

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**FARM FRESH COMPANY
TARGET ONE, LLC**

and

Case 28-CA-100434

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 99, AFL-CIO**

**ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF EXCEPTIONS**

Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
E-mail: Sandra.Lyons@nlrb.gov

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Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(a) of the Board's Rules and Regulations, files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge Geoffrey Carter [JD-51-13] (ALJD), issued on August 8, 2013, in this matter.¹ It is respectfully submitted that in all respects, other than what is excepted to below, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.

The ALJ found that Respondent committed numerous and serious unfair labor practices in violation of Section 8(a)(1) of the Act by unlawfully: discharging Maria Morales for engaging in protected, concerted activities; interrogating employees about their union and concerted activities; engaging in surveillance of employees' union and concerted activities; creating the impression that employees' union and concerted activities were under surveillance; and threatening employees with discharge for engaging in union and concerted activities. The ALJ additionally found that Respondent violated Section 8(a) (3) by

¹Farm Fresh Company, Target One, LLC., is referred to as Respondent. United Food and Commercial Workers Union, Local No. 99 (UFCW), is referred to as Union. References to the ALJD show the applicable page number. "Tr. ____" refers to pages of the transcript from the hearing held June 11-14, 2013. "GCX ____" refers to exhibits introduced by General Counsel at the hearing. "RX____" refers to exhibits introduced by Respondent. "UX____" refers to exhibits introduced by the Union at the hearing.

discharging three active union supporters—Martha Aguirre (Aguirre), Silvia Romero (Romero) and Roberto Pena (Pena). (ALJD at 24-25; 27)

The General Counsel excepts to the ALJ's failure to find that Respondent also violated Section 8(a) (1) by soliciting employee grievances and impliedly promising benefits through one-on-one meetings with employees, and during a Power Point presentation to employees. The General Counsel further excepts to the ALJ's failure to find that: Maria Morales' discharge also violated Section 8(a)(3) of the Act; Blas Virelas (Virelas) was discharged, or constructively discharged, for engaging in union and concerted activities; and that Respondent's reverification, through E-Verify, of employee work authorizations was a violation of Section 8(a)(3) of the Act. Finally, the General Counsel excepts to the ALJ failure to order two special remedies—that the Union have access to a bulletin board at Respondent's facility and Respondent provide the Union with names and addresses of bargaining unit members.

I. BACKGROUND

A. Respondent's Operations

Respondent packages product that is then sold to customers for sale in retail stores. (Tr. 45; ALJD at 3) The business has been in existence since 1972, and is based in Phoenix, Arizona. (Tr. 130; ALJD at 4) Since its inception, the Respondent's owners were the David Prince family. (Tr. 130; ALJD at 4) Sometime in 2012 David Prince (Prince) decided to sell the company to his general manager, Gary Schrum (Schrum). (Tr. 162; ALJD at 4) Schrum had worked for Respondent in a supervisory capacity since 1998. (Tr. 44; ALJD at 4)

The purchase was consummated on February 28, 2013², with the signing of an asset purchase agreement. (Tr. 162; GCX 2; ALJD at 4; 7)

Schrum took over the morning of March 1, 2013, and continued the business operations unchanged, retaining all employees, and keeping the same work schedules, wages, supervisors, customers, suppliers, and the location of Respondent's facility. (Tr. 72; ALJD at 8-9) The supervisors who existed before and after the sale were Schrum, who changed titles from general manager to Owner; Jesus "Martin" Loya, Production Supervisor; and Arturo Sousa, who changed title from Office Manager to Operations Manager. (Tr. 44, 193, 237; ALJD at 4) There are approximately 48 production employees who work at Respondent's facility. (Tr. 135-136; ALJD at 4)

B. Employees' Union Activities

Employees had serious and numerous concerns about their wages and working conditions, and especially were concerned about how they were treated by Production Supervisor Jesus "Martin" Loya. (Tr. 299-300; 480-481; ALJD at 4-5) Loya was extremely verbally abusive to employees, especially to the older ones. (Tr. 332; 336; 480-481; ALJD at 4-5) The ALJ properly found that Loya's was abusive towards employees. (ALJD at 4-5)

Fed up with the treatment they were receiving at the hands of Loya, Aguirre and Romero approached the United Food and Commercial Workers Union, Local 99 (the Union), and several meetings were held with the Union at Aguirre and Romero's home.³ (Tr. 306; 380; 520; 560; ALJD at 7; 9) The first meeting was held on February 26, 2013, and was chaired by the Union's Organizing Director Martin Hernandez. (Tr. 518; ALJD at 7) At this meeting, Hernandez directed Aguirre and Romero to return to work the next day and begin

² All dates are 2013, unless otherwise noted.

³ Romero is Aguirre's daughter-in-law. (ALJD at 7, fn. 11)

speaking to their fellow employees to see if there was sufficient interest in union representation, inviting them to a Union meeting at Aguirre's home on March 2. (Tr. 308; 521-522; 561; ALJD at 7)

Aguirre and Romero did as instructed (Tr. 308; 383; ALJD at 7), and immediately began talking to their coworkers about the Union, inviting them to the meeting at their home on March 2. (Tr. 308-309; 383-384; ALJD at 7) These discussions occurred on the production floor, directly in front of the supervisor's office. (Tr. 204; 309; 383-384; ALJD at 7)

C. Respondent's Response to Employees' Union Activities

1. E-Verify Existing Employees

Within days of Aguirre's and Romero's meeting with Union representatives, and their spreading the word about the Union campaign and soliciting support from coworkers, Schrum decided to E-Verify all employees. (Tr. 312; ALJD at 8) Respondent was under no obligation to run existing employees through E-Verify. (Tr. 82; ALJD at 8, fn. 14) These existing employees had all previously been verified by Prince as authorized to work in the United States. (Tr. 148-150; ALJD at 8; fn 13; 14) In fact, Prince testified that he and Schrum would routinely notify employees that they needed to update their records. (Tr. 148; ALJD at 8)

2. Schrum's One-on-One Meetings with Employees

Starting March 4, and continuing throughout the week, Schrum held one-on-one meetings with all employees, except the five discriminatees. (Tr. 81; 723; 733; RX 9 and 10; ALJD at 10) During these meetings, Schrum asked employees if they had any concerns with the new ownership, whether they had concerns about anything else that they wanted to ask

him, if they liked their jobs, as well as discussions with employees about bonuses and raises. (Tr. 82; 98-101; 714-715; ALJD at 10) Employees complained to Schrum about wages and about the conduct of Rosa Loya, Jesus Loya's wife. (Tr. 98; ALJD at 10) Schrum immediately took steps to address these complaints, by moving Rosa to another station and granting raises to every employee that was not discharged by him. (Tr. 101; 740; ALJD at 10).

