

UNITED STATES OF AMERICA  
BEFORE  
THE NATIONAL LABOR RELATIONS BOARD

ROAD SPRINKLER FITTERS LOCAL  
UNION NO. 669, U. A., AFL- CIO,

Respondent,

NLRB Case No. 27-CC-091349

FIRETROL PROTECTION SYSTEMS,  
INC.,

Charging Party,

and

COSCO FIRE PROTECTION, INC.,

MX HOLDINGS, INC.,

and

CFP FIRE PROTECTION, INC.,

Parties in Interest.

.....

**LOCAL 669'S BRIEF IN SUPPORT OF EXCEPTIONS**

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## LOCAL 669'S BRIEF IN SUPPORT OF EXCEPTIONS

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO ("Local 669" or "the Union"), Respondent herein, respectfully submits this Brief in Support of its Exceptions to the Decision and Order of the Administrative Law Judge ("ALJD").

### I. INTRODUCTION

This case arises from a grievance and a suit to compel arbitration by Local 669 following the discharge of an entire bargaining unit of employees of Firetrol Protection Systems ("Firetrol"), on the eve of and preventing an election that had been directed by the NLRB. Jt. Exh. 1 (Stipulation), paras. 3, 4.

The Union filed the grievance under the authorization card check/neutrality clause in its national collective bargaining agreement to which Firetrol's commonly-owned corporate affiliate Cosco Fire Protection, Inc. ("Cosco") is bound; the clause prohibits "coercion" and "interference" with employees' decision to sign authorization cards and their vote in an election -- a provision the National Labor Relations Board ("NLRB" or "the Board") recently confirmed to be primary, lawful and enforceable. *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB No. 176 (2011) (citing and relying upon its earlier card check/neutrality clause decision in *Heartland Industrial Partners*, 348 NLRB 1081 (2006), *review denied sub nom. Kandel v. NLRB*, 265 Fed. Appx. 1 (D.C. Cir.

2008)). The remedy sought by the Union grievance was a “restoration of the *status quo*” and that the terminated employees be “made economically whole.” Jt. Exh. 1 (Stipulation), para. 4.

The Union also demanded information relating to the decision to close the Firetrol facility and terminate the employees, the provision of which is required by the authorization card check/neutrality clause. The requested information has never been disclosed. G.C. Exh. 11.

When the employer parties refused to proceed to arbitration or to provide the information requested by the Union, the Union sued to compel arbitration as it had in a prior case involving the same parties. *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Protection, Inc., et al.*, 363 F. Supp. 2d 1220 (C.D. Cal. 2005).

The General Counsel refused to allow the arbitration to proceed and the merits of the Union’s grievance to be determined by an arbitrator on a full record subject to post-arbitral review by the NLRB and/or the courts. Instead, the General Counsel issued a Complaint at the behest of the employers, and has attempted to negate the arbitration process and to invade an arbitrator’s jurisdiction to determine the merits of the grievance, alleging that the mere filing of the grievance and suit to compel arbitration, under a lawful contract provision, have an illegal purpose and violate Sections 8(b)(4)(ii) (A) and (B) of the National Labor Relations Act (“NLRA”).

The General Counsel also attempted to enjoin the suit to compel arbitration by filing a Section 10(l) Petition, but the 10(l) Petition was denied and the General Counsel elected not to appeal. *Jones v. Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO*, Case No. 13-3015-GHK (JPRx) (C.D. Cal.), Dkt No. 55.

The General Counsel's allegations, and the decision by the Administrative Law Judge ("ALJ") endorsing those allegations, violate hallmark principles of federal labor law requiring deferral to the arbitration process, *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37 (1987), and reserving determination of the merits of a grievance to an arbitrator. *Major League Players Ass'n v. Garvey*, 532 U.S. 504, 509-10 (2001) (citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)).

The General Counsel's allegations and the ALJ's decision likewise violate the Union's First Amendment-protected right to petition the federal court. *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 530 (2002); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983); *BE&K Construction Co.*, 351 NLRB 451, 457 (2007); *Milum Textile Serv.*, 357 NLRB No. 169 (2011).

For these reasons, and as we further show below, the ALJ's decision should be reversed and the Complaint dismissed in its entirety.

## II. STATEMENT OF THE CASE

The facts as recited below are undisputed unless otherwise indicated.<sup>1</sup>

### A. The Parties

Local 669 is affiliated with the United Association and represents construction workers in 48 states and the District of Columbia who install and maintain automatic fire protection systems and whose terms and conditions of employment are governed by successive national multi-employer collective bargaining agreements between the Union and the National Fire Sprinkler Association (“NFSA”) (“the Agreement”) to which Cosco is bound. G.C. Exh. 21. *Road Sprinkler Fitters Local 669 (Cosco Fire Protection)*, 357 NLRB No. 176.

The Board recently described the corporate affiliations of Cosco, Firetrol and Consolidated Fire Protection, their common corporate parent, in these terms:

Cosco is owned by Consolidated Fire Protection, LLC (Consolidated). Consolidated also owns Firetrol Protection Systems, Inc. (Firetrol). Firetrol, like Cosco, is a contractor in the construction industry performing the inspection, installation, and repair of fire suppression devices and alarms.

*Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 8. It was admitted at the hearing that the predecessor to Consolidated, a holding company,

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<sup>1</sup> Citations to the transcript of the hearing in this matter are cited by page and witness “(White \_\_\_);” exhibits are cited as “(G.C. Exh. \_\_\_).” The decision of the Administrative Law Judge is cited as “ALJD \_\_\_.” Emphasis is supplied herein unless otherwise indicated.

originally “established Firetrol” as the non-Union counterpart to Cosco’s union operations (Jt. Exh. 3 at 8), and both Cosco and Firetrol perform fire protection work within the Union’s trade and national territorial jurisdiction. *Id.*

Consolidated, the common parent company of Cosco and Firetrol, merged with MX Holdings in 2010; the documentary record plainly establishes that the merged parent entity has continued to do business under the name of “Consolidated,” contrary to the ALJ’s erroneous finding (ALJD 4, fn. 9), and for that reason the parent entity is referred to herein as “Consolidated/MX.”<sup>2</sup>

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<sup>2</sup> Although the relationships between these corporate affiliates is one of many issues of fact for an arbitrator to resolve, the General Counsel’s claim and the ALJ’s finding that Consolidated “no longer exists” (ALJD 4, fn. 9) -- as if the employer parties herein are not the very same parties involved in the previous District Court and NLRB proceedings -- needs to be corrected for purposes of this case. Contrary to the employers’ protestations, following Consolidated’s merger with MX in 2010, the surviving parent entity has continued to do business under its preexisting name -- the undisputed evidence, consisting primarily of the employers’ own records and the General Counsel’s exhibits, plainly shows that the merged entity has continued to do business and to hold itself out to the public as “Consolidated” at all material times. G.C. Exh. 31 (10/09/12-4/28/12); Resp. Exh. 2 (7/11/12); Resp. Exh. 3 (11/1/12); Resp. Exh. 8 (10/12/12); Resp. Exh. 11 (9/18/12); Resp. Exh. 12 (2/23/13). For example, a series of fifteen (15) separate work orders for projects during the period from October 2012 through April of 2013, two years *after* the merger, each one of which identifies the contracting party as “Consolidated Fire Protection.” Respondent Exhibit 3 likewise documents the ongoing close relationship between “Consolidated Fire Protection” and Firetrol as advertised on *Firetrol’s* website as of October 2012, again two years *after* Consolidated supposedly disappeared from the business world. When asked how “Consolidated” could have obtained a copyright for its website under that name in 2012, having supposedly been out of business since 2010, Cosco’s CEO was at a loss for an answer. Fielding 266; Resp. Exh. 11.

