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

**THE KROGER CO. OF MICHIGAN**
**Respondent**

**and** **Case 07-CA-098566**

**ANITA GRANGER, an Individual**
**Charging Party**

# COUNSEL FOR THE GENERAL COUNSEL'S BRIEF ANSWERING RESPONDENT'S EXCEPTIONS

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Counsel for the General Counsel, Darlene Haas Awada, respectfully submits Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Decision and Order of the Administrative Law Judge.

## I. ARGUMENT[1]

### A. Respondent's Exceptions Fail to Meet the Requirements of Section 102.46 of the Board's Rules and Regulations

Section 102.46 of the Board's Rules and Regulations requires that exceptions be set forth with specificity. Namely, each exception must set forth the questions of procedure, fact, law, or policy to which exception is taken, with designations to the relevant part of the ALJD, and citations to supporting portions of the record. Exceptions failing to meet those specifications are deemed waived and should be disregarded. Section 102.46(b)(1) and (2). See ***W-L Molding Co.***, 272 NLRB 1239, 1239 (1984); ***Valentine Painting and Wallcovering***, 331 NLRB 883, 883 n.2 (2000), enfd. mem. 8 Fed. Appx. 116 (2nd Cir. 2001); ***Howard K. Sipes Co.***, 319 NLRB 30, 30 (1995). All of Respondent's six Exceptions fail to meet these requirements, and appear to cover only the following topics:

- The ALJ's finding that the disclaimer required by Respondent is "overly burdensome" and has a chilling effect on employees' exercise of Section 7 rights. (Exception 1)

[1]"ALJ" refers to Administrative Law Judge David I. Goldman; "ALJD" refers to the ALJ's Decision. "Br." refers to Brief in Support of Respondent's Exceptions to Decision and Order of the Administrative Law Judge. "Tr." refers to the transcript of the administrative hearing; "GCX," and "RX" refer to Counsel for the General Counsel's exhibits and Respondent's exhibits, respectively. "February 2011 Policy" refers to Respondent's February 2011 Online Communications Policy (GCX5). "June 2011 Policy" refers to Respondent's June 2011 Online Communications Policy (GCX3).

- The ALJ's finding that the provision of Respondent's "policy" requiring "compliance with intellectual property laws is unlawful." (Exception 2)
- The ALJ's finding that the "portion of the June 2011 Policy restricting employees from discussing confidential and proprietary information is unlawful." Respondent does not except to the ALJ's findings, analysis, conclusions of law, or remedy with regard to substance of this portion of the policy in the February 2011 version of the policy. (Exception 3)
- The ALJ's finding that the portion of Respondent's "policy" prohibiting "inappropriate behavior is unlawful." (Exception 4).
- The ALJ's finding that the "portion of the charge relating to Respondent's February 2011 policy was timely." (Exception 5)
- The ALJ's finding that "evidence of the settlement of a 2011 unfair labor practice case in Region 19 is irrelevant." (Exception 6) Respondent failed to except to the exclusion of the evidence, or to the failure of the ALJ to make any findings or conclusions of law based upon the exclusion of evidence.

Despite their deficiency, to the extent the Board considers Respondent's exceptions, Respondent failed to except to any of the ALJ's credibility findings, factual determinations, and legal analysis in reaching the findings in the above six exceptions. Accordingly, those are deemed waived under the Board's Rules and Regulations and well-established case law. In addition, Respondent failed to except to the ALJ's recommended remedy, and exceptions to the remedy also should be deemed to be

waived. In any event, the ALJ's factual findings are well-supported by the record, and his legal analysis, conclusions of law, and recommended remedy are consistent with established Board law.

### B. The ALJ Correctly Found that the Challenged Provisions of the Online Communications Policies Would Reasonably Tend to Chill Employees in the Exercise of their Section 7 Rights

As noted, Respondent did not file exceptions to the ALJ's legal analysis of the rules, which were sound and consistent with Board law, holding that maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1). ***Lafayette Park Hotel***, 326 NLRB 824, 825 (1998), enfd. mem., 203 F.3d 52 (D.C. Cir. 1999). Nonetheless, Respondent, throughout its Brief, misconstrues established Board law on determining whether a rule is lawful.

In determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading. ***Palms Hotel and Casino***, 344 NLRB 1363, 1367 (2005); ***Lutheran Heritage Village-Livonia***, 343 NLRB 646, 646 (2004). The Board first should decide whether the rule explicitly restricts activities protected by Section 7. ***Id.*** at 646. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. ***Palms Hotel and Casino***, supra at 1367; ***Lutheran Heritage Village-Livonia***, supra at 646.

Here, the appropriate inquiry on this record for evaluating Respondent's February 2011 and June 2011 Online Communications Policies (collectively "the Policies") is whether employees would reasonably construe the language to prohibit Section 7 activity.

In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather should be construed in context. ***Lutheran Heritage Village-Livonia,*** supra at 646. As always, however, ambiguity is construed against the drafter. ***Lafayette Park Hotel*****,** supra at 828. Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. See, e.g, ***W.D. Manor Mechanical Contractors, Inc.***, 357 NLRB No. 128, JD slip op. at 23 (2011); ***TeleTech Holdings, Inc.***, 333 NLRB 402, 403 (2001); ***Laidlaw Transit, Inc.***, 315 NLRB 79, 83 (1994). See also ***University Medical Center***, 335 NLRB 1318, 1320-22 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in rel. part*, 335 F.3d 1079 (D.C. Cir. 2003). The ALJ correctly applied this legal framework in analyzing the portions of the Policies which he found to be unlawful.

Respondent asserts (Br., p. 7-8) that the Board's "review of a rule should not be limited to the four corners of the rule," and that consideration "is also given to an employer's actions, such as whether the rule has been forced against employees for engaging in Section 7 activities, whether the rule was promulgated in response to union

or protected activity, or whether the employer had exhibited anti-union animus." This is a confused misstatement of the standard under the facts of this case, as described above.

### 1. The ALJ Correctly Found to be Unlawful the Provision Requiring Employees to Use a Specified Disclaimer if they Identify Themselves as an Associate of the Employer

The ALJ correctly found that the provision[2] requiring employees to use a specific disclaimer would reasonably chill employees from engaging in activities protected by Section 7 and therefore violates Section 8(a)(1). (ALJD p. 12, lines 39-41) "Where [] rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." ***Lafayette Park Hotel***, supra at 825.

In addition to the examples set forth in ALJ's comprehensive analysis of the rule (ALJD p. 9-12), a reasonable reading of this rule would require any employee who identifies his place of employment on his Facebook personal profile page expressly to state that his work-related comments are his personal opinions and do not reflect the "postings, strategies, or opinions" of Respondent every time he posts "work-related information" related to terms and conditions of employment or criticism of labor policies. Accordingly, Respondent's claim (Br. p. 9, n. 5) that "if someone discusses work-related matters without identifying him/herself as a Kroger employee the disclaimer requirement does not apply" is misleading—under a reasonable reading of the rule, any Facebook user who identifies in his profile "Kroger" as his place of employment would indeed need to

[2] The provision, identical in both Policies, states: "If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: 'The postings on this site are my own and do not necessarily represent the postings, strategies, or opinions of The Kroger Co. family of stores.'"

use the disclaimer each time he posted or commented on working conditions, or "liked" a post concerning working conditions.

In addition, employees' identification on their personal profile pages of their place of employment serves an important function in enabling employees to use online social networks to find and communicate with their fellow employees at their own and other stores. This rule would reasonably have the effect of chilling employees from identifying themselves as employees of Respondent online. For these reasons, and for the reasons articulated by the ALJ, the disclaimer requirement is particularly harmful to the Section 7 right to engage in concerted action for mutual aid or protection, and is unlawfully overly broad in violation of Section 8(a)(1).

Respondent argues (Br., p. 12-14) that the ALJ failed to consider all of its "legitimate business interests" in evaluating the disclaimer requirement, then goes on to make unsubstantiated assertions that it has legitimate business interests that the disclaimer prohibition was intended to address. However, Respondent failed to introduce or argue any asserted business interests at hearing. Respondent's effort to introduce evidence outside the official record prejudices the due process rights of the General Counsel. Respondent's post hoc assertions of "legitimate business interests" for maintaining its disclaimer must therefore be stricken in its entirety and disregarded. Section 102.45(b), Board's Rules and Regulations; ***King Soopers, Inc.***, 344 NLRB 842, 842 n. 1 (2005); ***Observer & Eccentric Newspapers, Inc.***, 340 NLRB 124, 124 n. 1 (2003); ***S. Freedman Electric, Inc***., 256 NLRB 432, 432 n. 1 (1981).

