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8 **UNITED STATES OF AMERICA**
9 **NATIONAL LABOR RELATIONS BOARD**

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11 PACIFIC COAST SUPPLY, LLC,
12 dba ANDERSON LUMBER COMPANY,

13 and

14 CHAUFFEURS, TEAMSTERS, AND
15 HELPERS LOCAL 150, INTERNATIONAL
16 BROTHERHOOD OF TEAMSTERS.

Case No. 20-CA-086308

17
18 **RESPONDENT PACIFIC COAST SUPPLY, LLC**
19 **dba ANDERSON LUMBER COMPANY'S**
20 **REPLY BRIEF IN SUPPORT OF EXCEPTIONS**
21 **TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**
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I
ARGUMENT

A. *The Standard Applied By The ALJ And The General Counsel Is Different Than The “Actual Loss Of Majority Support” Standard Announced In Levitz.*

In Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), the Board formally announced, “after careful consideration,” a new legal standard applicable to unilateral withdrawals of recognition:

“Under our new standard, an employer can defeat a post-withdrawal refusal to bargain allegation *if it shows, as a defense, the union’s actual loss of majority status.*” (emphasis added) Ibid.

Anderson Lumber met that standard by presenting undisputed evidence that all 8 of the employees – a majority of the 15 employee bargaining unit – did not support the Union:

- Each of the employees testified that when they wrote their letters they did not want to be represented by the Union and that their letters were intended to show that they did not support the Union;
- An offer of proof that each of the employees, if asked, would testify that they told the Region’s investigators that they did not support the Union and that when they wrote their letters they did not want to be represented by the Union; and
- NLRB Affidavits signed by 3 of the employees which state that the 8 employees wrote their letters in order to “get rid of the union,” because they were “dissatisfied with the union,” and because they “wanted to remove” the Union.

However, the ALJ’s Decision and the General Counsel’s Answering Brief completely ignore that evidence, even though it directly relates to the only issue framed by Levitz. According to the General Counsel, “pursuant to Levitz, it is immaterial what an employee may have intended,” and “Under Levitz, the relevant inquiry is whether at the time Respondent withdrew recognition from the Union, Respondent possessed evidence of the Union’s loss of majority support.” See, Answering Brief, pp. 8 and 11, respectively. Thus, the General Counsel now asks the Board to apply a different, more rigorous standard which is not found anywhere in Levitz and which, frankly, contradicts the rationale and holding of Levitz:

- 1 (1) that the union actually lost majority support (i.e., the Levitz standard); and
2 (2) that, when it withdrew recognition, the Company *knew of* all of the evidence on
3 which it later relied at the unfair labor practice hearing to prove that the Union
4 actually lost majority support.

5 As a result, the ALJ held and the General Counsel argues that any other evidence not
6 known to Anderson Lumber when it withdrew recognition is irrelevant and need not be
7 considered, even if that evidence would prove that the Union actually lost majority support and
8 even if that evidence would explain any ambiguities in the employees' letters. Adding this
9 "employer knowledge" requirement dramatically changes the "carefully considered" standard
10 announced by Levitz, 333 NLRB at 717, from one which focuses on ascertaining the truth through
11 proof at trial to one which ignores the truth and instead focuses only on what the employer knew.

12 In Allentown Mack Sales & Service v. NLRB, 522 U.S. 359, 376 – 377 (1998), the
13 Supreme Court held that when the Board formally announces a legal standard it must apply that
14 standard according to its plain meaning, and that the Board cannot require the employer to satisfy
15 some other, more rigorous standard, such as by requiring the employer to prove that it had a good
16 faith "disbelief" rather than just a good faith "doubt."

17 "Because reasoned decisionmaking demands it, and because the systemic consequences of
18 any other approach are unacceptable, the Board must be required to apply in fact the
19 clearly understood legal standards that it enunciates in principle, such as good-faith
20 reasonable doubt and preponderance of the evidence. Reviewing courts are entitled to
21 take those standards to mean what they say, and to conduct substantial-evidence review on
22 that basis. Even the most consistent and hence predictable Board departure from proper
23 application of those standards will not alter the legal rule by which the agency's factfinding
24 is to be judged."