## **B. The 2004 Grievance and Related District Court Litigation**

In 2004, Local 669 filed a grievance against Consolidated/MX and Cosco asserting a violation of what was then Article 3 of the 2000-2005 Agreement, which provided, as relevant here, as follows:

[i]n order to protect and preserve for the employees covered by this Agreement all work historically and traditionally performed by them, and in order to prevent any device or subterfuge to avoid the protection or preservation of such work, it is hereby agreed as follows: If and when the Employer shall perform any work of the type covered by this Agreement *as a single or joint Employer* (which shall be interpreted pursuant to applicable NLRB and judicial principles) within the trade and territorial jurisdiction of Local 669, under its own name or under the name of another, as a corporation, sole proprietorship, partnership, or any other business entity including a joint venture, wherein the Employer (including its officers, directors, owners, partners or stockholders) exercises either directly or indirectly (such as through family members) controlling or majority ownership, management or control over such other entity, the wage and fringe benefit terms and conditions of this Agreement shall be applicable to all such work...<sup>3</sup>

The Union's 2004 grievance under the foregoing "single employer" provision asserted that the terms and conditions of the 2000-2005 Agreement

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<sup>3</sup> The "single employer" clause, now found at Addendum C of the Agreement (G.C. Exh. 21 at 50-51), has been repeatedly sustained as lawful and enforceable. G.C. Exh. 1(f)(Motion for Summary Judgment (Exh. 2)); *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 8; *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Protection, Inc., et al.*, 363 F. Supp. 2d 1220, 1223-24 (C.D. Cal. 2005); *Virginia Sprinkler Co. v. Road Sprinkler Fitters Local Union No. 669*, 868 F.2d 116, 121 (4th Cir. 1989); *Road Sprinkler Fitters Local Union No. 669 v. Northstar Fire Protection Co.*, 644 F. Supp. 851, 856 (N.D. Tex. 1986).

applied to the non-union operations of Consolidated/MX's subsidiary Firetrol because the operations of Consolidated/MX, Cosco and Firetrol were operated "as a single or joint Employer (which shall be interpreted pursuant to applicable NLRB and judicial principles)" as provided in Article 3. *Road Sprinkler Fitters Local 669 v. Cosco Fire Protection, Inc., et al.*, 363 F. Supp. 2d at 1224.

When Consolidated/MX and Cosco refused to arbitrate the grievance, the Union sued to enforce the arbitration procedures in the Agreement, and the District Court ordered Consolidated/MX and Cosco to *jointly* submit to arbitration of the Union's grievance.

The District Court rejected the contention by Consolidated/MX that it could not be ordered to arbitrate the grievance because it was not signatory to the Agreement, reasoning that, because Cosco *was* signatory to the Agreement which "dictates that disputes arising under Article 3 [now Addendum C] shall be heard by an arbitrator," the "question of whether, and to what extent, Article 3 applies to *all* Defendants in this case is a matter for the arbitrator to decide." *Id.* at 1223-24 (emphasis in original). The District Court thereby applied settled law that, as "the Supreme Court has stated unequivocally[,] ... the courts have no business determining the *merits* of a grievance under the guise of deciding questions of arbitrability under a collective bargaining agreement," *UFCW Local 770 v. Geldin*

*Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994) (emphasis in original) (citations omitted).

Consolidated/MX and Cosco accepted the District Court's ruling and did not appeal the order compelling arbitration. Following a hearing, an arbitrator denied the Union's grievance.

### **C. The 2007 Amendment to the Agreement and Related Litigation**

Article 3 was relocated to Addendum C of the 2007-2010 Agreement and a second, authorization card check/neutrality provision was added at the same time:

... Should the Employer establish or maintain operations that are not signatory to this Agreement, under its own name or another or through another related business entity to perform work of the type covered by this Agreement within the Union's territorial jurisdiction, the terms and conditions of this Agreement shall become applicable to and binding upon such operations at such time *as a majority of employees of the entity (as determined on a state-by-state, regional or facility-by-facility basis consistent with NLRB unit determination standards) designates the Union as their exclusive bargaining representative on the basis of their uncoerced execution of authorization cards*, pursuant to applicable NLRB standards, or in the event of a good faith dispute over the validity of the authorization cards, pursuant to a secret ballot election under the supervision of a private independent third party to be designated by the Union and the NFSA within thirty (30) days of ratification of this Agreement. *The Employer and the Union agree not to coerce employees or to otherwise interfere with employees in their decision whether or not to sign an authorization card and/or to vote in a third party election.*

Particular disputes arising under the foregoing paragraphs shall be heard by one of four persons to be selected by the parties (alternatively depending upon their availability) as a Special Arbitrator. The Arbitrator shall have the authority to

order the Employer to provide appropriate and relevant information in compliance with this clause. The Special Arbitrator shall also have authority to confirm that the Union has obtained an authorization card majority as provided in the preceding paragraph.

Because the practice of double-breasting is a source of strife in the sprinkler industry that endangers mutual efforts to expand market share for union members and union employers, *it is the intention of the parties hereto that this clause be enforced to the fullest extent permitted by law.* G.C. Exh. 21 at 50-51.

In its present form, Addendum C to the Agreement includes two conceptually distinct subparts: the first part is applicable where corporate affiliates are determined by an arbitrator to be a “single or joint employer;” the second part, the authorization card check/neutrality clause, applies, as the Board has recently confirmed, where an arbitrator determines that the Employer “controls,” *i.e.*, has “establish[ed] or maintain[ed] operations that are not signatory to this Agreement, under its own name or another or through another related business entity,” and the non-signatory entity has violated the “neutrality” requirements of the clause. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 3-4.

Following the addition of the authorization card check/neutrality clause to Addendum C, the Union issued a formal disclaimer, on July 15, 2008, affirming that that clause could not and would not be applied for any secondary or unlawful purpose:

(i) that the Union has never had any such [“cease doing business”] object or purpose in mind; (ii) that the new contract

is not susceptible to such an interpretation; and (iii) that the language does not even arguably provide an arbitrator with authority to require a signatory contractor to “cease doing business” with any other organization. G.C. Exh. 1(f) (Motion for Summary Judgment (Exh. 14)).<sup>4</sup>

#### **D. The NLRB Upholds the 2007 Amendment**

In 2011, the NLRB rejected the challenge by Cosco, Firetrol and the General Counsel to the legality of the authorization card check/neutrality clause in Addendum C, relying *inter alia* upon its 2006 authorization card check/ neutrality clause decision in *Heartland Industrial Partners. Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4-5.