3. Discharge of Union Leaders and Supporters

By March 20 Respondent had five union leaders and supporters. The first discharged was Maria Morales (Morales) who attended the Union meeting on March 2, signed a union authorization card at this meeting, and began to speak with as many employees as she could on March 4 about the Union. (Tr. 491-492; ALJD at 11) Morales also invited employees to another Union meeting at the Union Hall in Phoenix on March 4; Morales invited and drove employee Virelas to this meeting. (Tr. 417; 491-492; ALJD at 9)

On March 5, Morales informed Loya that she had to leave work early to attend a meeting at her daughter's school. (Tr. 494; ALJD at 11) Loya authorized her to leave. (Tr. 495; ALJD at 11) However, as Morales went to her locker to obtain her personal items to leave for the day, Loya approached her and fired her, stating there was no more work for her. (Tr. 494; ALJD at 10) Morales was fired on the spot, despite having worked for Respondent for ten years.⁴ (Tr. 476; ALJD at 10) On March 6, Aguirre, Romero, and Pena, were all terminated by Respondent. (Tr. 287-288; 394-399; 462-463; ALJD at 13-14; 16) The ALJ properly found that all three were fired in violation of Section 8(a)(3) of the Act. (ALJD at 24; 26-27)

⁴ The ALJ found that Morales's termination only violated Section 8(a)(1). (ALJD at 25, fn. 35)

Virelas had worked for Respondent since 2002. (Tr. 413; ALJD at 16) His Union activities consisted of attending the March 4 union meeting and signing a union authorization card. (492-494; ALJD at 10) Within days, of attending the meeting and signing the union authorization card, Virelas was interrogated, threatened with discharge and then informed that Respondent had a no-match letter⁵ concerning his social security number. (Tr. 424-425; ALJD at 16; 28-30) Loya told Virales he had one week to fix the issue regarding his social security number and if he failed to do so, he would be discharged. (Tr. 420-435; ALJD at 16) After being interrogated, threatened, and told this to fix an alleged discrepancy with his social security number, Virelas worked one more week and then did not return. (Tr. 428; ALJD at 16-17)

4. Schrum's Power Point Presentation

Schrum drove home his anti-union message by showing a PowerPoint presentation to each and every employee. (Tr. 119; GCX 6; ALJD at 18) Between March 26 and 27, Schrum showed a PowerPoint to groups of employees, in both English and Spanish. (Tr. 119-125; GCX 6; ALJD at 18) Contained within this PowerPoint was the following statement: "Give me a chance first!" (GCX 6; ALJD at 20) This statement constituted a solicitation of grievances as well as a promise to change working conditions if employees did not select the Union as their collective-bargaining representative, especially when coupled with Schrum's one-on-one meetings.

5. Discharges and Violations of Section 8(a)(1) of the Act

The ALJ found that Respondent committed in serious unfair labor practices. (ALJD at 34) The ALJ found that the discharge of Aguirre, Romero and Pena were in violation of Section 8(a)(3) of the Act. (ALJD at 34) Moreover, the ALJ found that Respondent

⁵ "Notice of Employee of Tentative Nonconfirmation." (RX 4)

unlawfully interrogated employees, engaged in unlawful surveillance, created the impression of surveillance, and threatened employees with discharge for signing union authorization cards. (ALJD at 34) Despite finding these serious violations, the ALJ did not order two of the special remedies requested by the General Counsel—that Respondent provide a bulletin board to the Union at its facility and that the names and addresses of bargaining unit employees be provided to the Union. (ALJD at 35-36) The serious nature of these unfair labor practices, especially the discharge of the two main union organizers, has put the Union at an extreme disadvantage in organizing Respondent’s employees. Reinstating these employees and having a Notice to Employees read to employees is not sufficient to undue that harm. Therefore, General Counsel also excepts to the ALJ not ordering these two special remedies.

II. ANALYSIS

A. The ALJ Erred in Failing to Find that Respondent Terminated Morales for Engaging in Union and Concerted Activities in Violation of Section 8(a)(3) of the Act.

1. Allegation

The Complaint alleges that Respondent discharged Morales because of her union and concerted activities. [GCX 1(c) at para. 5(b) (h)] The ALJ found that Morales had engaged in protected, concerted activities, Respondent was aware of those activities, and Respondent discharged Morales on March 5 because of her protected, concerted activities. (ALJD at 25) The ALJ did not find, however, that Respondent discharged Morales in violation of Section 8(a)(3) solely because he determined that Respondent became aware of employees’ union activities after Morales was terminated, in the afternoon of March 5. (ALJD at 25; fn 35) In his decision in finding that Respondent was unaware of Morales’ union activities, the

ALJ did not discuss the evidence presented that showed employees, and specifically Morales, were involved in union activities prior to March 5, and Respondent was aware of those activities prior to March 5. (ALJD at 25)

2. The Record Evidence

Morales had worked for Respondent since 2003. (Tr. 476; ALJD at 11) Morales worked as a production worker and often worked with Aguirre. (Tr. 476-477; ALJD at 6-7) Morales was subjected to constant verbal abuse from J. Loya that consisted of him telling her she was an idiot hag, she was a “ball of Indians underneath the Sierra mountains,” she was a clown and a fool, and that she should be replaced with younger workers. (Tr. 478-479; ALJD at 4-5)

On two occasions in February, Morales spoke up to J. Loya along with Aguirre, about the way Loya treatment them. (Tr. 483-485; ALJD at 6) Morales continued to attempt to find assistance with the abusive treatment by attending a Union meeting on March 2, at Aguirre’s home and signing a Union authorization card. (Tr. 489-490; ALJD at 9) Upon returning to work on March 4, Morales started talking to employees at work and on the production floor about the Union. (Tr. 491-492; ALJD at 9-10) Morales even took Virelas to the Union meeting at the Union hall on March 4. (Tr. 417; ALJD at 10) Morales was extremely vocal at work in her support of the Union campaign. (Tr. 491-492; ALJD at 9-10)

On March 5, Morales informed J. Loya that she had to leave work early to attend a meeting at her daughter’s school. (Tr. 494; ALJD at 11) J. Loya told her it was fine. (Tr. 495; ALJD at 11) However, after Morales went to her locker to obtain her personal items to leave for the day, J. Loya approached her and fired her, stating there was no more work for her. (Tr. 494; ALJD at 11) Morales was fired on the spot, despite having worked for Respondent for ten years.

