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I. INTRODUCTION

Laurus Technical Institute, Inc. (hereinafter “Laurus” or “Employer”) submits this Brief in Support of its Exceptions to the Administrative Law Judge’s Decision (“Decision”), which Administrative Law Judge Donna N. Dawson (“ALJ”) issued on December 11, 2013. In her Decision, the ALJ concluded that the Charging Party, Josyln Henderson, engaged in protected concerted activity and that Laurus discharged her for engaging in Section 7 protected activity.

Laurus maintains the record does not support the ALJ’s Decision. Charging Party did not engage in protected concerted activity and Laurus did not fire her for engaging in protected concerted activity. Further, the Board’s lack of a quorum at the time it investigated the Complaint and issued it along with prosecuting it renders these proceedings as invalid. Lastly, the ALJ’s complete lack of impartiality violated the Administrative Procedures Act, also rendering the decision invalid.

Accordingly, the NLRB should overrule the ALJ’s Decision as described herein.

II. FACTUAL BACKGROUND AND ARGUMENTS IN SUPPORT OF EXCEPTIONS

Laurus is an Atlanta technical school in operation since 1986. Laurus operates in a competitive space with other institutions seeking many of the same students Laurus hopes to attract. While Laurus strongly believes it provides top-tier education in its field, because of the highly competitive nature of the industry, it expects its employees to work towards attracting students for its programs and not those of its competitors.

A. Charging Party’s Employment at Laurus.

Charging Party worked as an Admissions Representative for Laurus for over five years. Tr. at 240. As an admissions representative, she was responsible for making contacts with

prospective students and seeking to establish enrollment targets and conversion rates.¹ To accomplish this objective, Henderson was responsible for making a certain number of contacts with prospective students during the course of each working day. This is a critical component of Laurus's success and required the full-time commitment of Henderson and others similarly situated.

On January 13, 2012, Charging Party sent a letter to Laurus's CEO Terry Hess raising a number of issues Charging Party had with her position, her co-workers, and certain of Laurus's policies. R. Ex. 4. Hess took the matter seriously (Tr. at 248) and spent a significant amount of time categorically responding to each issue in a letter he gave to Charging Party on February 6, 2012. R. Ex. 4.

On February 13, 2012, Hess met with Charging Party regarding a complaint he had received from Steve Sachs, the IT Manager. G.C. Ex. 4. Sachs was one of the many employees that Charging Party would burden regarding the various individualized problems she would have at any given time. Tr. at 248. Hess had experienced problems with Charging Party unconstructively involving random employees in issues in which those employees were not involved and otherwise could not aid Charging Party with her own concerns. *Id.* Hess wanted to focus Charging Party's efforts so that she would bring her particularized issues to the people who could properly address them. *Id.* Also during this meeting, Hess discussed with Charging Party some accusations regarding sexual harassment claims that Charging Party had brought to Hess's attention. Tr. at 38. Charging Party had raised allegations of sexual harassment and implicated other employees as witnesses. *Id.* Hess wanted to investigate these claims further; however, Charging Party refused to reveal the witnesses' names to assist in the investigation. Tr.

¹ The conversion rate refers to the number of identified prospects who are converted into actual students.

at 42. At the end of the meeting Hess suspended Charging Party, asking that she think about whether she wanted to remain employed at Laurus and to be prepared when she returned to give Hess the names of the witnesses Charging Party was withholding.² G.C. Ex. 4; Tr. at 42.

Following his February 6, 2012 written response, Hess met with Charging Party on February 22, 2012, to go through her January 13, 2012 letter and his response line by line to make sure they had closure or resolution on each of the issues. Tr. at 245. As a further follow up, Hess prepared a final letter for Charging Party on March 30, 2012, resolving the last remaining issues from the February 22, 2012 meeting. Tr. at 245-55; R. Ex. 7.

