Vista Del Sol Health Services, Inc. d/b/a Vista Del Sol Healthcare *and* SEIU-ULTCW, Service Employees International Union, United Long Term Care Workers. Cases 31–CA–115318, 31–CA–115332, 31–CA–116089, 31–CA–116096, 31–CA–116481, 31–CA–116483, 31–CA–116484, 31–CA–116485, 31–CA–116486, 31–CA–116487, 31–CA–116488, 31–CA–118682, 31–CA–118685, 31–CA–118686, 31–CA–137770, 31–CA–138045, and 31–CA–140185

February 24, 2016

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

DECISION AND ORDER

On June 5, 2015, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Charging Party Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions in part, to reverse them in part,[2] and to adopt the judge's recommended Order as modified and set forth in full below.[3]

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 1 and renumber the subsequent paragraphs accordingly: "1. The Respondent is an employer engaged in commerce and in

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's crediting of the text messages sent by the Respondent's former director of nursing, Jeri Warner, to employee Remedios Lopez, asserting that they constituted inadmissible hearsay. The Respondent, however, failed to raise a timely hearsay objection at the hearing, and we find that the judge properly considered this evidence.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by promulgating a rule prohibiting employees from wearing union logos or insignia, interrogating employee Rosa Lopez about her and her coworkers' union activities and sympathies and promising her greater job security if employees rejected the Union, and impliedly threatening employee Genaro Meza with unspecified reprisals in response to his union activities. We also adopt the judge's findings, in the absence of exceptions, that a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is appropriate, that the Respondent had an obligation to bargain with the Union no later than October 14, 2013, and that, from October 18, 2013, to October 28, 2013, the Respondent violated Sec. 8(a)(5) by terminating employees Martha Aparicio, Delfina Sanchez, Genaro Meza, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo without providing the Union prior notice and an opportunity to bargain. Lastly, in the absence of exceptions, we adopt the judge's finding that in December 2013 the Respondent violated Sec. 8(a)(5) by granting to its certified nursing assistants a discretionary, across-the-board wage increase —a mandatory subject of bargaining —without providing the Union prior notice and an opportunity to bargain.

We agree with the judge that the Respondent coercively interrogated employee Maria Ramirez when Administrator Rosa Valdivia (i) asked Ramirez if "they" had been back to visit her and said she knew who "they" were, and (ii) asked Ramirez what the cards were that "they" were handing out. We therefore find it unnecessary to pass on the allegation that Valdivia's questions also created the impression of surveillance.

The judge included a citation to *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294 (2009), a case decided by a two-member Board. See *New Process Steel v. NLRB*, 560 U.S. 674 (2010). We note that a three-member panel of the Board subsequently incorporated *Stevens Creek Chrysler* by reference. 357 NLRB No. 57 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012).

[2] We reverse the judge's dismissal of the allegation that the Respondent unlawfully granted employees Maria Ramirez and Romana Lopez a discretionary 50-cent-an-hour wage increase in October 2013. The lawfulness of an employer's conferral of benefits during a union organizing campaign depends upon its motive. *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (citing *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)). The Board infers improper motive and interference with employees' Sec. 7 rights when an employer grants benefits during an organizing campaign without showing a legitimate business reason. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7 (2015); *Pacific FM, Inc.*, 332 NLRB 771, 773 (2000). This includes the period before a representation petition has been filed. *Hampton Inn NY—JFK Airport*, 348 NLRB 16, 17 (2006). Here, the credited evidence demonstrates that, at the time the Respondent granted the wage increases to employees Ramirez and Lopez, it knew of the Union's organizing campaign. Because the Respondent failed to show any legitimate business reason for granting the wage increases, we find that it violated Sec. 8(a)(1). Moreover, the extensive evidence of the Respondent's union animus further demonstrates that its motive for granting the wage increases was to interfere with employees' Sec. 7 rights. Member Miscimarra agrees that the wage increase granted Ramirez and Lopez was unlawful. He finds the General Counsel established this violation based on (i) the proximity of the increase to employees' union activities, (ii) the fact that the Respondent failed to establish a justification for the increase, and (iii) the Respondent's numerous unfair labor practices indicative of its anti-union animus. He finds it unnecessary to rely on *Sisters' Camelot*, 363 NLRB No. 13 (2015).

[3] We have amended the judge's conclusions of law and remedy and modified her recommended Order consistent with our findings and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

a business affecting commerce within the meaning of Section 2(6) and (7) of the Act."

2. Insert the following as Conclusion of Law 2 and renumber the subsequent paragraphs accordingly: "2. The Union is a labor organization within the meaning of Section 2(5) of the Act."

3. Insert the following as Conclusion of Law 3 and renumber the subsequent paragraphs accordingly: "3. Since October 14, 2013, the Union has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, representing a majority of the employees in the following appropriate unit:

> Included: All full-time, part-time, and on-call certified nursing assistants (CNA), restorative nurse assistants (RNA), caregivers, housekeeping, laundry, cooks, dietary aids, maintenance, and activity assistants.
>
> Excluded: All other employees, confidential employees, managers, office, clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act."

4. Insert the following as Conclusion of Law 5 and renumber the subsequent paragraphs accordingly: "5. By granting wage increases to employees in order to discourage them from supporting the Union and telling employees that it no longer trusts them in response to their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act."

AMENDED REMEDY

In addition to the remedies ordered by the judge, we shall order the Respondent to cease and desist from granting wage increases to employees in order to discourage them from supporting the Union and telling employees that it no longer trusts them in response to their union activities.

Additionally, we shall order the Respondent to compensate employees Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, including when the backpay period is less than 12 months. *Don Chavas, LLC d/b/a/ Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Vista del Sol Health Services, Inc. d/b/a Vista del Sol Healthcare, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to talk to the Union.

(b) Granting discretionary wage increases to employees in order to discourage them from supporting the Union.

(c) Coercively interrogating employees about their union membership, activities, sympathies, and/or support.

(d) Telling employees that it no longer trusts them in response to their union activities.

(e) Threatening employees with unspecified reprisals in response to their union activities.

(f) Instructing employees to leave the Respondent's premises in response to their union activities.

(g) Promulgating a rule prohibiting employees from wearing union logos or insignia.

(h) More strictly enforcing a tardiness rule in response to employees' union activities.

(i) Polling employees about their support for the Union.

(j) Promising employees enhanced job security in order to discourage them from supporting the Union.

(k) Threatening employees with closure of their work facility in response to their union activities.

(l) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(m) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(n) Changing the terms and conditions of employment of its unit employees, such as implementing an across-the-board wage increase and discharging employees, without first notifying the Union and giving it an opportunity to bargain.

(o) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in

the remedy section of the judge's decision as amended in this decision.

(c) Compensate Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time, part-time, and on-call certified nursing assistants (CNA), restorative nurse assistants (RNA), caregivers, housekeeping, laundry, cooks, dietary aids, maintenance, and activity assistants.
>
> Excluded: All other employees, confidential employees, managers, office, clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

(f) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented after October 14, 2013.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2013.

(i) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be publicly read in English and Spanish by Respondent Administrator Rosa Valdivia (or her successor) or, at the Respondent's option, by a Board agent in the presence of Valdivia (or her successor).

(j) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 24, 2016

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT instruct you not to talk to the Union.

WE WILL NOT grant you discretionary wage increases in order to discourage you from supporting the Union.

WE WILL NOT coercively interrogate you about your union membership, activities, sympathies, and/or support.

WE WILL NOT tell you that we no longer trust you in response to your union activities.

WE WILL NOT threaten you with unspecified reprisals in response to your union activities.

WE WILL NOT instruct you to leave our premises in response to your union activities.

WE WILL NOT promulgate a rule prohibiting you from wearing union logos or insignia.

WE WILL NOT more strictly enforce a tardiness rule in response to your union activities.

WE WILL NOT poll you about your support for the Union.

WE WILL NOT promise you enhanced job security in order to discourage you from supporting the Union.

