

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD REGION 28**

**LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 872**

**and**

**Case 28-CC-148007**

**NAV-LVH, LLC d/b/a WESTGATE  
LAS VEGAS RESORT & CASINO**

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**WESTGATE'S ANSWER BRIEF TO LOCAL 872's CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## Overview of Argument<sup>1</sup>

In accordance with Board Rules, Charging Party, NAV-LVH, LLC d/b/a Westgate Las Vegas Resort and Casino (“Westgate”) respectfully submits its answer brief. Laborers’ International Union of North America, Local 872 (“Union” or “Local 872”) exceptions<sup>2</sup> to the Administrative Law Judge Decision (“ALJD”) of August 21, 2015 are unsound and must be disregarded because they are unsupported or flatly contradicted by the substantial evidence or record. Most importantly, they are expressly rejected by the Board and Supreme Court precedent, as fully discussed in this answer brief.

## Standard of Review

The National Labor Relations Board (“Board” or “NLRB”) is required to conduct a *de novo* review of an Administrative Law Judge’s (“ALJ”) findings of law, legal conclusions and any derivative inferences arising from such legal conclusions.<sup>3</sup> A court will uphold a Board’s decision if it *is reasonable and supported by substantial evidence on the record considered as a whole*.<sup>4</sup> A scintilla of evidence is insufficient to meet this standard. Substantial evidence is “such relevant evidence that a reasonable mind would accept to support a conclusion.”<sup>5</sup> The Board “cannot ignore the relevant evidence that detracts” from an ALJ’s findings or its ultimate

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<sup>1</sup> Westgate filed its exceptions and supporting brief on October 16, 2015. Nothing in this answer brief shall be interpreted as a waiver or relinquishment of the exceptions timely asserted by Westgate. It is Westgate’s position that the ALJ’s Decision must be rejected because the substantial record evidence, as a whole, shows that Local 782 engaged in secondary boycott in violation to Section 8(b)(4)(ii). Some of the factual and legal shortcomings in the Decision and the Union’s argument (as set in their cross-exceptions filed after Westgate’s brief) have been fully articulated Westgate’s initial brief. As noted herein, Westgate fully adopts those arguments in order to avoid unnecessary duplication.

<sup>2</sup> Local 872 listed 17 exceptions to the ALJ Decision as stated in the Cross-Exceptions filing of October 29, 2015. References to Local 872’s Cross-Exceptions will be listed as CE, followed by the exception number. References to Local 872’s brief in support will be identified as CE Brief, followed by the corresponding page number. References to the hearing transcript will be identified as Tr. followed by the applicable page and/or line number.

<sup>3</sup> *Standard Dry Wall Products*, 91 NLRB 544, 545 [26 LRRm 1531] 1950, *enfd.* 188 F.2d 362 [27 LRRM 2631] (3rd Cir. 1951).

<sup>4</sup> See *Mobil Exploration and Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999); *NLRB v. Thermon Heat Tracing Serv., Inc.*, 143 F.3d 181, 185 (5th Cir.1998).

<sup>5</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

decision.<sup>6</sup> It is simply “not good enough” for the Board to blindly regurgitate or accept the ALJ’s finding because the “record” contains some evidence that could have conceivably supported them while overlooking contradictory “record” evidence.<sup>7</sup> When an ALJ misconstrues or fails to consider crucial incongruous evidence it is an indication that the decision is not based on substantive evidence.<sup>8</sup>

The Supreme Court admonished against any attempts to cherry-pick the record to justify an ALJ’s decision in *Universal Camera Corp. v. NLRB*<sup>9</sup> by holding that the Board may not make its determination “...merely on the basis of the evidence which in and of itself justify[es] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn.”<sup>10</sup> Congress signaled to the Board that its review of findings and conclusions of law was more than a “mere formality” when it incorporated the “substantiality of the evidence on the *whole record*” standard to evaluate an ALJ’s factual findings<sup>11</sup> or conclusions of law. Rubber-stamping a decision is incompatible with this exacting review process.<sup>12</sup> Ultimately, a Board’s Order (whether it adopts, modifies or rejects an ALJ’s decision) must be: (1) reasonably based on established law correctly applied to the facts of the particular matter at issue; and (2) cannot be inconsistent with the statutory mandate of the National Labor Relations Act or frustrate the congressional policy underlying a statute.<sup>13</sup>

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<sup>6</sup> *Lakeland Health Care Associates, Inc. v. NLRB*, 696 F.3d 1332, 1335 (11th Cir. 2012)(internal citations omitted); *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002).

<sup>7</sup> *Sears, Roe Buck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003)(holding that “the ALJ must minimally articulate his reasons for crediting or rejecting” evidence.); *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in partial remand).

<sup>8</sup> *Lakeland Health Care*, 696 F.3d at 1335(citations omitted).

<sup>9</sup> *Universal Camera Corp.*, 340 U.S. 474 (1951).

<sup>10</sup> *Universal Camera Corp.*, 340 U.S. at 487.

<sup>11</sup> When credibility issues arise, a court is “bound by the credibility choices of the ALJ, unless (1) the credibility assessment is unreasonable, (2) the choice contradicts other findings, (3) the choice is based upon inadequate reasons or no reason, or (4) the ALJ failed to justify his or her choice.” *NLRB v. Motorola, Inc.*, 991 F.2d 278, 282 (5th Cir.1993).

<sup>12</sup> *Universal Camera Corp.*, 340 U.S. at 487–90.

<sup>13</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980); *Lakeland Health Care*, 696 F.3d at 1335(citations omitted);

Furthermore, the Board “cannot ignore its own relevant precedent” but must explain why is not controlling.<sup>14</sup> Where an agency departs from its prior precedent without a reasonable explanation, its decision will be considered arbitrary and will be rejected.<sup>15</sup> Yet, this is exactly what Local 872 is attempting here by its gratuitous, and unwarranted, invitation for the NLRB to abandon universally recognized principles of law and record evidence directly repudiating the Union’s position. Consequently, this Board must reject the Union’s exceptions as unsound.

**I Local 872’s Cross-Exceptions lack the factual record evidence predicate required by the Board, are repudiated by controlling legal precedent and must be rejected by this Board.**

**A. The Union failed to adduce any record evidence or cite any legal authority in support of its challenge to this Board’s supposed lack of jurisdiction over this matter and CE No. 2 must be rejected.**

The Union generically contests whether Westgate and or Nigro were employers. Local 872’s challenge is untethered from any factual or legal basis. Instead, the Union simply concludes that the Board’s “commerce standard” is antiquated and should be updated. Local 872’s request for an “updated” version of the commerce clause is outside of this Board’s statutory authority and clearly, cannot substitute record evidence showing that Westgate and Nigro were employers. Jurisdiction is proper and the Board must reject this exception.

**B. Neither the ALJ nor the Board has the authority under Article III or the APA to adjudicate, let alone reverse, the constitutionality of Section 8(b)(4) of the NLRA. Consequently, CE No. 14 must be rejected.**

**1. Constitutional adjudication exceeds the statutory delegated powers of the ALJ and this Board.**

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*NLRB v. Teamsters “General” Local Union No. 200*, 723 F.3d 778, 783 (7th Cir. 2013); *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006)( must overturn Board decisions if the Board has incorrectly applied the law).

<sup>14</sup> *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal citations omitted); *Trump Plaza Associates v. NLRB*, 679 F.3d 822, 827 (D.C. Cir. 2012).

<sup>15</sup> *Id.*

The lion's share of the Union's brief<sup>16</sup> revolves around Section 8 (b)(4)'s supposed unconstitutionality and the ALJ's failure to make such finding. This argument is nothing more than a red-herring which cannot be adjudicated in this forum and the Union has not provided any legal authority ruling otherwise. Article III of the Constitution clearly establishes that federal courts are tasked with resolving constitutionality questions. The Administrative Procedure Act<sup>17</sup> also delineates the subject matters in which an agency, such as this, may adjudicate substantive rights but that mandate has never included the constitutionality of federal statutes. The Board Rules further delineate the specific authority conferred by the Board upon ALJs, as enumerated in Section 102.35 (a)(1)-(a)(13) of the Board's Rules. Absent from that list is the ability or power by an ALJ, or the Board, to decide the constitutionality of any portion of the NLRA.

The Ninth Circuit Court of Appeals aptly described this universally recognized and mandated separation of powers when rejecting the General Counsel's interpretation of Section 8(b)(4) in *Overstreet v. United Brotherhood of Carpenters and Joiners of America, Local 1506*.<sup>18</sup> In that case, the NLRB sought to enjoin the union member's display of labor dispute banners on public property outside of the premises of companies doing business with non-union contractors. The union argued that the bannering, at issue there, was protected by the First Amendment and did not violate the proscriptions Section 8 (b)(4). Overstreet, the regional director in that matter, argued, unsuccessfully, that the court was required to defer to the NLRB's interpretation of Section 8(b)(4). The Ninth Circuit in rejecting the NLRB's deference argument opined that:

because constitutional decisions are not the providence of the NLRB (or the NLRB's Regional Director or General Counsel), the task of evaluating the constitutional pitfalls of the Act and interpreting the Act to avoid those dangers are committed *de novo* to the

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<sup>16</sup> CE Brief, pp. 2-17.

<sup>17</sup> 5 U.S.C. §706

<sup>18</sup> 409 F.3d 1199, 1209 (9th Cir. 2005)

courts.<sup>19</sup>

Hence, the ALJ was not empowered to evaluate, let alone, reverse the constitutionality of Section 8(b)(4) and neither is the Board. In fact, such conclusion would constitute a fatal departure from applicable precedent, as set forth in *Overstreet, NLRB v. Retail Store Employees Union*<sup>20</sup> and *DeBartolo*.

**2. Section 8(b)(4) is constitutional and the Union’s reliance on the supposed reversal by the Supreme Court’s decision in *Reed* is unwarranted.**

Interestingly, the lion’s share of the Union’s unilateral conclusion of Section’s 8(b)(4) supposed constitutional death is based on legal articles<sup>21</sup> which carry no precedential or dispositive value whatsoever. While Westgate is not required to defend the “constitutionality” of Section 8(b)(4), the rumors of Section 8(b)(4) demise have been greatly exaggerated. Section 8 (b)(4) of the NLRA is not in any constitutional peril contrary to Local 872’s argument and this challenge will ultimately fail, as discussed below. Indeed, since the Supreme Court’s *Citizens United v. Fed. Election Comm’n*.<sup>22</sup> -invalidating campaign spending regulations imposed by the McCain–Feingold Act in 2010- the unions have been predicting the imminent downfall of Section 8(b)(4). The forecasted doom of Section 8 (b)(4) and the supposed Supreme Court’s rejection of its *DeBartolo* holding (and rational upholding the constitutionality of this provision) have yet to materialize and will not do so.

The *Reed*<sup>23</sup> decision, despite the Union’s claims, is completely irrelevant and would not

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<sup>19</sup> 409 F.3d at 1209 (internal citations to *Edward J. DeBartolo Corp v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) omitted).

<sup>20</sup> 447 U.S. 607, 615 (1980). In that case, the Supreme Court held that Section 8(b)(4)(ii)(B) imposed no impermissible restrictions upon constitutionally protected speech.

<sup>21</sup> CE Brief, fn. 5 and page 7.

<sup>22</sup> 558 U.S. 310 (2010). The Supreme Court held that political spending is a form of protected speech under the First Amendment, and the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections.

<sup>23</sup> *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

result in the Court’s abdication of the constitutionality of Section 8(b)(4) or a rebuke of Congressional intent. What was at issue in *Reed*? A church in the town of Gilbert, Arizona placed approximately 17 signs announcing the time and location of its services. Gilbert’s ordinance restricted the size, number, duration, and location of certain types of signs, including temporary directional signs used by the church. After receiving notice from the town that its signs violated the code, the church filed a suit claiming that Gilbert’s sign code was unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The trial court and the Ninth Circuit Court of Appeals upheld Gilbert’s sign code because it was “content-neutral” and the restrictions were reasonable, in light of the stated government interests. The Supreme Court disagreed. It found that “content based” statutes are presumptively unconstitutional and may be justified only if the government proves that they are narrowly-tailored to serve compelling state interests. In the context of public forums, the Court held that the “first step in the content-neutrality analysis [is] determining whether the law is content neutral on its face.”<sup>24</sup> If a law is not content-neutral on its face, *Reed* holds that it “is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.”<sup>25</sup>

According to Local 872, the holding in *Reed* signifies a reversal of Section 8 (b)(4)’s constitutionality. Yet, *Reed* does not deal- directly or indirectly- with the constitutionality of Section 8 (b)(4) nor remotely involves a labor dispute. Neither does *Reed* involve the application of canons of constitutional avoidance discussed in *DeBartolo*.<sup>26</sup> More importantly, courts

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<sup>24</sup> 135 S.Ct. at 2228.