3. Legal Analysis

The ALJ rejected Respondent's argument that Morales had resigned her employment and was not discharged because she could not pass E-Verify. (ALJD at 14; fn 14) However, the ALJ did not find that Morales was discharged for her union activities but, rather, for engaging in protected, concerted activities in February 2013, when she spoke up to Loya about his abusive treatment. (ALJD at 25, fn 35)

The ALJ incorrectly found that General Counsel had failed to allege a Section 8(a)(1) theory in the Complaint but that he was free to look at alternative theories despite those theories not being specifically alleged in the Complaint. (ALJD at 23) The Complaint alleged, at paragraph 5(b) and (h), that Morales was discharged for her union activities and, alternatively, constructively discharged. See GCX 1(c), para. 5(a); 5(h). The Complaint was amended, however, on June 5, 2013, alleging that Respondent also discharged Morales for engaging in protected, concerted activities. (GCX 1(f) at para. 5(f)) Therefore, the ALJD at 23 is incorrect.

Further, the ALJ does not give appropriate weight to the record evidence that Morales engaged in union activities prior to her discharge on March 5. (ALJD at 25, fn 33) In fact, Morales signed a union authorization card on March 2, and was actively and openly engaged in union activities at Respondent's facility on March 4, when she spoke to employees on the production floor about the Union and invited them to the Union meeting that afternoon. Morales was immediately fired the next morning. (ALJD at 25, fn. 33) Morales was not immediately fired after her protected, concerted activities but after she engaged in union activities. (ALJD at 25, fn. 34)

The ALJ finds that Respondent learned of the union campaign on the afternoon of March 5 when union representatives and employees were soliciting for the union outside of Respondent's facility. (ALJD at 11) The ALJ does not give appropriate weight to the extensive record evidence about the open union activities at Respondent's facility by Aguirre, Romero, and Morales prior to that time. Therefore, the ALJ erred in failing to find that Morales was discharged in violation of Section 8(a)(3) as well as Section 8(a)(1) of the Act.

B. The ALJ Erred in Failing to Find that Respondent's E-Verification of Existing Employees was done in Violation of Section 8(a)(3) of the Act

1. Allegations

The Complaint alleged that Respondent's decision and announcement that it would be requiring all existing employees to be subjected to an E-verification process to determine their authorization to work in the United States was done in violation of Section 8(a)(3) of the Act. (GCX 1(c), para. 5(a)) Specifically, due to the employees nascent union organizing campaign that began on February 26, something Respondent became aware of on February 27, Respondent instituted an optional review of its existing workforce, 90% of which consist of Spanish-speaking only employees. The ALJ erred in not finding that this reverification of existing employees was done in violation of Section 8(a)(3) of the Act.

2. The Record Evidence

Within days of Aguirre's and Romero's meeting with union representatives, spreading the word about the union campaign and soliciting support from coworkers, Schrum decided to E-Verify employees. (Tr. 312; ALJD at 9) Schrum testified that sometime in September 2012, when he was considering purchasing Respondent, he called an unknown person at an unknown number at the United States Department of Homeland Security who informed him that he was not required to run existing employees through the E-Verify system

when he purchased Respondent. (Tr. 82; ALJD at 8-9) Although Schrum claims he was told he could do so if he wanted, that testimony was uncorroborated, self-serving, and not responsive to the question posed. What is clear, is that Schrum knew there was no requirement that he E-Verify anybody upon his purchase of the company. (Tr. 82; ALJD at 8; fn. 14) Notwithstanding the fact he had no requirement to do so, Schrum announced on March 1, at a meeting of all employees, that he would be running all employees through the E-verify system. (Tr. 312; ALJD at 8-9) This was his first act as Respondent's new owner. Schrum admitted that over 90% of Respondent's workforce consists of Spanish-only speakers. (Tr. 80) Despite Schrum's insistence that he was treating all the existing employees as new hires, the facts do not support this assertion. Schrum did not require employees to fill out new job applications, new W-4 forms, new emergency contact information, or any other documentation that new hires would typically be required to provide. (ALJD at 8) Schrum merely informed them about the E-Verify system. (Tr. 312; ALJD at 8-9) Additionally, despite the language in the Asset Purchase Agreement that all employees were terminated at midnight on February 28, employees were never told they were being fired. Instead all employees returned to work at their regular time the next day and Respondent continued to employ them; it was just another regular work day. (Tr. 76; 310; ALJD at 8) Therefore, if employees were really fired at midnight on February 28 – as Respondent claims, they must have been “hired,” at 12:01 a.m. on March 1; clearly they were never terminated. (ALJD at 8)

Prince testified that all employees, when he was the owner, were required to fill out I-9 forms and that Prince and Schrum had access and control over those forms. (Tr. 148-150; ALJD at 8) Prince testified that when E-Verify was instituted, in approximately 2008, it was

required only for new hires who had not previously completed an I-9 form. (Tr. 148; ALJD at 8) Prince further testified that he routinely reviewed the I-9's to ensure that employees' work authorization documents had not expired and if they had, he would require that employee to provide a copy of their current work authorization documents.⁶ (Tr. 148; ALJD at 8) It was also revealed that a few years before 2008, an audit was done of Prince's I-9's and several employees were found to have false documents.⁷ (Tr. 175; ALJD at 8, fn. 13) According to Prince, after the audit he ensured that all employees were current on their work authorization; Schrum had no need to re-verify employees on March 1. (ALJD at 8)

In an attempt to support its defense, Schrum testified that, on January 23, 2013, he sent an email to his legal counsel communicating his desire E-verify all employees (Tr. 705-706; RX 11) Specifically, Schrum testified as follows:

Q [By Respondent's counsel] And was this an e-mail you sent to your prior counsel?

A It is.

Q And what is the date on this document?

A January 23rd, 2013.

Q And what are you communicating to your prior counsel in this document?

A That I wanted him to negotiate with Mr. Prince's lawyer so I can inform the employees before March 1st that I was planning on running everyone through E-Verify, so, and that, like it says here, so on the employees I am retaining, meaning that I did not want to keep all of Mr. Prince's employees and I wanted to be able to figure that out before March 1st when Mr. Prince wanted to

⁶ Aguirre testified that her "green card" expired in August 2012, and Prince asked her for her proof of status. (Tr. 358)

⁷ Aguirre, Pena, Virelas, and Morales all worked for Respondent during that time. They had worked for Respondent since 1989, 2001, 2002, and 2003 respectively. (Tr. 297; 448; 310; 476) Romero is the only discriminate that may not have been employed at the time of the audit as she was hired in 2006, although it is unclear as Prince's testimony was that it was a few years before 2008. (Tr. 175; 297) As they continued to work for Respondent, it is clear that they were not found to have used false documents and had the accurate I-9 forms to continue to work for Respondent. (Tr. 182)

inform everybody on March 1st at the time that I took over.