In *Heartland*, the Board had upheld a similar authorization card check/neutrality clause, one that required companies purchased by the signatory investment company (“covered business entities”) to recognize the Union based on an authorization card check provision. 348 NLRB at 1082-85. The Board concluded that the *Heartland* clause was primary and lawful under the Board’s decision in *Iron Workers (Southwestern Materials)*, 328 NLRB 934 (1999), and rejected the General Counsel’s attempt to analogize the authorization card check/neutrality clause in *Heartland* to the broad anti-dual shop clause found to be unlawful in *Northeast Ohio Dist. Council of Carpenters (Alessio Construction)*,

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<sup>4</sup> The Agreement likewise requires that Addendum C, “.... be applied in a manner which is consistent with all applicable Federal and State laws...” G.C. Exh. 21 at 42.

310 NLRB 1023, 1023 (1993). 348 NLRB at 1083-84. The Board emphasized that the General Counsel had failed to sustain his burden of proof to show that the *Heartland* clause had any proscribed “cease doing business” object, *Id.* at 1084, and cited *NLRB v. Operating Engineers (Burns & Roe)*, 400 U.S. 297 (1971), as support for its finding that enforcement of the *Heartland* clause would not cause “Heartland [to] cease doing business with anyone.” *Id.* at 1085.

The Board also rejected a hypothetical suggested by the General Counsel, where an arbitrator might in theory impose a cease doing business remedy in applying the clause explaining, that in that theoretical case, the Board would “be called upon to decide whether that *application* of the clause by an arbitrator violated Sec. 8(e).” *Id.* at 1084. In other words, the Board declined to preclude arbitration on the basis of the General Counsel’s speculation as to what decision an arbitrator might reach on the merits of a grievance in the first instance.

In *Road Sprinkler Fitters Local 669*, the Board followed its decision in *Heartland* and found the authorization card check/neutrality clause at issue in this case to be a primary, lawful and enforceable clause, citing the Board’s decision in *Southwestern Materials*, and rejecting again the General Counsel’s argument that the clause was unlawful by analogy to the Board’s ruling on the broad anti-dual shop clause in *Alessio*. 357 NLRB No. 176, slip op. at 2-4.

The Board explained that, as in *Heartland*, a lawful application of the clause in this case “simply requires [an arbitrator to find that] a signatory ... exercise its control over operations it establishes or maintains” and “does not expressly require the signatory to cease doing business with anyone” -- indeed, by the Board’s reading of the language, such an unlawful object “would not be possible.” *Id.* at 4-5.

And, as in *Heartland*, the Board concluded that the authorization card check/neutrality clause in this case should be interpreted to “require no more than what is allowed by law.” 357 NLRB No. 176 at 3, quoting *Teamsters Local 982 (J.K. Barker Trading Co.)*, 181 NLRB 515, 517 (1970)); *Heartland*, 348 NLRB at 1084. The NLRB’s decision was not appealed.

**E. The Closure of the Firetrol Office on the Eve of the NLRB Election, the Union’s Grievance and Suit to Compel Arbitration**

Six months after the Board issued its decision in *Road Sprinkler Fitters Local 669*, the Union filed an RC Petition with NLRB Region 27 seeking an election among the fire protection employees of the Firetrol office in Denver, Colorado based on their execution of authorization cards designating Local 669 as their bargaining representative. Jt. Exh. 1 (Stipulation), para. 2. The Region directed that an election be held among the Denver Firetrol employees.

The Region’s decision that an election be held was not appealed but the NLRB election was never conducted; instead the unit employees were all

terminated and the Firetrol office in Denver was closed. Jt. Exh. 1 (Stipulation), para. 3.

The Union responded by filing a grievance against Consolidated/MX, Cosco and Firetrol over the termination of the entire bargaining unit of Firetrol employees on the eve of the election directed by the NLRB as a blatant violation of the authorization card check/neutrality clause the Board had recently upheld. G.C. Exh. 11; Jt. Exh. 1, para. 4. *Cf. Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (“It is well settled that the timing of an employer’s action in relation to known union activity can supply reliable and competent evidence of unlawful motivation,” citing cases); *Gold Coast Produce*, 319 NLRB 202, 210-12 (1995); *Coronet Foods, Inc.*, 305 NLRB 79, 87-89(1991), *enf’d* 981 F.2d 1284 (D.C. Cir. 1993).<sup>5</sup>

As the parties have *stipulated* in this case, the remedy sought by the grievance on behalf of the terminated Firetrol employees was the “restoration of the *status quo*” and that the terminated employees be ““made economically whole.”” Jt. Exh. 1 (Stipulation), para. 4; G.C. Exh. 11. The remedy did not seek that any of the corporate affiliates “cease doing business” with one another or anyone else.

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<sup>5</sup> Local 669 also filed unfair labor practice charges with the NLRB over the closure of the Denver Firetrol office, but subsequently withdrew the charges and decided to proceed instead with the pending grievance. The NLRB did not make a formal determination regarding the Union’s charges. Jt. Exh. 1 (Stipulation), para. 3.

The grievance included a request for documents relating to the merits of the grievance under the requirement in Addendum C that “the Employer ... provide appropriate and relevant information.” G.C. Exh. 21 at 51. The Union requested:

1. Any and all documents relating to and/or memorializing the decision to discontinue the operation of the Firetrol facility in Denver, Colorado (including cost analyses, corporate decisions, correspondence, email and/or memoranda);
2. Any and all documents relating to and/or memorializing the decision to transfer, contract, and/or otherwise replace the operations at the Firetrol facility in Denver, Colorado (including cost analyses, corporate decisions, correspondence, email and/or memoranda);
3. Any and all documents relating to or supporting any contention that the decision to discontinue the operations of the Firetrol facility in Denver, Colorado and to transfer or subcontract the operations previously conducted there were for any legitimate business reason (including cost analyses, corporate decisions, correspondence, email and/or memoranda.) G.C. Exh. 11 at 2.

The suit to compel arbitration might have been avoided and/or the grievance settled had the information requested by the Union been timely provided; none of the requested information has ever been produced however. Tr. 471. An arbitrator will “have the authority to order the Employer” to comply with the Union’s request in due course (G.C. Exh. 21 at 51), and to draw an adverse inference against the corporate affiliates if they continue to withhold this obviously relevant information. *One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237, 1241 (2010); *Int’l Union (UAW) v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972).

In the meantime, Cosco offered to arbitrate but *only* if its corporate affiliates were *not* required to jointly participate in that arbitration. The Union disagreed and filed suit against Cosco and its corporate affiliates, *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Protection, et al.*, No. 8:12-cv-01596-GHK (JPRx) (C.D. Cal.), relying upon the unappealed District Court’s decision in 2005 holding that Cosco and Consolidated (MX) were *jointly* obligated to arbitrate the earlier grievance because their affiliate Cosco *was* signatory to the Agreement, and that the relationship between the corporate affiliates related to the merits of the grievance and was “a matter for the arbitrator to decide.” *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Protection*, 363 F. Supp. 2d at 1223-24.

In the present case, the District Court had directed the Union to file an Amended Complaint to compel arbitration when the suit to compel arbitration was stayed pending the Board’s decision; discovery has yet to be taken in that case. *Road Sprinkler Fitters Local Union No. 669*, Case No. 8:12- 1596-GHK (JPRx) (C.D. Cal.), Dkt Nos. 66, 68.