In any event, the asserted "business interests," which are generally related to maintaining the public's positive image of the company and protecting sales,[3] fail to justify the Respondent's maintenance of the rule. An employer with the best of intentions may violate Section 8(a)(1) by promulgating an overly broad rule. For example, ***Trinity Protection Services, Inc.,*** 357 NLRB No. 117 (2011), involved an employer that provided security guard services at various federal facilities. The legitimacy of its business concerns was not questioned. Nonetheless, the Board held unlawful a policy prohibiting employees from "divulging any company knowledge to any client." ***Id.*** at 1-2. Because of the "expansive scope of [the] admonition, employees would reasonably conclude that they could be disciplined for disclosing *any* information about" the employer to its clients, thereby impermissibly restricting their rights under ***Eastex, Inc. v. NLRB***, 437 U.S. 556, 565 (1978) to appeal to third parties. ***Id.*** at 2. If the rule in ***Trinity*** was found unlawful, despite the employer's undisputed grave responsibility to protect the government and general public from physical harm, it follows that Respondent's disclaimer requirement is not immunized simply by its asserted interest in protecting its public image and sales.

Respondent wishfully attacks (Br., p. 12) the ALJ's analysis of the disclaimer provision as "speculation" outside the scope of evidence, and as conjuring up unreasonable interpretations of the rule. However, the ALJ's analysis establishes a variety of ways that a reasonable reading of the disclaimer requirement would chill

[3] Respondent also asserts (Br., p. 14) for the first time that the disclaimer is required so that it can comply with Securities and Exchange Commission regulations regarding the disclosure of information, yet fails to identify how the disclaimer is required in that regard.

employees in the exercise of their Section 7 rights. For a rule to be unlawful, it is sufficient to show only that there exists **a** reasonable interpretation that the rule infringes upon Section 7 rights. It is not necessary to show that the overly broad interpretation is the only reasonable one. ***Double D Construction Group, Inc.***, 339 NLRB 303, 303-304 (2003). Accordingly, because a reasonable employee would construe the disclaimer requirement to chill his or her Section 7 activities, it violates Section 8(a)(1).

### 2. The ALJ Correctly Found the Intellectual Property Provision Contained in Both Policies to be Unlawful

The ALJ correctly found that Respondent violated Section 8(a)(1) by maintaining a provision[4] prohibiting the use of Respondent's intellectual property assets without permission.

The proscriptions against using Respondent's intellectual property assets, including trademarks and logos, without express permission obstruct fundamental Section 7 activities. In the absence of further explanation, employees would reasonably construe these rules to impede, for example, postings bearing Kroger's logo including electronic copies of policies, electronic leaflets, and photographs of picket signs.

The prohibitions restrict a broad range of uses of intellectual property to which employees are legally entitled. Specifically, the use of copyrighted material for purposes of criticism is considered "fair use." See ***Campbell v. Acuff-Rose Music, Inc.***, 510 U.S.

[4] The provision, contained in both Policies, states: "You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company's intellectual property assets (like copyrights, trademarks, patents or trade secrets – including, for example, Kroger or [sic] banner logos, or trade names of products, or non-public information about the Company's business processes, customers or vendors)."

569, 576-77 (1994) ("The fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by [Section 106 of the Copyright Act of 1976], for purposes such as criticism, comment, scholarship, or research, is not an infringement of copyright.") (citing 17 U.S.C.A. § 107). Moreover, there is no unlawful infringement where use of a trademark would not confuse the public regarding the source, identity, or sponsorship of the product. See, e.g., ***Smith v. Chanel, Inc.,*** 402 F.2d 562, 563(9th Cir. 1968) (use of trademark in an advertisement comparing the alleged infringer's product to the trademark holder's product not unlawful because it did not create a "reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product"). The use of intellectual property such as logos, trademarks, and copyrighted material for Section 7 activity does not implicate the interests that courts have identified as protected by trademark and copyright laws. Therefore, the prohibition is overly broad.