WE WILL NOT threaten you with closure of your work facility in response to your union activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT change the terms and conditions of employment of our unit employees, such as implementing an across-the-board wage increase and discharging employees, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (née Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time, part-time, and on-call certified nursing assistants (CNA), restorative nurse assistants (RNA), caregivers, housekeeping, laundry, cooks, dietary aids, maintenance, and activity assistants.

Excluded: All other employees, confidential employees, managers, office, clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment of our unit employees that were unilaterally implemented after October 14, 2013.

VISTA DEL SOL HEALTH SERVICES, INC. D/B/A DEL SOL HEALTHCARE

The Board's decision can be found at www.nlrb.gov/case/31-CA-115318 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Juan Carlos Ochoa Diaz, Esq., Simone Pang Gancayco, Esq., and *Lynn Ta, Esq.,* for the General Counsel.
Yolanda Flores-Burt, Esq., for the Respondent.
Sean D. Graham, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on January 21–23 and 26–28, 2015. The Service Employees International Union, United Long Term Care Workers (Charging Party or Union) filed above-captioned charges on various dates between October 18, 2013, and November 3, 2014.[1] The General Counsel issued the complaint before me, consolidating all of the charges, on December 15, 2014. Vista del Sol Healthcare (the Respondent or VDS) filed a timely answer denying all material allegations and setting forth affirmative defenses.

The complaint alleges that the Respondent violated Sections 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act) during the course of an organizing drive beginning in August 2013. The specific allegations, detailed below, concern alleged interrogations, promises of benefits and increases in benefits, threats, and the discharge of nine employees. The General Counsel contends that because the Union achieved majority support, a bargaining order is warranted, and alleges the Respondent granted wage increases and terminated employees without bargaining.

On December 12, 2014, the Regional Director filed a petition for a temporary injunction under Section 10(j) of the Act in federal district court. See *Mori Rubin v. Vista Del Sol Health Serv., Inc*., Case 2:14-CV-09534 MMM-FFM. On January 21, 2015, the Honorable Margaret M. Morrow granted the Regional Director's petition, finding a likelihood of success on all 8(a)(5), (3), and (1) allegations, ordering reinstatement of the discharged employees, and entering a *Gissel* bargaining order.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation that provides skilled nursing care and assisted living to residents of its facilities in Los Angeles, California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it is a health care institution within the meaning of Section 2(14) of the Act. It is undisputed that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. STATEMENT OF FACTS

A. Background and the Respondent's Operations

VDS operates a nursing facility located in Los Angeles, California. One part of the facility is a 50-bed skilled nursing facility, commonly referred to as "Vista." The other side is a 30-bed assisted living facility called Case del Mar, commonly referred to as "Casa." The two buildings are on the same property. (Tr. 34–35; R. Exh. 3.) James Preimesberger is VDS's president and owner.

From October 1 until at least October 14, VDS had roughly 60 employees. Rosa Valdivia (Valdivia) is the administrator, in charge of the overall operation of the facility, and serves as the top management official at the facility.[4] (Tr. 33–34.) Licensed Vocational Nurse Valorie Hanson is the social services designee and reports to Valdivia.[5] (Tr. 639.) The housekeeping staff, consisting of 6–7 housekeepers, directly reported to Valdivia until late October.[6] (Tr. 235.)

The director of nursing (DON), who during the relevant time period was Jeri Warner, reports to Valdivia.[7] Approximately five licensed vocational nurses (LVNs) and five registered nurses (RNs) report to the director of nursing. One of the LVNs or RNs serves as the charge nurse for each shift. Ingrid Castillo worked at VDS as an LVN and charge nurse at night for about

[1] All dates are in 2013 unless otherwise indicated.

[2] The Charging Party joined in the General Counsel's brief.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

In its answer, the Respondent did not admit or deny the Union is a labor organization. Based on the rationale set forth in the Respondent's brief and supported by record evidence, I find the Union is a labor organization. (R. Br. p. 94, fn. 16.)

[4] It has come to my attention that, since the time of the hearing, VDS has been sold. Any use of the present tense in this decision reflects the status at the time of the hearing.

[5] Hanson is an admitted supervisor.

[6] I state this in the past tense because, as detailed below, the housekeeping function was outsourced in October 2013.

[7] As discussed below, Warner was terminated following the events at issue in the complaint.

four years prior to her resignation in March 2014. (Tr. 507.) Other charge nurses during the relevant time period included Jennifer Abaunza and Arcadio DeBorja.

VDS employs roughly 30 certified nursing assistants (CNAs). The charge nurses direct the CNAs' work. (R. Exh. 3.)[8]

Esther Cuellar, the registered nurse (RN) supervisor, makes the schedule for the nursing staff. (Tr. 242, 582.) Cuellar also interviews CNAs and makes recommendations about which applicants VDS should hire. She reports to Vida Zelaya, the staff developer. Zelaya is in charge of educating the nursing staff and conducting training. She and Cuellar instruct staff on workplace rules and policies. (R. Exh. 3.) Cuellar also conducts new employee orientation. (Tr. 584.)

VDS has a dietary department, overseen by Supervisor Rafael Vasquez. He supervises the cooks and dishwashers. VDS employs 2 administrative staff, Esmerelda Valdivia (E. Valdivia), and Vanessa Valdivia (V. Valdivia), who work as clerical employees.[9] (R. Exh. 3.)

During new employee orientation, employees receive VDS's employee handbook. (Tr. 587.) VDS maintains a policy prohibiting sleeping on the job, and the employees are told about this during orientation. The penalty for sleeping on the job is termination of employment. (Tr. 598; R. Exh. 2, p. 18.) Employees are permitted to sleep during their breaks when they are off the clock. (Tr. 616.)

Nurses and CNAs work in three shifts: 7am-3pm (morning), 3-11pm (afternoon), and 11pm-7am (night). Nurses on each shift are entitled to a ½-hour lunchbreak and two 10-minute rest periods. Employees clock out for the lunchbreak but not for the rest periods.

Under a California law referred to as 3.2, all facilities need to provide 3 hours and 20 minutes of care for each patient each day. To meet this number, employees must work 7.5 hours. When employees come in late and leave early, this creates a problem. VDS had trouble getting employees to work enough hours, particularly on the 3–11pm shift. (Tr. 620–622.)

Employees were permitted to come late and leave early as long as they punched in or out within 7 minutes of their scheduled shifts. This 7-minute grace period was not part of the employee handbook but has been a longstanding policy at VDS. (Tr. 619, 739.) Employees who were late beyond the grace period were not disciplined.[10] On occasion, there were meetings to remind employees about clocking in and working a full shift. (R. Exh. 8.)

In mid-May 2013, a binder with employees' I-9 information was taken from Valdivia's office.[11] (Tr. 682; R. Exh. 3.)

[8] Though I have cited to parts of R. Exh. 3, I do not credit any of the hearsay comments, particularly those that contradict witness testimony, unless specifically stated herein,

[9] Esther and Vanessa are Rosa Valdivia's daughters. (Tr. 242.) Esther worked full time and Vanessa worked part time. (R. Exh. 3.)

[10] For example, on July 25, 2013, Hanson was 15 minutes late for her shift. She was not disciplined. (Tr. 664; GC Exh. 99.) Many more examples appear below.

[11] There is no indication the Union was involved in organizing employees at VDS in May, and I make no presumption that anyone from the Union was involved in this incident.

B. The Union's Early Organizing Efforts

Union organizing efforts began in late July/early August 2013. (Tr. 531.) The unit the Union was seeks to represent consists of:

> Included: All full-time, part-time, and on-call Certified Nurse Assistants (CNA), restorative nurse assistants (RNA), caregivers, Housekeeping, Laundry, Cooks, Dietary aids, maintenance, and activity assistants.
>
> Excluded: All other employees, confidential employees, managers, office, clerical employees, professional employees, guards and supervisors as defined in the [A]ct.

Housekeeper Rosa Lopez first heard of the Union around July of 2013.[12] She spoke to coworkers about the Union and asked whether they would be interested in supporting the Union. During this time period, Valdivia called Rosa Lopez one evening at approximately 7 p.m. and told her employees had informed her that people were visiting them at their homes. She told Rosa Lopez not to let them in because they were thieves. (Tr. 235–237.)