25 As a result, the Supreme Court rejected the Board's argument that "doubt" really meant
26 "disbelief" instead of its real meaning, "uncertainty." Writing for the majority, Justice Scalia held
27 that "We cannot accept that linguistic revisionism." 522 U.S. at 367.

28 Interestingly, in Levitz the Board expressly stated that it was following the "teachings in
Allentown Mack" so as to avoid "the confusion over terminology" which had plagued the Board's
application of the good faith doubt standard:

1 “In addressing the arguments concerning the Celanese rule and the standards for holding
2 RM elections, then we must take into account the Court’s teachings in Allentown Mack.
3 *In particular, we must avoid the confusion over terminology* which the Court identified in
our application of the good faith doubt standard.” (emphasis added)

4 The Board then “carefully” chose the terminology that it used to describe its new
5 withdrawal of recognition standard:

6 “*After careful consideration, we have concluded that there are compelling legal and policy*
7 *reasons why employers should not be allowed to withdraw recognition merely because*
8 *they harbor uncertainty or even disbelief concerning unions’ majority status. We therefore*
9 *hold that an employer may unilaterally withdraw recognition from an incumbent union*
10 *only where the union has actually lost the support of the majority of the bargaining unit*
11 *employees, and we overrule Celanese and its progeny insofar as they permit withdrawal on*
the basis of good-faith doubt. *Under our new standard, an employer can defeat a post-*
12 *withdrawal refusal to bargain allegation if it shows, as a defense, the union’s actual loss of*
13 *majority status.”* (emphasis added) 333 NLRB at 717.

14 Lest there be any doubt about the exact terms of the standard that it was adopting, the
15 Board repeated its new standard numerous times in the course of its opinion:

16 “Accordingly, we shall no longer allow an employer to withdraw recognition unless it can
17 *prove that an incumbent union has, in fact, lost majority support.”* (emphasis added) 333
18 NLRB at 723.

19 “If the union contests the withdrawal of recognition *in an unfair labor practice*
20 *proceeding, the employer will have to prove by a preponderance of the evidence that the*
21 *union had, in fact, lost majority support at the time the employer withdrew recognition.”*
(emphasis added) 333 NLRB at 725.

22 “For all of these reasons, we hold that an employer may rebut the continuing presumption
23 of an incumbent union’s majority status, and unilaterally withdraw recognition, only on a
24 *showing that the union has, in fact, lost the support of a majority of the employees in the*
25 *bargaining unit.”* (emphasis added) 333 NLRB at 725.

26 On the other hand, in Levitz the Board never stated that all of the evidence supporting an
27 actual loss of majority support must be known to the employer when it withdraws recognition, as
28 the ALJ held and the General Counsel now contends. To the contrary, throughout the Levitz
decision the Board contrasted its new standard, which focuses on proof of an actual loss of
majority support at an unfair labor practice proceeding, 333 NLRB at 725, with the old good faith
doubt standard which focused on what the employer knew and believed at the time of withdrawal.
See, Brief in Support of Exceptions, 26:3 – 28:28. And Levitz, 333 NLRB at 724, made clear that,

1 having abandoned the good faith doubt standard, the employer’s state of mind – what it knew or
2 believed at the time of withdrawal – no longer had “any relevance”:

3 “Indeed, nothing in the Act indicates that an employer’s uncertainties or beliefs concerning
4 majority status – whether or not held in good faith – have *any relevance* to its bargaining
5 obligation under Sections 8(a)(5) and 9(a) of the Act.” (emphasis added)

6 In NLRB v. B.A. Mullican Lumber and Manufacturing Company, 535 F.3d 271, 282 – 283
7 (4th Cir. 2008), the 4th Circuit agreed that “[t]he Levitz standard focuses on the Act’s policy of
8 promoting employee choice by determining actual employee desires, rather than employers’
9 beliefs about employee desires, by asking whether there was in fact majority support for the union
10 at the time the employer withdrew recognition, *regardless of what the employer believed*. ... The
11 Levitz standard therefore introduced *a truth-seeking test*.” (emphasis added)

12 As a result, the 5th Circuit rejected the General Counsel’s argument there (the very same
13 argument that the ALJ and the General Counsel advance here) that only evidence which is known
14 to the employer at the time of withdrawal is relevant to determine whether there has been an actual
15 loss of majority support:

16 “Thus, “[i]f a majority of the unit employees present evidence that they no longer support
17 their union, their employer may lawfully withdraw recognition,” *and this is so regardless*
18 *of what the employer knew at the time*.” (emphasis added) Ibid.