Indeed, and as the ALJ noted (ALJD p. 13, lines 22-24), the Board has found prohibitions on the use of company logos to be unlawful. Contrary to Respondent's misrepresentation (Br., p. 17), ***Spirit Construction Services***, 351 NLRB 1042, 1045 (2007), relied upon by the ALJ, **did** involve the employer's assertion that it ordered employees to remove stickers using the employer's logo from their hardhats due to alleged concerns of protecting the employer's trademark. The Board found this to be a violation of Section 8(a)(1). ***Id.*** at 1042. Similarly, in ***Pepsi Cola Bottling Co.***, 301 NLRB 1008, 1019-20 (1991), enfd., 953 F.2d 638 (4th Cir. 1992), the Board upheld the administrative law judge's finding that an employer policy prohibiting employees from

wearing uniforms with the company's logo while engaging in union activity was an unlawful infringement on Section 7 rights. In ***Boise Cascade Corp.,*** 300 NLRB 80, 85 (1990), the Board upheld the administrative law judge's finding that the wearing of a T-shirt depicting the employer's logo in connection with a protest of terms and conditions of employment was protected.

As the ALJ correctly noted (ALJD p. 13, lines 29-35), the rule's requirement that employees request and receive permission in order to use intellectual property assets in their Section 7 activity is antithetical to the Act. Under this prohibition, an employee would be unable to use on social media postings bearing Kroger's logo including electronic copies of policies, electronic leaflets, and photographs of picket signs, without first obtaining Respondent's permission. Although the ALJ cited ***J.W. Marriot***, 359 NLRB No. 8 (2012), a case that has now has no precedential weight due to the Supreme Court's decision in ***NLRB v. Noel Canning***, 199 LRRM 3685 (June 26, 2014), the Board has, in other cases, stated that that managers' absolute discretion over application of a rule is unlawful where it requires management's permission for employees to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission because of the chilling impact on the exercise of Section 7 rights. See, e.g., ***TeleTech Holdings, Inc.***, supra at 403; ***Brunswick Corp.***, 282 NLRB 794, 795 (1987). The provision's flat prohibition without permission on the use of intellectual property, as the ALJ found, is an overbroad restriction. Accordingly, this restriction violates Section 8(a)(1) of the Act.

Respondent again asserts (Br., p. 19) that the ALJ failed to consider its legitimate interests in his analysis of the intellectual property prohibition. However, again, Respondent failed to introduce or argue any asserted business interests at the hearing. Respondent's effort now to introduce evidence outside the official record prejudices the due process rights of the General Counsel. Accordingly Respondent's efforts now to introduce of "legitimate business interests" for maintaining its intellectual property prohibition must therefore be stricken in its entirety and disregarded. Section 102.45(b), Board's Rules and Regulations; ***King Soopers, Inc.***, supra at 842 n. 1; ***Observer & Eccentric Newspapers, Inc.***, supra at 124 n.1; ***S. Freedman Electric, Inc***., supra at 432 n. 2.

Moreover, to the extent Respondent now advances business interests, the provision is not narrowly tailored and therefore unlawfully jeopardizes employees' ability to engage in Section 7 activity.

### 3. The ALJ Correctly Found the Provisions Restricting Discussion of "Confidential and Proprietary Information" Contained in Both Policies to Be Unlawful

The ALJ correctly found both versions of the provision restricting "confidential and proprietary information" to be unlawful. Respondent excepts only to the ALJ's substantive finding that the June 2011 provision[5] is unlawful; Respondent's Exception to

[5]The June 2011 Policy states: "Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors or speculation related to the Company's business plans."

the ALJ's findings and conclusion regarding the February 2011 provision is only that it is time-barred.[6] (Exceptions 3 and 5; Br., p. 20)

The ALJ's analysis of the June 2011 provision is well-grounded in Board law. Although the entire rule is read in context, the last line of the prohibition, barring "comment[s] on rumors or speculation related to the Company's business plans" renders the rule overly broad. As the ALJ noted (ALJD p. 14, lines 36-41) the prohibition against commenting on rumors or speculation "related to the Company's business plans" would reasonably be read to include matters such as transfer of employees, potential shutdowns, closures, layoffs, and transfer of work, all of which touch upon employees' working conditions. Thus, a reasonable employee would construe the prohibition to restrict Section 7 activity.

In addition, the Board and courts have long held that the maintenance of rules prohibiting employees from making false statements violate Section 8(a)(1). ***Lafayette Park Hotel***, supra at 828; ***American Cast Iron Pipe Co.***, 234 NLRB 1126, 1131 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). It follows that prohibiting commentary on rumors and speculation would also be an unlawful infringement on Section 7 activities.