#### **F. The Secondary Boycott Charges and Section 10(l) Petition**

Firetrol filed NLRB secondary boycott charges against Local 669 as it had in 2007, and the General Counsel again issued a Complaint alleging that the Union’s grievance -- under the same contract clause the Board had recently determined “does not have a secondary objective,” *Road Sprinkler Fitters Local 669*, 357

NLRB No. 176 (slip op. at 5) -- violated NLRA Sections 8(b)(4)(ii)(A) and (B).

The General Counsel also sought injunctive relief under Section 10(l) to enjoin the suit to compel arbitration of the Union's grievance.

The District Court denied the General Counsel's 10(l) Petition on the basis that such an injunction would constitute a "prior restraint" upon the Union's First Amendment-protected right to petition the courts under *BE&K*, and because the General Counsel was also unable to demonstrate "irreparable harm." *Jones v. Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO*, Case No. 13-3015-GHK (JPRx) (C.D. Cal.), Dkt No. 55, Order at 3-4, 5-6. The District Court's denial of the 10(l) Petition was not appealed.

### **G. The Hearing and Decision of the Administrative Law Judge**

At the unfair labor practice hearing, the Union declined to litigate the merits of its grievance before the Board -- relying on more than a half-century of NLRB and Supreme Court precedent that the merits of the grievance are for an arbitrator to resolve, and *not* for the General Counsel or the Board to *pre-determine*. *Garvey*, 532 U.S. at 509-10.

The General Counsel's evidence at the hearing consisted primarily of the testimony of the officers of Cosco, Firetrol and Consolidated/MX who predictably protested that they were not commonly "controlled" for purposes of the Union's authorization card check/neutrality clause -- a question that, we submit, goes to the

merits of the grievance and is therefore for an arbitrator to decide, on a full and complete record, and not for the Board to adjudicate at least in the first instance.

*Id.*

In any event, the General Counsel's proof had any number of shortcomings. For reasons that have not been explained, the General Counsel did not obtain or submit any of the documentation sought by the Union's request for information regarding which of the corporate affiliates directed, participated in and/or approved the decision to close the Firetrol office and terminate the employees on the eve of the NLRB election -- information as relevant to the General Counsel's theory of the case as it is to the Union's grievance. G.C. Exh. 11; Tr. 47.

Moreover, the General Counsel's witnesses admitted on cross examination to the existence of substantial documentation that was plainly relevant and available but not produced and submitted by the General Counsel or the Charging Party -- including the corporate documents that legally define and govern the relationships between Consolidated/MX, Cosco and Firetrol (White 99-100; Fielding 273-76; Krofcheck 378; Carrier 458), and Minutes of the relevant corporate meetings jointly held by these corporate affiliates. Fielding 277-78; Carrier 456-58.

The ALJ issued her decision on August 22, 2013. Although the parties' stipulation and the relevant documents established that the Union had filed a

grievance seeking to remedy the termination of an entire bargaining unit of Firetrol employees on the eve of and preventing an NLRB election (Jt. Exh. 1 (Stipulation), that the grievance was filed under a lawful and enforceable clause, *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, and that the suit to compel arbitration was reasonably based upon a prior decision by that same District Court that required the same employers to jointly arbitrate a similar grievance, *Road Sprinkler Fitters Local Union No. 669 v. Cosco Fire Protection*, the ALJ had a very different view of the case.

The ALJ rubber-stamped each and every one of the General Counsel's contentions and concluded that the Union had unlawfully attempted to pursue its grievance under the authorization card check/neutrality clause because Cosco, Firetrol and Consolidated/MX "do not constitute a single employer" (ALJD 5-6); that the record contained "no evidence" that the corporate affiliates "control" Firetrol (ALJD 7); that the Union's grievance was intended to achieve a variety of contradictory illegal objective(s) -- causing the corporations to "cease doing business" with one another, and/or "work acquisition" and/or "unlawful representation" (ALJD 7); that the Union failed to sustain *its burden of proof* that the grievance and suit to compel were "arguably meritorious" (ALJD 8); and that, because the grievance had "an illegal object," the Supreme Court's decision in *BE&K* did not protect the Union's First Amendment right to sue to compel

arbitration. ALJD 8. The ALJ recommended that the Union be ordered to desist from pursuing a remedy for the termination of the Firetrol employees on the eve of the NLRB election, and to reimburse the corporate affiliates for all of their attorneys' fees and costs. ALJD 8-9.

The ALJ's conclusions are plainly erroneous as we now show.

### **III. ARGUMENT**

#### **A. Applicable Legal Principles**

Bedrock federal labor law holds that the NLRB and the courts will defer the resolution of contractual disputes to final and binding arbitration, *Paperworkers v. Misco, Inc.*, 484 U.S. at 37 (federal labor policy “reflect[s] a decided preference for private settlement of labor disputes without the intervention of government”); *American Mfg. Co.*, 363 U.S. at 567 (the union “should not be deprived of the arbitrator’s judgment, when it was his judgment and all that it connotes that was bargained for”); *Ray Angelini, Inc.*, 351 NLRB 206, 209 (2007) (the Board’s policy is to “stay its hand” unless the Union’s lawsuit is “plainly foreclosed as a matter of law or is otherwise frivolous...,” quoting *Bill Johnson’s Restaurants*, 461 U.S. at 747); *UFCW Local 540 (Pilgrim’s Pride Corp.)*, 334 NLRB 852, 855 (2001) (the Board “will defer processing of unfair labor practice charges while the parties present the dispute to the arbitrator.”)

A second and related principle of federal labor law provides that the merits of a grievance are for an arbitrator to decide and not for the courts or the NLRB to predetermine. *Pilgrim's Pride*, 334 NLRB at 855; *Garvey*, 532 U.S. at 509-10; *American Mfg. Co.*, 363 U.S. at 568 ; *UFCW Local 770 v. Geldin Meat Co.*, 13 F.3d at 1368; *Road Sprinkler Fitters Local 669 v. Cosco Fire Protection, Inc., et al.*, 363 F. Supp. 2d at 1223-24.

And where a grievance is reasonably based and at least “arguably meritorious,” its pursuit is not conduct constituting unlawful “coercion” under NLRA Section 8(b)(4)(ii). *Pilgrim's Pride Corp.*, 334 NLRB at 855; *Ceramic Tile Workers Local 67 (Fisher & Reid)*, 318 NLRB 569, 571 (1995) (arguably meritorious grievance not unlawful “coercion” even though the employer against whom the grievance was filed was *not* signatory to the grievance/arbitration process at issue) (citing *Longshoremen Local 7 (Georgia Pacific)*, 291 NLRB 89, 93 (1988), *enf'd* 892 F.2d 130 (D.C. Cir. 1989)); *ILWU Local 151 (Port Townsend Paper Corp.)*, 294 NLRB 674, 674 (1989); *Brockton Newspaper Guild (Enterprise Publ'g)*, 275 NLRB 135, 136 (1985).