In April 2012, Laurus experienced personnel and structuring changes but nothing remotely close to the ALJ's "mass firing." Waldo Bracy, who previously worked for ITT Technical Institute, hired three of his former co-workers, Florence Coram, Admissions Representative; Angela Cooper, Admissions Representative; and Shashanta Norwood, Receptionist. Tr. at 145, 148, and 258. Also in April 2012, Hess concluded that the Admissions Department needed his active involvement, and he began to take a greater role in the department. Two weeks after Laurus hired Coram, Cooper, and Norwood, Hess decided to terminate Bracy's employment because the department "was not working appropriately." Tr. at 265. Hess decided at this time to lead the Admissions Department and moved his office into the same room where the Admissions Representatives' cubicles were located. Tr. at 240. Following Bracy's departure, the Admissions Department under Hess's direction was running functionally and was productive up until July 2012. Tr. at 265.

² While overly broad as defined by NLRB, Hess felt that the letter was prudent and necessary to direct the Charging Party with a corrective action, given the negative impact Charging Party's actions were having within multiple departments among numerous co-workers and the company's ability to appropriately address Charging Party's concerns with corrective actions or disciplinary measures. G.C. Ex. 4; Tr. at 248.

B. Charging Party’s Disruptive Behavior Caused the Environment at Laurus to Become Toxic.

In July 2012, Hess hired Larry Williams as Director of Admissions. Tr. at 74. It was at this point that Charging Party’s behavior and actions caused a downhill spiral in the working environment. Tr. at 260. Charging Party felt threatened by her new supervisor and immediately became paranoid that he was out to get her. G.C. Ex. 18; Tr. at 167. Her bizarre behavior included a campaign she initiated to try to get Williams fired. Tr. at 167. Charging Party approached other Admissions Representatives about a plan to intentionally fail to make their conversion rates in order to sabotage Williams.³ Tr. at 167; G.C. Ex. 18. Charging Party believed that she was legally protected from being terminated for any reason and that Hess would be forced to fire Williams.⁴ *Id.*

It was also around this time that Charging Party became increasingly paranoid and obsessed with what she called the “ITT Connect” conspiracy. Tr. at 154. Charging Party referred to Coram, Cooper, and Norwood as the “ITT Connect” because they all previously worked at ITT Technical Institute. Tr. at 144, 148, 154. Charging Party was convinced that the “ITT Connect” was against her and out to get her. G.C. Ex. 18. As a result, Charging Party met with Hess a number of times regarding the unfair treatment she felt she was being given by the “ITT Connect.” Tr. at 213. These meetings involved Cooper whose work was being disturbed by the Charging Party’s paranoid contentions that she was not receiving the same number of leads as her “ITT Connect” co-workers.⁵ Tr. at 213 – 14. Charging Party would constantly

³ In explicably, the ALJ ignored this important fact.

⁴ On November 8, 2011, Charging Party filed a sexual harassment charge with the Equal Employment Opportunity Commission (the “EEOC”). G.C. Ex. 1. It appears Charging Party was under the impression that the Company would not terminate her employment, regardless of her behavior, for fear of Charging Party filing a retaliation charge with the EEOC. G.C. Ex. 18.

⁵ Leads refer to the distribution of prospective students to the individual Admissions Representatives. Also, the ALJ ignored Cooper’s corroborative testimony of the toxic

complain to Coram that “all her people were gone,” and “she wanted somebody to protect her.” Tr. at 154.

By October 2012, the environment Charging Party created had become “hostile” and was affecting the “mental state” of her co-workers. Tr. at 153, 156. It got so uncomfortable that if Coram spoke with Norwood or Cooper, Charging Party would rant to Cooper about the “ITT Connect.” Charging Party was actively trying to convince Coram that leads were being distributed unfairly, although Coram knew this was not the case. G.C. Ex. 18. Charging Party wanted “complete division” of the “ITT Connect,” so that they would all hate each other, and would fight. G.C. Ex. 18. As Coram put it “[s]he [Charging Party] wanted to divide and conquer and that’s what she was trying to do.” G.C. Ex. 18.

The Charging Party’s behavior had become so extreme that in October 2012, she got extraordinarily close to Coram and put her finger in Coram’s face, screaming “I’m sick of this ITT thing,” Tr. at 155; G.C. Ex. 18. Coram was very threatened and disturbed by the incident, and asked her to please step down. Tr. at 155 – 157. At this point Coram had exhausted her patience with Charging Party’s erratic behavior and went to Williams to discuss the incident. Tr. at 157.

