.

III. ALJ KOCOL PROPERLY DISMISSED THE GENERAL COUNSEL'S INDEPENDENT SECTION 8(a)(1) VIOLATIONS.

The General Counsel claimed SFTC engaged in a variety of independent violations of Section 8(a)(1) of the NLRA. In dismissing these allegations, ALJ Kocol properly evaluated the credibility of the witnesses and considered the underlying circumstances. With respect to ALJ Kocol's numerous credibility determinations relating to these allegations, the Board should affirm those credibility findings because the General Counsel has failed to produce any evidence to establish, by a preponderance of the evidence, that those determinations were incorrect. *See, Standard Dry Wall Products,* 91 NLRB 544 (1950), *enf'd.* 188 F.2d 362 (3d. Cir. 1951). For the reasons explained below, the Board should affirm ALJ Kocol's dismissal of these Section 8(a)(1) allegations.

A. Interrogation.

As the Board has recognized, 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).

ALJ Kocol properly concluded that Gustavo Terrones did not interrogate Yolanda Galaviz during his August 9, 2012 meeting with her. [ALJD at p. 9] In reaching this conclusion, ALJ Kocol evaluated the totality of the testimony regarding the August 9th meeting and correctly concluded that there was no evidence that Mr. Terrones had interrogated Ms. Galaviz concerning her union or protected activities or that she could have construed any of Mr. Terrones' statements as seeking to elicit information regarding those activities. [ALJD at p. 9-10] In doing so, ALJ Kocol specifically stated that he was discrediting portions of Ms. Galaviz's testimony concerning the August 9, 2012 meeting. [*Id.*] Counsel for the General Counsel has not articulated a basis for overturning ALJ Kocol's credibility determinations concerning Ms. Galaviz's testimony, and no such reason exists. Therefore, the Board should affirm ALJ Kocol's dismissal of this allegation.

There is also no basis to reverse ALJ Kocol's decision to dismiss the General Counsel's allegations that Mr. Terrones unlawfully interrogated employees during meetings that occurred on August 8 and 9, 2012. [Answering Brief at p. 19-20] In asserting this argument, the General Counsel broadly argues that by "systematically calling individual Committee members into Terrones' office, for extended periods, and

asking very pointed questions about their Committee activities and the activities of other employees," SFTC engaged in unlawful interrogation. [*Id*.] This argument completely ignores the very purpose of those meetings, which was to respond to the Comité's August 7, 2012 letter that raised various workplace issues. In dismissing the General Counsel's allegations, ALJ Kocol specifically recognized that the meetings, which the Comité claims were unlawful, were precisely the type of response that Comité was seeking when it delivered its letter to SFTC. [ALJD at p. 4] In light of this purpose, ALJ Kocol properly dismissed the General Counsel's allegations that the meetings themselves were inherently unlawful.

Finally, the Board should reject the General Counsel's attempt to add allegations that were not specifically alleged in its Consolidated Complaint. Although the General Counsel claims that certain paragraphs of its Consolidated Complaint "cover" newly asserted allegations relating to a meeting between Mr. Terrones and Gustavo Abel Lopez, the General Counsel failed to put SFTC on proper notice of those allegations. In his decision, ALJ Kocol rejected the General Counsel's request to find violations of the Act not found in the Complaint citing SFTC's due process rights. [ALJD at p. 9, fn. 6] SFTC requests the Board likewise reject the General Counsel's attempt to litigate new claims in deprivation of SFTC's due process rights.

B. Solicitation of Grievances.

As ALJ Kocol correctly concluded, SFTC did not unlawfully solicit grievances from its employees. Once again, the General Counsel seeks to rely on broad principles while ignoring the underlying facts. However, 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 General Counsel failed to elicit any evidence that SFTC engaged in unlawful solicitation.

At the Hearing, ALJ Kocol recognized that this case did not involve the typical union organizing situation and specifically asked Counsel for the General Counsel to provide case law demonstrating that SFTC's alleged solicitation of grievances was unlawful *under the circumstances presented by this case*. As ALJ Kocol noted in his decision, the General Counsel failed to provide any applicable case law. He further went on to clearly explain the reason for his dismissal of the General Counsel's solicitation allegations:

> …this is a case where the employees outwardly expressed their concerns and asked that they be addressed and the employer asked about those concerns and promised to rectify them if appropriate. *The employees cannot voice concerns and ask that they be rectified and then complain when an employer does just that.*

[ALJD at p. 4 (emphasis added)]

Under the circumstances present in this case, there is absolutely no basis for the Board to find that SFTC engaged in unlawful solicitation of grievances. The record is devoid of any evidence that the employees at SFTC were seeking to organize a formal union to serve as their collective bargaining representative. Instead, the evidence clearly shows, as the General Counsel admits, that the Comité was formed to provide a "collective voice" to raise issues with SFTC management – issues that the group presumably wanted addressed. It is absolutely unreasonable for the General Counsel to allege that SFTC violated the law for simply responding to the Comité's request to address the concerns of its members. Moreover, there is also no evidence in the record to demonstrate that SFTC either expressly or impliedly suggested that the Comité's grievances would be resolved only if its members rejected union representation.

C. Promises of Benefits.

For the reasons explained in the preceding section, ALJ Kocol properly dismissed the General Counsel's allegations that Gustavo Terrones made unlawful promises of benefits to certain employees. There was simply no evidence in the record to support the General Counsel's allegations that such promises were made.

D. Unlawful Threats.

As with the other independent violations, ALJ Kocol also properly concluded that the General Counsel failed to establish that SFTC unlawfully threatened any of its employees. In evaluating the General Counsel's allegations concerning unlawful threats, ALJ Kocol fully evaluated the evidence, as well as the demeanor of the relevant witnesses, and found that the purportedly unlawful statements did not constitute unlawful

threats when taken in context. The General Counsel's allegations stretch the bounds of the law and are simply not supported by the evidence in the record. The Board should affirm ALJ Kocol's dismissal of those allegations.

CONCLUSION

For the reasons set forth in this Brief, Respondent SFTC, LLC respectfully requests that the Board deny the General Counsel's Cross-Exceptions.

DATED: August 20, 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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **ANSWERING BRIEF OF RESPONDENT SFTC, LLC'S IN SUPPORT OF LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE 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 August 20, 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

Comité 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

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