<sup>25</sup> 135 S.Ct. at 2228.

<sup>26</sup> 485 U.S. at 577.

decisions after *Reed* illustrate its limited application, in particular to our case.

For example, in *Contest Promotion Inc. v. City of San Francisco*<sup>27</sup> the plaintiffs sought to challenge the legality of the city’s signage ordinance based, in part, on the *Reed* decision. While the specific facts are not relevant to this matter, the discussion concerning *Reed* and the status of commercial speech, which involves union speech, is very instructive. The plaintiff argued, essentially as the Union does here, that the ordinance distinctions imposed an impermissible content based regulation on speech which was subject to strict scrutiny. The trial court rejected this expansive approach by underscoring that the *Reed*’s decision did not impact or reverse the Supreme Court’s analysis of commercial speech.<sup>28</sup> While commercial speech is afforded some First Amendment protection, the protection is limited and dissimilar to greater protections offered to noncommercial forms of free speech.<sup>29</sup> Thus, the analysis remains unchanged.

First Amendment protections apply to commercial speech only if the speech concerns *lawful activity and is not misleading*. If a plaintiff proves those elements, then the government restriction is subject to intermediate scrutiny as discussed by the Supreme Court in *Central Hudson*.<sup>30</sup> The courts in *Citizens for Free Speech*<sup>31</sup> and *Timilsina*<sup>32</sup> similarly found that *Reed*’s holding was limited in scope and did not reverse or modify the existing analysis framework for commercial speech. Union speech is still considered “commercial speech” which does not warrant higher constitutional scrutiny. And, union speech, contrary to the Union’s depiction, is not favored over other types of commercial speech.

Most importantly, this Board must reject the Union’s brazen efforts to obfuscate the

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<sup>27</sup> 2015 WL 4571564 (N.D. Cal. July 28, 2015).

<sup>28</sup> *Id.* at 2-4.

<sup>29</sup> *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993); *In re Doser*, 412 F. 3d 1056, 1063 (9th Cir. 2005).

<sup>30</sup> *Central Hudson Gas & Elec. Corp. v. Pub Serv. Comm’n*, 447 U.S. 557, 563-66 (1980).

<sup>31</sup> *Citizens for Free Speech, LLC v. County of Alameda*, 2015 WL 4365439 (N.D. Cal. July 16, 2015)

<sup>32</sup> *Timilsina v. West Valley City*, 2015 WL 4635453 (D. Utah Aug. 2, 2015)

factual and legal issues directly controlling this case. This case was not about the Union's speech or the content of the banners placed on the public sidewalks. Neither General Counsel nor Westgate took issue with the content<sup>33</sup> of the banners placed on the public sidewalk that didn't obstruct the public's path. The dispute arose primarily, as reflected by the undisputed testimony cited in Westgate's exceptions,<sup>34</sup> by the Union's unauthorized placement of up to seven giant inflatables on Westgate's private property for four days. These allegations involve conduct, not expressive activity, and as such are outside of the First Amendment reach. Lastly, but equally dispositive, and as fully discussed *infra*, the Union's First Amendment rights do not extend to private property and private owners have a right to maintain control over the use of their property.<sup>35</sup>

**C. The Union failed to establish, as they must, that the RFRA was applicable or relevant to this labor dispute; therefore, CE No. 12 must be rejected.**

Local 872's takes exception to the ALJ's supposed failure to find that the mandates of Section 8(b)(4) must be subjugated to religious freedoms guaranteed under the Religious Freedom Restoration Act ("RFRA").<sup>36</sup> Yet, this Union's exception is nothing more than speculative debate unworthy of consideration. Let's us start with the obvious flaws in this argument. How is the RFRA relevant to the unfair labor practice charge filed against the Union for illegal "secondary boycotting" under Section 8(b)(4)(ii)? Not surprisingly, neither the

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<sup>33</sup> While Westgate continues to believe that the content of the banner was misleading and failed to address the actual labor dispute, if any, between the Union and Nigro, Westgate did not rely on this expressive activity to support its Section 8(b)(4) violations.

<sup>34</sup> For the purposes of this answer brief, Westgate adopts the facts discussed in Section I. B of its Exceptions Brief which, unlike the Union's brief, are corroborated by references to the actual transcript testimony and admissible evidence.

<sup>35</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-41 (NLRA does not confer a right to nonemployee organizers to trespass on privately-owned property, except under exceptionally narrow circumstance which are clearly absent in this case.) *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 416 (Nev. 2001)(The power to exclude has been one of the fundamental elements of private property.)

<sup>36</sup> CE Brief, p. 37.

Union’s “exceptions” nor its supporting brief satisfactorily documents this crucial jurisdictional foundational threshold and this blatant omission forfeits the Board’s need to evaluate this argument.<sup>37</sup> More importantly, the Union failed to prove, let alone show, the viability of RFRA as an affirmative defense, as fully discussed below.

**1. Local 872’s RFRA Affirmative Defense was not viable and the ALJ would have been required to strike it, had it been fully considered.**

The facts here are quite undisputed. The Complaint issued against Local 872 does not involve “religious conduct” or the RFRA.<sup>38</sup> RFRA was first introduced by the Union solely as an affirmative defense to excuse the conduct.<sup>39</sup> The Union bore the burden of showing entitlement to its affirmative defenses but it failed to do so in this case. Under these circumstances, the NLRB Trial Manual requires that any affirmative defense- in this case RFRA- be stricken if it is: (1) not legally recognized or excused the Union’s illegal conduct; (2) outside of the scope of the Complaint or (3) irrelevant.<sup>40</sup> Therefore, the ALJ was legally required to reject the RFRA affirmative defense, as a matter of law.

**a. The Union failed to show a *prima facie* case under the RFRA.**

It is simply baffling why the Union continues to invoke RFRA protections as an affirmative defense, let alone as a valid exception here, as this is completely specious. Local 872 cannot complain about the ALJ’s exclusion of its RFRA defense when the Union failed to comply with its evidentiary predicate, *i.e.* to show a *prima facie* case under the RFRA. As the Union concedes, a cornerstone of any claim under the RFRA is the individual’s sincere *exercise*

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<sup>37</sup> See Board Rules, Section 102.46

<sup>38</sup> GC Ex. 1(e) and 2.

<sup>39</sup> GC Ex. 1 (g).

<sup>40</sup> NLRB Trial Manual § 3-550.

*of religion*.<sup>41</sup> A plaintiff seeking relief under the RFRA must first establish a *prima facie* claim by *proving each of these three elements*: (1) a substantial burden imposed by the federal government on a (2) a sincere (3) exercise of religion.<sup>42</sup> Only if a plaintiff successfully carries his or her burden, the burden then shifts to the government to justify the restriction imposed by the statute.

The Union failed to satisfy this vital component of its affirmative defense. Let's start with the core principle at issue under any RFRA, a sincere exercise of religion. The hearing record is completely bare of this aspect and the Union's brief's is unsurprisingly silent on this crucial evidentiary issue. Oscar Villarreal, union member, and Mike DaSilva, Director of Organizing testified in behalf of the Union.<sup>43</sup> Not once during their testimony did they utter a single word concerning their religious beliefs, let alone a sincere exercise of religion which was substantially burdened by Section 8(b)(4). And, while the Union dedicates seven (7) full pages of its brief to support its RFRA argument, neither its cross-exceptions nor its brief includes a single reference to transcript testimony by its members of their religious belief, the sincerity of their beliefs, or the burdening of this exercise by Section 8(b)(4). Neither can the Union seriously argue that the testimony adduced during the hearing could be remotely characterized as religious in nature.

The Union's counsel's post-hearing impassioned proclamations of his personal "religious" notions of the labor's role in American society, while commendable, does not and cannot substitute actual evidence. The Union's position cannot be reconciled with the facts of the case and the Union does not even attempt to do so. There is absolutely no evidence implicating –directly or remotely- that a religious component was involved in this dispute. Theoretical or

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<sup>41</sup> CE Brief, p. 41, elements of RFRA analysis.

<sup>42</sup> *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001);

<sup>43</sup> Tr. pp. 121-138 and 257-306, respectively.

speculative debate of the supposed burdens imposed by Section 8(b)(4) on the RFRA *does not cure* the Union's omission in discharging its obligation to show relevance and entitlement of this affirmative defense. The evidence unequivocally shows that Local 872's RFRA's affirmative defense was irrelevant and outside of the scope of the Complaint and should have been stricken. Union's Cross-exceptions numbers 12 and 15 must be discarded, as contradicted by the record evidence as a whole.

Similarly, the Union's contrived argument that this matter involved the "abuse of immigrant workers" or that the Union's duty to help others with "work place" issues is a core religious activity is simply absurd. There is absolutely no evidence, and the Union fails to cite to any, characterizing the dispute between Westgate and the Union as involving the abuse of immigrant workers. Quite the contrary, the Union's illegal conduct was unrelated to the alleged "abuse of immigrant workers," a generic and unsubstantiated reference used on the Union banners.<sup>44</sup> Local 872's supposed dispute was with Nigro and A & B, not with Westgate. The source of the actual labor dispute is unknown as the Union never presented evidence regarding this issue. Local 872's self-serving and belated characterization of this dispute as a redress of immigrant abuses is repudiated by the record. Westgate, the secondary employer, alleged that the Union's repeated and lengthy trespass onto its private property to erect numerous giant inflatables during a four (4) day period, coupled with the obstruction of public paths, constituted an illegal boycott.

The supposed conflict between the rights afforded by RFRA and Section 8(b)(4) is also imagined. There is no need to actually discuss the cases cited by the Union as none of them

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<sup>44</sup> The banners- in its entirety- read as follows: NIGRO DEVELOPMENT SUPPORTS Immigration Labor Abuses by Hiring A & B Environment at the WESTGATE. Labor Dispute (in red letters). GC. Ex. 3(b).

stand for this proposition. None of the cases relied on by the Union involve an unfair labor practice charge or Section 8(b)(4) violations in an RFRA context. More importantly, not a single case cited by the Union equates or transforms “union activity” into protected religious expression or accepted religion entitled to RFRA protection. And, while Section 7 of the NLRA does recognize the right of employees to engage in “concerted activity,” as argued by the Union in its brief, this issue is of no moment as this dispute has never involved Section 7 rights or Westgate’s employees as they were represented by other unions.<sup>45</sup> Other than the Union’s empty rhetoric, there is no legal authority or valid precedent holding that Section 7 (or the exercise of its protections by the union or its members) is a core religious activity, a religious belief or entitled to any religious protection under the RFRA. Likewise, in the absence of any evidence on the record showing that the Union’s or its member’s religious or Section 7 rights were disturbed, let alone violated,<sup>46</sup> no injury in fact occurred and the Union lacks standing to proceed on this argument.<sup>47</sup>

Lastly, while *Hobby Lobby* held that a corporation may be considered a person- it was the actual “religious beliefs” held by the owners of Hobby Lobby that the Supreme Court found to be burdened by the “contraceptive regulations” imposed by the Affordable Health Act. The fact that the Union may be a “person” for purposes of the RFRA does not automatically confer entitlement to the protections afforded by RFRA. In particular, as here, where the Union simply leapfrogs over the RFRA elements by reciting the Union’s supposed generic welfare beliefs

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<sup>45</sup> Section 7 gives employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...” 29 U.S.C. § 157. *See also*, Tr. p. 48, lines 19-25; 49, lines 1-3.

<sup>46</sup> The Union failed to adduce any evidence supporting these arguments at the hearing so they are waived.

<sup>47</sup> The standing requirements under Article III require (a) an injury in fact; (b) sufficient causal connection between the injury and the conduct complained of; and (c) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Susan v. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (discussing standing requirements in the context of free speech).

loosely categorized as core principles shared by recognized religions without record references to: (a) the specific holder of the supposed “religious beliefs,” (b) whether this person controls or has substantial ownership over Local 872 and lastly, (c) how those beliefs are burdened by compliance with Section 8(b)(4). Local 872’s theoretical approach is not owed any consideration or credibility. Neither the ALJ nor the Board can blindly bolster the viability of the Union’s RFRA affirmative defense, based solely on hypothetical, albeit faulty, suggestions, without a reasoned reconciliation of the record evidence and why this outcome is proper despite the overwhelming factual and legal hurdles discrediting its relevance and viability in this case. What the Union wants the Board to do is to enter the very type of arbitrary decision that has been rebuked by the Supreme Court in *Universal Camera Corp. v. NLRB*.