19 The Board’s choice of terminology in Levitz is important, both because the Board sought
20 to follow the “teachings of Allentown Mack” and because the Board was “careful” to describe its
21 new standard in order to “avoid confusion.” 333 NLRB at 717. Levitz repeatedly uses the terms
22 “actually lost” majority support and “in fact, lost” majority support in conjunction with the
23 requirement that the employer must “show” and “prove” the actual loss “by a preponderance of
24 the evidence” “as a defense” at an “unfair labor practice proceeding,” showing that the question of
25 whether the Union actually lost majority support would be put to the test of truth at trial. “Actual”
26 means “existing in fact; typically as contrasted with what was intended, expected, or believed,”
27 Oxford Dictionaries Online, www.oxforddictionaries.com/us/definition/american_english/actual.
28 “Prove” means “to establish or make certain; to establish a fact or hypothesis as true by
satisfactory and sufficient evidence.” Blacks Law Dictionary, 1968, p. 1388. Thus, if a
withdrawal is challenged at an unfair labor practice proceeding, the employer must “establish as

1 true, with satisfactory and sufficient evidence” that the Union’s loss of majority support is
2 “existing in fact ... as contrasted with what was intended, expected, or believed.”

3 Since the Board “carefully” chose the terminology of its new standard to “avoid
4 confusion” and to satisfy Allentown Mack’s requirement of reasoned decisionmaking, one must
5 conclude that the new standard includes all the factors which administrative law judges and the
6 courts need in order to understand and apply the new standard. Conversely, one must conclude
7 that anything not included in the announced standard, such as the “employer knowledge”
8 requirement advocated by the General Counsel here, was intentionally not included. The ALJ’s
9 and the General Counsel’s attempt to read this “employer knowledge” requirement into the
10 standard is the same kind of “linguistic revisionism” that the Supreme Court decried in Allentown
11 Mack. The Levitz standard is simple and straightforward and must be applied as announced.

12 ***B. Anderson Lumber Proved That The Union Lost Majority Support.***

13 If the Levitz rule is applied as announced and according to its plain meaning, then
14 Anderson Lumber proved, by a preponderance of the evidence, that the Union actually lost
15 majority support:

- 16 • All 8 employees testified that they did not support the Union when they wrote their
17 letters and that the intended meaning of the letters was that they no longer wished to be
18 represented by the Union;
- 19 • All 8 employees would have testified, if asked, that they told this to the Region’s
20 investigators; and,
- 21 • Most importantly, the NLRB Affidavits taken by the Region’s investigators from 3 of
22 the employees expressly state that the 8 employees wrote their letters to the Company
23 because of “*our dissatisfaction with the Union*” (Gonzalez Affidavit, R. Ex. 1), because
24 they wanted “*to get rid of the Union*” (Ramos Affidavit, R. Ex. 2), and because they
25 wanted to “*remove the Union*” (Garcia Affidavit, R. Ex. 3).

26 The ALJ and the General Counsel rely on Highland Hospital Corp., Inc., 347 NLRB 1404
27 (2006), for the Board’s conclusory statement, otherwise unexplained, that Levitz “makes clear”
28 that evidence not known to the employer when it withdrew recognition is “irrelevant.” However,

1 as is discussed in Section A, *supra*, Levitz makes no such holding. To the contrary, although the
2 Board “... anticipate[d] that ... employers will be *likely* to withdraw recognition only if the
3 evidence before them clearly indicates that unions have lost majority support” (emphasis added),
4 the Levitz decision did not *forbid* them from withdrawing recognition on less certain evidence in
5 the hope of being able to prove an actual loss of majority support at trial. If that was the Board’s
6 intention, it would have been simple enough to say so. Instead, the Board said, “If future
7 experience proves us wrong, the Board can revisit this issue.” 333 NLRB at 726.