Under yet another maxim of federal labor law, a suit to compel arbitration of a reasonably-based grievance is protected by the First Amendment and by the NLRA, as recognized by the District Court in rejecting the General Counsel's Section 10(l) Petition. *BE&K Constr.*, 351 NLRB at 457; *Jones v. Road Sprinkler*

*Fitters Local Union No. 669, U.A., AFL-CIO*, Case No. 13-3015-GHK (JPRx) (C.D. Cal.), Dkt. No.55., Order at 3-4, citing *BE&K*, 536 U.S. at 530.

The Board has adopted two post-*BE&K* exceptions to the latter principle: First, a grievance or arbitration that seeks to achieve an “illegal object,” one that is “incompatible with” a prior determination by the Board, is not protected by *BE&K*. *Sheet Metal Workers’ Local 27 (E.P. Donnelly)*, 357 NLRB No.131 (2011) (slip op. at 3); *Plasterers’ Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160 (2011) (slip op. at 3-4); *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1011-12 (2004). Second, *BE&K* does not apply to a lawsuit that is preempted by the NLRA (a contention the General Counsel does not raise here.) *Fed. Sec., Inc.*, 359 NLRB No. 1 (2012), slip op. at 4-14.

In determining whether a lawsuit lacks a reasonable basis under *BE&K*, the Board imposes the burden of proof *on the General Counsel*, applies the standards set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 50 (1993), and requires the General Counsel to prove that the Union “did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its [claims].” *Milum Textile Serv.*, 357 NLRB No. 169 (2011), slip op. at 6-7.

In *Milum*, the Board anticipated the situation the Union finds itself in in this case where the lawsuit in question is at a preliminary pre-discovery state:

[T]he question is whether a plaintiff, with the factual information in its possession and whatever additional factual information a reasonable potential litigant would have acquired prior to filing, could reasonably have believed it had a cause of action upon which relief could eventually be granted. This does not mean that a plaintiff must possess all of the evidence necessary to prove its case at the time of filing. Some necessary evidence is not within the possession or control of the plaintiff and cannot be acquired without discovery. *Id.*

The General Counsel is required to “prove not simply that summary judgment would have been granted had [Cosco *et al.*] moved for it..., but that [the Union] would not have been able to present a colorable argument in opposition to the grant of summary judgment at that time.” *Id.*

Finally, the Board has recently re-emphasized that authorization card check/neutrality clauses such as the ones in *Heartland* and *Road Sprinkler Fitters Local 669*, are not only lawful and enforceable but are mandatory subjects of bargaining, *Pall Biomedical Prods. Corp.*, 331 NLRB 1674, 1677 (2000), and “favored” under national labor policy, in the construction industry as elsewhere. *Goodless Elec. Co., Inc.*, 332 NLRB 1035, 1038 (2000), *rev’d* 285 F.3d 102 (1st Cir. 2002), *on remand* 337 NLRB 1259 (2002); *Verizon Info. Sys.*, 335 NLRB 558, 559-60 (2001); *Houston Div. of Kroger Co.*, 219 NLRB 388, 391 (1975).

## **B. The Administrative Law Judge's Decision is Contrary to Law and Undisputed Fact**

### **1. The Grievance Was Filed Under a Lawful and Enforceable Clause**

The General Counsel and the ALJ have all but ignored the NLRB's decisions in *Road Sprinkler Fitters Local 669*, and in *Heartland* upon which it was based, that the authorization card check/neutrality clause under which the grievance was filed in this case is primary, lawful and enforceable -- and does not "have a secondary objective," does not advance a secondary "cease doing business" object and that such a proscribed object "would not be possible" by the Board's reading. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4-5, citing *Heartland*, 348 NLRB at 1085.

The ALJ's conclusion that the grievance represents a secondary and unlawful "application" of a lawful clause (ALJD 6) is necessarily premature and speculative. Although a lawful clause may in theory be found to be secondary and unlawful after "it is authoritatively construed by an arbitrator as having a meaning that is inconsistent with Section 8(e)," *Newspaper & Mail Deliverers' Union of New York (New York Post)*, 337 NLRB 608, 609 (2002), the General Counsel's and the ALJ's theories have the perverse effect of preventing an arbitrator from

even considering the merits of a grievance and thereby preclude any arbitral construction of the provision.<sup>6</sup>

The ALJ's "application" theory is also precluded by the Board's direction in *Road Sprinkler Fitters Local 669* that the clause be interpreted by an arbitrator "to require no more than is allowed by law" (357 NLRB No. 176, slip op. at 3, quoting *Teamsters Local 982 (J.K. Barker Trading Co.)*, 181 NLRB at 517), a requirement found in the plain language of the Agreement itself. G.C. Exh. 21 at 42.

The ALJ's erroneous "application" determination is derived from her apparent confusion between the first part of Addendum C, applicable where corporate affiliates are found to be a "single or joint employer," and the second part, the authorization card check/neutrality provision at issue, which lawfully applies, by its plain language and by the Board's recent construction, where it can be proven that the employer directly or indirectly "controls," *i.e.*, has "establish[ed] or maintain[ed] operations that are not signatory to this Agreement, under its own name or another or through another related business entity." *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 3-4.

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<sup>6</sup> And, because the Union's grievance is at the very least "arguably meritorious," it cannot constitute conduct deemed to be "coercion" under Section 8(b)(4)(ii), as a matter of law, and the ALJ's "application" theory fails for that reason as well. *Pilgrim's Pride Corp.*, 334 NLRB at 855; *Fisher & Reid*, 318 NLRB at 571; *Georgia Pacific*, 291 NLRB at 93; *Enterprise Publ'g*, 275 NLRB at 136.

The ALJ mistakenly conflated the two different parts of Addendum C as demonstrated by the primary factual determination underlying her decision -- that Cosco and its corporate affiliates are not a “single employer” under the NLRA. ALJD 3.<sup>7</sup>

While a “single employer” finding is necessary for a successful grievance under the first provision in Addendum C (“If and when the Employer shall perform any work of the type covered by this Agreement *as a single or joint Employer* (which shall be interpreted pursuant to applicable NLRB and judicial principles) ...”), a “single employer” determination is irrelevant to this case. There is *no* “single employer” element or factor anywhere to be found in the language of the second, authorization card check/neutrality clause of Addendum C, or in the Union grievance, as the Board recognized in its earlier decision distinguishing the two contractual provisions. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4. G.C. Exh.11.

Rather, the primary, lawful and enforceable nature of the authorization card check/neutrality provision in Addendum C, as the Board has determined, is predicated on a showing to an arbitrator of common ownership and control. *Road*

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<sup>7</sup> The ALJ’s confusion may have been caused by the General Counsel’s mistaken contention that it is the Union’s burden to prove that the corporate affiliates are a “single employer” under the NLRA. General Counsel’s Post Hearing Br. at 39-40.

*Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4. *See Teamsters Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212, 1213-14 (1980).