Lastly, the Union did not support its contention that the RFRA, even if applicable, would have excused its conduct here. Once again, the exceptions and the Union’s brief are completely silent on this crucial evidentiary threshold. In the seven pages submitted in support of the RFRA argument, there is absolutely no discussion of any authority, let alone a single dispositive case, substantiating the supposed viability of the RFRA as an affirmative defense to a Section 8(b)(4) violation. The Free Exercise Clause of the First Amendment does not make unionizing the labor force an exercise of religion protected by the Constitution. The RFRA is outside of the matters addressed in the Complaint, utterly irrelevant to the resolution of this matter and, if evaluated by the ALJ, rejected by the ALJ and the Board must do the same.

**D. The Union’s unsubstantiated challenge to Westgate’s proprietary rights, the existence of an “easement” and its impact on the Union are expressly repudiated by the record evidence and controlling law, as fully discussed below.**

- 1. Westgate’s ownership and possessory interest are unquestionably established by the record evidence and the ALJ correctly found that Westgate was the owner of the property or had possessory rights to exclude the Union. Consequently, CE No. 1 and 7 must be rejected as baseless.**

The ALJ's Decision concluded that Westgate has ownership and/or possessory rights to the property and the utility cutouts. While the ALJ's Decision does not directly address the trespass allegation, it concludes wrongly, that the Union's activity on utility cutouts did not violate Section 8(b)(4)(ii).<sup>48</sup> Westgate has challenged the ALJ's reasoning and conclusion, in its own brief, as unreasonable and arbitrary. In order to presumably circumvent the trespass allegations, the Union now argues that "Westgate" was not the owner of the property or cutouts. In exceptions 1 and 7, the Union claims that the Charging Party, NAV-LVH, LLC, d/b/a/ Westgate Las Vegas Resort & Casino which was defined as Westgate in the dispute, was not the "owner" of the subject property. The very fact that the sum total of this argument is articulated in a brief one paragraph underscores the Union's lack of confidence in the validity of this argument.<sup>49</sup>

First, even if the Charging Party was not the "owner," as suggested but unproved by the Union, this fact is inconsequential to the analysis of the merits or the adjudication of the Charging Party's Section 8(b)(4)(ii) claims. As discussed, *infra*, *520 Michigan Avenue Associates v. Unite Here Local 1*, a case specifically relied on by the ALJ's in his Decision, but ignored in the Union's brief, held that a charging party is not required to satisfy the exacting standards of proof of a criminal or civil trespass claim under state law in order to show a violation of Section 8(b)(4).

Secondly, the Union cannot cherry-pick the record and ask the Board to reject a factual finding without first showing that it is not supported by the substantial weight of the record evidence. In fact, a Board's findings of fact (or an ALJ's findings of fact) are entitled to deference and the courts are precluded from making credibility determinations or reweighting the

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<sup>48</sup> ALJD, p. 7 lines 26-35.

<sup>49</sup> CE Brief, p. 30.

evidence when determining whether factual findings are supported by the record.<sup>50</sup> While the accorded deference to the ALJ's factual finding is not without limits, the Board must adopt the ALJ's findings of fact unless the record shows them to be clearly erroneous.<sup>51</sup> The Union failed to bear its evidentiary burden and the ALJ's conclusion that the Charging Party was the owner of the property, including the utility cutouts, must be adopted by the Board.

Let's review the record evidence developed during the hearing. First and foremost, the Union has no ownership or possessory interest on the utility cutouts at issue, as stipulated by the Union.<sup>52</sup> The disputed utility cutouts are unquestionably within the private property boundaries, as shown in GC Ex. 9, 11, whose accuracy the Union did not dispute. Likewise the record evidence established, directly or through reasonable inferences, that the Charging Party owned or, at the very least, had a possessory interest to the disputed private property where the Union had no legally recognizable interest. On this very, vital legal issue the Union failed to adduce any evidence contradicting the Charging Party's interest. It is undisputed that NAV-LVH, LLC is the employer and the property is the work-site.<sup>53</sup> As the employer of over 1800 employees, NAV-LVH, LLC has a possessory interest on its work premises and can exclude others, even if there is no outright ownership interest. The evidence bears this out as documented by the NAV-LVH, LLC's counsel letters to the Union on March 11, 2015.<sup>54</sup>

This conclusion is further cemented by the testimony of Mr. Froehlich, whose credibility and competency on this particular matter was unimpeached by any Union witness<sup>55</sup>. The Union

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<sup>50</sup> *NLRB v. Thermon Heat Tracing Serv., Inc.*, 143 F.3d 181, 185 (5th Cir.1998).

<sup>51</sup> *Id.*

<sup>52</sup> Tr. pp. 235-236.

<sup>53</sup> Tr. pp. 48-49

<sup>54</sup> GC Ex. 4-5.

<sup>55</sup> While the Union may attempt to argue that Mr. Froehlich did not have specific knowledge of the entirety of Westgate's national corporate structure, he testified that he was intimately familiar with the Nevada operations and the Charging Party's structure. Tr. pp 245, lines 3-11.

is not privy to this subject matter, a fact conceded by the Union in its brief.<sup>56</sup> Mr. Phillip Froehlich, Vice President of Westgate's Western Region, testified that he oversees seven different properties in the Western United States, including Westgate Las Vegas Hotel & Casino located at 3000 Paradise Road, which is the property at issue here.<sup>57</sup> The hotel was acquired on July 1, 2014. Mr. Froehlich further testified that he was intimately familiar with the property as he helped create legal documents and performed the due diligence on the property prior to the July purchase.<sup>58</sup> The Union correctly points out that Mr. Froehlich testified that "Westgate, 3000 Paradise" owned the property.<sup>59</sup> Yet, that was not the entirety of Mr. Froehlich's testimony on this issue which the Union's brief fails to acknowledge. And, this omitted testimony unravels the Union's unfounded attacks on the Charging Party's ownership rights.

Mr. Froehlich specifically testified that NAV-LVH, LLC, the Charging Party here, is solely owned by 3000 Paradise and that it was created to satisfy potential statutory licensing issues at the time of purchase.<sup>60</sup> NAV-LVH, LLC, as Mr. Froehlich testified, operates and manages the hotel and employs all the staff.<sup>61</sup> NAV-LVH, LLC's ownership and possessory interest in the property consequently flow from its common ownership with "3000 Paradise."<sup>62</sup> Both limited liability companies are owned by Westgate Resorts as Mr. Froehlich explained during his testimony.<sup>63</sup> And, it is a matter of public knowledge that David Siegel is the owner of Westgate Resorts.

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<sup>56</sup> CE Brief, p. 30.

<sup>57</sup> Tr. p. 48.

<sup>58</sup> Tr. p. 232, lines 6-8.

<sup>59</sup> Tr. p. 232, line 11.

<sup>60</sup> Tr. pp. 242, line 23-25; 243, line 1; 245, lines 5-6; 246, lines 25; 247, lines 1-2.

<sup>61</sup> *Id.*

<sup>62</sup> The full name of the entity was 3000 Paradise Road, LLC, as discussed below.

<sup>63</sup> Tr. pp. 244, line 20-25; 245, lines 1-11; 246, lines 5-20. Westgate Resorts, Inc. is the managing member of these two companies as reflected by documents filed with Nevada Secretary of State, as shown in Charging Party Ex. 1. This agency must take Administrative notice of these business records under Fed. R. Evid. 201. *See generally Bud Antle, Inc.*, 359 NLRB No. 140 (2013).

Consequently, the ALJ's factual finding corroborating the validity of the Charging Party's ownership is not only reasonable but an accurate recitation of the weight of the record evidence based on Mr. Froehlich testimony and the documentary evidence admitted in the case, all which remain unimpeached by the Union. And, also equally controlling for this analysis is the fact that NAV-LVH, LLC, has a greater possessory right than the Union and as such, it can exclude third parties, like the Union, from the *private property* it owns and operates.

The Union's counsel seeks to undermine the ALJ's finding by arguing that the map of the property filed with the county states that the owner of the property is Westgate Las Vegas Resort, LLC, a Delaware company. Yet, this "information" does not detract from the accuracy of the ALJ's finding and it is wholly consistent with Mr. Froehlich's testimony concerning the typical set up of resort operations, as discussed above. In order to dispel any misunderstandings, the Board should take judicial notice of the documents filed with the Secretary of State in Nevada and Delaware.<sup>64</sup> In July, 2014, "3000 Paradise Road, LLC" changed its name to Westgate Las Vegas Resorts, LLC. Therefore, we are still talking about the same entities that the Union, in its brief, concedes to be related.

The Union's challenge to the Charging Party's ownership and possessory interest is factually and legally unsound warranting this Board's rejection. However, in the unlikely event that the Board finds that the record is incomplete on this issue, then the proper remedy is to remand the matter for further testimony and not, the rejection of this specific fact of the ALJ's Decision.

**2. The Union did not and could not obtain permission from the easement holders to set the inflatables on Westgate's private property and CE No. 11 must be rejected.**

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<sup>64</sup> Charging Party Ex. 1. The Board is permitted to take judicial notice under Fed. R. Evid. 201 of document filed with the Secretary of State in Nevada and Delaware, records whose accuracy is not questionable and are available to the public.

First, the Union waived<sup>65</sup> any challenge to the supposed failure by the General Counsel to introduce the relevant easement into evidence, as this matter was not specifically listed in the Union's exceptions to the Decision, as required by Board Rules. More importantly, this statement is inaccurate, as reflected by the unimpeached record evidence.

Similarly, the Union waived any claims to due process rights as they were not preserved at the hearing and are expressly repudiated by the record. In footnote 27 of its brief, the Union wrongly claims that "trespass theory" sought by General Counsel during the hearing "radically" changed the theory of the case by inserting property ownership issues that plainly disadvantaged the Union. Yet, the transcript reveals these claims to be completely unfounded.

After General Counsel moved to amend the Complaint by asserting an 8(b)(4)(i) claim and adding allegations of trespass to the already pending 8(b)(4)(ii), counsel for the Union objected.<sup>66</sup> The crux of Local 872's objection centered around the supposed undue prejudice to the Union if the General Counsel was allowed to raise a violation of Section (8)(b)(4)(i) for the first time during the hearing.<sup>67</sup> It was this addition of the 8(b)(4)(i) claim which the Union characterized as a "radical" departure from the case of the General Counsel's theory. Indeed, the Union's counsel conceded that he was aware of the "trespass allegations" as that issue had been present at the inception of the case and Local 872 submitted information to the Region regarding the property interests surrounding the easement on the utility cutouts.<sup>68</sup> General Counsel advised the ALJ that there was no surprise on the trespass aspect of the case, and its resulting legal queries due to the easements and the location of the inflatables.<sup>69</sup> The ALJ acknowledged the

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<sup>65</sup> Board Rules, Section 102.46 (b)(1) and (2); CE Brief, p. 35.

<sup>66</sup> The relevant portion of this discussion starts on Tr. p. 8.

<sup>67</sup> Tr. p. 15, lines 19-20.

<sup>68</sup> Tr. p. 17-18, lines 17-25.

<sup>69</sup> Tr. p. 22.

Board's liberal policy in granting Amendments to the Complaint<sup>70</sup> but specifically offered the Union "more time" to address the amendments, including the "trespass" allegations.<sup>71</sup> Indeed, the ALJ warned the parties that he was inclined to grant the Union's Motion for additional time, if so requested, at the closing of General Counsel's case.<sup>72</sup> However, Local 872's counsel never moved for additional time, as suggested by the ALJ, and now the Union cannot rely on this ground to challenge the ALJ's findings.

**a. The testimony of the sole expert in this matter and the Final Map of the property, evidence unchallenged by the Union, established the existence of the easement and its scope.**

The Union- without support- claims that there was no evidence of the easement in question. The Union's denial of evidence clearly showing the scope of easement controlling the utility cutouts is specious and symptomatic of the continued disregard by the Union of unrebutted testimony, noted in their own brief, repudiating the Union's claims. First, the stipulations entered by Local 872's counsel belie the Union's point. The Union stipulated to the following controlling facts and are now bound by them: (1) Glen Davis, Principal and Managing Partner at Lochsa Surveying, was an expert in surveying<sup>73</sup>; and (2) the accuracy of GC Exhibits 8 and 9, ALTA/CMS Land Title Survey of 5/22/2014 of WESTGATE's property and Final Map of WESTGATE's property filed with the Clark County, Nevada Records of March 4, 2015.<sup>74</sup> Mr. Davis specifically testified that the utility cutouts were inside Westgate's private property and that they were subject to an easement.<sup>75</sup>

The evidence adduced by the General Counsel indeed remains unrebutted and shows that

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<sup>70</sup> Tr. p. 22, lines 7-12.