However, the email, RX 11, says **nothing** about E-Verifying employees, and nothing about obtaining new I-9 forms. It simply says that Schrum was going to treat everyone as a “new hire,” was planning to use an outside company for payroll, and that he wanted to get employee information to the payroll company on the employees that would be working for him. (RX. 11)

3. Legal Standard

Although the tools of E-Verify are used legitimately by employers throughout the United States, the use of E-Verify in order to put a chill on employees’ rights and to discriminate against union supporters is strictly prohibited and violates the Act. *Sure-Tan, Inc.*, 234 NLRB 1187 (1978) (constructive discharge of Mexican employees by calling Immigration and Naturalization Service to investigate employees’ status); *National Livery Service*, 281 NLRB 698 (1986) (Board affirmed ALJ’s ruling of a violation when Employer called Immigration for the purpose of threatening and coercing employees in their Section 7 rights); *In re Belle Knitting Mills, Inc.*, 331 NLRB 80 (2000) (Violation when Employer announced that employees did not know that if they brought in a Union, the first step was to ask for their immigration papers) Respondent was aware that union activity was afoot. In order to put fear into the employees, it announced that it would be requiring all employees, even those who had been working for years, to resubmit I-9 forms.

The Immigration Reform and Control Act does not require that a successor employer reverify employees where the successor has maintained the previous employer’s records and I-9 forms. See CFR Section 274a.2(b), (1)(viii), (A), (7).⁸ Further, Federal courts have

⁸ For purposes of IRCA, a successor employer includes an employer who continues to employ some or all of the previous employer’s workforce in cases involving a ...sale of assets. CFR Section 274a.2(b), (1)(viii)(A)(7)(ii).

recognized that a formal inquiry into the immigration status is intimidating and chills the exercise of statutory rights of employees. *Rivera v. NIBCO, Inc.*, 364 F. 3d 1057, 1065 (9th Cir. 2004), cert. denied 544 US 905 (2005). The Board has noted that, an employer reverifying an employee will, in some circumstances, constitute an unfair immigration-related employment practice on its own. *Flaum Appetizing Corp.*, 357 NLRB No. 162 slip op. at 6 (2001) (citing 8 CFR Section 274a.2(b), (1), (viii), (A), (5)).

Respondent is an admitted successor employer of Prince's company.⁹ (Tr. 223) Prince testified to a specific list of items he took when he left; this list did not include the I-9s. As Prince testified that all employees hired while he was the owner completed I-9 forms, that he and Schrum were responsible for the forms, and that they were kept in a file in Respondent's office, and he did not list the I-9 forms with the documents that he took when he left, there can be no doubt that Schrum did not have to reverify employees but that he instead chose to do so.

The ALJ made a determination that on March 1, when Schrum announced his plan to E-verify employees, Respondent had no knowledge of union activities of its employees and did not gain knowledge until March 5. (ALJD at 11, fn. 18) However, in so finding, the ALJ fails to give appropriate weight to the record evidence of open and ongoing union activities throughout the production floor, starting on February 27 and continuing through March 1. Further, the ALJ credits Schrum's testimony that he decided to E-verify employees well before the union campaign, even though there is no evidence to support this determination except Schrum's self-serving testimony. (ALJD at 28) Even the email that it presented that purports to show his intent to E-Verify, doesn't mention E-verify. The ALJ fails to mention

⁹ The transcript was corrected by the ALJD at page 222, line 23. Where it states "deny", it should state "admit". (ALJD at 3, fn 3)

this email in his decision. Outside of Schrum's uncorroborated testimony, the record evidence is bereft of a decision to E-Verify prior to March 1.

C. The ALJ Erred in Failing to Find that Virelas was either Discharged or Constructively Discharged in Violation of Section 8(a)(3) of the Act.

1. Allegations

The Complaint alleges that Virelas was discharged because of his union and concerted activities in violation of Section 8(a)(3). (GCX 1(c); 5(c)) As an alternative theory, the Complaint alleges that Virelas was constructively discharged due to Respondent's unlawful E-verification process and Respondent's insistence that Virelas be given only a week to work after receiving a "no-match" letter regarding his social security card. (GCX 1(c); 5(e))

Due to the ALJ's determination that Respondent's use of E-Verify was not in violation of Section 8(a)(3), he subsequently determined that Virelas was properly reverified, that Respondent received a no-match letter regarding Virelas social security number, that Virelas elected not to fight it, and resigned after Respondent agreed to hire his daughter. (ALJD at 28) The ALJ erred in first finding that the use of E-Verify by Respondent was not a violation of Section 8(a)(3) of the Act as discussed above. The ALJ further erred in failing to find that Respondent's discharge and/or constructive discharge of Virelas was not in violation of Section 8(a)(3) even after Virelas was interrogated and threatened regarding his signing a union authorization card.

2. The Record Evidence

Virelas had worked for Respondent since 2002. (Tr. 413; ALJD at 16) Virelas was also a production worker and had been subjected to numerous abuses by J. Loya as well as observing the abuses of other employees. (Tr. 413 – 415; ALJD at 4-5) As this bothered him and in order to obtain better wages, Virelas attended the Union meeting on March 4, at which

time he signed a Union authorization card. (Tr. 417-418; ALJD at 10) Morales took Virelas to the Union meeting. (Tr. 417; ALJD at 10) Within days, Virelas was called into J. Loya's office and told that since employees had come on over with the Union, they could no longer work for Respondent, that Respondent was going to "run them off", and they should go ask "Martha's son", meaning Ricardo Aguirre, for work. (Tr. 419; 434; ALJD at 29-31)

Apparently, a "no-match" letter from the Social Security Administration office was returned after Respondent ran Virelas' social security number through E-Verify. (RX 4) Schrum testified that he, Yvonne Ortiz (Ortiz), and J. Loya called Virelas into the office, presented him with the paperwork regarding his social security number, and informed him he had eight days to clarify the social security number. (Tr. 709; ALJD at 16) Although Schrum claims that Virelas signed the "no-match" letter stating he was not going to contest it, Respondent failed to provide the full three-page document, including the page where Virelas supposedly signed his name. (RX 4) Respondent only presented the first page where it is noted that it is a three-page document. (RX 4) The ALJ does not seem to be bothered by the absence of the remaining two pages of the document. (ALJD at 16, fn. 27) Even if this meeting occurred with Schrum, Ortiz, J. Loya and Virelas, J. Loya held further one-on-one conversations with J. Loya.¹⁰ (ALJD at 29-31)

Soon after threatening Virelas by telling him that those employees who signed Union cards could no longer work there and should ask Ricardo for work, J. Loya spoke with Virelas and told him he could only work for one more week because of a paper. (Tr. 420) Virelas clearly did not understand what the paper was and merely signed it as instructed to by J. Loya.