**2. The Grievance Does Not Advance Any “Cease Doing Business,” “Work Acquisition” or Any Other “Illegal” Object**

In their attack on the Union’s grievance, the General Counsel and the ALJ have attempted to attribute a series of contradictory “illegal” purposes to the Union’s attempt to remedy the pre-election termination of the entire bargaining unit of Firetrol employees, *i.e.*, that the Union is attempting to cause the corporate affiliates to “cease doing business” with one another and/or to unlawfully “acquire work,” and/or to cause “unlawful representation” of Firetrol employees. ALJD 7-8. The burden is on the General Counsel to affirmatively prove that the Union’s grievance and lawsuit seek to advance any of these unlawful objects. *Heartland*, 348 NLRB at 1084.<sup>8</sup>

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<sup>8</sup> The General Counsel also asserted, but was then obliged to disavow the claim that the grievance in this case was “illegal” because it was contrary to a previous Board determination. The Union had filed a motion to reopen the record on the basis that the General Counsel was attempting to re-write the allegations in the case at the eleventh hour; the General Counsel then formally disavowed the allegation and, on this basis, the ALJ denied the Union’s motion. ALJD 7, n. 13. *See Jones v. Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO*, Case No. 13-3015-GHK (JPRx) (C.D. Cal.), Dkt No. 43 (“The parties hereby stipulate that Petitioner has withdrawn the argument in her Reply that Respondent’s grievance and lawsuit had an illegal objective because it undermined the no-merit decision by the Regional Director of Region 27 in Respondent’s unfair labor practice charge against Firetrol.”)

The ALJ's conclusion that the Union's grievance and suit to compel arbitration seek to advance an unlawful "cease doing business" object (ALJD 7) -- in the face of the parties' stipulation that the remedy sought by the Union's grievance, a "restoration of the *status quo*" and that the terminated employees be "made economically whole" (Jt. Exh. 1 (Stipulation), para. 4; G.C. Exh. 11) -- is, with all due respect, incomprehensible.

The Board considered and rejected precisely that claim, holding that the authorization card check/neutrality provision at issue "... *does not* expressly require the signatory [Cosco] to cease doing business with anyone" and, by the Board's reading of the clause, such an object "would not be possible." *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4-5. The Board rejected the same contention by the General Counsel in *Heartland*, 348 NLRB at 1083 & n. 5, 1085.

Nor were the General Counsel or the ALJ able to cite to a single piece of affirmative evidence even arguably satisfying the General Counsel's burden of proof as to an alleged "cease doing business" object. ALJD 7. The abundant and undisputed evidence is uniformly to the contrary: as in *Heartland* (348 NLRB at 1085), the contractual language does not afford an arbitrator with any authority to cause or require any cessation of business (G.C. Exh. 21 at 50-51); the parties *stipulated* that the pending grievance seeks no such remedy (Jt. Exh. 1, para. 4);

the Union has formally *disclaimed* any such object (G.C. Exh. 1(f) (Local 669 Motion for Summary Judgment (Exh. 14)); and the representatives of Firetrol, Cosco and Consolidated (MX) all testified that they were unaware that the Union was pursuing any such objective. White 125, 136; Fielding 172-73, 277; Krofcheck 366; Carrier 380-82, 452.

The ALJ's citation to the Supreme Court decision in *Burns & Roe* (ALJD 7) does not validate her "cease doing business" determination. In *Burns & Roe*, a case involving a jurisdictional strike over a work assignment in violation of NLRA Section 8(b)(4)(D), the Court plainly stated that

[s]ome disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected. Likewise, secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so light that the "cease doing business" requirement is not met. 400 U.S. at 304-05 (citations omitted).

Indeed, the Board cited *Burns & Roe* in *Heartland*, not for the proposition that authorization card check/neutrality clauses are secondary and unlawful, but for the opposite rule: some activity, such as enforcement of lawful clauses, may have "secondary" effects without having an unlawful "cease doing business" object. *Heartland*, 348 NLRB at 1085. *See also IBEW Local 46 (Puget Sound NECA)*, 303 NLRB 48, 50 (1991) (rejecting *Burns & Roe* as a basis for finding that arbitration of a grievance was secondary and unlawful).

The ALJ's unlawful "work acquisition" contention is equally baseless. ALJD 6-7, citing *Southwestern Materials*, 328 NLRB at 936. Authorization card check/neutrality clauses, by their very nature, provide for voluntary recognition based on a majority showing through authorization cards in a new and *separate* bargaining unit, and do not "acquire work" for, or have any effect upon the preexisting assignment of work to Union members elsewhere. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4-5; *Heartland*, 348 NLRB at 185; *Verizon Info. Sys.*, 335 NLRB at 559; *Goodless Electric*, 332 NLRB at 1038; *Pall Biomedical Prod.*, 331 NLRB at 1674-77; *Kroger Co.*, 219 NLRB at 388. As stipulated at the hearing, the remedy sought by the Union's grievance is a "make whole" remedy for a *separate unit* of terminated Firetrol employees, a separate unit found by the Region to be appropriate. Jt. Exh. 1 (Stipulation), para. 4.

The Board has twice rejected the General Counsel's contention that the authorization card check/neutrality clauses in *Road Sprinkler Fitters Local 669* and *Heartland* are protected under the Board's decision in *Southwestern Materials*. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 2, 3-4; *Heartland*, 348 NLRB at 1083. By continuing to argue that enforcement of an authorization card check/neutrality clause is unlawful under *Southwestern Materials*, in the face of the Board's rejection of that contention in *Road Sprinkler Fitters Local 669* and in *Heartland*, the General Counsel and the ALJ appear to be

reading from the dissenting opinions in those cases rather than the Board majority's rulings. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 5-6 (Member Hayes dissenting); *Heartland*, 348 NLRB at 1085-87 (Member Battista dissenting).

The General Counsel's final try at proving an "illegal object" -- that the Union's grievance has an "unlawful representation" purpose -- was adopted by the ALJ *pro forma* without citing to any evidence or supporting legal authority (ALJD 7), and is easily disposed of. Finding that the authorization card check/neutrality clause in this case has an "unlawful representation" object would outlaw all of the card check clauses that the Board has ever approved, each of which has, by definition, a "representation" purpose. *Heartland*, 348 NLRB at 1081; *Verizon Info. Sys.*, 335 NLRB at 559-60; *Goodless Elec.*, 332 NLRB at 1038; *Pall Biomedical Prod.*, 331 NLRB at 1674; *Kroger Co.*, 219 NLRB at 388-89.<sup>9</sup>

In sum, this case is unlike Board decisions where an "illegal object" is found based on a grievance filed under a facially *unlawful* contract provision, *Carpenters Local 745 (SC Pac. Corp.)*, 312 NLRB 903, 904 (1993), *enf'd* 73 F.3d 370 (9th

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<sup>9</sup> The entire legal authority offered by the General Counsel as support for the "unlawful representation" allegation, *UFCW Local 1996 (Visiting Nurses Health System)*, 336 NLRB 421 (2000), involved alleged secondary *picketing* in support of an NLRB election certification, and has nothing whatever to do with arbitration of a grievance under a lawful authorization card check/neutrality provision, nor has the Board ever cited the case for anything like the proposition for which it was cited by the General Counsel here.

Cir. 1995), or based on a grievance that seeks a result that is contrary to, or “incompatible” with a prior decision of the Board. *E.g.*, *Sheet Metal Workers Local 27 (E.P. Donnelly)*, 357 NLRB No.131, slip op. at 3; *Plasterers’ Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 3-4; *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB at 1011-12. This case is the flipside of those decisions -- the grievance was filed under a contract clause the Board has previously upheld as lawful and enforceable, and is perfectly “compatible” with that prior NLRB decision. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 4-5.