<sup>71</sup> Tr. pp. 26-28

<sup>72</sup> Tr. p. 26, lines 13-21.

<sup>73</sup> Tr. 143, lines 12-13.

<sup>74</sup> Tr. 144, lines 22-25; 146, lines 1-7; 149, lines 5-6.

<sup>75</sup> ALJD, p. 3, lines 1-6; 5, line 25; 6, lines 5-16; GC Exhibits 9 and 11; Tr. 147, lines 15-20.

that the following entities possessed recorded easements on Westgate's property (as it related to the utility cutouts in questions): Nevada Power Company, Las Vegas Valley Water District, Southwest Gas Corporation, Cox Communications, Las Vegas, Inc. Clark County Fire Department, Central Telephone Company DBA Century Link.<sup>76</sup> As reflected in GC Ex. 9 (a), the Final Map recorded with Clark County, Westgate:

grant[ed] and convey[ed] to Nevada Power Company, Las Vegas Valley Water District, Southwest Gas Corporation, Cox Communications, Las Vegas, Inc. Clark County Fire Department, Central Telephone Company DBA Century Link, jointly and severally, and to their successors and assigns, an easement as shown hereon as all areas not occupied by any building structure for the *construction, maintenance, operation, and final removal and/or abandonment of street lights, fire hydrants, underground power, telephone, gas lines, water lines, sewer lines, and appurtenances and for the above ground electric transformers and above ground telephone equipment pads, together with the rights of ingress and egress therefrom.*

(Emphasis added). Hence, the Union's belated claim of the supposed absence of evidence showing the existence of the scope of the easements is flat wrong.<sup>77</sup> And, while administrative hearings are not subject to the strict implementation of the Federal Rules of Evidence, this uncontroverted evidence meets the admissibility standard of Fed. R. Evid. 803 (14) and (15)'s exceptions to hearsay.

**b. The ALJ could not conclude that the Union was authorized by an easement holder to place the giant inflatables on Westgate's property at any time, let alone for four days.**

CE No. 11 faults the ALJ for failing to find that the Union was supposedly authorized to use the utility cutouts by an easement holder. Yet, this premise is factually and legally flawed as articulated by Westgate in its post-hearing submission and most recently in its Exceptions of October 16, 2015. Notably, Westgate interpreted the ALJ's Decision as actually finding that the

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<sup>76</sup> GC Ex. 8-10.

<sup>77</sup> CE Brief, p. 35.

Union had permission from at least one easement holder to place the inflatables on the utility cutouts, a ruling that is contrary to two hundred years of American jurisprudence involving property rights. The Union is asking the Board to reach a conclusion which requires the Board to ignore the express language of the easement and the legal impact of the easement on the parties. In other words, to reach an arbitrary decision and this, the Board cannot do.

An easement is a nonpossessory interest in the land of another.<sup>78</sup> ***An easement is not an ownership interest in a servient tract, but a mere privilege to use the land of another in a particular manner.*** Easements may be created by express agreement, implication, necessity, or prescription.<sup>79</sup> An express easement is created if the intent of the parties has been specifically evidenced by language in declarations or documents.<sup>80</sup> Courts are required to construe an easement strictly in accordance with its terms and to give effect to the intentions of the parties.<sup>81</sup> More importantly, easements are construed strictly in favor of the property owner.<sup>82</sup> A party is privileged to use another's land only to the extent expressly allowed by the easement.<sup>83</sup>

In *S.O.C. Inc. v. Mirage Casino-Hotel*, the Mirage Casino-Hotel granted Clark County a “perpetual easement and pedestrian easement over, under and across” the sidewalk property at issue.<sup>84</sup> The easement also included the following descriptive language: “a perpetual easement for a pedestrian and maintenance easement for streetlights, traffic control devices and for detectors over, under, and across the parcel of land.”<sup>85</sup> This is similar to the language used in GC Exhibit 9, with the exception that the easement granted by Westgate does not contain the

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<sup>78</sup> *Boyd v. McDonald*, 81 Nev. 642, 647 (1965); *see also* Restatement (Third) of Property (Servitudes) § 1.2 (2000).

<sup>79</sup> *Id.* The creation of an easement by necessity, implication or prescription is not at issue here. Similarly, there is no record evidence supporting the Union’s entitlement to an express easement. The Union is unable to rely on the easement to justify its trespass.

<sup>80</sup> *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 408 (Nev. 2001).

<sup>81</sup> *S.O.C., Inc.*, 117 Nev. at 408; *Peake Development, Inc.*, 2014 WL 859215, at \*2.

<sup>82</sup> *S.O.C., Inc.*, 117 Nev. at 408.

<sup>83</sup> *Id.*; *City of Las Vegas v. Cliffs Shadows Prof'l Plaza*, 293 P.3d 860, 867 (Nev. 2013).

<sup>84</sup> *S.O.C., Inc.*, 117 Nev. at 408.

<sup>85</sup> *Id.*

term “pedestrian” or allowed the use of the easement by pedestrians. The Mirage brought suit to enjoin the distribution of commercial handbills on the privately owned sidewalks of its properties by third parties alleging that the acts constituted trespass.<sup>86</sup>

The defense raised two arguments: first that the sidewalks were encumbered by a perpetual easement allowing for public access, and second that the activities of the hand-billers fell within the permissible scope of the easement.<sup>87</sup> Both arguments were rejected by the Supreme Court.<sup>88</sup> The Nevada Supreme Court held that the existence of an easement alone, without more, failed to transform private property into a public forum<sup>89</sup> because the “right to exclude others” has been held to constitute a “fundamental element of private property ownership.”<sup>90</sup> Likewise, it rejected the argument that the hand biller’s actions were within the scope of the easement at issue.<sup>91</sup> A court cannot interpret easements broadly but must narrowly apply them in a manner tailored to achieve the intended result of the easement and “[a]ny misuse of the land or deviation from the intended use of the land is a trespass for which the owner may seek relief.”<sup>92</sup> Not surprisingly, the Union omits any discussion of this controlling case.

Hence, the resolution of the easement query for our case was rather simple had the ALJ actually followed the applicable common law on easements. Local 872 was not an easement holder or a beneficiary of the easements, as these were not public easements. The Union’s activities (*i.e.* erecting inflatables on the “utility cutouts”) were completely outside of the nature and scope of the easements. By allowing Local 872’s activity, the ALJ improperly negated the intent of the parties when creating the easements. Lastly, the utility companies were legally

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<sup>86</sup> *Id.* at 407.

<sup>87</sup> *S.O.C., Inc.*, 117 Nev. at 408.

<sup>88</sup> *Id.* at 416.

<sup>89</sup> *Id.* at 408, 411 (“Privately owned property does not lose its private nature merely because the public traverses upon it.”).

<sup>90</sup> *Id.* at 412.

<sup>91</sup> *Id.* at 408.

<sup>92</sup> *S.O.C., Inc.*, 117 Nev. at 408.

incapable of granting the Union either access to the property or permission to erect the colossal inflatables for four days as they did- even if one believes the hearsay conversation between Mr. DaSilva and an unknown water district employee of March 6, 2015.<sup>93</sup> Simply stated, the Union had no right to trespass onto Westgate's property based on the express language of the easements and the ALJ could have never concluded otherwise.

**c. Mr. DaSilva's testimony is suspect and not worthy of any credence, as impermissible double hearsay.**

As discussed *supra*, the supposed authorization of a sole easement holder for a single day activity- even if it occurred- carries no dispositive or legal impact here. More importantly, this conveniently timed self-service testimony is unworthy of any weight by the Board. While the Board *may* defer to an ALJ's credibility assessments concerning witness testimony, no such deference is required *unless* the ALJ's credibility findings are supported *by the clear preponderance of all relevant record evidence as a whole*.<sup>94</sup> The ALJ's creditability assessment of Mr. DaSilva's testimony was patently wrong and must be rejected.<sup>95</sup> Mr. DaSilva testified of a conveniently timed "discussion" with an unidentified "water district employee who happened to be working near *one of the west-side utility cutouts* on March 6." This mystery man told Mr. DaSilva that there "was no problem putting an inflatable in the cutout as they were not working there."<sup>96</sup> The ALJ erred in giving any credence to Mr. DaSilva's testimony as none was warranted or justified. The Union has failed to offer any legal basis rendering Mr. DaSilva's uncorroborated hearsay testimony credible or worthy of any consideration. Likewise, it cannot

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<sup>93</sup> See *Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871 (9th Cir. 2001) (holding that the Cable Communications Policy Act of 1984 did not allow a cable franchisee access to a private apartment complex through easements granted to other cable providers).

<sup>94</sup> *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982); *NLRB v. Katz's Delicatessen of Houston St.*, 80 F.3d 755, 765 (2nd Cir. 1996)(An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole.")

<sup>95</sup> ALJD p. 6, fn 11.

<sup>96</sup> *Id.*

be the basis of a factual or legal conclusion that the easement holders gave permission or sanctioned the Union's unauthorized use of what is undisputed private property not owned by the easement holders.

The ALJ was certainly aware of actual admissible evidence produced during the hearing, including the maps and the easement documents, repudiating Mr. DaSilva's testimony.<sup>97</sup> Mr. DaSilva conceded during cross examination that he did not seek nor obtained permission from anyone (metro, detectives or utilities) to place the inflatables in Westgate's property *before or after* March 6, 2015.<sup>98</sup> Mr. DaSilva's testimony was not credible, let alone persuasive. The ALJ consequently erred by ignoring evidence detracting from his findings.

The ALJ's recitation and reliance on hearsay testimony from Mr. DaSilva, involving the Nevada metro police and detectives to substantiate the findings that the Union had a right to erect the inflatables is equally misplaced.<sup>99</sup> These people- who allegedly reviewed the placement of the inflatables and deemed it legal- never testified. There is no record evidence showing that the police or the detectives were authorized or had the expertise to determine Westgate's property boundaries, let alone the legal impact of the easements. Mr. DaSilva conceded this during cross-examination.<sup>100</sup> More importantly, the record evidence unequivocally shows that these second hand assurances that the Union was on "public property," if they took place at all, were misplaced because the expert and the maps conclusively proved otherwise. No such inference could be derived from the record and the ALJ's creditably assessments of Mr. DaSilva's testimony must be discounted.

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<sup>97</sup> GC Exhibit 8, 9 and 10.

<sup>98</sup> Tr. pp. 291, lines 4-24, 292, lines 8-16; 294, lines 21-25; 295, lines 1-4.

<sup>99</sup> Tr. 294, line 21-25; 295, lines 1-4.

<sup>100</sup> Tr. pp. 291, line 4-24; 292, lines, 8-16; 294, lines 21-25; 295, lines 1-4.

**E. There is no evidence that the utility “cutouts” were “public” or had ever been used by the Union, or the public at large, as the equivalent of a “public forum” and the Board must reject CE No. 6 and 10 because it is expressly contradicted by the actual facts in the case and dispositive case law.**

**1. The Union failed to address, let alone corroborate, these exceptions as required by the Board Rules; therefore, these exceptions must be rejected.**

The Union in its filed exceptions ( CE No. 6 and 9) has challenged the ALJ’s supposed failure to find that the inflatables were on public areas or in the alternative, were used as the public sidewalks which are protected by the First Amendment. Westgate has also challenged the ALJ’s conclusions, and ultimate dismissal of Complaint, because the ALJ in reaching its decisions had to “conclude” that the utility cutouts served as the functional equivalent of a public sidewalk, when there is no factual or legal predicate on the record to reach this conclusion. Unlike Westgate, the Union failed to support its exceptions with direct notations to the record or controlling law. There is no specific place in the brief where these exceptions are discussed, let alone corroborated as required by Board Rules. Instead, the Union provided generic conclusory statements –untethered from substantiated record evidence- that the utilities cutouts were public.

For example, in footnote 30, while purportedly arguing Westgate’s lack of notice requirements under Nevada’s criminal statute, Local 872 states that “Respondent has used utility cutouts before without incident.”<sup>101</sup> Notably, this crucial statement, which if accurate would legally destroy the General Counsel’s entire case, lacks a specific citation to the record. This blatant omission renders these exceptions waived and no further review is necessary or warranted.<sup>102</sup>

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<sup>101</sup> CE Brief, p. 30, fn. 30. Tr. pp. 262-264.

<sup>102</sup> There are other entries in the brief which suffer from the same factually supporting defects and that as discussed *infra* are contradicted by unimpeached documents or testimony. See CE brief, p. 36 lines 1-3.