Respondent criticizes (Br., p. 22) the ALJ's distinguishing of ***Hyundai American Shipping Agency, Inc.***, 357 NLRB No. 80 (2011), stating that "employees have no protected right to make statements related to non-public, confidential information." However, Respondent fails to cite any case law in support of its strained criticism. Indeed, Respondent ignores the Board's recent holding in ***MCPC, Inc.***, 360 NLRB No.

[6] Respondent's statute of limitations defense is discussed below.

39 (2014), in which the Board found unlawful a rule that "idle gossip or dissemination of confidential information within [the Company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination." Moreover, while Respondent again states (Br., p. 22) that it has "a legal obligation under SEC rules to ensure non-public information is disclosed only when and how appropriate [sic]," it fails to state how this overly broad restriction is necessary to accomplish this vague asserted obligation. To the extent Respondent has legitimate business concerns, as to which the record at hearing is devoid of evidence, it is the job of the employer to narrow its own broadly drawn rule. ***Bigg's Foods***, 347 NLRB 425, 425 n. 7 (2006); ***TeleTech Holdings, Inc.***, 333 NLRB 402, 403 (2001). Defective ambiguity or overbreadth can readily be resolved either by the drafter's tapering the rule to address its genuine business concerns, or by its expressly explaining to employees that their wages and working conditions are not subject to the rule's proscriptions.

#### 4. The ALJ Correctly Found the Provisions Prohibiting "Inappropriate" Behavior While Online Contained in Both Policies to Be Unlawful

Consistent with Board precedent, the ALJ found (ALJD p. 16-17) that both Policies' prohibitions on "inappropriate" behavior violate Section 8(a)(1).[7] Respondent asserts that the rule makes it clear that the "policy is covering actions covered by 'other policies and rules of conduct.'" Apparently, Respondent is asserting (Br., p. 23) that

[7] The February 2011 Policy states: "When online, do not engage in behavior that would be inappropriate at work and that will reflect a negative or inaccurate depiction of our Company," and the June 2011 Policy states: "When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company's (or competitors') products, services, executive leadership, employees, strategy and business prospects."

"inappropriate" is defined as "violating one of Respondent's other policies or rules of conduct." However, that is not clear at all from the text of the rule. As always, ambiguity is construed against the drafter. ***Lafayette Park Hotel*,** supra at 828. Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. See, e.g, ***W.D. Manor Mechanical Contractors, Inc.***, supra, JD slip op. at 23; ***TeleTech Holdings, Inc.***, supra, at 403; ***Laidlaw Transit, Inc.***, supra, at 83.

The prohibitions in the February and June 2011 Policies are overly broad and reasonably would be read to prohibit Section 7 activity. In the February 2011 Policy, the admonitions not to engage in "behavior that would be inappropriate at work" and "that will reflect a negative or inaccurate depiction of our Company" are sweeping prohibitions similar to those that the Board has found to be unlawful because they would reasonably be read to encompass concerted communications protesting or criticizing an employer's treatment of its employees, among other Section 7 activities, as the ALJ found (ALJD p. 16, lines 13-14). Thus, in ***First Transit, Inc.***, 360 NLRB No. 72 (2014), the Board found overly broad a rule prohibiting "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public. Disorderly conduct during working hours [sic]." The Board held that employees would construe such a rule as limiting their communications concerning employment, and accordingly found it unlawful. ***Id.*** at 3.

Similarly, the Board has consistently held that rules prohibiting "negativity" reasonably would be read to limit Section 7 activities. See, e.g., ***Hills and Dales General***

***Hospital***, 360 NLRB No. 70, slip op. at 1 (2014) (prohibitions on "negative comments" about fellow team members and "negativity" unlawful); ***Southern Maryland Hospital***, 293 NLRB 1209, 1222 (1989) (rule prohibiting "derogatory attacks on hospital representatives" unlawful), enfd. in relevant part, 916 F.2d 932, 940 (4th Cir. 1990); ***Claremont Resort & Spa***, 344 NLRB 832, 832 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on Section 7 activities). See also ***Costco Wholesale Corp.***, 358 NLRB No. 106, slip. 1-2 (2012)(rule prohibiting comments that "damage the Company, defame any individual or damage any person's reputation" found unlawfully overbroad); ***Knauz BMW***, 358 NLRB No. 164, slip op. at 1 (2012)(rule stating that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Company]" found overly broad).[8]