### **3. The General Counsel Cannot *Disprove* the Reasonableness of the Union’s Grievance**

The ALJ attempted to impose a burden of proof upon the Union, concluding “that [the Union] did not present any evidence that the grievance and lawsuit were arguably meritorious.” ALJD 8. Settled NLRB precedent imposes the *BE&K* burden on *the General Counsel* and it is a heavy burden indeed -- to show that the Union’s suit to compel arbitration of a grievance is “objectively baseless,” that the Union “did not have, and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove its [claims],” *Milum Textile Servs.*, 357 NLRB No. 169, slip op. at 7; *BE&K Constr.*, 351 NLRB at 457. And the Board factors into that burden the pre-discovery status of the case:

This does not mean that a plaintiff must possess all the evidence necessary to prove its case at the time of filing. Some necessary evidence is not within the possession or control of the plaintiff and cannot be acquired without discovery. *Milum*, 357 NLRB No. 169, slip op. at 7.

The General Counsel must prove “not simply that summary judgment would have been granted” to Cosco *et al.* in the pending suit to compel arbitration, but that, following discovery, the Union “would not have been able to present a colorable argument in opposition.” *Id.*; *BE&K Constr.*, 351 NLRB at 457.<sup>10</sup>

The General Counsel’s *BE&K* burden of proof is unsustainable in this case.

The Union’s lawsuit, even at the current preliminary, pre-discovery stage, is “reasonably” based, in accord with the District Court’s earlier (unappealed)

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<sup>10</sup>*Dilling Mech. Contractors, Inc.*, 357 NLRB No. 56 (2011), the only post-*BE&K* decision cited by the ALJ in support of her conclusion that the Board’s *BE&K* holding is inapplicable (ALJD 8) is distinguishable. In *Dilling*, there was no determination by the Board on the issue of whether or not the Respondent’s lawsuit lacked a reasonable basis under *BE&K*. Slip op. at 2. The issue the Board did rule on was that the Respondent’s discovery requests seeking to identify employees who had joined the Union had an obviously illegal objective in violation of the employees’ Section 7 rights. *Id.* at 3. *Dilling* is plainly inapposite here; the Union’s lawsuit and grievance have no objective other than to *vindicate* the rights of Firetrol employees to sign authorization cards and vote in an election, rights that are *protected* by the NLRA. The other decisions cited by the ALJ are pre-*BE&K* and inapposite. ALJD 7. *Elevator Constructors (Long Elevators)*, 289 NLRB 1095 (1988), *enf’d* 902 F.2d 1297 (8th Cir. 1990), is a case involving a *picket line clause* allowing employees to disregard lawfully established reserved gates, and *Sheet Metal Workers Local 27 (AeroSonics)*, 321 NLRB 540 (1996), involved an arbitration *decision* penalizing the employer for using a non-union employer’s products; the Board held that a facially valid contract provision may violate Section 8(e) and constitute an “agreement” for purposes of NLRA Section 8(e) if it is *authoritatively construed by an arbitrator* as having a secondary and unlawful meaning.

decision involving *the same parties*, that Cosco was signatory to the Agreement and that the “question of whether, and to what extent, Article 3 applies to *all* Defendants in this case is a matter for the arbitrator to decide.” 363 F. Supp. 2d at 1223-24 (emphasis in original).

The underlying grievance is likewise “reasonably based.” It is entirely consistent with the Board’s decisions in *Road Sprinkler Fitters Local 669* and *Heartland* sustaining the clause at issue as lawful, primary and enforceable, and the stipulated facts afford substantial support to the Union’s grievance: the Firetrol facility in Denver was abruptly closed and the bargaining unit employees who had signed Union authorization cards terminated on the eve of and preventing the NLRB-directed election -- at least *prima facie* evidence of a violation of the clause prohibiting “coercion” and “interference” with the employees “in their decision whether or not to sign an authorization card and/or to vote in a third party election.” Jt. Exh. 1 (Stipulation), paras. 2-4; G.C. Exh. 21 at 50-51. *See Davey Roofing, Inc.*, 341 NLRB at 223 (“It is well settled that the timing of an employer’s action in relation to known union activity can supply reliable and competent evidence of unlawful motivation,” citing cases).

To be sure, as the Board has ruled, it will be incumbent upon the Union to demonstrate to an arbitrator that Cosco and/or Consolidated (MX) “establish[ed] or maintain[ed],” and “control” Firetrol, directly or indirectly, for purposes of

Addendum C. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176, slip op. at 3-

4. On this question of “control,” however, the ALJ’s conclusion that the existing record contains “no evidence” of “control” as between these affiliated corporations (ALJD 7) is once again simply wrong.

While the burden of proof is on the General Counsel and not the Union, and a full and informed presentation of the relevant facts awaits disclosure of the information requested by the Union (G.C. Exh. 11; Tr. 471), discovery in the pending lawsuit and a hearing before an arbitrator, even the truncated and one-sided factual presentation by the General Counsel at the hearing exposed significant and undisputed evidence of such “control” including that:

- consistent with the plain language of the relevant contract provision requiring the Union to prove to an arbitrator that a signatory entity has, directly or indirectly, “establish[ed] or maintain[ed] operations that are not signatory to [the Local 669] Agreement” (G.C. Exh. 21 at 50), it was *admitted* that Cosco, at all times a Union fire protection contractor, was purchased by a holding company, the predecessor to Consolidated/MX, which in turn “established Firetrol” as its non-union counterpart. Jt. Exh. 3 at 8;
- the interrelationships, authority and control among and between Cosco, Consolidated/MX and Firetrol are governed by formal corporate documents which have been withheld to date (White 99-100; Fielding 273-76; Krofcheck 308-9, 378; Carrier 457-58);
- the chief executive officers of Firetrol, Cosco and Consolidated/MX each report for direction to the same “direct supervisor,” the President of their parent company

(White 135; Fielding 172-73, 181; Carrier 380-381, 397); and the officers of Cosco, Consolidated/MX and Firetrol meet together four or five times a year at Directors' meetings, the Minutes of which exist but have been withheld to date (Fielding 277-78; Carrier 456-58); and

- these commonly-owned subsidiaries operate and maintain a single integrated national account program where they have *continued to* provide fire protection services, under the name of "Consolidated," to large national companies, such as Home Depot, Cosco, Walgreen and Kohls, which are advertised to the customers on their websites as if they are a single integrated program operated through a single telephone number. (G.C. Exh. 31; Resp. Exhs. 2, 3, 8, 11, 12; White 111; Fielding 248, 251).

The General Counsel and the ALJ have sought to place the Union in the untenable position of defending its grievance before the Board with a blindfold on -- allowing the corporate affiliates to continue to withhold the crucial information requested by the Union, *One Stop Kosher Supermarket, Inc.*, 355 NLRB at 1241; *Int'l Union (UAW) v. NLRB*, 459 F.2d at 1338; in a proceeding before the NLRB, an administrative forum where discovery is not available, *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 315 NLRB 882, 882 (1994), *enf'd mem. in part* 96 F.3d 1439 (4th Cir. 1996); and while also preventing the Union from obtaining discovery in either the pending suit to compel arbitration or from an arbitrator. *Cf. SC Pac. Corp.*, 312 NLRB at 903 (pre-*BE&K* decision holding that a violation could not be found merely because the union's "understanding of the facts [regarding the targeted employer's relationship to the signatory] turned out to be wrong.")