¹⁰ Respondent continued to describe these conversations as "meetings", confusing Virelas. However, when Virelas was asked about conversations with J. Loya, he understood them to mean the conversations he testified having with Virelas. (Tr. 436-437) Respondent's counsel's questions were confusing for this witness.

(Tr. 42). Again, if this was the paper mentioned by Schrum, Respondent failed to produce it for the hearing. (RX4)

Later, J. Loya approached Virelas while he was cleaning his machines and asked him to tell him whether he had signed a Union card. (Tr. 420; ALJD at 15) Virelas responded “who told you?” and J. Loya told Virelas “You see? I know everything about here.” (Tr. 421; ALJD at 15) Virelas testified that he only worked one more week because of the conversations with J. Loya where he was told he could only work for one more week, not due to his inability to fix the no-match letter. (Tr. 421)

3. Legal Analysis

The ALJ determined that Virelas was neither discharged nor constructively discharged, and resigned his employment. (ALJD at 28) As a basis for this belief, the ALJ points to Virelas asking that Respondent hire his daughter and Respondent doing so. (ALJD at 16) There is no indication that Virelas’ daughter was involved with the union nor had signed a union card. Respondent clearly believed that Virelas had been involved in union activities, given Loya’s questions and statements—statements the ALJ found were made and constituted violations of the Act. (ALJD at 29-31)

In making a determination as to whether a discharge violates Section 8(a)(1) and (3) of the Act, a *Wright-Line* burden-shifting analysis must be done. *Wright Line*, 251 NLRB 1083 (1980), *enf’d*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). To establish a violation, the government must prove, by a preponderance of the evidence, that the employee’s protected activities were a motivating factor in the employer’s decision to take the adverse action. *Wright Line*, 251 NLRB 1083 (1980). In meeting its burden of persuasion, the General Counsel must establish that the discriminatees engaged in protected activity, that

respondent had knowledge of this activity, and that the protected activity was a motivating factor in the adverse employment actions. Once that is established, the burden of persuasion shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of protected activities. *Id.*

A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices;¹¹ (3) statements and actions showing the employer's general and specific animus;¹² (4) the disparate treatment of the discriminatees;¹³ (5) departure from past practice;¹⁴ (6) failing to adequately investigate whether the discriminatee engaged in the alleged misconduct; and (7) evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext.¹⁵ The Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive."¹⁶

Evidence of Respondent's knowledge of Virelas' union activity is shown by the fact that Virelas was interrogated about signing a union authorization card soon after he did so. Respondent had full knowledge of the Virelas' union activities.

As for animus against employees who engage in protected conduct, Respondent's numerous 8(a)(1) violations, standing alone, are sufficient to establish its unlawful animus.

¹¹ See *Mid-Mountain Foods, Inc.*, 332 NLRB 251, (2000) enf'd 11 Fed.Appx. 372 (4th Cir. 2001) N.2, 260 (2000), enf'd mem., 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993).

¹² See *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999) (statements, even if lawful, serve as background evidence of animus);

¹³ See *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

¹⁴ See *JAMCO*, 294 NLRB 896, 905 (1989), aff'd mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991).

¹⁵ See, e.g., *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998).

¹⁶ *J.S. Troup Elec.*, 344 NLRB 1009 (2005) citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995) enf'd. 97 F.3d 1448 (4th Cir. 1996) (table); *ADS Elec. Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Avondale Industries, Inc., 329 NLRB 1064, 1071 n. 4 (1999). Accordingly, the evidence establishes that Virelas' protected activities were the motivating factor in Respondent's decision to fire him. As such, the burden shifts to Respondent to demonstrate that it would have fired Virelas even in the absence of his protected conduct. *Id.* at 1065. Respondent cannot do so.

The timing of the discharge – less than two weeks after Respondent learns of the union organizing campaign – proves that Respondent fired Virelas to prevent him from continuing to organize its workforce. See, *Overnite Transportation Co.*, 129 NLRB 1026, 1037 (1960) *en'f'd.* 308 F.2d 279 (4th Cir. 1962) (timing of discharge, coming in the midst of the employer's anti-union campaign, supports a finding that the discharge was illegally motivated); *Carl's Jr.*, 285 NLRB 975, 999 (1987) (timing of discharge, coming in the during the company's anti-union campaign, coupled with apparent pretext, shows illegal motive). A week after Virelas is interrogated and threatened about signing union authorization cards, he is fired.

Respondent's conduct toward Virelas regarding a "no-match" letter is also suspect. A Social Security Administration "no-match" letter is a written notice informing an employer that a name does not match the social security number attached and are not intended to contain positive information of immigration status and could be triggered by reasons other than fraudulent documents, and that no-match letters merely indicate that worker earnings were not being properly credited. IRCA, Section 101(a) (1), 8 USCA Section 1324a(a)(1), (2); 8 CFR Section 274(a.1)(1). Employers are specifically cautioned against taking any adverse employment action against an employee based solely on the receipt of the letter. *Id.* If an employer takes adverse action and uses the letter as a basis to either retaliate against an

employee or otherwise subject the employee to heightened scrutiny, it can subject the employer to liability under the anti-discrimination provision of the Immigration and Nationality Act, codified at 8 U.S.C., Section 1324b. Employers are advised that it may take as much as 120 days to resolve the issue. See Frequently Asked Questions, *supra*. Further, as noted by the Ninth Circuit, a “no-match” letter received by the Social Security Administration does not put an employer on notice that any particular employee was an undocumented worker. *Aramark Facility Services*, 530 F. 3d 817 (9th Cir., 2008) (giving employees 3 days to clear up no-match letter discrepancy, and firing them 7 to 10 days later, unreasonably short).