C. **Laurus Learns of Charging Party’s Solicitation of Current Laurus Employees for Laurus’s Competitor.**

Like Coram, Cooper was having difficulty with Charging Party’s disruptive behavior, and on October 8, 2012, she submitted an unsolicited formal written complaint about Charging Party to Williams her immediate supervisor. Tr. at 215. Among other things, Cooper complained that Henderson had actively solicited and recruited Cooper and another employee,

atmosphere Charging Party was creating.

Coram, to leave Laurus and to become employed with one of Laurus's competitors following Bracy's termination. Tr. at 215.

Hess explained that Williams reported this to him, which was the first time he learned about the improper solicitation. Tr. at 250. When it was brought to Hess's attention that Charging Party had tried to recruit Cooper and Coram away to work for one of Laurus's competitors, he felt that this was something that could not be tolerated and decided to suspend Charging Party with pay. Tr. at 250 – 51. Hess was concerned about the extraordinary disloyalty displayed by the active solicitation coupled with Henderson's disparaging statements about Laurus. Tr. at 250.

Coram and Cooper testified that following Bracy's discharge, Charging Party urged Coram and Cooper to interview at another school (Westwood) because they needed "to really kind of maybe get out of here, and [Laurus was] going to do the same to [them] (i.e., fire them)." Tr. at 150, 214. Both Coram and Cooper were unequivocal that it was Charging Party who brought the Westwood opportunity to them, not the other way around. In so doing, Charging Party attempted to provoke them to quit by telling them that their jobs were in jeopardy and that Laurus "was a shady company." Tr. at 196, 207.⁶ Coram, at first, felt that Charging Party was helping Cooper and herself by looking out for them but soon realized that Charging Party was being manipulative and only did the solicitation to cause Coram and Cooper to leave Laurus. Tr. at 197 – 99. Coram developed this suspicion after going on the interview with the competitor

⁶ Curiously, and as discussed further below, the ALJ made no mention of Cooper's testimony affirming this sequence (Tr. at 205) and instead focused only on Coram whom she completely discredited. Significantly, Cooper testified that she was present at the hearing only because the General Counsel subpoenaed her and that she otherwise did not want to be there. Tr. at 204. It is simply inconceivable how the ALJ could conclude that it was Coram and Cooper who sought out Henderson to inquire about work for a competitor when both said otherwise and the ALJ just ignored Cooper's testimony. Likewise, the fact Charging Party referred to Laurus as a "shady company" when seeking their ouster was similarly ignored by the ALJ.

school and learning that Charging Party's claim that she was not seeking the job because a degree was needed was explicitly denied by Westwood during the interview.⁷ Coram had asked her interviewer if a degree was necessary, and the reply was, if you have experience "we can take you." Tr. at 121 – 22, 151 – 52, 298; R. Ex. 3 (confirming no degree was necessary).⁸

D. Laurus Suspends, Investigates, and Terminates Charging Party.

During Charging Party's suspension, Hess and Charlene Gatewood, Director of Human Resources, met with Cooper and Coram.⁹ During these meetings Hess and Gatewood confirmed the solicitation and fully learned the extent of the toxic environment that Charging Party had created.¹⁰ Tr. at 251. After these discussions, it became clear to Hess that Henderson's discharge was necessary but he wanted to make sure that the discharge decision could not be viewed as retaliatory (which it was not) so Hess sought an additional layer of review from his outside counsel. Tr. at 252 – 53.

Laurus's attorney engaged an independent attorney, Adam Appel, to conduct a review of the termination decision. Tr. at 217 – 18. Appel reviewed all of the relevant documentation and met with Hess and Gatewood, and concluded that Laurus's decision to discharge was legitimate

⁷ Coram admitted to going on the interview, but credibly testified that she withdrew her application the same night that she went on the interview. Tr. at 151; R. Ex. 8.