In addition, the February 2011 Policy's admonition not to engage in behavior that would reflect an "inaccurate depiction of our Company" offends the long-standing principle that Section 7 communications are protected even when inaccurate, as long as they are not maliciously false. ***Lafayette Park Hotel***, supra at 828; ***American Cast Iron Pipe Co.***, supra at 1131; ***Central Security Services, Inc.***, 315 NLRB 239, 243 (1994). Accordingly, as the ALJ found, and consistent with Board precedent, Respondent's February 2011 Policy's provision prohibiting "behavior that would be inappropriate at

[8] Although upon the Supreme Court's issuance of its decision in ***NLRB v. Noel Canning***, 199 LRRM 3685 (June 26, 2014), both ***Costco Wholesale Corp.***, 358 NLRB No. 106 (2012), and ***Knauz BMW***, 358 NLRB No. 164 (2012), have no precedential weight, the GC urges that their rationale is persuasive and should continue to be followed.

work" and "that will reflect a negative or inaccurate depiction of our Company" would be reasonably read to limit Section 7 activity and therefore violates Section 8(a)(1).

The changes Respondent made to the February 2011 Policy as exhibited in the June 2011 Policy fail to rehabilitate the rule: The rule is still unlawful as contained in the June 2011 Policy. Respondent defines "behavior that would be inappropriate at work" in a manner that includes "disparagement of the Company's . . . executive leadership, employees, strategy and business prospects." As discussed above, the Board has found such non-disparagement language unlawful. See ***First Transit, Inc.***, supra at 1, n.5, relying upon ***Costco Wholesale Corp.***, supra at 1-2 (rule overly broad prohibiting "outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company").

Respondent asserts in its Exceptions (Exception 4) that this provision of its policy[9] is tailored to protect its legitimate business interests. However, Respondent failed to assert at the hearing what those alleged interests are. Any attempts to introduce new evidence now should be disregarded. Section 102.45(b), Board's Rules and Regulations; ***King Soopers, Inc.***, supra at 842 n. 1; ***Observer & Eccentric Newspapers, Inc.***, supra at 124 n. 1; ***S. Freedman Electric, Inc***., supra at 432 n.1.

[9] Respondent fails to specify whether it is referencing the February 2011 or the June 2011 version, and neglects to set forth what alleged business interests are protected by the policy/policies.

### C. The ALJ Correctly Rejected Respondent's Statute of Limitations Defense

Respondent asserts (Exeption 5; Br., p. 25-27) that the ALJ's findings that provisions of the February 2011 Policy are unlawful are time-barred by Section 10(b) because Respondent rescinded the February 2011 Policy and replaced it with the June 2011 Policy. The ALJ correctly rejected Respondent's argument (ALJD, p. 18-21).

As the ALJ found, Respondent continued until at least the date of hearing to distribute Employee Handbooks to employees containing the February 2011 Policy. (ALJD p. 18, lines 17-19; Tr. 42, 48, 91-92; GCX5) Respondent relied upon the February 2011 Policy after the June 2011 Policy was implemented when it issued disciplines in December 2012 which expressly referenced the February 2011 Policy.[10] (RX3, GCX4, GCX5, GCX6) The Board has found under similar circumstances that such attempted "revocations" do not insulate employers from liability. Thus, in ***Winkle Bus Company, Inc.***, 347 NLRB 1203 (2006), the Board upheld the ALJ's finding that an employer violated Section 8(a)(1) by maintaining an unlawful solicitation policy within its employee handbook, even where the employer subsequently posted on the facility's bulletin board a memorandum setting forth specific narrower prohibitions on solicitations. The administrative law judge in ***Winkle Bus Company*** found that the memorandum did not state that it was revoking the handbook policy, and the employer continued to distribute the old policy. The "mere existence of an overbroad policy chills

[10] While Respondent attempted to characterize its reliance upon the February 2011 Policy (GCX4, GCX6) as a "mistake" by human resource coordinator Scott Bell (Tr. 66), he was only involved with issuing one of the two Constructive Advice Records relying upon the February 2011 Policy. (Tr. 67) None of the disciplines which issued for violations of the Online Communications Policy relied upon the June 2011 Policy.

employees' exercise of their Section 7 rights, even if the Respondent no longer intends to enforce the unlawful restriction." ***Id.*** at 1216, citing ***Alaska Pulp Corp***., 300 NLRB 232, 234 (1990), enfd. 944 F.2d 909 (9th Cir. 1991); ***Brunswick Corp.***, supra at 795.