Respondent asserts that it told Virelas he had eight days to fix his social security no-match and that he signed a form indicating he was not going to contest it and could not provide the documents. However, RX 4 is missing two pages, specifically this page referenced by Respondent that Virelas supposedly signed. The only thing RX 4 shows is that Respondent received the letter from the social security administration. Respondent would be the only party that would have the entire document including the page allegedly signed by Virelas. By not providing the portion they assert they showed Virelas and had him sign, Respondent has failed to support its argument and such evidence should be disregarded. The ALJ erred in stating that he did not consider this because General Counsel did not ask questions about why the remaining two pages were missing. (ALJD at 16, fn. 27) This completely ignores the fact that the record evidence is that it is a three page document and Respondent alleges that Virelas signed the document, agreeing not to contest the “no-match” letter. Virelas disputes that and Respondent has failed to provide it. For the ALJ to ignore this evidence because General Counsel did not ask about the two left out pages is in error. As

noted by the Supreme Court, “[t]he production of weak evidence [testimony about the document] when strong is available [the document itself] can lead only to the conclusion that the strong would have been adverse.” *Interstate Circuit v. U. S.*, 306 U.S. 208, 226 (1939). As Respondent clearly had the entire document (RX4) at its disposal and failed to introduce it, an adverse inference is warranted that the remaining two pages of RX4 are unfavorable to Respondent’s position. *Miramar Sheraton Hotel*, 336 NLRB 1203, 1215 (2001). The ALJ had an obligation to hold Respondent accountable for failing to provide the document that supported its testimony that contradicted Virelas, not General Counsel. As such, the record evidence clearly supports the finding that Respondent’s conduct violated Section 8(a)(3).

The Complaint alleges an alternative theory that by announcing that all employees would be subjected to new scrutiny of their work authorization status and by giving Virelas a no-match letter, providing only a week to correct his social security number, Virelas was constructively discharged as opposed to being discharged. General Counsel argues that there is overwhelming evidence that Virelas was discharged as opposed to being constructively discharged. However, in the alternative, if Virelas resigned, he clearly did so because of the unlawfully motivated announcement that all employees would be subjected to new and heightened scrutiny of their work authorization status as well as Respondent’s questioning of Virelas concerning his “no-match” letter.

In order to prove that an employee was constructively discharged, the General Counsel must establish that the burdens imposed on the employee “must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force [the employee] to resign” and that the burdens were imposed because of the employee’s union activity. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). Any threat to report employees to

Immigration because they selected the Union as their representative constitutes an act of intimidation and coercion under the Act. *Impressive Textiles*, 317 NLRB 8, 13 (1995); *CKE Enterprises*, 285 NLRB 975, 989 (1987). Respondent's illegal actions by threatening them with E-Verify immediately after these employees began a union campaign and telling Virelas he had a "no-match" letter was the reason for his resignation if the Board determined Virelas quit his employment. Threatening to run employees through another system after those employees had already provided Respondent with documentation authorizing them to work in the United States many years previously, could cause an employee to be coerced into quitting by such an unlawfully motivated threat. *SureTan, Inc.*, 246 NLRB 788 (1979); *Sioux Products*, 257 NLRB 353 (1981); *LaMousse, Inc.*, 259 NLRB 37 (1981).

As the law above states, an employer cannot discharge an employee based on a no-match letter alone. Employees must be given sufficient time to correct a no-match letter and a week or eight days is not sufficient. The ALJ failed to discuss this in his decision, failed to give appropriate weight to the overwhelming evidence that Virelas was told he could only work for one more week coupled with unlawful threats of discharge, interrogation, and surveillance, and failed to hold Respondent accountable for crucial documentary evidence that it failed to produce. Because of these errors, the ALJ subsequently erred in failing to find that Virelas was either discharged or constructively discharged in violation of Section 8(a)(3) of the Act.

D. The ALJ Erred in Failing to Find that Schrum’s One-on-One Meetings with Employees Constituted a Violation of Section 8(a)(1) of the Act

1. Allegations

Immediately after Respondent learned of the union organizing campaign, Schrum called employees into his office, one by one, to ask them about any concerns or issues they had with the workplace, and if there was anything he could do for them. (ALJD at 10) The ALJ erred when he found that this conduct was not an unlawful solicitation of grievances and a promise to increase benefits if employees refrained from Union activities in violation of Section 8(a)(1) of the Act.

2. The Record Evidence

Starting on March 4, and continuing throughout that week, Schrum met with “all of his employees” in one-on-one meetings. (Tr. 81; ALJD at 10) Curiously, he did not meet with any of the five discriminatees, despite Virelas being employed according to Respondent’s records until March 20, and Pena being employed until March 13. (Tr. 723; 733; RX9 and 10; ALJD at 10) These meetings were held in the office and Schrum had Ortiz, an individual who is not employed by Respondent, acted as a translator. (Tr. 81; ALJD at 10) Schrum asked the employees if they had any concerns with the new ownership, concerns about anything else that they wanted to ask him, if they liked their jobs, as well as discussions about bonuses and raises. (Tr. 82; 98-101; 714-715; ALJD at 10) Employees complained to Schrum about the wages and about the conduct of Rosa. (Tr. 98; ALJD at 10) Schrum immediately took steps to address those grievances, by moving Rosa to another station and granting raises to each and every employee that was not discharged by him. (Tr. 101; 740; ALJD at 10)

3. Legal Analysis

Schrum admits that starting on March 4 and continuing throughout the week, he spoke to all employees, one-on-one, to ask them about any concerns they were having and to make sure they were happy and if he could do anything for them. (ALJD at 10) This occurred immediately after the employees began their union organizing campaign.

a. Solicitation of Grievances

An employer's solicitation of grievances chills employee organizing efforts because it demonstrates that: (1) efforts to organize are unnecessary; and (2) that the employer will only improve working conditions as long as the workplace remains union-free.¹⁷ The relevant principles regarding the solicitation of grievances are well established. Absent a previous practice of doing so, the solicitation of grievances during an organizing campaign accompanied by a promise to remedy those grievances, whether express or implied, violates Section 8(a)(1) of the Act. *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (solicitation of grievances made during the midst of a union campaign inherently constitute an implied promise to remedy the grievances, which is rebuttable by showing that the employer had a past practice of soliciting complaints).

Here, the evidence shows that Respondent unlawfully solicited grievances from employees immediately after employees began to organize. There is no evidence Respondent had a previous practice of meeting with employees and asking them about their workplace problems. Although Respondent may argue that it was a new company as of March 1, such

¹⁷ See *Center Service System Division*, 345 NLRB 729, 730 (2005), enforced in relevant part, 482 F.3d 425 (6th Cir. 2007) (solicitation of grievances influences employee choice during an organizational campaign because it raises inferences that the employer is promising to remedy those grievances); *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 370-371 (6th Cir. 2002) (when an employer institutes a new practice of soliciting employee grievances during a union organizing campaign there is a compelling inference that he is implicitly promising to correct those inequities and is urging employees that the combined program of inquiry and correction will make union representation unnecessary).

an argument is meritless; everything remained the same, the supervisors, the employees, the customers, the location of the plant, only the identity of the owner changed. There is no indication that Schrum ever met with employees one-on-one in his position as General Manager or that Prince or J. Loya had a practice of doing so.