Housekeeper Eliza Mayorga first heard of the Union in August 2013. She attended 3–4 meetings and encouraged coworkers to come to the meetings. (Tr. 336.) CNA Martha Aparicio heard about the Union from Sandra Cerros in mid-August 2013. She said she would support the Union, and she attended 5–6 union meetings. (Tr. 127–128.) CNA Marcos Salvador attended about 5 union meetings. He spoke with two coworkers, Jeanette Aguilera and Zenon Perez, about the benefits of the Union. (Tr. 474, 478.)

On August 7, CNA Maria Ramirez called Valdivia and asked if VDS had sent someone to her house. Valdivia responded that she did not send anyone to Maria Ramirez' house, and the individual probably knew her address because of a theft from the office. (Tr. 267, 677–678; R. Exh. 3.)

Hanson recalled the Union visited her home twice in the early summer of 2013. During the first visit, at about 8:30 p.m., Hanson answered the door and the individual identified himself as being from the Union. She found him aggressive because he insisted she needed to talk to him. The individual came back a couple of days later and left his phone number with Hanson's son. She told Valdivia about the incidents, and told her she did not know how the union person had gotten her address. She conveyed that the union representative was aggressive and said she was scared. Valdivia told her that a booklet containing employee names and addresses was missing from VDS. (Tr. 652–655.)

According to Valdivia, Hanson called her at about 4:30 the afternoon of August 7, and said a man was at her house. The individual identified himself as being from VDS and said he had questions about the facility. Hanson reported that and that the individual was pushy and persistent, and she felt uncomfortable for her family's safety. (R. Exh. 3; Tr. 679).

Valdivia claims she first learned of the Union when Maria Sura, a dishwasher, reported on August 8 that someone from

[12] Rosa Lopez attended about 10 union meetings.

the Union had visited her.[13] Valdivia received a report that from Zeny Tabak that same day, and later received a similar report from Blanca Valle. (Tr. 68, 680–681; R. Exh. 3.) The employees were upset that someone had obtained their addresses.

Housekeeper Carmelina Perdomo first became aware of the Union in August or September 2013. (Tr. 380.) In mid-September, Valdivia asked Perdomo if anyone had visited her at her home. Perdomo responded she had been visited. Valdivia asked the name of the individual, and Perdomo told her it was Jose Manzano. (Tr. 383.) According to Valdivia, on or around October 16, Perdomo asked to speak to her and said she was being harassed and called a traitor by her coworkers. She said nobody was willing to be her friend if she did not sign with the Union. She did not want to give names. Valdivia told her nobody had the right to harass her. (Tr. 684–685; R. Exh. 3.)[14]

Housekeeper Romana Lopez learned about the Union in early October and attended a couple of meetings. (Tr. 354–355.)

Yolanda Velasco, who works in the kitchen at VDS, said the Union visited her many times, but she could not recall any dates, or even the year. She received a telephone call from someone at the Union named Jose. He asked her if she was interested in supporting her coworkers, and she replied that she was not. She told him that she could not support the Union because they sometimes take part in strikes, which are inconsistent with her religious values. According to Velasco, Jose told her that a lot of her coworkers were in the Union, and that if she did not sign, she would have to pay "double the quote." (Tr. 556–559.)

During August 2013, Valdivia held a series of meetings with employees. Valdivia told employees a folder containing I-9 information was stolen and she had heard reports of employees being visited at their homes. She told them to be careful, and instructed them not to open their doors if they did not want to. (Tr. 47.)

During one of these meetings, Valdivia and Cuellar met with Remdios Lopez, Marcos Salvador, Maria Ramirez, and Reyna Artola, Elfega Lopez, and some other employees by the nurses' station. Valdivia said that if anyone knocked on their doors, they should not let them in because someone had gone into her office and stolen personally identifiable information.[15] (Tr. 405–406.) She said that there was someone pretending to be from the Union, and she described him, stating he had a tattoo. She told them not to open the door because they were trying to see what the employees had so they could come in and rob them. She said to let her know if anyone came to their houses. (Tr.475–476.)

In September 2013, Cuellar told a group of housekeepers and CNAs, including Perdomo and Mayorga, not to answer the door if they were visited at home because the people visiting could be thieves. (Tr. 385.)

C. October Employee Raises

Employees do not receive regularly scheduled raises. Instead, raises are granted dependent upon Respondent's financial ability to authorize any increase in pay. (GC Exh. 85, pp. 1–2.)

On October 2 or 3, Valdivia told Maria Ramirez she was getting a raise. On October 10, for the pay period ending September 30, Maria Ramirez received a wage increase of 50 cents per hour, from $8.75 per hour to $9.25 per hour. (GC Exh. 64.) Prior to that time, her last raise was in 2011. (Tr. 266.)

Housekeeper Romana Lopez received a raise at this same time, from $10 per hour to $10.50 per hour. (GC Exh. 64.)

D. October 3 Contract for Housekeeping Services

On October 3, Valdivia signed a contract with an outside company called Pro-Clean to provide housekeeping services for VDS. (GC Exh. 56.) The agreement provided that Pro-Clean would utilize VDS's existing housekeeping equipment. The terms of the agreement began on October 3, to continue until canceled by either party.

The decision to discharge housekeeping employees and subcontract out housekeeping to Pro Clean was made by "corporate," not by Valdivia. (Tr. 72.) Donna and another person from VDS's corporate offices told Valdivia that the housekeeping department was operating over budget, so they had decided to contract out the department. Valdivia had no input into the decision.[16] (Tr. 704.)

Someone from Pro-Clean called Valdivia toward the end of August/beginning of September and told her they were going to come look at the facility. The individual prepared a quote and Valdivia sent it to corporate. (Tr. 719.)

For the 8-month period ending August 31, 2013, the housekeeping department was $8,712 over budget. The other departments over budget were maintenance, by $8,311, nursing by $10,150, and administration, by $47,333. Overall, losses for that time period were $28,703. (R. Exh. 5.) Valdivia reported that housekeeping and maintenance were chosen for subcontracting because those were the only departments that did not impact patient care. (Tr. 707.) For the last 2 years the company had been operating in the red, and Valdivia had heard comments from the corporate office that they might need to shut down the facility if financial performance did not improve. (Tr. 711.) The losses in 2012 were $336,562, and the losses in 2013 were $249,193. (R. Exh. 6.)

The housekeeping employees were not notified of this contract, and continued to work as normal. The housekeepers were scheduled into November and their vacation requests were granted into November. (Tr. 60–61, 247, 395; GC Exhs. 61–62.)

E. CNAs on the Night Shift and Events of October 6/7

Typically, three CNAs work the night shift in the main build-

[13] This was the first time Valdivia claims she heard mention of a Union. (Tr. 680; R. Exh. 3.)

[14] I do not credit the statements Valdivia attributes to Perdomo about being harassed by coworkers and called a traitor. They are refuted by Perdomo herself, who testified she was not called a traitor or threatened by anyone about the Union. (Tr. 381–382.) I note the transcript erroneously states "trader" instead of "traitor."

[15] Remedios Lopez placed this meeting later, but the subject matter of the meeting is more in line with Valdivia's recollection of her meetings during this time period.

[16] At another point during her testimony, Valdivia said she was part of the discussions and recommended that VDS subcontract housekeeping, but could not recall who at corporate she spoke with about this. (Tr. 89.)

ing, and one or two work at the Casas. The employees who work in the Casas come to the main building regularly. (Tr. 125, 161.) During the relevant time period, the charge nurses on the nightshift were Ingrid Castillo and Jennifer Abaunza.

CNA Martha Aparicio worked at VDS's main building from June 2007 through October 18, 2014, on the night shift. Other CNAs on the night shift included Lerma Davis, who has worked for VDS for almost 10 years; Maria Lopez, who has worked for VDS since 1990; and Hermila Negrete, who worked for VDS roughly 5 years. CNA Delfina Sanchez worked on the nightshift at VDS for 3 weeks, from the end of September until October 18, 2013. (Tr. 123–125, 161, 178, 201.)