More importantly, these statements are just false, misleading and have been expressly contradicted by the record. During the hearing, the Union attempted to elicit testimony of its routine practices with regard to demonstrations against other employers. Charging Party objected and the ALJ agreed that prior practices by the Union involving other employers- which included the use of utility cutouts during demonstrations- were wholly irrelevant to this matter.<sup>103</sup> The Union cannot rely on excluded irrelevant statements to support its exceptions or the conclusion that utility cutouts were public in nature. The evidence unquestionably shows that the utility cutouts were on private property and have never been utilized at all by this Union or the public<sup>104</sup> as a “public forum” contrary to the Union’s empty rhetoric in its brief.

**2. The evidence unequivocally shows, as the ALJ properly concluded, that the utility cutouts were on Westgate’s private practice.**

The union wrongly continues to argue that the utility cutouts were “public” up until March 12, 2015, when Westgate put up the chains to “make them” private property. In doing so, the Union attempts to conflate two very mutually exclusive legal inquiries, with the ultimate purpose of absolving, albeit unsuccessfully, their unlawful actions. The cutouts were on private property and the Union has failed to adduce a single piece of evidence negating this legal finding. The Union stipulated to the accuracy of the property map which clearly shows that all the inflatables were placed on *private property* on March 6, 7, 10 and 11,<sup>105</sup> to which the Union had no recognizable ownership or possessory interest. Local 872’s continued mischaracterization of the designated legal status of the utility cutouts as “public” property, irrespective of their unfounded quibbling of the proper owner, is a brazen misrepresentation of uncontroverted facts.

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<sup>103</sup> Tr. p. 262-264.

<sup>104</sup> Tr. p. 231, lines 11-25.

<sup>105</sup> Tr. 144, lines 22-25; 146, lines 1-7; 147, lines 15-20; 149, lines 5-6; and GC Ex. 8-9, 11.

CE. No. 6 and 10 are unfounded and must be disregarded by this Board. And, as discussed fully below, the lack of signage designating the cutouts as “private property” or the incidental and momentary use of the property by the public does not, and cannot, magically transform what is uncontroverted private property into a public forum warranting First Amendment protection.

**3. The First Amendment of the Constitution is not implicated in this matter.**

**a. There is no evidence of that the disputed conduct occurred in a “public forum,” on fundamental predicate for protected First Amendment expressive activity.**

The public has a right to engage in expressive activity in public forums. Yet, nothing in the Decision, Local 872’s unsubstantiated exceptions or the record provides the evidentiary factual or legal predicate to conclude that the “utility cutouts” were public fora. As discussed in Westgate’s brief,<sup>106</sup> the ALJ’s Decision does not directly address this dispositive issue nor applies, as it must, controlling First Amendment precedent in light of the record evidence. Not surprisingly, the Union’s brief also evades this dispositive evidentiary query whose answer will ultimately unravel the fallacy of Union’s exceptions and the ALJ’s conclusion. The proper standard of law is not as the ALJ suggests: (1) whether there was a sign at the “utility cutouts” designating it private property; or (2) whether the utility companies, who had no ownership or possessory right of that property, had tacitly approved the Union’s use of Westgate’s property. The proper inquiry was whether the “utility cutouts” served as the equivalent of a public forum, which would protect the Union’s activity, in the same manner that the ALJ concluded that the display of the banner on public property was protected under the First Amendment.

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and

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<sup>106</sup> See Westgate Exception Brief, Sect. V., (I)(A)(2)(C).

adherence.”<sup>107</sup> Embedded in this principle is the idea “that freedom of speech prohibits the government from telling people what they must say.”<sup>108</sup> Nor can the government force private actors to promote messages with which they disagree.<sup>109</sup> The Supreme Court has identified three types of forums, “the traditional public forum, the public forum created by government designation, and the nonpublic forum.”<sup>110</sup> “Traditional public fora are defined by the objective characteristics of the property, such as whether, ‘by long tradition or government fiat,’ the property has been ‘devoted to assembly and debate.’”<sup>111</sup> Designated public fora are created by “purposeful government action,... by intentionally opening a nontraditional public forum for public discourse.”<sup>112</sup> Other property is either a nonpublic forum or not a speech forum at all.<sup>113</sup>

Hence, for the Decision to stand, or to adopt the Union’s position, the Board must first find that the utility cutouts, which were unquestionably private property, functioned as the equivalent of the “quintessential public forum” typified by public sidewalks *based* on the preponderance of the evidence of the record developed in this case. No such finding is compatible with this record evidence. The Ninth Circuit Court of Appeals decision in *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*<sup>114</sup> underscores this impossibility. At issue there was whether the Casino’s sidewalk built on private property lost its “First Amendment protection,” commonly given to other public sidewalks.

The Ninth Circuit held that while built on private property, the disputed sidewalk was intended to be used -and was actually used- as the equivalent of a public sidewalk making it a

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<sup>107</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>108</sup> *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quotation omitted).

<sup>109</sup> *Pacific Gas and Elec. Co. v. Public Utilities Com’n of California*, 475 U.S. 1, 7 (1986).

<sup>110</sup> *Arkansas Educ. Television Com’n v. Forbes*, 523 U.S. 666, 677 (1998) (quotations and citations omitted).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas et al.*, 257 F.3d 937 (9th Cir. 2000)

protected public forum.<sup>115</sup> “Whether a property has historically been used for public expression plays an important role in determining if the property will be considered a public forum.”<sup>116</sup> In that case, the new sidewalk was built to replace the former public sidewalk in order to accommodate the construction of the Venetian and to ensure a continuous pathway between strip hotels. The Casino also agreed to subjugate its ownership rights to the sidewalk and to provide “for [the] unobstructed public use of the [private] sidewalk” through an agreement with the County.<sup>117</sup>

No such “public forum” *indicia* is present here, a dispositive fact omitted from the Union’s brief and the ALJ’s Decision. The functionality of these areas is completely different from a sidewalk type of structure.

The utility easements provide no designated connection or pathway to the property, as shown by the pictures in GC Ex. 3. In fact, a pedestrian using the utility cutouts as a pathway would face a number of serious and dangerous obstacles- from changing surfaces, substantial inclines, to dangerous equipment such as transformers and switches- as those areas were never intended to be or used as paths of travel to or from the Hotel. GC Ex. 3 (c), (e), (f) and (g)<sup>118</sup> underscore the absurdity of characterizing the utility cutouts as “public sidewalks,” as the Union does here. The fact that the utilities cutouts abutted the public sidewalk, as noted by the ALJ and the Union, solidifies the non-public nature of the utilities. They were not sidewalks or pathways to the Hotel and the Union has not adduced any credible evidence to the contrary.

Likewise, an inference from the record that the “utility cutouts” were ever used or had

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<sup>115</sup> *Id.* at 943-46.

<sup>116</sup> *Id.* at 944 (internal citations omitted).

<sup>117</sup> *Id.* at 943.

<sup>118</sup> Photos of the roach erected by the power boxes on Karen Ave./Joe W. Brown Blvd.; the rat on the concrete utility easement by Karen Ave./ Paradise Rd. surrounded by gravel, rocks and a substantial incline; fat cat by Paradise Rd./North lot surrounded by gravel and requiring to walk underneath the monorail; and the pig on Paradise Rd. surrounded by power boxes.

been historically used as “public forums” is equally false and devoid of factual basis. Indeed, while the Union expressly raises this very issue, as noted in exception 10, the brief is fatally silent on evidence corroborating this argument. First, the Union did not adduce any evidence demonstrating the easements’ usage by that particular Union or the public at large, as noted above. Certainly, Local 872’s brief contains no reference supporting this factual and legal claim. And, such inference can’t survive when measured against the uncontroverted record evidence. Mr. Froehlich, Vice President of Westgate’s Western Region, testified that he contacted the police when homeless persons tried to rest on the utility easements.<sup>119</sup> Certainly, there is no testimony showing that Westgate routinely allowed the “public” to stand for prolonged periods on the utility easements or to erect any kind of structure there for four (4) whole days, as Local 872 did here. Or more importantly, there is a dearth of record evidence showing that Westgate allowed the public to engage in any “expressive activity” on those utility easements. The fact that a tourist may – on occasion- stop momentarily at one of easements does not make it public property, let alone a public forum, as that term is defined by law. Certainly, the Union has failed point to a single legal authority supporting this legal theory despite the depth of jurisprudence on First Amendment rights. The Union was required to demonstrate factually and legally that the cutouts were public fora or treated as such as part of their affirmative defense, and it failed to do so.

Likewise, Local 872’s “expressive activity” was incompatible with the easement’s nature, purpose and use of the property in question<sup>120</sup> which further discredits the merits of the Union’s exceptions and the soundness of the ALJ’s decision. The “utility cutouts” were never intended to be public easements or for the benefit of the public. Indeed, the operative facts in this case are

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<sup>119</sup> Tr. pp. 58, lines 6-9; 231, lines 11-25.

<sup>120</sup> *Int’l Soc’y for Krishna Consciousness v. Lee (ISKCON)*, 505 U.S. 672, 688, 698-99 (1992); GC Ex. 9(a).

akin to the facts in *Hawkins*<sup>121</sup> where the Tenth Circuit found that walkways within the Galleria, a partially open area leading to the Denver Performing Arts Complex (DPAC), were not a public forum. Unsurprisingly, Local 872's brief completely dodges this case as it repudiates its argument.

The Tenth Circuit held that the disputed property could not be a traditional public forum because it was not analogous to a public “*right of way or thoroughfare*.”<sup>122</sup> Like Westgate's utility cutouts, the Galleria did not form part of the transportation grid and pedestrians did not generally use it as a throughway for other destinations. The utility cutouts cannot be considered public fora. And, any conclusions that they effectively served a public forum are unreasonable and contrary to the substantive weight of the evidence.

**b. The Union has failed to present any persuasive, let alone controlling, authority showing that the NLRA or the First Amendment requires this Agency to disregard over two hundred years of American Jurisprudence regarding the sacrosanctity of private property ownership rights.**

**1. *Eliason* is irrelevant and cannot be the basis to absolve the Union's trespass and illegal boycott in violation of Section 8(b)(4)(ii).**

The Union's dedicates a substantial amount of its brief to the notion that the use of bannerling and inflatables is protected by the First Amendment and this Board's decision in *Eliason & Knuth of Arizona, Inc.* (“*Eliason*”) <sup>123</sup> and its progeny, *Marriot Warner Center* (“*Marriott*”) and *Brandon Regional Medical Center* (“*Brandon*”). The ALJ's Decision similarly improperly relies on these cases to conclude that the Union's conduct was protected, a matter for which Westgate has taken exception.<sup>124</sup> Westgate has never argued that bannerling or the use of

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<sup>121</sup> *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287-88 (10th Cir.1999).

<sup>122</sup> *Id.* at 1287.

<sup>123</sup> See ALJD, p. 6, lines 25-30; p. 7, lines 1-6 discussing *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010); *Carpenters Local 1506 (Marriot Warner Center)*, 355 NLRB 1330 (2010); *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB No. 162 (2011).

<sup>124</sup> See Westgate's Exception Brief, pp. 25-27.

inflatables is incompatible with or prohibited by Section 8(b)(4). That has never been the issue in this case despite the Union's repeated efforts to obfuscate this. *Eliason* and its "off-springs" stand for the proposition that *in certain circumstances* the use of stationary banners and inflatables against a secondary/ neutral employer does not violate Section 8(b)(4)(ii) of the Act. However, the *operative* facts in those cases are legally distinguishable from our case and cannot ratify the ALJ's finding that the Union's conduct was protected under Section 8(b)(4)(ii). The expressive activity in those cases took place in undisputed "public forums." This vital fact is simply missing in our case where the debate centers around the Union's unauthorized, repeated and prolonged used or what it is unquestionably private property.

## **2. The Supreme Court has and continues to uphold private property rights in the labor context.**

The Supreme Court has routinely sustained private property rights emanating from state common law by holding that the NLRA does not supersede an employer's right to exclude third parties- even Union organizers- from their private property.<sup>125</sup> It is the law of the land, that the property rights of the employers will trump those of non-employee third parties. A detailed discussion of *Babcock* and *Lechmere* and the controlling impact of these Supreme Court cases in the proper adjudication of this matter, in light of the record evidence, are fully explored in Westgate's Exception brief. Consequently, it is unnecessary to duplicate this analysis here.<sup>126</sup> The very fact that the Union failed to mention, let alone reconcile, any of these two controlling Supreme Court cases expressly contradicting the Union's position about trespass and private ownership rights only serves to underscore the fallacy of the Union's argument. Judge Thomas' discussion in *Lechmere* is particularly salient in exploiting the shortcomings in the Union's

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<sup>125</sup> *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

<sup>126</sup> See Westgate Exception Brief, pp. 10-17. As already discussed, some of the exceptions made by the Union mirror those made by Westgate. While the analysis and conclusions offered by each party differ, the Union failed to validate – factually or legally- its exceptions which must result in the rejection of the Union's exceptions.

position. Indeed, it expressly rejects the unsubstantiated exception taken by the Union that the ALJ failed to find that Nevada “trespass law” did not prohibit the placement of the “critters” on the utility cutouts as stated in CE No. 8, yet wholly unsupported in the brief.