For example, Schrum admitted asking every employee what kind of changes they wanted and admitted asking employees how Respondent could help them. Such questioning constitutes an unlawful solicitation of grievances. *L.M. Berry & Co.*, 266 NLRB 47, 54-55 (1983) enfd. 668 F.2d 249 (6th Cir. 1982) (employer unlawfully solicited grievances when, after employees started organizing, its assistant vice president took employees to breakfast and asked them what their problems were and why they had taken the steps they had taken); *General Electric Company*, 264 NLRB 953, 953 (1982) (building manager's "questioning of employees as to whether they had particular problems, and what some of their problems were" amounted to solicitation of grievances with an inference that the employer promised to remedy problems brought to its attention).

The ALJ argues that Schrum was merely talking to his employees now that he was the new owner and his meetings had nothing to do with the ongoing union organizing campaign. (ALJD at 32) The ALJ fails to point out the record evidence that Schrum had been the general manager for over twenty years, had rarely spoken to employees in the past, and although he wanted to talk to all employees, he specifically did not talk to the main union advocates—Aguirre, Romero, Pena, Morales, and Virelas. (ALJD at 10) This alone shows that these conversations were geared towards those employees who were not yet sold on union representation, in order to coerce their potential union activities. That is precisely why solicitation of grievances during a union campaign is so dangerous and should not be done.

Accordingly, the record evidence supports a finding that Respondent solicited employee grievances during each individual employee meeting in order to discourage employees from engaging in Union activities in violation of Section 8(a)(1) of the Act.

b. Promise to Help Employees

Promises of benefits by an employer, while employees are organizing, have a coercive effect, because employees are not likely to miss the inference that the source of benefits presently conferred is also the source from which future benefits must flow, that may dry up if not obliged. *Permanent Label Corp.*, 248 NLRB 118, 131 (1980) enf. 657 F.2d 512 (3rd Cir. 1981), citing *NLRB v. Exchange Parts Co.*, 375 US 405, 409 (1964). As the Supreme Court observed in *Exchange Parts, Co.*, “[T]he danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove.” 375 US at 409.

“The promise of benefits need not be specific in nature or as to the time of its implementation, and need not be expressly conditioned on abandonment of union support.” *Permanent Label Corp.*, 248 NLRB at 131. Thus, the Board has found a violation where an employer promised that it “would someday better itself and offer the employees more,” or where a company tells employees that it realizes “management mistakes had been made and it was willing to correct them” and asked employees to give the company another chance.” *Id.* (internal citations omitted).

Here, Schrum informed employees that he was going to give all of them a raise and do something about their complaints about Rosa. *Triana Industries, Inc.*, 245 NLRB 1258, 1263 (1979) (employer’s discussing a raise, in the context of interrogating employee concerning her union activity, constituted a promise of a benefit in violation of Section 8(a)(1)) The timing of the promises were in direct response to the ongoing union campaign. Further, employees

would have understood that the statements and meetings were a direct response to their ongoing union activities. Most notable is who Schrum did not meet with—the five discriminatees, despite the fact that all worked past March 4, and Pena and Virelas worked for at least a week later. (Tr. 723; ALJD at 10) Therefore, the record evidence that should have been considered by the ALJ, shows that during the noted individual employee meetings, Respondent violated Section 8(a)(1) of the Act by explicitly and implicitly promising to help employees with their problems, promising raises, and by doing something about the abuse of Rosa in order to dissuade employees from engaging in activities in support of the Union.

c. Granting of Benefits

Almost as soon as the union campaign began, Schrum granted raises to all employees. (ALJD at 10) Conferral of employment benefits during an organizing campaign is not per se unlawful, but the Board will presume that such action is objectionable unless the employer can show that its actions were governed by factors other than the union campaign. *Guard Publishing Co.*, 344 NLRB 1143 (2005). The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow, and which may dry up if it is not obliged. *NLRB v. Exchange Parts, Co.*, 375 U.S. 405, 409 (1964) The Board has found that a wage increase, with little else, has an enduring impact on the bargaining unit and can be enough to warrant a Gissel bargaining order. *Skyline Distributors*, 319 NLRB 271 (1995), enf. denied 99 F. 3d 403 (D.C. Cir. 1996). Here, Schrum contended that he only granted the wage increases because he could not pay the bonuses that employees had received in the past. If Schrum had simply raised wages without the one-on-one meetings where he solicited employee grievances that might be a

valid argument. However, coupled with Schrum's solicitation of grievances, promising benefits, telling employees he wanted them to be happy, there can be no doubt that the granting of the wage increases was designed to "give Schrum a chance" to grant benefits before the employees chose the Union as their collective-bargaining representative; just as Schrum asked in his anti-union Power Point presentation. It was a clear violation of Section 8(a)(1) of the Act and the ALJ's erred in failing to find such violations.

E. The ALJ Erred in Failing to Find that an Anti-Union Power Point Comment Constituted a Violation of Section 8(a)(1) of the Act.

1. Allegations

The Complaint alleged, as amended at the hearing, that two statements in a anti-union PowerPoint presentation violated Section 8(a)(1) of the Act. In particular, the PowerPoint contained erroneous statements concerning what would happen during a strike that the ALJ found to be violations of Section 8(a)(1). (ALJD at 30) However, the ALJD failed to find that the statement "Give me a chance!" violated the Act, and determined it was proper election campaign propaganda and permissible under Section 8(c) of the Act. (ALJD at 30-33)

2. The Record Evidence

Schrum met with ten employees at a time, on or about March 26 and 27, and presented a PowerPoint to them, in English and Spanish. (ALJD at 18-20) By certain statements in this presentation, Schrum solicited grievances, promised employees a change in their working conditions and threatened employees with discharge if they selected the union as their collective-bargaining representative.

3. Legal Analysis

An employer may speak freely to his employees regarding issues arising in connection with a union organizational campaign, so long as his statements do not contain a threat of reprisal or force or promise of benefit. The Supreme Court, in *Gissel Packing Co., v. NLRB*, 395 U.S. 575, 616-619 (1969), articulated the following rigorous standards an employer must meet to avoid a violation, when predicting the effect unionization will have on employees:

[T]he question raised here most often arises in the context of a nascent union organizational drive, where employers must be careful in waging their antiunion campaigns.... Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.... [W]hat is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk. ... Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, *the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control* or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. .