CNAs working the nightshift make rounds during the first couple hours of their shifts. This includes checking each room to see what patients needs, and then fulfilling those needs. During the relevant time period, they usually clocked out after this for their ½-hour break, which tended to be somewhere between 12:30 and 2 a.m. They generally took their actual breaks later, when things were quieter, which was usually around 3:30-4 a.m.[17] (Tr. 126–127, 132, 172–173, 191, 203, 523–524.) If there was not time, they would sometimes not take a meal break. The CNAs would tell the charge nurse when they were going to take their breaks. (Tr. 132–133.)

Patients communicate needs through use of a light system. A patient can activate the lights, which are at the nurses' station and were accompanied by a sound, if they need anything in the night. (Tr. 127.) Some patients, however, are not able to move, so it is important for the nurses on the night shift to check in on them. CNAs on the night shift turn patients who are unable to move every 2 hours to prevent bedsores. (Tr. 594.)

It is common for CNAs on the nightshift to take naps during their breaks. When there are no lights on, the CNAs routinely sit in four chairs in front of the nurses' station and close their eyes when things are not busy. (Tr. 137, 191–194, 210–211, 517.) CNAs check with the charge nurse before taking naps. Martha Aparicio, Maria Lopez, Lerma Davis, Delfina Sanchez, and Aurora Rodriguez took naps on the nightshift in view of the charge nurses. Nobody was previously disciplined for taking naps. (Tr. 138–140, 173–174, 183, 211–212, 517.)

Abaunza was the charge nurse for the night shift on October 6–7. Maria Lopez was scheduled to work the nights shift at Casa, and Martha Aparicio and Delfina Sanchez were scheduled to work in the main building. Maria Lopez clocked in at 11:07 p.m., clocked out for her break at 12:33 a.m., and clocked back in at 1:01 a.m. She completed her shift at 7:05 a.m. (Tr. 64, 70.) Aparicio signed in at 11:10 p.m.,[18] signed out for her meal break at 1:30 a.m., and signed back in at 2 a.m. (GC Exh. 44; Tr. 132.) In line with her usual practice, she did not take actually take her meal break from 1:30–2 a.m. Aparicio asked Abaunza for a break around 4 a.m. that day. She was with Delfina Sanchez and Maria Lopez. It had been a very heavy night, and the three CNAs sat on the chairs by the nurses' station, put up their feet on adjacent chairs, and rested. All three employees were resting in the same manner. She took her break and fell asleep for about 25 minutes. Delfina Sanchez and Maria Lopez each slept for about 15 minutes. (Tr. 133–134, 184–186, 207–208.)

At about 4:20 a.m. on October 7, Thomas Adelman, the son of a resident, reported seeing employees asleep at VDS. He used his phone to take photographs of the employees. (Tr. 94, 97–100.) One of the individuals picture sleeping was a hospice worker tending to his mother in her room. (GC Exh. 36.) This individual did not work for VDS. The other employees were by the nurses' station. The employees pictured sleeping were Abaunza, Aparicio, and Delfina Sanchez. In addition to the individuals he photographed, Adelman saw another CNA sleeping off to the left side of the room. (Tr. 103, 135; GC Exhs. 37–39.) This was Maria Lopez, who had a sweater over her face and had closed her eyes. (Tr. 135, 183–186.) The charge nurse eventually woke up and raised her head.[19] (Tr. 104.) Adelman told Abaunza he had taken the photographs. Abaunza told the CNAs about the pictures. She instructed the CNAs to just continue to work as normal. (Tr. 134, 209.)

Later that morning, Adelman came back and showed the photographs to Valdivia. At Valdivia's request, he emailed her the photographs. He told Valdivia he saw five individuals sleeping. (Tr. 106–109.)

DON Warner told Charge Nurse Castillo about the incident and showed her the pictures. Warner told Castillo to make sure the CNAs do not take breaks at the same time and to make sure Castillo was always at the nurses' station. Warner said she understood how hard it was to work the night shift, and it was okay for the CNAs to close their eyes, but to make sure they did not take breaks at the same time, and that their eyes were open when they were not on break. Warner did not state the individuals involved would be disciplined. (Tr. 508–509.)

Two days after the incident, Castillo spoke with Davis and Negrete. She told them a family member came to VDS and took pictures of CNAs sleeping. She told them that they were going to start taking turns taking their breaks. (Tr. 171–172.)

Around this same time, Castillo told Martha Aparicio and Delfina Sanchez that she had spoken to the Warner and was told not to worry. She told them if they needed a nap they just needed to make sure somebody else could relieve them. (Tr. 136–137, 509-510.) After the incident and after Castillo's meeting with Warner, Sanchez and Aparicio worked their regularly scheduled shifts on October 7, 8, and 11–14, 2013, without issue.

During the week following October 7, CNA Lerma Davis took naps during her break in view of Charge Nurse Castillo, and was not disciplined. CNAs Delfina Sanchez, Hermila Negrete, Aurora Rodriguez, and Maria Lopez all napped while on break during this same time period, in view of Castillo. (Tr. 175–176, 213.)

[17] According to Cuellar, Valdivia, and Hanson, it was not a common practice for CNAs to work through the lunch break and take their actual breaks later. (Tr. 599, 646–647, 701–702.) For the reasons set forth in the analysis section below, I do not credit this testimony.

[18] When she was hired, she told Esther Cuellar she would not be able to start until about 11:20 or 11:30 because she had an underage child she could not leave home alone. She was permitted to come in late, and did so regularly without discipline. (Tr. 151–152.)

[19] Adelman mistakenly referred to this individual as the receptionist.

F. Union Authorization Cards

During the week of October 7, employees started to sign union authorization cards. The union authorization cards stated:

> I hereby authorize SEIU, its agents or assigns, to act for me as my exclusive representative for the purpose of collective bargaining with my employer regarding wages, benefits, and other terms and conditions of employment. I understand and agree that this card may be used to establish majority support among the employees in the unit in which I am employed and obtain voluntary recognition from my employer without an NLRB election.

(GC Exhs. 2–33.)

Rosa Lopez signed a union authorization card the week of October 7. She asked almost all of her coworkers to sign cards, and collected cards from about 5 of them. (Tr. 237–238.) Restorative nurse assistant (RNA) Reyna Artola voluntarily signed a union authorization card on October 10. (Tr. 440; GC Exh. 27.)

CNAs Lerma Davis, Martha Aparicio, Marcos Salvador, Delfina Sanchez, Remedios Lopez, Dafny Cobar, Ivania Rueda, Jeannette Aguilera, Maintenance Worker Genaro Meza, and Housekeeper Elisa Mayorga, each voluntarily signed authorization cards on October 11. (Tr. 128, 163–164, 204–205, 290–291, 304–305, 316, 337–338, 403–404, 476–479; GC Exhs. 2, 4, 6, 8, 11, 12, 15, 17, 18, 22, 26.) Delfina Sanchez received her card from Sandra Cerros.[20] (Tr. 204–205.) Other employees who signed cards on October 11 were Danely Suazo, Guadalupe Figueroa, Maria Rodriguez, Mirna Scoovia, Reyna Artola, and Silvia Figueroa. (GC Exh. 3, 9, 20, 23, 27, 32.)

Zenon Bernardino, the cook at VDS for the last 26 years, voluntarily signed a union authorization card on October 12. (Tr. 467–469; GC Exh. 33.) Elfega Lopez, Kiran Singh, Omela Cuesta, Petrona Davila, Rosalba Salazar, and another employee[21] also signed an authorization cards on October 12. (GC Exhs. 5, 14, 21, 24, 25, 30.)

On October 13, the following individuals voluntarily signed union authorization cards: CNAs Maria Lopez, Maria Ramirez, and Erika Salguero, and Housekeepers Maria Menjivar[22] and Romana Lopez. (Tr. 179–180, 283, 355–356, 367–368, 460–462; GC Exhs. 7, 17–19, 28.) CNA Hermila Negrete voluntarily signed an authorization card on October 14. (Tr. 188–189; GC Exh. 10.) Juana Navarlete and Sandra Cerros also signed authorization cards on October 14. (GC Exhs. 13, 31.)