In disavowing the notion that Section 7 rights afforded unions a “reasonable trespass” right, as justified by the Board in prior decisions, Justice Thomas wrote:

Our reference to ‘reasonable’ attempts [in *Babcock*] was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees—***not an endorsement of the view (which we expressly rejected) that the Act protects “reasonable” trespasses.*** Where reasonable alternative means of access exists, § 7 guarantees do not authorize trespasses by nonemployee organizers, *even* (as we noted in *Babcock, ibid.*) ‘under ... reasonable regulations’ established by the Board... So long nonemployee union organizers have reasonable access to employees outside of the employer’s property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to the second level, balancing the employees’ and the employers’ rights as described in the *Hudgens* dictum.<sup>127</sup>

The ALJ could not find, as the Union posits, that Nevada trespass law did not prohibit the Union’s use of Westgate’s private property to place its critters, the Supreme Court already spoke on this very issue. There is no trespass allowed and this notion is not susceptible to degrees or the Union’s intention, despite its belated excuses. Whether the Union tried to stay on “public” property and the placement of the inflatables prevented the obstruction of the public right away is completely inconsequential to the resolution of this case. The Union set up the inflatables on private property and contrary to its belated claims never took any steps to ensure or were assured by anyone capable of doing so that they were in fact on public property, even after they were confronted by Westgate’s personnel.<sup>128</sup> The Union unwisely gambled, at their own peril, that the

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<sup>127</sup> *Lechmere*, 502 U.S. at 535 (emphasis is original, internal citations omitted.)

<sup>128</sup> Tr. pp. 294, lines 21-25; 295, lines 1-4; 272, lines 20-21; 273, lines 18-21; 277, lines 14-16; 283, lines 1-15. Mr. DaSilva completely repudiated his direct testimony that the Union had obtained assurances from the police that they were on private property. Moreover, this testimony constitutes double hearsay. None of these individuals had the knowledge, ability or tools to determine where the property ended. Likewise, the notion that the utility cutouts were the only place where the inflatables could be set up is absurd and irrelevant to any analysis under trespass law or the

“utility cutouts” were “public property” or would be treated as “public forum” and its trespass is conclusory evidence of conduct prescribed by Section 8(b)(4)(ii).

**F. Nevada trespass claims are not preempted and more importantly, the NLRB must take in consideration trespassing conduct in deciding allegations under Section 8(b)(4)(ii); consequently, CE. No. 13 cannot survive and must be rejected.**

In order to circumvent its conduct the Union, wrongly, argues that Nevada trespass law was preempted by conflating to very separate issues. Preemption deals with limitations on a party to redress wrongs, which may fall under state and federal statutes, *i.e.* does Westgate has the option to file a state-claim for trespass allegations against the Union under Nevada civil or criminal statute or does it have to pursue an unfair labor practice charge with the NLRB because the trespass involved a labor dispute. A completely different legal inquiry involves the standard of proof required of Westgate (or General Counsel as it relates to ULPs) to prevail on a ULP charge for violations of Section 8(b)(4)(ii), even when the conduct alleged involves trespass.

The focus of the inquiry and the legal standard must be determined by the actual claims and redress sought, as applied by the jurisprudence developed by the particular forum. For example, showing that the disputed conduct may constitute illegal secondary boycott under the NLRA does not mean that Westgate may have met its burden of proof in establishing a state-claim for trespass under Nevada law. The opposite is also true. The fact that the Union’s conduct may not rise to the evidentiary elements required to prove a civil or a criminal trespass allegation in a Nevada state court does not mean that the Union’s conduct is protected under Section 8(b)(4)(ii). Simply stated, Westgate does not have to prove that the Union’s conduct constituted trespass under state-law (whether civil or criminal) to prevail under Section

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NLRA. In fact, the union in *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB No. 162 (2011), a case cited in the Decision, mounted their inflatables on a truck and this Union could also do the same.

8(b)(4)(ii) and the Union does not prevail here because Westgate could not show trespass under Nevada state-law, as the Union argues in its brief.

**1. Westgate does not have to prove that the Union’s actions constituted actual trespass under civil or criminal standards to prove or prevail on its secondary boycott claims under Section 8(b)(4)(ii).**

Once again, the Union failed to meet its burden under the Board Rules and this exception is not sound. The Seventh Circuit’s decision in *520 Michigan Avenue Associates v. Unite Here Local 1*<sup>129</sup>, cited by the ALJ but ignored by the Union in its brief, repudiates the Union’s suggested departure from NLRB precedent. In fact, this opinion was fully analyzed by Westgate in its exception brief, as it related to the misapplication of controlling law by the ALJ in its decision.<sup>130</sup> The specific Seventh Circuit discussion regarding the evaluation of trespassing conduct in the context of unprotected secondary boycott bears repeating here:

The question then becomes whether trespassing and harassment could count as coercive behavior under federal labor law. We concede that the Union is permitted some initial entry onto private property so it may convey its views to the decision-makers of a secondary organization. *See Servette*, 377 U.S. at 51, 84 S.Ct. 1098. But, even in the context of primary picketing, at some point the trespass becomes unprotected. *See Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 205, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) (“[T]here are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable.”); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992) (“[T]respasses of nonemployee union organizers are ‘far more likely to be unprotected than protected.’ ”) (quoting *Sears*, 436 U.S. at 205, 98 S.Ct. 1745); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L.Rev. 1527, 1573–74 (2002) (“[S]tates are largely free to enforce general laws against violence, intimidation, and trespass in the context of labor disputes.”). And the Supreme Court has made clear that federal labor law “does not require that [an] employer permit the use of its facilities for organization when other means are readily available.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 114, 76 S.Ct. 679, 100 L.Ed. 975 (1956).

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Putting the matter succinctly, we hold that a union may be liable under § 158(b)(4)(ii)(B) for unlawfully coercing a secondary to cease doing business with the struck employer if

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<sup>129</sup> 760 F.3d 708 (7th Cir. 2014).

<sup>130</sup> *See* Westgate Exception Brief, pp. 28-31.

the union's conduct amounts to harassment or involves repeated trespass or both. Granted, trespass and harassment of a secondary organization's members differ from picketing in one central way that supports the Union's position. They do not create a symbolic barrier between a business and its customers in the way a picket line does. But such conduct may nevertheless significantly disrupt a business and pose a substantial threat to an organization's finances. Indeed, trespass and harassment may be more coercive than picketing in one important sense. Picketing generally occurs outside a place of business—perhaps on a sidewalk, or on the periphery of the neutral's establishment. The Union here is accused in several instances of barging into offices, bypassing security, following certain targets around stores, and shouting at employees. This is the sort of conduct that can—and did—get the police called in to intervene. The Union's alleged conduct easily could have been as disruptive of a neutral organization's property, privacy, and business operations as any picket line. Instead of creating a barrier between customers and the business, the Union infiltrated their neutral targets and disturbed them from the inside. That behavior, if proven, can be deemed coercive. It is also important to point out that Section 158(b) does not merely bar coercion that is actually exerted; it also does not permit the Union “to threaten” a neutral with unlawful secondary activity.<sup>131</sup>

More importantly, the Seventh Circuit fully articulated the standard of proof required to establish an unfair labor practice charge for Section 8(b)(4) allegations involving trespass claims by specifically holding that the employer need not show that the union was criminally or civilly<sup>132</sup> liable for trespass or harassment in order to prevail on its claims.<sup>133</sup> Consequently, Westgate's supposed inability to prove criminal trespass under N.R.S. §207.200<sup>134</sup> is inconsequential as decreed by the Seventh Circuit in *520 Michigan Avenue Associates*.

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<sup>131</sup> 760 F.3d at 721-722.

<sup>132</sup> Under Nevada law, a civil trespass exists when there is an unpermitted and unprivileged entry onto a land of another or one with possessory interests to the land. *Allied Props. v. Jacobson*, 343 P.2d 1016 (Nev. 1959).

<sup>133</sup> 760 F.3d at 722.

<sup>134</sup> Westgate has proved criminal trespass by the Union. The Union argues in footnote 42, which is not part of any exceptions and its waived, that there cannot be trespass because the “critters” are not persons and as such could not violate the criminal statute. The Union does not bother to support this ridiculous argument. The critters were placed there by union members who are persons. Trespass is not only limited to an actual physical entry by a person, which occurred here, but by causing the entry of a thing, in this case the critters, onto private property because it invades another's possession interest. *See* Restatement (Second) of Torts (1965). Equally ridiculous is the Union's argument that it promptly and voluntarily removed the inflatables on March 12, 2015. This claim is contradicted by counsel's argument that the chains set by Westgate prevented the placement after March 12, 2015. The Union stipulated that the March 10, 2015 letter, depicted in GC Ex. 4, was sent and received. Tr. pp. 90-92. And while the Union wants to quibble over whether the right owner sent the letter or when it was received (even though the letter states it was sent by fax and email which confirm an immediate receipt), they had formal written notice that they were not supposed to be there. Lastly, and more importantly, any argument that Westgate did not address the

**a. The Union's cited cases for the proposition that Westgate must show trespass under state law to prevail here are inapplicable or distinguishable**

The Union's reliance on *Thunder Basin*,<sup>135</sup> *Glendale Associates*<sup>136</sup> and *United Brotherhood of Carpenters*<sup>137</sup> for the proposition that Westgate must prove an actual claim for trespass under state law to succeed in its labor charge is completely misplaced. In *Thunder Basin*, a mine operator brought action challenging an order of the Mine Safety and Health Administration (MSHA) to post designation of miners' representative entitled to exercise walk around inspection rights. The Supreme Court held that: (1) Federal Mine Safety and Health Act ("Mine Act") precluded a district court's jurisdiction over pre-enforcement challenge, and (2) the lack of pre-enforcement jurisdiction did not deprive mine operator of due process. This case did not involve any actual (or threatened trespass) or secondary boycott allegations.

In fact, the opinion, included the cited portions by the Union in its brief, is completely void of any language or discussion remotely associated with trespass, let alone a mandate for the application of state law elements to decide trespass issues involving federal statutes. The miners argued that being forced to post the designation of miners' representatives would infringed its ownership rights to exclude non-union members from its property in accordance with *Lechmere*. The Supreme Court disagreed that *Lechmere* reversed "walkaround law" as it has developed under the Mine Act<sup>138</sup> and that the operator's concerns about potential abuse by nonunion members, at that point, was speculative at best. As discussed, there is no reference to trespass or the required evaluation of state trespass law to adjudicate a secondary boycott under the NLRA.

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trespass on the very first day is illogical in light of the testimony and any reasonable inferences derived from the record.

<sup>135</sup> *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 at 217 n. 21 (1994).

<sup>136</sup> 347 F.3d 1145, 1153 (9th Cir. 2008)

<sup>137</sup> *United Brotherhood of Carpenters v. NLRB*, 540 F. 3d 957 (9th Cir. 2005)

<sup>138</sup> *Id.* at 214 fn. 18.

The decision in *Glendale Associates* is similarly unsupportive of the Union's departure from applicable law. In that case, the union filed an unfair labor practice charge against a shopping mall that prevented its members from distributing written materials on mall premises which attacked labor practices of a sister company of one of its tenants. The mall owner argued that the Board misapplied *Lechmere* which allowed the owner to exclude union representatives from its property for failure to comply with the Galleria's rules. The Board, in response, argued that *Lechmere* does not apply to situations where an employer restricts union representatives pursuant to a rule that violates state law. In that particular case, the California State Constitution prohibited the "owners of shopping malls and general access stores from excluding speech activity on their private adjacent sidewalks and parking lots."<sup>139</sup>

Two things are noteworthy in this opinion. First, its ruling was based, in part, because the court found that the Union was engaged in protected Section 7 activity, which as we know is not the case here. Likewise, the decision did not turn on whether the mall could prove a state-law claim of trespass-as this issue was never discussed. It was the existence of a specific state law prohibiting the very same activity at issue which deprived the mall owners from property interest to exclude the objected conduct. The holding is *United Brotherhood of Carpenters* similarly involves identical operative factual and legal issues. No such law exists in Nevada. Nevada trespass claims (both civil and criminal) reinforce the common-law ownership rights recognized in *Lechmere*.