By denying the Union any opportunity to obtain “evidence necessary to prove its case... [that] cannot be acquired without discovery...,” *Milum Textile Serv.*, 357 NLRB No. 169, slip op. at 7, the General Counsel and the ALJ are attempting to nullify the protections afforded by *BE&K*, and to render the contract provisions upheld by the Board in *Road Sprinkler Fitters Local 669* and *Heartland* unenforceable.

While litigation can be challenging and the outcome of arbitration is always uncertain, even “a lawsuit that entails some tacking into the wind of adverse precedent” is not for that reason lacking a reasonable basis under *BE&K*. *Children’s Hosp. Oakland*, 351 NLRB 569, 571 (2007).

#### **4. The Merits of the Grievance Are For an Arbitrator to Decide**

Citation should not be necessary for the cardinal rule that the NLRB and the courts defer the resolution of labor management disputes to final and binding arbitration. *Misco, Inc.*, 484 U.S. at 37 (federal labor policy “reflect[s] a decided preference for private settlement of labor disputes without the intervention of government.”); *Ray Angelini, Inc.*, 351 NLRB at 209 (the Board’s policy is to “stay its hand” unless the Union’s lawsuit is “plainly foreclosed as a matter of law or is otherwise frivolous...”); *Pilgrim’s Pride Corp.*, 334 NLRB at 855 (“Federal labor policy strongly favors the use of the grievance-arbitration process.”).

The merits of the grievance include the relationships and control between Cosco and its corporate affiliates and are therefore issues for the arbitrator to decide in the first instance. *Road Sprinkler Fitters Local 669*, 357 NLRB No. 176 (slip op. at 3-4); *UFCW Local 770 v. Geldin Meat Co.*, 13 F.3d at 1368; *Road Sprinkler Fitters Local 669 v. Cosco Fire Protection, Inc., et al.*, 363 F. Supp. 2d at 1223-24 (citing authorities).

The General Counsel and the ALJ would stand this fundamental labor law principle on its head by redirecting the merits of the grievance to be determined by the Board in the first instance, on a substantially incomplete and one-sided record, and based on their speculation as to the result. *Teamsters Local 917 (Peerless Importers)*, 349 NLRB 1057, 1059 (2007) (“The possibility that an arbitrator might issue an award that could result in a secondary boycott, and that the union could thereafter coercively compel employees to participate in such a work stoppage, was deemed too speculative to establish a violation [of the NLRA] based on the demand for arbitration alone.”) (citing *Mfrs. Woodworking Assn. of Greater New York (Peterson Geller Spurge, Inc.)*, 345 NLRB 538, 541-42 (2005)).

By requiring the Union to obtain a permit from the Board before proceeding to arbitration -- a procedure for which we know of no precedent -- the General Counsel and the ALJ would establish a process that would necessarily consume years and substantial resources of the parties and the Board, and would encourage

“those who would prefer a Board decision ... to stall the arbitration process. Such a result would undermine the federal policy in favor of arbitration.” *Lodge 1327, Machinists v. Fraser & Johnston Co.*, 454 F.2d 88, 91 (9th Cir. 1971), *cert. denied* 406 U.S. 920 (1972).

Erecting such an artificial barrier to timely, final and binding arbitration is also entirely unnecessary because any decision by an arbitrator will be subject to appeal and review by the Board or the courts. *E.g.*, *Inland Steel Co.*, 263 NLRB 1091, 1091 (1982) (the Board will reject any arbitration decision it deems to be “palpably wrong as a matter of law.”); *Olin Corp.*, 268 NLRB 573, 574 (1984) (same); *A. Dariano & Sons, Inc. v. District Council of Painters*, 869 F.2d 514, 517 (9th Cir. 1989). The mere “possibility of conflict [with a subsequent NLRB ruling] is no barrier to resort to a tribunal other than the Board,” *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964); *Georgia Pacific*, 291 NLRB at 93.

### **C. The ALJ’s “Attorneys Fees” Remedy Compounds Her Erroneous Decision**

According to the General Counsel and the ALJ, a union should not only be required to obtain the Board’s *pre*-approval before submitting of a grievance to final and binding arbitration in reliance upon the prior decisions of the NLRB and the District Court, but should also pay a heavy financial penalty in the form of the employers’ very substantial attorney fees and costs for not having done so. ALJD 8. Such a punitive rule would have a chilling effect on the private enforcement of

collective bargaining agreements, contrary to national labor policy, and would all but prohibit First Amendment-protected access to the Courts under *BE&K*.

The Board has long held that litigation short of that which is “truly frivolous” does not warrant the “extraordinary” remedy of an award of litigation expenses. *E.g., Chino Valley Med. Ctr.*, 359 NLRB No. 111 (2013) (slip op. at 1, n.2) (citing *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995), *enf. denied sub nom. Unbelievable, Inc. v. NLRB*, 118 F. 3d 795 (D.C. Cir. 1997) and *Waterbury Hotel Mgmt. LLC*, 333 NLRB 482 (2001), *enf’d* 314 F. 3d 645 (D.C. Cir. 2003)). Neither the General Counsel nor the ALJ have even recognized this to be the proper standard, much less attempted to prove that the Union’s grievance and suit to compel arbitration are “truly frivolous.”

The Board has also rejected attorneys fees remedies in cases involving lawsuits to enforce unlawful secondary contract clauses. *See Glens Falls Bldg. & Constr. Trades Council*, 350 NLRB 417, 422 n. 14 (2007) (citing *Shepard v. NLRB*, 459 U.S. 344 (1983)). And, as the Board recently emphasized, where a case involves “unusual and unsettled legal issues ... an award of litigation expenses is not warranted.” *Douglas Autotech Corp.*, 357 NLRB No. 111 (2011), slip op. at 12 (citing authorities).

*Service Employees Local 32B-32J (Nevins Realty)*, 313 NLRB 392, 403 (1993), *enf’d in relevant part* 68 F.3d 490, 496 (D.C. Cir. 1995) (ALJD 8), the

only precedent cited for the ALJ's remedy, is a pre-*BE&K* decision and thus of questionable application, and is easily distinguishable in any event. *Nevins Realty* involved a union's attempt to appropriate work by seeking to enforce a subcontracting clause to claim work that it did not have even "a colorable basis" for claiming, and that had never been considered to be bargaining unit work, 313 NLRB at 392, in contrast to the Union's grievance in this case to protect the Firetrol employees terminated on the eve of the NLRB election.

Notably, in none of the other cases cited by the ALJ as support for her decision did the Board require reimbursement of litigation costs. *Long Elevator*, 289 NLRB at 1099; *AeroSonics*, 321 NLRB at 541, 549; *Dilling Mech.*, 357 NLRB No. 56, slip op. at 4.

#### **IV. CONCLUSION**

For the reasons stated above, and in the Union's various submissions to the ALJ, the ALJ's decision should be reversed, and the Complaint dismissed.

Dated: November 1, 2013

Respectfully submitted,

/s/ William W. Osborne, Jr.

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