Perdomo did not sign a union card because some friends told her she could lose her job if the Union did not win. Mayorga asked her to sign a card, but Perdomo told her no. Mayorga did not call her a traitor. She was not threatened about signing a union card, and nobody made promises to her to get her to sign a card. (Tr. 380–382.)

Velasco signed a card Marcos Salvador gave to her at work. She felt forced to sign because the Union had majority support, and she feared she would have to pay double. (Tr. 562–563.)

All told, As of October 14, 32 of the 46 employees in the proposed unit had signed union authorization cards, and designated the Union as their exclusive collective-bargaining representative.[23] (GC Exhs. 2–33, 94.)

G. Events in Mid-October

1. October 14 petition and march

As Maria Ramirez was punching out at about 3 p.m. on October 14, Valdivia asked if "they" had been back to look for her. She responded that they had, but her son told them to look for her at work. Valdivia said she knew who "they" were, and Maria Ramirez responded that she did too. Valdivia asked what the cards were that they were handing out, and asked Maria Ramirez to come to her office. Maria Ramirez said that they were going to take her a list, and she had signed it. Valdivia asked why, and Maria Ramirez responded that she liked her job, but she wanted to be valued and respected. She said that during the in-service meetings with Vida Zelaya, they were humiliated. Valdivia told her VDS was a good place to work, and that she could change her mind if she wanted to. Valdivia told Maria Ramirez that if she put her trust in the Union, the two of them would not be able to speak as they were doing. She also told her not to comment about the raise she had been given because VDS had not done evaluations due to the losses it was experiencing. (Tr. 269–273.)

A short time later, a group of about 25 off-duty employees and union field organizers Eduardo Gutierrez, Paul Vellanoweth, and Jose Manzano, met about two blocks away from the hospital. The employees were given T-shirts bearing the Union's name to wear. They all proceeded together and approached Valdivia at the nurses' station at about 3:30–3:45 p.m. (Tr. 141, 239, 481.) Employee Marcos Salvador spoke, and told Valdivia the employees were marching to communicate the desire for the Union to come to VDS. (Tr. 483.) Salvador presented Valdivia with a petition signed by 31 employees stating:

> We the undersigned employees of Vista Del Sol Healthcare Services are marching in support of Union recognition.
>
> An overwhelming majority of the employees have signed cards to join the union. We hereby authorize SEIU–ULTCW, Service Employees International Union—United Long Term Care Workers, its agents or assigns, to act for as our exclusive representative for the purposes of collective bargaining with our employer regarding wages, benefits, and other terms and conditions of employment. We represent a majority of employees who have signed authorization cards and are requesting Vista Del Sol to sign below to grant card check union recognition upon showing of a majority of authorization

[20] Valdivia stated that CNA Sandra Cerros told her around October 17 that she felt forced to sign the petition. (R. Exh. 3; Tr. 685.) Sandra Cerros was not a witness in this proceeding. Given Delfina Sanchez' unrefuted testimony that Cerros gave her an authorization card to sign, I find the hearsay evidence is not reliable and it is insufficient to prove Cerros felt forced to sign the petition.

[21] The name on GC Exh. 21 is illegible.

[22] Maria Menjivar is now married and her surname is Valladares. She is referred to in this decision by her maiden name.

[23] This does not include a card from Velasco, who testified she signed because she feared she would have to pay double if she didn't sign a card.

cards.

(GC Exh. 34; Tr. 41.)

The following employees participated in the march: Marcos Salvador, Martha Aparicio, Lerma Davis, Delfina Sanchez, Aurora Rodriguez, Reyna Artola, Remedios Lopez, Rosalba, San, Jeannette, Rosa Lopez, Ivania Rueda, Angelica, Silvia Figueroa, Zenon Perez, Eliza Mayorga, Maria Ramirez, and Genaro Meza, among others.[24] (Tr. 131, 141, 165, 206, 239, 305–306, 338–339, 407, 480.) They all wore purple shirts bearing the Union's name. (Tr. 39, 240, 275, 307, 340.)

Valdivia told Salvador she did not have the authority to sign the form and she would route it to corporate. She then told them to leave the building. (Tr. 41, 143, 240, 275, 308, 340, 409, 483.) There were no threats of violence or damage to facility. (Tr. 42.) The employees were not loud and they did not shout, chant, or make aggressive comments.[25] (Tr. 483, 350.) Rosa Lopez was the last one to leave. Valdivia approached her and said, "Rosa, we know each other." (Tr. 241.)

Yolanda Velasco signed the petition because the Union had majority support and she feared she would have to pay double if she did not support the Union. (Tr. 563–564; R. Exh. 3.)

CNA Maria Lopez did not sign the petition and did not march, nor did Maintenance Employee Ramon Lopez. (Tr. 181–182, 274, 307–308, 339–340.)

Valdivia forwarded the petition to Preimesberger. (R. Exh. 3.)

Employees sometimes came to the facility on their days off to visit with residents. They didn't stay long and Valdivia did not have a problem with it. (Tr. 45, 241, 341, 410, 484.)

2. Meetings and conversations during the week of October 14

During the week of October 14, management held meetings with employees about work rules. She distributed pages of the employee handbook regarding work rules and progressive discipline, and discussed penalties for tardiness. (Tr. 51; GC Exhs. 66–68.)

On October 15, employees Rosa Lopez, Genaro Meza, Eliza Mayorga, Carmelina Perdomo, Maria Menjivar,[26] and Dafny Cobar met with Valdivia, Cuellar and E. Valdivia in Valdivia's office.[27] (Tr. 242, 318, 341–342.) Valdivia showed the employees a page from the handbook about employee leave and conduct. She then asked what time their shifts started, and told them they needed to come in at their scheduled time. (Tr. 243, 294, 319–320, 342–343, 369–371, 386–388; GC Exh. 68.) Rosa Lopez asked if there was a grace period, and Valdivia responded that it was 7 minutes. Valdivia said the third time they were tardy, they would be terminated. She also told them that they should come appropriately dressed, and they should not wear shirts with logos on them. (Tr. 244, 294, 320, 343.)

Warner and Zelaya conducted another in-service meeting with CNAs on October 15, in the small dining room. Roughly four employees were present, including RNA Artola and CNAs Elfega Lopez, Rosalba Salazar, and Maria Ramirez. During the meeting, Warner said that there would be zero tolerance for tardiness, that she was going to look at each punch-in time, and that employees arriving seven minutes late would receive a warning. Warner said she would give the employees paperwork the following day. (Tr. 276–278.)

Valdivia, Warner, and Zelaya held another meeting on October 16, in the lobby of Valdivia's office. About six employees were present, including RNA Artola and CNAs Salvador, Kiran Singh, Elfega Lopez, and Maria De Fatima Rosa. (Tr. 485–486; GC Exh. 66.)[28] Warner asked the employees what positions they held. She said they were doing a good job, but from this point forward there would be zero tolerance for tardiness. Warner began by stating there was a new arrival time. The 7-minute grace period was being change to a 5-minute grace period, and they would receive warnings if they were tardy. She also said uniforms with logos would not be permitted. (Tr. 484–486.)

Warner held another meeting on October 17, with CNAs Lerma Davis, and Hermila Negrete. She said she was going to look at the punch-in time for each employee. Warner showed a entry for Davis showing that she had clocked in at 11:06. Davis responded that she was within the 7-minute grace period. Warner responded that she didn't know anything about that, and said she would be monitoring their clock-in times. Davis was never given discipline about tardiness. (Tr. 167–170.)

Warner and Valdivia conducted another meeting on October 18 in Valdivia's office. RNA Artola was presented, as were CNAs Ivania Rueda and Anabela Gamez. Warner gave them a piece of paper and told them they could not arrive late. (Tr. 308–310; GC Exh. 67.)[29] Prior to this meeting, Rueda was not aware of a policy stating employees would be disciplined for being more than seven minutes late. The employees were provided with a copy of the policy. (GC Exh. 68.)