Similarly here, in spite of Respondent's posting of the June 2011 Policy, Respondent continued and continues to distribute and rely upon the February 2011 Policy. As the ALJ found (ALJD p. 20, lines 7-12), quoting ***Winkle Bus Company***:

> "it is an understatement to say that reasonable employees would not consistently assume that the policy the Respondent was distributing to them [in the handbook] had been revoked . . . At best, the Respondent's two pronouncements regarding" online communications "create confusion among employees about what is permitted, and such confusion itself has the effect of unlawfully discouraging employees from engaging in [Section 7 activities]."

In addition, most of the unlawful aspects of the February 2011 Policy are continued in the June 2011 Policy so, to the extent Respondent is attempting to establish that it somehow cured the unlawful promulgation of the earlier policy by the promulgation of an equally unlawful second policy, this argument fails. Wherever Respondent is maintaining these unlawful rules—in its Handbooks, on its intranet, on its "communication" (bulletin) boards, near its time clocks—the unlawful rules should be rescinded.

In order to avoid a finding of a violation, Respondent would need to demonstrate that it eliminated the impact of the unlawful rules by conveying to employees a clear intent to allow activities protected by Section 7. ***TeleTech Holdings***, supra at 403 ("a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule"). Here, Respondent

perpetuated the unlawful rules in the June 2011 Policy which are just as unlawful as the February 2011 Policy.

Nor did the June 2011 Policy amount to a repudiation of the February 2011 Policy. In order for a repudiation to serve as a defense to an unfair labor practice finding, it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. ***Passavant Memorial Area Hospital***, 237 NLRB 138, 138-139 (1978). There must be adequate publication of the repudiation to the employees involved, and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. Finally, the employer must admit wrongdoing. ***Ark Las Vegas Restaurant Corp. v. NLRB***, 334 F.3d 99, 108 (D.C. Cir. 2003). Here, the June 2011 Policy was—except for a few inconsequential tweaks which failed to cure the unlawfulness of the February 2011 Policy—the same unlawful rules reissued. There was no repudiation.

### D. The ALJ Correctly Rejected Evidence Related to a Case in Another Region as Irrelevant

Respondent excepts (Exception 6) to the ALJ's rejection of proferred evidence related to a settlement in another Region involving an affiliate of Respondent. The ALJ correctly rejected the proferred evidence as irrelevant to the instant matter. (ALJD p. 21-22). It is well-established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. ***Interstate Bakeries Corp.***, 360 NLRB No. 23, slip op. at 1, n. 1 (2014). Here, the ALJ did not abuse his discretion in excluding the documents. (R-1 and R-2).

Respondent appears to be arguing that, by way of its affiliate entering into a settlement, it is insulated for all time from the impact of any changes in the law with regard to its rules.[11] As the ALJ found (ALJD p. 21-22), the General Counsel's prehearing discretion, which permits the GC to withdraw complaints pursuant to settlement—and to decline to issue complaints—carries no precedential weight, and is not binding on the GC in future cases. ***NLRB v. UFCW, Local 23,*** 484 U.S. 112, 114, 130 (1987); ***Fairmont Hotel***, 314 NLRB 534, 534 (1994); ***USWA (Cequent Towing Prods.)***, 357 NLRB No. 48, slip op. at 5 (2011). Accordingly, there is no relevance to the proferred documents regarding a settlement involving a different affiliate in a different location in 2011, and the ALJ did not abuse his discretion in rejecting the proferred exhibits.

[11] In attempting to enter the irrelevant evidence, Respondent was not arguing settlement bar, nor would settlement bar apply to this situation as the instant matter concerned the promulgation and maintenance of the unlawful provisions of the Online Communications Policies well after 2011. Compare with ***Jefferson Chemical Co.,*** 200 NLRB 992, 994 (1972)(dismissing ULP charges where union previously brought similar charges and the Board found it "should have known" about the new charges when it previously sought action against the employer).

## II. CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondent's Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy

Respectfully submitted this 15th of July, 2014.

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## CERTIFICATE OF SERVICE

I certify that on the 15th day of July, 2014, I electronically served copies of the Counsel for the General Counsel's Brief to the Administrative Law Judge on the following parties of record:

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