8 Of course, nothing prevents the Board from revisiting the issue if “future experience” does
9 prove it wrong. But it has not done so yet. Allentown Mack requires that if the Board chooses to
10 change the standard announced in Levitz, it must honor the principles of reasoned decisionmaking:
11 i.e., that any changes to Board standards be adopted in a “logical and rational” decision which
12 “forthrightly and explicitly” explains the legal and policy reasons for making the change. 522
13 U.S. at 374 – 375, 378. Highland Hospital’s conclusory statement, without any discussion, that
14 Levitz “makes clear” that later acquired evidence is irrelevant does not meet Allentown Mack’s
15 “reasoned decisionmaking” requirement.

16 In any event, the Highland Hospital decision is incorrect as a matter of law. The
17 Administrative Law Judge there held that if an employer did not have evidence of an actual loss of
18 majority support when it withdrew recognition, it would “undermine the essence and purpose of
19 the Levitz decision” to give that employer a chance to prove an actual loss “months later” at trial.
20 347 NLRB at 1414. But Levitz makes clear that its “essence and purpose” is protecting the
21 employees’ Section 7 rights to freely choose their representatives, and that this right is protected
22 by requiring proof at an unfair labor practice hearing of an actual loss of majority support. 333
23 NLRB at 724 – 725. If an employer proves at trial that the union actually lost majority support,
24 whether with evidence known at the time of withdrawal or learned later, the fact remains that the
25 employer has still proved an actual loss of majority support, and the employees’ right to choose
26 their representative has been vindicated. Thus, allowing employers to use later acquired evidence
27 to prove an actual loss of majority support does not harm employees’ Section 7 rights and does not
28 “undermine” Levitz.

1 Nor does the fact that Highland Hospital and its progeny say that such evidence is
2 irrelevant make it irrelevant. As the 5th Circuit held in Tri-State Health Services, Inc. v. NLRB,
3 374 F.3d 347, 355, ft. 9 (5th Cir. 2004),

4 “it is not enough for the Board merely to string-cite a list of cases in which similar
5 evidence was found to have no bearing on a dispute involving different parties and a
6 different set of operative facts. ... Rather, the Board is justified in dismissing evidence
outright only if it can show that it is – as a matter of logic and reason – unhelpful to the
position in support of which it is proffered.”

7
8 Further, the Supreme Court held in Allentown Mack, 522 U.S. at 577, “Even the most
9 consistent and hence predictable Board departure from proper application of those standards will
10 not alter the legal rule by which the agency’s fact finding is to be judged.” Therefore, the
11 evidence adduced here at trial is relevant and should be admitted.

12 **C. *The Remaining 4 Employee Letters Show An Actual Loss Of Majority Support.***

13 Putting aside for the moment the question whether this evidence is admissible to prove a
14 loss of majority support, at the very least the evidence adduced at trial is relevant and admissible
15 to resolve any ambiguity in the four remaining employee letters (Singh, Davis, Rocha and
16 Hernandez). In Diversicare Leasing Corp., 351 NLRB 817, 818 (2007), the Board held that the
17 evidence upon which an employer relies to withdraw recognition need not be “unambiguous” and
18 recognized that extrinsic evidence could be considered to resolve any such ambiguity. “*Absent*
19 *any extrinsic evidence about the petition solicitation process*, we agree with the judge that the
20 resolution of this issue turns on the language in the petition.” (emphasis added).

21 Here, we have extrinsic evidence which shows what the employees intended when they
22 wrote their letters. And, in addition to each employees’ testimony, the three NLRB Affidavits
23 state that all 8 employees discussed writing their letters because of “*our dissatisfaction with the*
24 *union*,” because they wanted “*to get rid of the union*,” and because they wanted to “*remove the*
25 *union*.” This extrinsic evidence is relevant because it has “a logical connection to the matter in
26 dispute;” i.e., the intended meaning of the employees’ letters and whether the Union actually lost
27 majority support. Tri-State Health Services, 374 F.3d at 355, ft. 9. As the Supreme Court held in
28 Allentown Mack, 522 U.S. at 378 – 379:

1 “When the Board purports to be engaged in simple factfinding, unconstrained by
2 substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what
3 inferences from the evidence it will accept and reject, but must draw all those inferences
4 that the evidence fairly demands.”