In the past, if they employees were late, they could make up the time. Rosa Lopez, Meza, Mayorga, Menjivar, Perdomo, and Cobar were not aware of a rule stating an employee would be fired the third time she was tardy. (Tr. 245, 295, 321, 344, 388–389.) Rosa Lopez was typically tardy beyond the grace period once or twice a week, and had not been disciplined for it. (Tr. 246.) Cobar was tardy once or twice a month, but had not been disciplined for it. (Tr. 295.) Mayorga was tardy about twice per week and was not disciplined. (Tr. 345.) Perdomo was also tardy about twice per week and was not disciplined. (Tr. 390.) Maria Ramirez would typically stay about 30–40 minutes after her shift 2–3 times per week to wait for Petrona or Miguel[30] to show up and relieve her. (Tr. 277–279.) Salva-

[24] Not all of the individuals' surnames are known.

[25] In her affidavits, Valdivia stated that the man who was with the employees yelled, "we're in, we're in" as they were leaving the building. (R. Exh. 3; GC Exh. 89.) During the hearing, Valdivia testified, "They were all chanting—'we're in, we're in,'" but did not say this was as they were leaving. (Tr. 41–42.)

[26] Meza and Mayorga referred to Menjivar's first name as Isabel. (Tr. 318, 342.)

[27] Cobar recalled the meeting was October 16. (Tr. 292.)

[28] It is clear that GC Exh. 66, the notes from the in-service meeting, reflect more than one meeting, as multiple times are reflected on the document.

[29] It is clear that GC Exh. 67 likewise represents notes from more than one meeting, as multiple times are reflected on the document.

[30] The surnames of these employees is not a matter of record.

dor had been late before without repercussions. (Tr. 486–487.) None of the employees were aware of a rule stating employees could not wear shirts with logos. (Tr. 246, 295–296, 345, 372, 390, 486–487.)

Valdivia denied there was a change in the rule, stating that tardiness was a recurring problem she regularly addressed with the staff. She has not disciplined anyone for coming in late. (Tr. 702–703.)

3. Valdivia's distribution of voluntariness forms and inquires to employees,

October 15–22

Valdivia, in consultation with Preimesberger, prepared the following document, which will be referred to as the voluntariness form:

> To:
>
> From: Vista Del Sol Care Center
>
> Re: Union Affiliation by means other than Voluntary
>
> Dear: _____
>
> It has come to our attention by several of you that you have been recently approached at your homes or within our premises seeking your signatures in support to a certain Petition. Some of you have expressed concern with Intimidation tactics by which your signatures were forced into a form. Concurrently with your concerns, we have received a sheet signed by a number of employees apparently in support to a certain petition to affiliate to a Union.
>
> We need you to know that while you have the right to participate in any legal association however, you are not obligated to do so especially as a result of illegal or intimidating tactics. As such, this Memorandum is intended to allow you the opportunity to either affirm your voluntary participation or to decline it if you desire. As your employer, we will be dealing with these issues making sure that your free will, whichever it is, is respected. Please know that your employment with our company will not be altered. In any manner as a result of any decision which you choose to express but only based on your performance under our exiting guidelines and company policy.
>
> Please sign and return this form by no later than October 22, 2013
>
> I,_____,VOLUNTARILY signed the petition seeking
> Print Name
> affiliation with_____(SEIU-United long Term Care Workers)
>
> I, _____DID NOT voluntarily signed the petition
> Print Name
> seeking affiliation with _____ (SEI U-United Long Term Care workers)
>
> Dated:_____
> Signature

(GC Exh. 82; Tr. 694.) Forms with pre-typed names were prepared for and given to Reyna Artola, Maria Ramirez, Romana Lopez, Hermila Negrete, Remedios Lopez, Rosa Lopez, Mirna Segovia, Danely Suazo, Kiran Singh, Rosalba Salazar, and Dafny Cobar. (GC Exhs. 71–81.) Forms without employee names on them were left for employees to pick up and fill out. (GC Exh. 82; Tr. 86.)

Valdivia created the form in response to the employee concerns. (Tr. 688.) Valdivia said that she was worried about the employees and wanted to know whether they had been forced to sign union cards. Valdivia made the return date October 22 because she had heard there was to be a vote on October 23. (Tr. 691.)

On or about October 15, Valdivia told Menjivar to come to her office. Valdivia explained the document, said she was not against the Union, but wanted to know if they had been forced to sign cards. Menjivar said she would take the letter home. She did not sign it. (Tr. 373–374.)

The Union filed a petition for representation with Board on October 17, 2013. (GC Exh. 35.)

On October 18, Valdivia told Rosa Lopez she was going to allow her to take her vacation. Valdivia asked Rosa Lopez what had happened on Monday, and she responded, "You know ma'am because you saw me." Valdivia then said, "I don't know what the persons offer you, those that you trust in." Rosa Lopez responded that "the human being is like a child. That if you have one candy you are happy." Valdivia replied that the economy was very bad and they did not have enough patients to give a raise. (Tr. 248–249.)

Valdivia gave Maria Ramirez a copy the voluntariness form when she was punching out on or around October 18–20. She told her to read it. Ramirez did not sign it. (Tr. 296; GC Exh. 72.)

Around October 19, at about 3:15 p.m.,Valdivia asked Perdomo if someone had given her a card to sign. Perdomo responded that Mayorga had given her a card but she had not signed it. Valdivia told her to let her know if she was forced to sign a card. (Tr. 390–391.)

Around October 20, during break time, Charge Nurse Arcadio DeBorja and Maria Lopez were in a small room referred to as the utility room. DeBorja asked Maria Ramirez whether she was a member of the Union. Maria Ramirez

Romana Lopez met with Valdivia in her office the morning of October 21. Valdiva showed her the voluntariness form and asked whether she understood it. Romana Lopez said she did not understand the form. Valdivia asked whether she was being forced by the Union, and Romana Lopez responded that she was not being forced. Valdivia told Romana Lopez to sign the letter and she would have no problems. She showed her where sign, pointing to the line indicating that she did not voluntarily sign the petition seeking to affiliate with the Union. (Tr. 357–358.)

On October 21, Valdivia asked Rosa Lopez to come to her

office. She gave Rosa Lopez a copy of the voluntariness form, with her name pre-typed on it. (GC Exh. 76.) Valdivia read the letter to Rosa Lopez in English and explained it to her in Spanish. She told Rosa Lopez to sign the letter if she had felt forced to sign a union card. Valdivia said that if Rosa Lopez signed the letter stating that she had been forced, she would have her job as long as she liked. Rosa Lopez said she had not been forced, and she wanted the Union. (Tr. 251–252, 256.)

Cobar received the voluntariness form from Valdivia at about 4 p.m. on October 21. Valdivia told her to read it and sign it. (Tr. 296; GC Exh. 81.)

That same day, Valdivia called Velasco into her office and asked her if she had signed the petition voluntarily. Velasco responded that she had been pressured to sign. Valdivia gave Velasco a copy of the form, with her name typed in, and Velasco signed, stating that she did not sign the petition voluntarily. (Tr. 564–566; R. Exh. 1.) Velasco believed that if she signed this document, she would not be part of the Union. (Tr. 572–574.)

Around this same time, Valdivia and Meza met in Valdivia's office. Valdivia asked Meza if he knew what he had done, and asked if they had forced him to sign. She handed him a copy of the letter and told him he could sign it if he had felt the Union had forced him to sign. He did not respond, and Valdivia said she did not trust him anymore. She asked what the Union was offering them. He said he was in favor of the Union because when he would go to the office to speak with her, she would not give him attention. (Tr. 322–325.)

Later that day, Meza spoke with Cuellar. She asked him if he was going on vacation, and he replied that Valdivia had not approved it. Cuellar said she felt sorry for them because Valdivia was well prepared. (Tr. 325–326.) The conversation took place between Cuellar's office and the laundry room. Mayorga overheard it. (Tr. 346.)