⁸ Again, the ALJ just dismissed this important point. Indeed, Cooper testified she asked Henderson why she was not applying for the job if the circumstances at Laurus were so bad and Henderson only stated a degree was necessary and she lacked one. Tr. at 205. The ALJ simply chose to believe Henderson exposing her impartiality.

⁹ Hess spoke with Coram twice in October regarding Charging Party, in addition to what Williams told Hess of Coram and Williams's conversation. Tr. at 159 – 60. While the transcript (G.C. Ex. 18) is of the second meeting with Coram, Hess, and Gatewood, it is clear from both Coram and Hess's testimony that Coram told Hess of the solicitation by Charging Party. Tr. at 158 – 60, 250 – 51.

¹⁰ While General Counsel sought to undermine the legitimacy of the discharge being based at all on the alleged improper solicitation by eliciting testimony regarding the scope of Laurus's review of this improper conduct, the Company believed the information it had in hand was sufficient, especially coupled with the Charging Party's extremely improper conduct resulting in a negative impact on her co-workers working environment and the effect it had on their ability to perform their job responsibilities.

and based solely on Charging Party “trying to encourage her coworkers to leave employment of Laurus and being disruptive generally.”¹¹ Tr. at 220 – 21, 224.

After Appel concluded his investigation and confirmed his findings in writing, Laurus discharged Charging Party. G.C. Ex. 12. The termination letter Laurus sent to Charging Party outlines the decision including her behavior which was “an obvious distraction and impedes [Charging Party’s] coworkers’ ability to effectively do their job,” and “has had a direct and negative impact on [Charging Party’s] coworkers’ ability to perform their job responsibilities.” *Id.* Tr. at 256 -60. Laurus discharged Charging Party’s for two reasons – her disruptive behavior (G.C. Ex. 12; Tr. at 224) and because “of attempts to actively solicit and recruit coworkers to work for another company, a direct competitor.” G.C. Ex. 12.

III. LEGAL ARGUMENT

A. There Is No Evidence that Laurus Discharged Charging Party Because of any Alleged Protected Concerted Activity.

There is simply no direct nor circumstantial evidence that Laurus retaliated against Charging Party for any alleged protected concerted activity. Accordingly, the relief requested in General Counsel’s Amended Complaint should be denied.¹²

In *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the Board announced its causation test in cases alleging violations of

¹¹ Appel’s testimony is relevant because it shows that there is no pretext behind the reasons Laurus gave for Charging Party’s discharge. Tr. at 229. The ALJ’s explanation for disregarding Appel’s testimony and his underlying conclusion is further evidence of her impartiality. The ALJ either disregarded or simply did not understand the simple fact that Laurus hired an outside attorney to look at its discharge is evidence alone that Laurus wanted to make sure it had good cause to discharge her. The ALJ, who it appeared had never presided over an NLRB hearing before, seemed to not understand the concept of relevancy.

¹² Laurus does not believe the gossip policy violates the NLRA. And, even if is found to be overbroad, Henderson’s violations of same were not the motivating reason for her discharge. As discussed throughout, Laurus would have fired Henderson irrespective of the gossip policy as confirmed by Appel. Tr. at 229.

Section 8(a)(1) or (3) of the NLRA. To establish such a violation, the General Counsel must prove, by a preponderance of the evidence, that an individual's protected concerted activity was a motivating factor in the employer's action. To sustain its burden, the General Counsel must show that: (1) the employee was engaged in protected activity, (2) the employer was aware of that activity and (3) the activity was a motivating reason for the employer's action. If the General Counsel can make this showing, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. *NLRB v. Transportation Management Corp.*, 426 U.S. 393, 395 (1983); *see also FPC Holdings v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995).

Based upon these standards, Laurus submits that that the Board should reverse the ALJ's finding that Laurus fired charging party in violation of her Section 7 rights. General Counsel cannot establish a *prima facie* case. More specifically, General Counsel did not established that: (1) Charging Party engaged in any protected concerted activity; or (2) that Charging Party's protected concerted activity was a motivating reason for Laurus's decision to discharge Charging Party's employment.