5 Yet, the ALJ completely disregarded this evidence and avoided the common sense
6 inferences to be drawn from that evidence by summarily concluding that the remaining four
7 employee letters are not ambiguous. “Statements of desire to terminate union membership do not
8 support withdrawal of recognition” and “mean[] only that an employee does not wish to pay dues
9 to the union.” ALJD, 5:36 – 38.

10 This is error. An employee’s statement that he wants to “get out of” the Union (Singh) or
11 “exit the Union” (Davis) or does not wish to join the Union (Rocha) or wants to resign from the
12 Union (Hernandez) is inherently ambiguous because it could mean either that the employee does
13 not want to be a Union member but still wants the Union to represent him or that the employee
14 does not want to be a Union member because he does not support the Union. In fact, this is
15 precisely what the Supreme Court decided in Allentown Mack, 522 U.S. at 369, when it found that
16 an employee’s statement that “he was not being represented for the \$ 35 he was paying” could

17 “... reflect the speaker’s desire that the union represent him more effectively, but could
18 also reflect the speaker’s desire to save his \$35 and get rid of the union. The statement
19 would assuredly engender an uncertainty whether the speaker supported the union, and so
20 could not be entirely ignored.”¹

21 The ALJ’s and the General Counsel’s arguments about these four letters boil down to the
22 contention that the employees only wanted to resign their Union memberships and stop paying
23 dues. However, the parties’ collective bargaining agreement included a union shop clause which
24 provided that employees who were not members of the Union or failed to pay Union dues would
25 be fired. In its Brief in Support of Exceptions, pp. 23:20 – 25:14, the Company argued that it is
26 not reasonable to conclude that Davis, Singh, Rocha and Hernandez still supported the Union
27 because resigning Union membership and not paying dues would result in their termination if the

28 ¹ Notwithstanding the General Counsel’s tortured “logic” to the contrary, Don Davis’ virtually
identical letter is an even clearer statement of a lack of support because it states that he wanted “to
exit the union ... due to the union not doing any services for the cost that they are charging.”

1 Union continued as their representative. But the General Counsel completely ignores this issue.

2 The fact that these employees worked in a union shop environment is an undisputed fact
3 which must be taken into consideration. The Board "... is not free to prescribe what inferences
4 from the evidence it will accept and reject," but "must draw all those inferences that the evidence
5 fairly demands." Allentown Mack, 522 U.S. at 378. Thus, the General Counsel cannot just ignore
6 the fact that the employees worked in a union shop, even if that fact is inconvenient to its case.
7 Nor can it simply rest on a string-cite of cases which hold that a decline in union membership does
8 not "necessarily" mean that the union has lost majority support. Allentown Mack teaches that the
9 Board's evaluation of evidence must be "a matter of logic and sound inference from all the
10 circumstances, not an arbitrary rule of disregard to be extracted from prior Board decisions." 522
11 U.S. at 379. As the 5th Circuit held in Tri-State Health Services, 374 F.3d at 355, ft. 9,

12 "When reason counsels that a category of evidence has a logical connection to the matter
13 in dispute, it is not enough for the Board merely to string-cite a list of cases in which
14 similar evidence was found to have no bearing on a dispute involving different parties and
15 a different set of operative facts. Rather, the Board is justified in dismissing evidence
outright only if it can show that it is – as a matter of logic and reason – unhelpful to the
position in support of which it is proffered. The Board has not done that here."

16 Before concluding that the employees' letters mean that the employees wanted to resign
17 Union membership and stop paying dues, as the ALJ and General Counsel contend, the Board
18 must consider how that would play out in the context of their union shop environment. Since the
19 natural inference to be drawn from resigning Union membership and not paying dues is that the
20 employees would be fired, then the Board must ask if it is more logical and reasonable to conclude
21 that (1) the 4 employees still wanted to be represented by the Union even though it would result in
22 their terminations, or (2) that they wanted to get rid of the Union altogether so that they would not
23 have to worry about getting fired. Logic dictates that the second possibility is the more likely –
24 the "more reasonable" – interpretation of their ambiguous letters. If so, then Anderson Lumber
25 has proved by a preponderance of the evidence that these 4 employees did not support the Union.