H. October 18 Terminations of Martha Aparicio and Delfina Sanchez

CNAs Martha Aparicio and Delfina Sanchez were issued notices of termination on October 18.[31] (GC 45–46.) That morning, at about 8 a.m. Aparicio met with the Warner and Cuellar in Warner's office. Warner spoke and Cuellar translated. Warner told Aparicio she was not needed at VDS anymore. When Aparicio asked why, Warner mentioned the pictures Adelman took and said she knew she was not permitted to sleep at work. Aparicio asked why they waited so long to terminate her if what she did was so bad. Warner responded that the order came from Valdivia. Aparicio said to Warner, "Well, you're the one that told us not to worry, to just continue work as normal and if that someone fell asleep, just to make sure there was someone that could relieve her." Aparicio mentioned that she was on a break when she was sleeping. She also mentioned that the nurses always sleep. (Tr. 615.) Warner again said there was nothing she could do because the order came from Valdivia. Warner gave Aparicio her check and told her to sign a notice of employee reprimand, but Aparicio refused to sign it. (Tr. 146–150; GC Exh. 45.) Prior to this meeting, no supervisor had questioned her about the events of October 7. (Tr. 150.)

That same day, at around 11 a.m., Sanchez met with Warner and Cuellar in Warner's office. Cuellar provided translation from English to Spanish. (Tr. 612.) Warner told Sanchez that someone had taken pictures of her asleep, and that she was being terminated. Sanchez asked why this was happening 2 weeks after the incident. Warner apologized, but said that because of the pictures, she had to take action.[32] Sanchez asked if she was firing all of them, and Warner responded that she was terminating "all three." Sanchez told Warner that there were four individuals sleeping, including Maria Lopez. Warner said she did not know anything about that but she would continue to investigate to see if someone else had fallen asleep. Sanchez was not questioned prior to this meeting. (Tr. 215–217.)

Final checks issued for Martha Aparicio and Delfina Sanchez on October 15, 2013. (Tr. 70; GC 47.)

The decision to terminate Martha Aparicio and Delfina Sanchez was a joint decision by Warner, Cuellar, and "corporate." Valdivia said there was a "little bit of an investigation" because they had the pictures. (Tr. 695–697.) She did not speak with Aparicio or Sanchez or question them prior to their terminations. (Tr. 89–90, 735.) The reason Valdivia gave for retaining Maria Lopez was that she was not on the schedule and was working in a different building, so Valdivia did not believe she was involved in the incident. (Tr. 697–698.)

After the CNAs were terminated, cameras were installed but CNAs continued to sleep during their breaks. (Tr. 195.)

On October 22, Castillo ran into Cuellar in the parking lot as she arrived for her shift a little before 3 p.m. She asked why they were hiring so many nurses. Cuellar said Valdivia was going to get rid of the people who joined the Union, and remarked that she was glad she was going on vacation with everything that was happening. (Tr. 512.)

At around 5 p.m. that day, Castillo and Zelaya were at the nurses' station. Zelaya said some people tried to talk Valdivia out of firing people.[33] (Tr. 513.)

At Valdivia's request on either October 30 or 31, Adelman wrote a statement regarding what he observed on October 7. His statement, dated October 31, stating that he saw Sanchez and Aparicio "deeply asleep" on some chairs. He further noted that when he turned to the nurse at the desk, she was also asleep. He did not mention the hospice worker because he was not a VDS employee. Adelman did not mention the other nurse in the reception area because he wrote the statement to support the photographs, and he did not have a photograph of this other CNA. (Tr. 111, 114–115; GC Exh. 40.)

[31] On an undetermined date, Valdivia told Cuellar she was ready to terminate Sanchez, Abaunza, and Aparicio. Cuellar agreed that VDS should follow their policy and terminate them. Jennifer Abaunza was issued a notice of termination on October 28, 2013. (Tr. 607–608; GC Exh. 48.)

[32] Cuellar denied that Warner apologized or showed sympathy. (Tr. 614.)

[33] Castillo memorialized her recollection of these conversations, as well as the conversation with Warner about the nurses who were sleeping in statements dated October 21 and October 24, 2014. (GC Exhs. 41, 42.)

I. Discharge of Housekeepers and Maintenance Worker

All six housekeepers and maintenance worker Genaro Meza received their notices of terminations between October 25–27. (Tr. 74; GC Exhs. 49–55.) All of the discharged employees, except Perdomo, openly supported the Union.

Meza was scheduled to work on October 25. Valdivia called him into her office in the afternoon. E. Valdivia and Cuellar were also present. Valdivia told Meza they would no longer need his services because people from the outside would be performing his job. (Tr. 328–329.) Mayorga and Menjivar also worked October 25, and were let go in a similar manner. (Tr. 348, 374–375.)

On October 26, Valdivia met with Cobar, told her the company had decided to contract with a cleaning agency to do the housekeeping, and told her she would give her a reference if she needed one. (Tr. 297.)

On October 27, VDS's housekeeping employees came to work as scheduled. Ramon Lopez approached Rosa Lopez and told her she needed to train a new employee. The new employee wore a red apron that said "Pro-Clean." Rosa Lopez trained the employee and, as she was walking to the parking lot, she ran into Romana Lopez who said she had just been fired. Rosa Lopez then saw Valdivia, who asked to speak to her. They went to Valdivia's office and Valdivia told her that the corporation decided to have another company do the housekeeping, and she was being laid off. Valdivia gave Rosa Lopez a check for the week and for her vacation. (Tr. 257–259.) Romana Lopez and Carmelina Perdomo were let go in a similar manner. Perdomo asked whether the CNAs were being let go, and expressed her belief that the housekeepers were being let go because of the Union. Valdivia responded that she could not let the CNAs go if they were keeping the rules. (Tr. 358, 392–394.)

The housekeeping employees saw their names on the schedule for November 2013 posted shortly before they were discharged. (GC Exh. 60; Tr. 262, 349, 361, 376, 396.)

The contract noted a monthly savings of $831. The annual amount to be paid under the contract was 184,872, in monthly installments of $15,406. (GC Exh. 56.) From July–October 2013, the monthly amount VDS paid to Pro-Clean was $16,387.36. (GC Exh. 98.)

At the time of the discharges, there were two maintenance employees, Genaro Meza and Ramon Lopez. Meza, who was discharged, had signed the union petition and participated in the march. Ramon Lopez, who was retained, did not sign the union petition or participate in the march. (Tr. 75.) Valdivia said Ramon Lopez was retained because he worked the evening shift and doubled as a security guard, and Pro-Clean does not provide services in the evening.[34] (Tr. 720–721.) Meza, who had worked at VDS since 1993, had more seniority than Ramon Lopez.

At the time of their discharges, Maria Menjivar had worked for VDS since 1980, Carmelina Perdomo had worked for VDS since November 3, 1983, Elisa Mayorga had worked for VDS since December 20, 1988, Dafny Cobar had worked for VDS since April 4, 1999, Rosa Lopez had worked for VDS since August 4, 2000, and Romana Lopez had worked for VDS since 2007. (Tr. 234, 288, 335, 352, 366, 379.)

J. Post-Discharge Events

1. Employee visits to facility in November 2013

In November 2013, Rosa Lopez, Elisa Mayorga, Romana Lopez, and Genaro Meza returned to VDS with union organizer Eduardo Gutierrez to request their files. Valdivia said she could not provide them, and they would need to officially request the files. She told them to leave. (Tr. 261–263, 329–330, 350, 362.)

2. CNA raises in December 2013

For the pay period beginning December 1, 2013, VDS gave a 50-cent across-the-board wage increase to all CNAs. (Tr. 18–19.) Lerma Davis, Ivania Rueda, and Remedios Lopez's most recent raises had been 5 years prior. (Tr. 176, 312, 410.) The wage increase was discretionary and unscheduled. (GC Exh. 85.)

3. Conversations between CNA Remedios Lopez and DON Jeri Warner in January 2014

Remedios Lopez received a series of text messages from Warner, who had since been terminated from VDS, between January 1 and January 21, 2014. They stated, in relevant part:

> Rosa did get rid of house keeping and laundry because she said the CNA will need 50% vote. I did not agree with her practices so she has to fire me too.
>
> . . .
>
> What is the name of your local union and the local number? I am writing corporate to let them know that Rosa was retaliating against the CNA formation of the union. I will tell your union if the (sic) want 2 know. I also told Dion this same thing so I am not a disgruntled employee!
>
> . . .
>
> Of course I said all along but she was so mad about this union business Rosa did (sic) even want 2 do employee of the month which I said should be u and Marcos. Nope she wAs 2 mad.
>
> . . .
>
> I know that the people rosa fired have a case with the labor board. I need to find out information about that. I think rosa is gonna blame things on me & I need to make sure she does not & I do need to let the labor board know that rosa fired them as retaliation. If u know anything let me know.