Moreover, assuming *arguendo* that General Counsel somehow established its *prima facie* case, Laurus satisfied its burden of proving that it would have discharged Charging Party even in the absence of any protected concerted activity.

1. Charging Party's Alleged Protected Activity Is Not Protected.

As discussed above, the record is devoid of any evidence of alleged protected concerted activity. The solicitation of current employees to work for Laurus's competitor by Charging Party is not protected concerted activity. *Clinton Corn Processing Co.*, 194 NLRB 184, 185-86 (1971) (a company's actions are not unfair labor practices when it acted out of motivation induced by complainant's "unprotected conduct in inducing [the company's] employees to quit);

see also Technicolor Gov't Servs., 276 NLRB 383, 389 (stating that soliciting an employee to quit brings the employee's action outside of protection from Section 7 of the NLRA); *Boeing Airplane Co. v. NLRB*, 238 F.2d 188, 193-95 (9th Cir. 1956) (employee's service as an agent attempting to place employer's employees with competitors was unprotected activity and valid ground for termination). “To convince other workers to quit and to work for competitors is an act of disloyalty, injurious to the employer, and is a legitimate basis for discharge.” *NLRB v. Interstate Builders*, 351 F.3d 1020, 1040 (10th Cir. 2003). Hess placed Charging Party on immediate suspension after learning Charging Party might have solicited employees to work for a competitor because of the disloyalty associated with the act. Tr. at 250. Hess only needed to confirm these accusations through Cooper and Coram to be sure termination of Charging Party's employment was the correct course. Tr. at 251. General Counsel has not proven that this motive is pretext for any other activity of Charging Party or animosity towards Charging Party.

Counsel for General Counsel tried to paint a picture of Charging Party as a helpful and concerned co-worker, but the record demonstrates otherwise. The record clearly shows that Charging Party had deceptive motives that demonstrated that the solicitation was not intended to help her fellow co-workers. As discussed above, both Coram and Cooper testified that Charging Party approached them about the Westwood opportunity – not the other way around. Henderson explicitly stated otherwise a direct contradiction ignored by the ALJ. And, the undisputed evidence showed that no college degree was required for the position undermining Charging Party's alleged reason for staying at Laurus while encouraging Coram and Cooper to quit. Further, Charging Party's subsequent behavior – seeking to sabotage Williams¹³ and her paranoia about the alleged “ITT Connect” support the reality that Charging Party sought to have

¹³ Again, the ALJ ignored this evidence.

Cooper and Coram quit in order to advance her own self-interest. Such conduct is clearly not protected.

For employee conduct to constitute “protected concerted activity,” it must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). The basic principles emerge from the Board’s decisions in *Meyers Industries, Inc.*, 268 NLRB 493 (1984) [*“Meyers I”*] and *Meyers Industries, Inc.*, 281 NLRB 882 (1986) [*“Meyers II”*]. Thus, in *Meyers I*, the Board defined concerted activity under Section 7 of the NLRA as an activity that is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers I* at 497. This definition was refined in *Meyers II* to make clear that concerted activity occurs when “individual employees seek to initiate or to induce or to prepare for group action.” *Meyers II* at 887. Importantly, in *Meyers I*, the Board overturned the doctrine of “constructive concerted activity,” which had been articulated in the Board’s earlier decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). This doctrine allowed concerted activity to be established by a presumption that other employees supported an individual employee’s complaint. Since the decisions in *Meyers I* and *Meyers II*, it has been clear that concerted activity cannot be presumed, and must be established by *evidence* of group activity, or an individual seeking to initiate or invoke group activity, or an individual raising a group, rather than an individual, complaint.

However, it is clear from her co-workers’ testimony that Charging Party was engaging in subterfuge. Tr. at 198 – 99 and 209 – 10. Charging Party’s paranoid and uncooperative behavior throughout the latter stages of her employment demonstrated that she only had one real motive in mind when interacting with her co-workers: how to better her position. Tr. at 154 - 155. She did not engage in protected concerted activity when “helping” her co-workers find more permanent

employment -- she was trying to eliminate what she perceived to be HER competition. Tr. at 199.