26 ***D. An Affirmative Bargaining Order Is Inappropriate.***

27 An affirmative bargaining order is inappropriate here because the Region learned during its
28 investigation that 8 out of 15 bargaining unit members did not support the Union. The General

1 Counsel admits that he has a “policy to decline to issue complaint where he has objective evidence
2 of a union’s lost (sic) of majority support even if the employer had no such evidence.” In that
3 event, the General Counsel may not seek an affirmative bargaining order because doing so would
4 be antithetical to the employees’ Section 7 right to choose their representative. Mullican Lumber,
5 535 F.3d at 283 – 284.

6 The General Counsel argues here that this policy does not apply because “at no point
7 during the course of the investigation did the General Counsel obtain evidence of the Union’s loss
8 of majority status.” But that is simply not true. The 3 NLRB Affidavits offered into evidence
9 here *expressly* state that all 8 employees wrote their letters because they were “*dissatisfied with the*
10 *union*” and in order to “*get rid of the union*” and to “*remove the union.*” This is clear evidence of
11 a loss of majority support. The General Counsel refused to present any contrary evidence of what
12 it did or did not learn during the investigation and, therefore, the record is undisputed that the
13 General Counsel learned that the Union had actually lost majority support. Thus, even if we
14 assume *arguendo* that Anderson Lumber did not prove an actual loss of majority support at trial,
15 the Board should nonetheless refuse to impose an affirmative bargaining order. Mullican Lumber,
16 535 F.3d at 283 – 284.

17 II

18 CONCLUSION

19 Allentown Mack requires that the Board apply the Levitz standard as formally announced
20 and according to its plain meaning. The employer knowledge requirement applied by the ALJ and
21 advocated by the General Counsel here is nothing but “linguistic revisionism” which must be
22 rejected, per Allentown Mack. If so, the undisputed evidence presented by Anderson Lumber
23 proves, by a preponderance of the evidence, that the Union actually lost majority support.

24 Accordingly, the Complaint should be dismissed.

25 Dated: September 3, 2013.

DAVENPORT GERSTNER & McCLURE

26 / s /

27 _____
STEPHEN THOMAS DAVENPORT, JR.
Attorneys for Respondent Pacific Coast Supply, LLC,
28 dba Anderson Lumber Company

1 **PROOF OF SERVICE**

2 I declare that I am employed in Contra Costa County, California, I am over eighteen years
3 old, and I am not a party to the within action and that my business address is 2540 Camino Diablo,
4 Suite 200, Walnut Creek, California 94597. On this date, I served true copies of the following
5 document(s) on the person(s) listed below at the address(es) shown below by the means of service
6 marked below:

7 RESPONDENT PACIFIC COAST SUPPLY, LLC, dba ANDERSON LUMBER
8 COMPANY’S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF
9 THE ADMINISTRATIVE LAW JUDGE

- 10 By First Class Mail – I deposited the document(s), in an a sealed envelope addressed to the
11 person(s) to be served, with the United States Postal Service in Walnut Creek, California
12 with first-class postage fully prepaid thereon.
- 13 By Personal Service – I caused the document(s) to be given to a messenger for personal
14 delivery to the person(s) to be served.
- 15 By Overnight Courier – I caused each such envelope to be given to an overnight mail
16 service at Walnut Creek, California, for delivery to the person(s) to be served the next day.
- 17 By Fax – I transmitted the document(s) from a fax machine with telephone number (925)
18 932-1961, before 5:00 p.m., to the person(s) and fax number(s) listed below. I declare that
19 the transmitting fax machine reported that the transmission was complete and without error
20 and properly issued a transmission report, a copy of which is attached hereto.
- 21 By Electronic Service – I caused the document(s) to be transmitted electronically from my
22 email address to the person(s) and email address(es) set forth below on the date and time
23 listed below. My email address is: alice@laborcounsel.com

24 Person(s) and address(es) to be served:

25 Elvira Pereda – Elvira.Pereda@nlrb.gov

26 Costa Kerestenzis – Ckerestenzis@beesontayer.com

27 I declare under penalty of perjury that the foregoing is true and correct and that this
28 declaration was executed in Walnut Creek, California.

Dated: September 3, 2013.



Alice Garcia