The Union similarly seeks to diminish the legal impact of its overall conduct by cherry-picking the record to argue that the trespassing conduct only involved an alleged shoe and portion of a rat's tail over the property boundary. The Union's illicit lengthy and improper

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<sup>139</sup> 347 F.3d at 1153, *see also* 347 F.3d at 1151-52.

incursion and use of Westgate's private property have been accurately memorialized in pictures (GC Ex. 3, 9, 11 and 12) which are not susceptible to the Union's questionable and self-serving characterization. The Union cannot engage in revisionist history and discard undisputed facts negating the merits of their argument. Westgate, based on the preponderance of the record and controlling case law, has fully shown that the Union engaged in "repeated and sustained trespass or unlawful harassment," conduct which is repugnant to Section 8(b)(4)(ii) and Congressional intent, as fully addressed in Westgate's Exceptions Brief.<sup>140</sup> Consequently, the Board must disregard the Union's exceptions and the ALJ's decision by finding that the Union's conduct was coercive and violated Section 8(b)(4)(ii).

**2. Preemption is inapplicable here<sup>141</sup> as state-law property claims are not preempted by Section 303 nor do they conflict with the policies of Section 8(b)(4).**

Federal Courts, and in particular the Ninth Circuit Court of Appeals have consistently held that state tort claims are not preempted.<sup>142</sup> The Supreme Court's jurisprudence is unequivocal in this regard: "The right of employers to exclude union organizers from their private property emanates from state common law."<sup>143</sup> As a result, there is nothing "federal" about a claim for trespass, even if by happenstance the trespasser happens to be a union. Therefore, the mere fact that a state claim for trespass may be asserted in the course of a labor dispute" does not invoke the preemption requirement of by Section 303 of LMRA.

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<sup>140</sup> To avoid needless duplicative argument, Westgate adopts its legal argument and factual assertions showing that the Union's lengthy, repeated, harassing and illegal use of its private property during a four day period amounted to coercive conduct which violated Section 8(b)(4)(ii) of the NLRA. See Westgate Exceptions Brief, pp. 28-31.

<sup>141</sup> Westgate objects to the Union's reference to GWP's claim. CE Brief, p. 28, line 8. GWP is not a party to this matter and its supposed claim is irrelevant here.

<sup>142</sup> See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 199-200 (1978). *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997); *Retail Property Trust v. United Broth. of Carpenters and Joiners of America*, 768 F.3d 938 (9th Cir. 2014).

<sup>143</sup> See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 at 217 n. 21 (1994).

**a. Westgate’s vindication of its property owner’s right through a state- law claim of trespass against the Union does not implicate federal labor law.**

Federal law governing labor relations does not remove the states’ power to regulate where the activity regulated is a merely peripheral concern. The Supreme Court clarified, more than thirty years ago, that the NLRA does not preempt state-law property claims.<sup>144</sup> In *Sears*, the question was whether the NLRA “deprives a state court of the power to entertain an action by an employer to enforce state trespass laws against picketing which is arguably - but not definitely - prohibited or protected by federal law.”<sup>145</sup> Justice Stevens explained that the Court was “unwilling to presume that Congress intended the arguably protected character of the Union’s conduct to deprive the [State] courts of jurisdiction to entertain [a] trespass action.”<sup>146</sup> The Court’s holding is still binding and fully repudiates the Union’s preemption argument.

The controversy to be adjudicated in the state action was very limited in *Sears*. The employer was not challenging the lawfulness of the picketing but instead sought to enforce its private property rights to remove pickets from its property.<sup>147</sup> In reaching the decision to uphold the state-court jurisdiction, Justice Stevens explained:

the history of the labor preemption doctrine in [the Supreme] Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected.<sup>148</sup>

Trespass is a labor-neutral tort, despite the fact that the Union was the offending party in this case and the trespass occurred in a labor dispute context. And although *Sears* recognized

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<sup>144</sup> *Sears*, 436 U.S. at 207.

<sup>145</sup> *Id.* at 182.

<sup>146</sup> *Id.* at 207.

<sup>147</sup> *Id.* at 185.

<sup>148</sup> *Id.* at 188.

that unions have a limited federal right to access private property,<sup>149</sup> this right does *not* preclude a property holder from invoking state-court jurisdiction to bring a claim for trespass against a union, even if the federal right arguably attaches.<sup>150</sup> Hence, preemption was not applicable. Consequently, Westgate had the right to seek redress for trespass, civil or criminal, in state court and would have been required to prove the elements of its claim based on the jurisprudence requirements in Nevada. Or, Westgate could have pursued relief, as it did here, for the secondary boycott violation of Section 8(b)(4) based on the Union’s conduct, which in this case included trespass. This very fact renders the Union’s argument moot. Nevertheless, a second boycott claim is not the equivalent of a trespass claim. These are two different claims, consisting of different elements and standards of proof and imposing different remedies and as such are not subject to preemption.

Tellingly absent from the Union’s cited authority is any reference to *Radcliffe v. Rainbow Constr. Co.*<sup>151</sup> There, the Ninth Circuit specifically rejected the notion of state tort preemption. The court noted that “the fact that a state tort may also constitute an unfair labor practice does not inevitably cause preemption of the state claim.”<sup>152</sup> More importantly, the court unsurprisingly recognized that “[t]he property right underlying the law of trespass, of course, is a matter of state law.”<sup>153</sup> Stated simply, the trespass action turns exclusively on state-law issues<sup>154</sup> while the secondary boycott does not hinge on the proof of validity of state-claim for

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<sup>149</sup> Any limited access rights discussed by the Supreme Court are in circumstances not remotely analogous to the one at bar. *See Sears*, 436 U.S. at 204-06.

<sup>150</sup> *See Sears*, 436 U.S. at 204-06 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535, 539 (1992) (recognizing the limited nature of this federal right); accord 2 John E. Higgins, Jr., *The Developing Labor Law* 2365 (5th ed. 2006) (explaining that test supporting the narrow federal right of access is “a stringent one”). And, as fully discussed above, these narrowly defined exigencies are completely lacking here and have not been asserted or supported by the Union.

<sup>151</sup> 254 F.3d 772, 784 (9th Cir. 2001).

<sup>152</sup> *Id.* at 785.

<sup>153</sup> *Id.* at 784.

<sup>154</sup> *See Helmsley-Spear, Inc. v. Fishman*, 11 N.Y.3d 470, 476, 900 N.E.2d 934, 938 (NY 2008).

trespass as discussed in *520 Michigan Avenue Associates v. Unite Here Local 1* and the Union's preemption argument must be rejected, as inconsequential to the outcome in this case.

In enacting the NLRA, Congress expressed no intent to displace state-law remedies designed to protect the private property interests of a state's citizens. Rather, Section 303 provides a limited and specific form of federal relief: it supplies a cause of action for business and property losses incurred by "reason of" the secondary activity itself; it does not limit damages for other forms of tortious conduct.<sup>155</sup>

**G. The Union failed to provide, as they must, legal authority for its outlandish demands and the Board must discard CE. No. 15, 16 and 17.**

**1. This Board does not have authority to award fees under RFRA.**

In its exceptions (CE No. 15, 16, and 17), the Union criticized the ALJ's decision for failing to: (a) award "attorney's fees to Local 872 and its members and supporters, (b) "order a training session for the Regional Office with respect to First Amendment Rights" and (c) order "Westgate [to] allow the critters to be reestablished on the utility cutouts."<sup>156</sup> Yet, the Union offers no substantive argument or citation of authority to support these outlandish demands in contravention of Board Rules, Section 102.46 (b)(2) and (c). Instead, as part of the brief's conclusion the Union demands fees under the RFRA, a rebuke of the Region for its supposed interference with the RFRA, the compulsory use of Westgate's private property for indefinite use for "critters" and other non-sense. This omission is fatal and warrants the summary dismissal of CE No. 15-17.

Local 872 has failed to show that the Board whose oversight is limited to the Charge filed

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<sup>155</sup> See 29 U.S.C. § 187(b); see also *Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 274 at 261 (1964) (explaining that "state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities"); see also *Retail Property Trust v. United Broth. of Carpenters and Joiners of America*, 768 F.3d 938 (9th Cir. 2014).

<sup>156</sup> CE No. 15, 16 and 17, respectively.

by Westgate for illegal secondary boycott violation under Section 8(b)(4)(ii) may compel a remedy which is outside of the statutory mandates of the NLRA. Let's start with the fee request. As a threshold matter, the Union does not identify who they are seeking fees against. This is yet another fatal flaw in the Union's ridiculous demands. The Board has ruled that the NLRA, unlike other statutes, does not provide an award of fees to "prevailing party." While there's a number of narrow cases in which the Board has awarded litigation expenses –including fees- as a sanction for "bad faith conduct" in collective bargaining issues contested before the Agency,<sup>157</sup> this is not such case. On the contrary, Westgate, the employer, was the one seeking redress for the Union's illegal conduct as it is permitted by the statute.

Moreover, this type of relief violates Article III, the APA and Supreme Court precedent foreclosing the "jettison of the traditional rule against nonstatutory allowances to the prevailing party" as Congress was exclusively tasked with deciding this issue when enacting legislation.<sup>158</sup> Indeed, the D.C. Circuit court has ruled that the "Board lacks authority under the NLRA to order a respondent to pay for litigation expenses."<sup>159</sup> Clearly, the Board has no authority to grant the Union's requested relief and must be rejected.

The Union's reliance on the RFRA for its fee request is equally unavailing and ludicrous. Contrary to the Union's characterization, there is no pending claim under RFRA. In fact, there is no religious component involved in this labor dispute. As fully discussed above, Local 872 could not even establish a *prima facie* claim as it failed to adduce to any evidence concerning standing, religious beliefs, or injury in fact. The Union has not argued and cannot argue that it was a "prevailing plaintiff or defendant." As the Union failed to establish the factual and legal

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<sup>157</sup> *Camelot Terrace*, 357 NLRB No. 161 (December 30, 2011)

<sup>158</sup> *Aleyska Pipelane Serv. Co. v. Wilderness Soc.*, 421 U.S. 240 (1975)

<sup>159</sup> *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 799 (D.C. Cir. 1997).

predicate for a fee award under RFRA, this belated demand and CE No. 15 must be rejected.

**2. The Board does not have authority to order Westgate to surrender its private property or ownership rights to the Union.**

CE No. 17 suffers from the same fatal legal defects as the RFRA award fee. The Union also failed to justify the validity of this remedy or the power of the Board to order this remedy. There is no statutory provision authorizing the Board to sanction what is basically an illegal taking of Westgate's private property in violation of the Fifth Amendment, and contravening to universally recognized ownership principles of American Jurisprudence. The Board has no ownership interest in Westgate property and can no more dictate how Westgate uses its property- or who it invites to its property- than the Union or a stranger.

**H. The record evidence supports ALJ's factual findings excepted by Local 872 and CE No. 3, 4, 5, 6 and 9 must be rejected.**

The facts in this case are and continue to be uncontroverted. While the parties have filed objections to certain specific findings, as identified in the exceptions, it is clear that the core facts, as recited by the ALJ's decision, remain undisturbed. The actual findings in the Decision are discussed starting on page 2 and ending on page 6, line 20.<sup>160</sup> Local 872's attacks on its challenged factual findings are unjustified, unwarranted and ultimately, unrelated to the actual fact disputed. In order to reverse the ALJ's disputed (as identified by the Union) findings of facts, this Board must first conclude that they are not supported by substantial evidence or "such relevant evidence that a reasonable mind would accept to support a conclusion."<sup>161</sup> The Union is unable to meet this burden as these facts are unequivocally grounded on the substantial record evidence.

For example, the Union challenges, through CE No. 3, the ALJ's discrete finding that up

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<sup>160</sup> Westgate, as discussed in its brief, objected to certain factual findings on page 6, lines 16-19 and footnote 11 and nothing in this answer brief shall constitute a waiver of those exceptions.

<sup>161</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

to seven inflatables were stationed around the perimeter of the property. This matter is undisputed based on the testimony and specific pictures –which the Union conceded were accurate and admitted into evidence. Indeed, the Union offered no citations to the specific record to directly discredit this finding. Instead, they object to the “finding” to the extent that it implies that inflatables were placed after March 11, 2015. However, the express language in the opinion does not state that or remotely supports that reading. In fact, the ALJ on page 6, lines 20-21 specifically found that no inflatables were placed after March 12, 2015.