Assuming, *arguendo* that soliciting employees to work for a competitor is protected concerted activity, it has long been recognized that there are limitations on the protections of Section 7 of the NLRA. Both the Board and Courts alike have held that “flagrant conduct of an employee, even though occurring in the course of [protected] activity, may justify disciplinary action by the employer.” *Allied Aviation Fueling of Dall. LP*, 490 F.3d 374, 379 (5th Cir. 2007)(quoting *Boaz Spinning Co. v. NLRB*, 395 F.2d 512, 514 (5th Cir. 1968)). As the U.S. Supreme Court has recognized, employees “are not at liberty to intimidate or coerce other employees. When employees resort to that kind of activity, they take a position outside the protection of the statute and accept the risk of discharge upon grounds aside from the exercise of the legal rights which the Act protects.” *Paramount Mining Corp. v. NLRB*, 631 F.2d 346, 348 (4th Cir. 1980) (citing *NLRB v. Fansteel*, 306 U.S. 240 (1939)). Moreover, the Board has held that “where an employee is discharged for conduct that is part of the *res gestae* of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for service.” *Guardian Indus. Corp.*, 319 NLRB 542, 549 (1995) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)).¹⁴

It is well established that “false statements that are knowingly false and therefore malicious are unprotected.” See *Radisson Muahlebach Hotel*, 273 NLRB 1464, 1464 (1985). Disloyal, reckless, or maliciously untrue remarks as to constitute “a disparagement or vilification

¹⁴ This same analysis would apply to violations of an alleged overbroad no gossip policy. That is, an overbroad policy would not protect conduct that is otherwise not protected by Section 7.

of the employer's product or reputation," are not protected by Section 7 of the NLRA. *Sahara Datsun*, 278 NLRB 1044, 1046 (1986), *enf'd* 911 F.2d 1317 (9th Cir. 1987), quoting *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), *enf'd*. 636 F.2d 1210 (3rd Cir. 1980). In the instant case, the record demonstrates that Charging Party told her co-workers they should be fearful of their job and disparaged the Company (including calling Terry Hess the "devil") while urging them to seek employment elsewhere. Tr. at 150, 153, and 250 – 251. Charging Party knowingly told her co-workers "they're going to do the same to you," hoping to disparage the Company enough so that they would leave. Tr. at 150.

Based upon these standards, Laurus submits that General Counsel's Amended Complaint should be dismissed because General Counsel did not establish that Charging Party's activity falls within the protections of Section 7 of the NLRA and the ALJ erred in finding that it did. Therefore, the General Counsel has failed to satisfy its threshold burden of establishing that Charging Party had engaged in protected activity and that the termination resulted from the conduct associated with that activity.

2. *Laurus Satisfied Its Burden of Proving that It Would Have Discharged Charging Party Even in the Absence of Any Protected Concerted Activity.*

Finally, even if General Counsel has somehow established its *prima facie* case, Laurus has satisfied its burden of proving that it would have terminated Charging Party's employment even in the absence of any protected concerted activity.

As Hess testified, Charging Party's behavior was "disruptive," causing the Admissions Department to be "very dysfunctional, and it wasn't going to get better. It was very, very clear." Tr. at 252. "That reason alone... was worth terminating her." Tr. at 253. The ALJ completely disregarded this evidence. Regardless, if the Board finds the solicitation of her coworkers is protected, Charging Party's "ranting and raving[s]" created a "hostile environment" for her

coworkers, such that Laurus had no other decision but to terminate her employment. G.C. Ex. 18; Tr. at 154. In a work environment such as Laurus, where the Admissions Representatives are the face of the Company, it is imperative that a company's employees are able to do their work in a harmonious environment. Laurus was not willing, nor should it be forced to sacrifice the sanity of all of its employees, for the sake of one bad seed.¹⁵

Lastly, even if the Board finds that Laurus discharged Charging Party for misconduct that arose from protected activity, Laurus has shown and the evidence clearly established that it had an honest belief that Charging Party engaged in the misconduct that led to her discharge.¹⁶ The burden turned then to the General Counsel to show that the misconduct did not occur. *Pepsi-Cola Co.*, 330 NLRB 1096 (2001) (case remanded for determination of whether employer had good faith belief and whether General Counsel could prove misconduct did not occur). Here, there was substantial evidence that Charging Party engaged in numerous acts of misconduct. The ALJ chose to not believe Coram's description of the highly volatile behavior Charging Party engaged in but she did not conclude that the behavior never took place. Hess based his decision to discharge Charging Party in part on that behavior and in so doing did it in good faith.