In assessing whether Section 8(a)(1) has been violated, the Board's test is whether, in light of all the circumstances, including the context in which the alleged unlawful statement or action

occurred, the charged conduct reasonably tends to interfere with the free exercise of the employees' rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959); *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 fn. 1 (1992).

The statement "give me a chance first" after stating that it is almost impossible to get rid of a union once they are in, as well as coupled with the previous solicitation of grievances and promises of benefits, is part of the unlawful course of conduct by Respondent that if employees do not vote for the Union, Respondent would make things better. Further, Respondent told employees that if they continued to be unhappy, after Respondent had been given a chance to make things better, they could always bring in the Union. (GCX 6) In *Waste Management of Utah*, 310 NLRB 883 (1993), the Board upheld the ALJ's finding that the statement to employees to "hold off on signing anymore union cards and give us a chance to make things right" constituted a violation of the Act. *Id.* at 888. In *Acme Bus Co.*, 320 LRB 459 (1995), employees were presented a proposed benefits package prior to an election and those employees were told that if they wanted the owner to instate a benefits package, they needed to give the owner a chance and not vote for the union. *Id.* at 463. In *Overnite Transportation Co.*, 329 NLRB 990, (1999), the employer had an anti-union campaign with the slogan "Give Jim a Chance", referring to the owner. This statement coupled with solicitation and promises of benefits was found to be part of an overall illegal promise of benefits scheme. *Id.* at 1047. In *Fisher-Haynes Corp of Georgia*, 262 NLRB 1274 (1982), the Board overturned the ALJs decision to dismiss the 8(a)(1) allegation where the supervisor asked employees to "give him a chance to make things better...and make employees happy", and found a violation, stating that it was an offer to increase wages if the employees abandoned the union campaign. *Id.*

The ALJ determined that the statement “give me a chance!” was not accompanied by threats, and was not coercive. The ALJ failed to give any context to the statement. This statement was made in an anti-union PowerPoint presentation where the ALJ found that Respondent issued unlawful threats. (ALJD at 30) Further, this PowerPoint presentation was given after threats, interrogation, and unlawful surveillance not to mention the discharge of five union supports had occurred. Respondent’s PowerPoint statements to give it a chance was an unlawful promise of benefits if employees just held off in selecting the Union as their collective-bargaining representative and violated Section 8(a)(1) of the Act and the ALJ erred in his failure to find this violation.

F. The ALJ Erred in Failing to Ordering Two Special Remedies Requested by the General

1. Special Remedies

The Complaint specifically requested that the ALJ order special remedies in this case given the serious nature of the unfair labor practices in Respondent’s attempts to “nip in the bud” a union organizing campaign. Specifically, the Complaint requested that Respondent be required to allow the Union access to Respondent’s bulletin boards and require Respondent to provide the Union with the names and addresses of all employees employed by Respondent. The ALJ erred by failing to order these remedies, notwithstanding Respondent’s numerous and serious unfair labor practices.¹⁸

¹⁸ The ALJ did order Respondent to have a public reading of the Notice to Employees with either Schrum or a Board Agent reading the Notice to Employees. (ALJD at 35)

2. Legal Analysis

The Board allows special remedies to be required when a respondent had committed numerous and serious unfair labor practices. *Charlotte Amphitheater Corporation d/b/a Blockbuster Pavilion*, 331 NLRB 1274, 1276 (2000). One of the remedies the Board has authorized is a limited bulletin board access to a Union that has had its organizing campaign stopped by the obstacles of those unfair labor practices. See *Charlotte Amphitheater Corporation*, supra. “The limited bulletin board access remedy is designed to reduce the obstacles to free union-employee communication that were created by the Respondent’s prior coercive conduct.” *Id.* at 1276. It also serves to offset the Respondent’s numerous and serious unfair labor practices by reassuring the employees “that the Union has a legitimate role to play in their decision whether to seek union representation.” *Avondale Industries*, 329 NLRB 1064, 1065 fn. 15 (1999). The ALJ clearly found numerous and serious unfair labor practices that chilled employees in their union activities. Union Representatives Martin Hernandez and Efrain Sanchez both testified that employees were scared to speak to them after the unfair labor practices began. (Tr. 620-623; 630)

Further, the names and addresses remedy is one provided for in similar circumstances in *United States Service Industries*, 319 NLRB 231, 232 (1995), *enfd.* 107 F. 3d 923 (D.C. Cir. 1997). “If the names and addresses remedy makes organizing easier, that result is appropriate where the employer’s unfair labor practices have obstructed organizing and the remedy serves to neutralize those unfair labor practices.” *J.P. Stevens & Co. v. NLRB*, 417 F. 2d 533, 540-541 (5th Cir. 1969)

The ALJ erred in failing to order these two special remedies after finding numerous and serious unfair labor practices to include the discharge of the lead union organizers coupled with threats, interrogations, and surveillance. (ALJD at 34)

III. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board find that Respondent violated Section 8(a)(1) and (3) of the Act as discussed above, affirm and adopt the ALJ's other findings and conclusions, and issue an order providing a full and appropriate remedy in this matter.

Dated at Phoenix, Arizona, this 19th day of September 2013.

Respectfully submitted,

s/ Sandra L. Lyons

Sandra L. Lyons

Counsel for the Acting General Counsel

National Labor Relations Board, Region 28

2600 North Central Avenue, Suite 1400

Phoenix, AZ 85004-3099

Telephone: (602) 640-2133

Facsimile: (602) 640-2178

E-mail: Sandra.Lyons@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS in FARM FRESH COMPANY, TARGET ONE, LLC., Case 28-CA-100434 was served by E-Gov, E-Filing and by E-mail, on this 19th day of September 2013, on the following:

Via E-Gov, E-Filing

Gary W. Shinnery, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via Electronic Mail

Thomas M. Stanek, Attorney at Law
Christopher J. Meister, Attorney at Law
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016-9291
E-mail: thomas.stanek@odnss.com
E-mail: christopher.meister@odnss.com

Elizabeth Q. Hinckle, Attorney at Law
Davis Cowell & Bowe, LLP
595 Market St, Ste 1400
San Francisco, CA 94105-2821
Email: eqh@dcbsf.com

/s/ Sandra L. Lyons

Sandra L. Lyons
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
Telephone: (602) 640-2133
Facsimile: (602) 640-2178
Sandra.Lyons@nlrb.gov