Again, the challenge to the facts listed in page 3, lines 30 to 39 are equally specious and divorced from the actual language of the facts identified by the opinion. Here, the Union challenges the finding that the “sloped ramps” are not ADA compliant. Yet, nothing in the express language of the finding supports the Union’s position. Indeed, nothing in the 9 cited lines of the Decision can be remotely portrayed as characterized by the Union. The ALJ found that the island had “sloped ramps” to permit access by an individual using a wheelchair or a mobility scooter. The existence of the sloped ramp is unquestioned as depicted in the various pictures in evidence and it is common knowledge that ramps allow access to individuals with mobility challenges. Once again, the Union is objecting to supposed language and an interpretation that is simply not there and must be rejected.

The Union CE No. 5 is equally silly. Here, the Union nitpicks at the finding that the banner placed by the Union on the public traffic island extended about “three quarters” into the ramp. Interestingly, the Union’s does not challenge the fact that its banner blocked the access ramp at least half of the way. This objection is equally unfounded. The AJL based this finding on actual pictures that were admitted into evidence as accurately depicting the obstructions.<sup>162</sup>

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<sup>162</sup> GC Ex. 3 (h), 6(d) and 7(b)(c) and (d).

The adage “don’t believe your lying eyes” come to mind. It is clear from the picture and the testimony on the record that the placement and obstruction level by the Union banner of the access ramp changed and the finding of fact is wholly supported by the substantive evidence. In fact, what the Union is asking here is for the Board to reject a proven fact by completely disregarding evidence contravening the Union’s position and that, the Board cannot do.

The Union’s sixth exception is again unrelated to the actual findings of fact set forth by the ALJ on page 6, lines 5 to 21 regarding the placement of the inflatables on the utility cutouts.<sup>163</sup> The Union’s position is that the ALJ should have found that the utility cutouts were used by the public and were in fact, public forum a claim which as discussed above was fully discredited.

Lastly, the challenge to ALJ’s finding of fact on page 5, line 27 does not have to do with the actual facts but the characterization that a car would have to make a hard right to get out. Once again, the Union asks this Board to ignore pictures and supplant reasonable inferences simply because the Union does not like the characterization. This, the Board cannot do as the Union has failed to show that the challenged findings were not supported by reasonable evidence.

Westgate objects to the Unions’ characterization of arguments made in Westgate’s brief as abandoned. As the Board knows, Westgate had no control over the General Counsel’s Complaint or theory of the case. Westgate did not challenge the ALJ’s conclusion that a Section 8(b)(4)(i) was not proven. However, Westgate has not waived any argument that the Union’s obstructions to the public sidewalks (GC Ex. 7) occurred or that they should be considered violations as evidence of Section 8(b)(4)(ii) violations.

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<sup>163</sup> Westgate has objected, like the Union, to footnote 11 and lines 16-19 on page 6, as fully discussed in its brief and nothing in this answer brief should be interpreted as a waiver of those exceptions.

## **CONCLUSION**

For the reasons stated above, Westgate requests this Board to reject all the exceptions filed by the Union, and as requested in its Exceptions Brief, reverse the ALJ's Decision the Union violated Section 8(b)(4).

Respectfully submitted,

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Myrna L. Maysonet

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed via E-Gov, E-Filing, and electronic mail on this 11<sup>th</sup> day of December, 2015 on the following:

**E-Gov, E-Filing**

National Labor Relations Board  
Office of the Executive Secretary  
1015 Half Street SE  
Washington, D.C. 20570-0001

**Via Electronic Mail**

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National Labor Relations Board  
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By: s/Myrna L. Maysonet  
Myrna L. Maysonet

# **CHARGING PARTY EX. 1**

# Delaware

PAGE 1

*The First State*

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "3000 PARADISE ROAD, L.L.C.", CHANGING ITS NAME FROM "3000 PARADISE ROAD, L.L.C." TO "WESTGATE LAS VEGAS RESORT, LLC", FILED IN THIS OFFICE ON THE THIRD DAY OF JULY, A.D. 2014, AT 9:56 O'CLOCK A.M.

5200788 8100

140916660

You may verify this certificate online  
at [corp.delaware.gov/authver.shtml](http://corp.delaware.gov/authver.shtml)



  
Jeffrey W. Bullock, Secretary of State  
AUTHENTICATION: 1507895

DATE: 07-03-14

## STATE OF DELAWARE CERTIFICATE OF AMENDMENT

1. Name of Limited Liability Company: \_\_\_\_\_  
3000 Paradise Road, L.L.C. \_\_\_\_\_
2. The Certificate of Formation of the limited liability company is hereby amended as follows:

Section 1 is hereby deleted and replaced with the following:

1. The name of the Limited Liability Company is Westgate Las Vegas Resort, LLC

IN WITNESS WHEREOF, the undersigned have executed this Certificate on the 3 day of July, A.D. 2014.

By: Ellen G  
Authorized Person(s)

Name: Ellen Gilmore

Print or Type

SECRETARY OF STATE



## NEVADA STATE BUSINESS LICENSE

**WESTGATE LAS VEGAS RESORT, LLC**  
Nevada Business Identification # NV20121643014

**Expiration Date: October 31, 2014**

In accordance with Title 7 of Nevada Revised Statutes, pursuant to proper application duly filed and payment of appropriate prescribed fees, the above named is hereby granted a Nevada State Business License for business activities conducted within the State of Nevada.

This license shall be considered valid until the expiration date listed above unless suspended or revoked in accordance with Title 7 of Nevada Revised Statutes.

IN WITNESS WHEREOF, I have hereunto  
set my hand and affixed the Great Seal of State,  
at my office on July 3, 2014

ROSS MILLER  
Secretary of State

This document is not transferable and is not issued in lieu of any locally-required business license, permit or registration.

*Please Post in a Conspicuous Location*

**You may verify this Nevada State Business License  
online at [www.nvsos.gov](http://www.nvsos.gov) under the Nevada Business Search.**

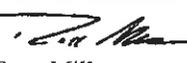


ROSS MILLER  
 Secretary of State  
 204 North Carson Street, Suite 1  
 Carson City, Nevada 89701-4520  
 (775) 684-5708  
 Website: www.nvsos.gov



\*091302\*

**Amendment to Foreign  
 Limited-Liability Company**  
 (PURSUANT TO NRS CHAPTER 86)

Filed in the office of 	Document Number <b>00004326068-49</b>
Ross Miller Secretary of State State of Nevada	Filing Date and Time <b>07/03/2014 8:15 AM</b>
	Entity Number <b>E0550602012-5</b>

USE BLACK INK ONLY - DO NOT HIGHLIGHT

ABOVE SPACE IS FOR OFFICE USE ONLY

**Amendment to Application for Registration of a  
 Foreign Limited-Liability Company**  
 (Pursuant to NRS Chapter 86)

1. Name of Foreign Limited-Liability Company:

3000 Paradise Road, L.L.C.

2. Name under which this Foreign Limited-Liability Company is currently conducting business in Nevada:

3000 Paradise Road, L.L.C.

3. The Articles have been amended as follows (provide article numbers, if available):\*

Section 2 is hereby deleted and replaced with the following:

2. The name of the foreign limited liability company being registered with Nevada is Westgate Las Vegas Resort, LLC.

4. If company name has been amended in section three, indicate name under which the Foreign Limited-Liability Company will now be conducting business in Nevada:

Westgate Las Vegas Resort, LLC

5. Effective date and time of filing: (optional)

Date:

Time:

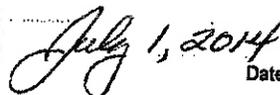
(must not be later than 90 days after the certificate is filed)

6. I hereby declare and affirm under the penalties of perjury that I am a manager in the above named Limited-Liability Company and that the execution of this amendment is my act and deed and that the facts stated herein are true:

X



Signature of Manager



Date

\* 1) If adding managers, provide names and addresses.

2) If amending company name, it must contain the words "Limited-Liability Company," "Limited Company," or "Limited" or the abbreviations "Ltd.," "LL.C.," or "L.C." The word "Company" may be abbreviated as "Co."

**FILING FEE: \$175.00**

**IMPORTANT:** Failure to include any of the above information and submit with the proper fees may cause this filing to be rejected.  
 This form must be accompanied by appropriate fees.

# NAV-LVH, LLC

Business Entity Information			
Status:	Active	File Date:	7/19/2012
Type:	Domestic Limited-Liability Company	Entity Number:	E0380332012-6
Qualifying State:	NV	List of Officers Due:	7/31/2016
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20121446480	Business License Exp:	7/31/2016

Additional Information	
Central Index Key:	

Registered Agent Information			
Name:	CSC SERVICES OF NEVADA, INC.	Address 1:	2215-B RENAISSANCE DR
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89119
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information			
No Par Share Count:	0	Capital Amount:	\$ 0
No stock records found for this company			

- Officers		<input type="checkbox"/> Include Inactive Officers	
Manager - WESTGATE RESORTS INC			
Address 1:	5601 WINDHOVER DRIVE	Address 2:	
City:	ORLANDO	State:	FL
Zip Code:	32819	Country:	USA
Status:	Active	Email:	

- Actions/Amendments			
Action Type:	Articles of Organization		
Document Number:	20120498622-26	# of Pages:	3
File Date:	7/19/2012	Effective Date:	
(No notes for this action)			

<b>Action Type:</b>	Initial List		
<b>Document Number:</b>	20120564368-47	<b># of Pages:</b>	1
<b>File Date:</b>	8/15/2012	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Annual List		
<b>Document Number:</b>	20130396016-41	<b># of Pages:</b>	1
<b>File Date:</b>	6/14/2013	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Registered Agent Address Change		
<b>Document Number:</b>	20130534424-28	<b># of Pages:</b>	1
<b>File Date:</b>	8/13/2013	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Annual List		
<b>Document Number:</b>	20140480087-04	<b># of Pages:</b>	1
<b>File Date:</b>	7/1/2014	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Annual List		
<b>Document Number:</b>	20150206776-66	<b># of Pages:</b>	1
<b>File Date:</b>	5/5/2015	<b>Effective Date:</b>	
15-16 exp			
<b>Action Type:</b>	Registered Agent Change		
<b>Document Number:</b>	20150338833-56	<b># of Pages:</b>	1
<b>File Date:</b>	7/28/2015	<b>Effective Date:</b>	
(No notes for this action)			

# WESTGATE LAS VEGAS RESORT, LLC

Business Entity Information			
Status:	Active	File Date:	10/22/2012
Type:	Foreign Limited-Liability Company	Entity Number:	E0550602012-5
Qualifying State:	DE	List of Officers Due:	10/31/2016
Managed By:		Expiration Date:	
NV Business ID:	NV20121643014	Business License Exp:	10/31/2016

Additional Information	
Central Index Key:	

Registered Agent Information			
Name:	CSC SERVICES OF NEVADA, INC.	Address 1:	2215-B RENAISSANCE DR
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89119
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information			
No Par Share Count:	0	Capital Amount:	\$ 0
No stock records found for this company			

- Officers <span style="float: right;"><input type="checkbox"/> Include Inactive Officers</span>			
Manager - WESTGATE RESORTS, INC.			
Address 1:	5601WINDHOVER DR	Address 2:	
City:	ORLANDO	State:	FL
Zip Code:	32819	Country:	USA
Status:	Active	Email:	

- Actions\Amendments			
Action Type:	Application for Foreign Registration		
Document Number:	20120718128-12	# of Pages:	1
File Date:	10/22/2012	Effective Date:	
(No notes for this action)			

<b>Action Type:</b>	Initial List		
<b>Document Number:</b>	20130040096-75	<b># of Pages:</b>	2
<b>File Date:</b>	1/22/2013	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Annual List		
<b>Document Number:</b>	20130668077-40	<b># of Pages:</b>	1
<b>File Date:</b>	10/10/2013	<b>Effective Date:</b>	
2013/2014			
<b>Action Type:</b>	Amendment		
<b>Document Number:</b>	00004326068-49	<b># of Pages:</b>	1
<b>File Date:</b>	7/3/2014	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Amended List		
<b>Document Number:</b>	20140503902-86	<b># of Pages:</b>	1
<b>File Date:</b>	7/11/2014	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Registered Agent Change		
<b>Document Number:</b>	20140727392-47	<b># of Pages:</b>	1
<b>File Date:</b>	10/22/2014	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Annual List		
<b>Document Number:</b>	20140763749-13	<b># of Pages:</b>	1
<b>File Date:</b>	11/17/2014	<b>Effective Date:</b>	
(No notes for this action)			
<b>Action Type:</b>	Annual List		
<b>Document Number:</b>	20150375709-29	<b># of Pages:</b>	1
<b>File Date:</b>	8/24/2015	<b>Effective Date:</b>	
(No notes for this action)			