Based upon these standards, Laurus submits that the ALJ erred in concluding that Laurus fired Charging Party for engaging in protected concerted activity and requests that the Board overrule the ALJ's decision.

¹⁵ General Counsel may not agree with Laurus's reasoning for discharging Henderson, but it is not the role of the General Counsel or the Board to second-guess Laurus's business judgment. *Sacred Heart Medical Center*, 347 NLRB 531 (2006); *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 [38 LRRM 2142] (5th Cir. 1956) ("[A]s we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision").

¹⁶ It is here that Appel's testimony is indeed relevant and probative that Laurus wanted a second opinion to independently review its decision.

IV. THE BOARD DID NOT HAVE A LEGALLY SUFFICIENT QUORUM WHEN THE REGIONAL DIRECTOR ISSUED THE COMPLAINT IN THIS MATTER OR WHEN COUNSEL FOR THE ACTING GENERAL COUNSEL ADJUDICATED THE DISPUTE BEFORE THE ADMINISTRATIVE LAW JUDGE

Because neither the Board nor the Acting General Counsel had authority to investigate the underlying charges and/or issue the Complaint, any current or subsequent action must be deemed unconstitutional and therefore, this matter must be dismissed.

It is well-settled law that the Board must maintain a quorum of at least three members to have the authority to act. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644 (2010); *see also* 29 U.S.C. § 153(b) (“[T]hree members of the Board shall, at all times, constitute a quorum of the Board”) In *Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir. 2013 No. 12-1225, 2013), cert. granted, 133 S. Ct. 2861 (June 24, 2013) the Court invalidated President Obama’s recess appointments of Sharon Block, Terence F. Flynn and Richard F. Griffin to the Board, thus leaving the Board without a quorum. *Noel Canning*, 705 F.3d at 513-14. In light of *Noel Canning*, the Board remained without a quorum until August 12, 2013 and, therefore, since at least as early as January 4, 2012, did not have the authority to act. As will be explained below, in investigating and prosecuting this matter, the General Counsel has acted unconstitutionally and without requisite authority.

A. The Board Lacked A Proper Quorum At All Relevant Times.

On January 25, 2013, the Court of Appeals for the District of Columbia issued its *Noel Canning* decision. Specifically, the court held that three members of the Board, Sharon Block, Terence F. Flynn, and Richard F. Griffin, Jr. (appointed by the President on January 4, 2012 purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. Art. II,

§ 2, cl. 3.), were not appointed validly.¹⁷ The court’s ruling raises significant issues in the instant case regarding the jurisdiction of the Regional Director to investigate and issue the Complaint, the jurisdiction of the General Counsel to prosecute the case, and the jurisdiction of the Administrative Law Judge to render a decision.

In *Laurel Baye Healthcare of Lake Lanier*, 564 F.3d 469 (D.C. Cir. 2009), the court explained that (a) a Board delegation “cannot survive the loss of a quorum on the Board”; (b) “an agent’s delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended”; and (c) “an agent’s delegated authority is also deemed to cease upon the resignation or termination of the delegating authority.” *Id.* at 472-73.

Under the Act, the General Counsel “shall have final authority, *on behalf of the Board*, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law” (emphasis added). 29 U.S.C. 153(d) (2012). Further, under Section 102.5 of the Board’s Rules and Regulations, a regional director is defined to be an “agent” of the Board. Consequently, the power of regional directors and the general counsel to act ceases “when the Board’s membership dips below the Board quorum of three members.” *Lauren Baye*, 564 F.3d at 475.

B. The Board Lacked Jurisdiction To Investigate And Prosecute The Present Complaint Against Respondent And To Enter Into A Settlement Agreement In The Absence Of A Valid Quorum Of Board Members.

In the instant case, the Charging Party filed her charge on November 28, 2012. The Regional Director issued its Complaint on March 13, 2013, and the hearing in the matter was

¹⁷ Art. II, § 2, cl. 3 provides: “The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”

conducted on May 9, 2013. All of these events took place after President Obama made his recess appointments and before a full quorum of the Board was constituted.

As stated previously, in regard to the charge filed during the time period the Board lacked a quorum, the Region:

- a. conducted an investigation;
- b. gathered evidence;
- c. conducted factual and legal analyses;
- d. drew factual and legal conclusions;
- e. requested advice from Acting General Counsel;
- f. acted pursuant to the advice;
- g. determined to issue a complaint;
- h. ordered a hearing; and
- i. prosecuted the complaint.

The Region and General Counsel conducted each and every action set forth above without the constitutional authority to do so. Accordingly, the Regional Director lacked the authority to both the complaint and the General Counsel lacked the authority to prosecute it. The ALJ should have granted Laurus's Motion to Dismiss made at the outset of the hearing; at the close of evidence and then re-urged in post-trial briefing. The Board should overrule the ALJ's decision.

V. THE ALJ'S DECISION AND REASONING EVIDENCES HER IMPARTIALITY IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

The Board need not follow credibility findings of the ALJ when they conflict with well supported inferences drawn from other portions of the record. *Russell-Newman Manufacturing Co. v. NLRB*, 407 F.2d 247, 249 (5th Cir. 1969). Further, "it is the special function of the administrative law judge to prepare for the Board an independent and careful analysis of the factual issues and legal arguments in the case over which the Board presides." *Waterbury Hotel*, 333 NLRB 482 (2001). And, in this regard, the ALJ should not simply adopt the brief of the General Counsel, something clearly done in this case. *See e.g.* General Counsel Brief bottom

paragraph of page 9 and ALJ decision, p. 7, fn. 13.

Laurus called four witnesses during its presentation of the case: Terry Hess (Laurus CEO); Florence Coram, Angela Cooper and Adam Appel. The ALJ found with regard to Hess “it is evident that Hess did not tell the truth in an attempt to legitimize his actions” - in other words, called him a liar. As for Coram, the ALJ found it necessary to say she “discredited” her or otherwise rejected her testimony at least eight times – without once offering why Coram would have openly perjured herself or otherwise misrepresented her testimony. With regard to Cooper, despite the fact that she directly rebutted Henderson’s contention that it was Coram and Cooper who approached Henderson about employment with a competitor, the ALJ effectively dismissed this testimony as insignificant despite the fact that Laurus’s motivation to discharge Henderson was based in part on Henderson having been the solicitor. Who initiated the conversation was an important and salient point disregarded by the ALJ. This is made even more so by the fact that Cooper was a reluctant witness with no evidence of bias or impartiality. Lastly, even though Appel testified that he was an attorney who understood the concept of retaliatory discharge, the ALJ did not give any value to his testimony that based upon his review of the evidence, Laurus was not motivated by retaliatory intent when it discharged Henderson.

It is apparent the ALJ cherry-picked the record to support her view of a finding she had decided upon before the record was complete. In so doing, she violated the Administrative Procedure Act by failing to preside in an “impartial manner.” 5 U.S.C. §556(b)(3).

VI. CONCLUSION

Based upon the foregoing, the Employer requests the ALJ’s Decision, including her Conclusions of Law, Remedy, and Order, regarding the foregoing matters be overruled.

Respectfully submitted this 8th day of January, 2014.

By: /s/Jeffrey A. Schwartz
Jeffrey A. Schwartz, Esq.
Georgia Bar No. 558465

JACKSON LEWIS P.C.
1155 Peachtree Street, N.E., Suite 1000
Atlanta, Georgia 30309
Direct Dial: (404) 586-1811
Facsimile: (404) 525-1173
Email: schwartzj2@jacksonlewis.com

ATTORNEYS FOR
LAURUS TECHNICAL INSTITUTE