(GC Exh. 92; Tr. 412–413; 418.) Remedios Lopez also spoke with Warner the day she was terminated. Warner told him that "she wanted us to continue with the Union and she wanted to help us. And if we needed anything to call her and she would

[34] Valdivia said Ramon Lopez worked 3–7 p.m. both before and after the switch to Pro-clean but the evidence shows he worked more. (Tr. 779; GC Exh. 100.)

give us good advice." (Tr. 419.)

4. October 9, 2014 letter

On October 9, 2014, the Respondent's attorney sent a letter to the Region regarding settlement. The letter was copied to the Union's attorney and states, in relevant part:

> Please accept the following as a reply to both the proposals for settlement as well as the warnings if settlement fails. . . . We strongly suggest that the Board ensure that the employees are made aware of these offers and that they have a say in the decision. They may not like the alternative. . . . the only alternative VDS [Vista Del Sol/Respondent] will have is to close down its facility. In such a situation, . . . the remaining of the 60 employees will lose their employment. . . . This letter is been [sic] sent to the Union's Counsel as well in the hope that she makes the Claimants [discriminatees] aware of all alternatives so they have the opportunity to make informed selfless decisions.

(GC Exh. 83.) On November 3, 2014, Paul Vellanoweth from the Union showed Remedios Lopez, Rosa Lopez, and Reyna Artola the letter when they met at a McDonald's. (Tr. 414–415, 441–442.)

On July 14, 2014, Valdivia sent an email to Luis Torres at Pro-Clean services suggesting that they keep Ramon Lopez as maintenance supervisor in the afternoons, and she would supervise the housekeepers in the morning. (Tr. 744; GC Exh. 95.)

III. DECISION AND ANALYSIS

A. Credibility Legal Standards and General Findings

Many of the disputes at issue rest on witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below. My general observation, however, was that Valdivia's testimony was contradictory at times. For example, she testified both that she gave input into the decision to subcontract the housekeeping department, and that she was not involved in the decision. Her testimony was also inconsistent with other reliable evidence of record. For example, she said she was not at any of the October meetings with employees regarding tardiness and uniforms, but this is contradicted by the corroborative testimony of multiple witnesses. Valdivia gave further inconsistent testimony about the level of investigation she conducted prior to terminating Martha Aparicio and Delfina Sanchez. She testified that she did a "little bit" of an investigation, but did not speak with either employee prior to terminating them. For the first time at the hearing, Valdivia said she called them on the phone and neither answered. (Tr. 90.) This simply lacks credence, given that minimal effort would have been required for her to reach Martha Aparicio and Delfina Sanchez to speak to them.

Valdivia was at times evasive in her testimony. For example, she testified about a stricter policy regarding employees visiting VDS off duty until she was presented with her affidavit. (Tr. 43–45.) Valdivia was also evasive when it came to identifying decision-makers. She referred to "corporate" during her testimony but, even when pressed, was reluctant to provide names of the individual decision makers comprising "corporate."

The testimony of the employees and former employees was generally corroborative and credible, as discussed below. Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

The Respondent asserts that the employee and former employee witnesses were coached to provide the exact same testimony about the events of October 2013. (R. Br. 16–17.) The record belies this, however, and it is readily apparent that the witness' testimony, while generally corroborative, is not exactly the same. The Respondent also argues that the witness' recollection of the events at issue does not square with their failure to recall receiving and signing for the employee handbook. First, I note that most employees were not asked about their receipt of the employee handbook. In any event, many of the witnesses had worked for VDS for a very long time, and therefore failure to recall receipt of a document ostensibly given to them during orientation long ago is not suspicious. For these reasons, I reject the Respondent's arguments about witness coaching.

B. The 8(a)(1) Allegations

The complaint alleges numerous violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees

in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "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 . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147(1959).

It is the General Counsel's burden to prove Section 8(a)(1) allegations by a preponderance of the evidence.

1. Alleged instructions not to talk to the Union

a. CNAs Remedios Lopez and Marcos Salvador

The complaint alleges, at paragraph 9(a), that in or around August 2013, Valdivia, by the nurses' station, instructed employees not to talk to the Union, in violation of Section 8(a)(1).

Valdivia, Remedios Lopez, and Salvador, all agree that Valdivia conducted meetings about individuals visiting employees at their homes during this time period. Valdivia's testimony does not reference the Union, and is couched more in terms of warning employees in light of the theft of the I-9 binder. Salvador recalled Valdivia stating that a man with a tattoo was pretending to be from the Union and was looking to rob the employees. Remedios Lopez recalled Valdivia stating that if "any men came to knock on our door at home to not let them in, because she had lost some document that someone had gone into her office to steal that and they could do something with that personal information of ours." (Tr. 406.) A similar meeting took place around this same time period with Esther Cuellar and a group of housekeepers.

I find the employees' accounts of the meeting to be credible and reliable.[35] First, as current employees, Remedios Lopez and Salvador were testifying against their pecuniary interests. They responded to open-ended questions in a straightforward manner, and appeared to be genuinely attempting to recall what occurred. Moreover, their testimony is generally in line with Valdivia's testimony that she held meetings during this time period, and with the similar meeting Cuellar conducted. It is also more in line with the events that were unfolding in August 2013.

I find that Valdivia's instructions would tend to restrain and interfere with employees in the exercise of their Section 7 rights. Though motivation is not a requirement to establish an 8(a)(1) violation, the timing of events is important. Valdivia reported the alleged theft of the I-9 binder to the police on May 15. Had she truly been concerned about protecting her employees, it is curious that she waited until August, when the union organizers started visiting employees, to warn employees about the potential consequences of the binder's theft. Any claim that Valdivia did not know, or at least suspect, that it was union organizers visiting the employees is belied by the reports from employees that union organizers visited them at their homes.[36] (See, e.g., GC Exh. 89, p. 2.) From the employees' standpoint, as Union organizing efforts were getting underway, the highest management official at the facility was instructing them that the individuals claiming to be from the Union were thieves, and saying the employees should not open their doors to them.

Valdivia easily could have told employees about the potential breach of their personally identifiable information and warned them to take precautions without implicating the Union and stating that the individuals visiting them were thieves.[37] In her affidavit, Valdivia stated that she posted a notice of the theft by the employee time clock "sometime later in May," and that she had a copy of the notice. (R. Exh. 3.) The notice was not attached to her affidavit or provided at the hearing. In its response in the 10(j) proceedings, the Respondent said Valdivia "filed a police report that same day and notified employees of the theft . . . ." (GC Exh. 88.) The record is devoid, however, of any employee meetings at or around the time the binder went missing. In fact, the record contains examples of Valdivia informing employees of the binder's disappearance during these meetings.

In short, it was not until Valdivia received reports of employees being visited by the Union that she decided to hold meetings warning employees not to answer their doors. Particularly when coupled with other evidence of coercion herein, I find the meeting violated Section 8(a)(1) as alleged.

b. Housekeeper Rosa Lopez

Paragraph 9(b) of the complaint alleges that, in or around August 2013, Valdivia instructed employees by telephone not to talk to the Union.

Rosa Lopez provided unrefuted testimony that in or around August 13, Valdivia called her on the phone at about 7 p.m. and told her employees were being visited at home, and she should not let the visitors in because they were thieves. Lopez confirmed nobody had visited her at home.

[35] Though Remedios Lopez had the date wrong, considering the events occurred more than a year prior to the hearing, I do not find this renders his memory of the meeting's content unreliable. See *Dorothy Shamrock Coal Co*., 279 NLRB 1298 (1986); *Sheet Metal Workers Local 224*, 297 NLRB 528, 535 (1990).

[36] Valorie Hanson testified that, on October 7, she reported the Union's visits to her home to Valdivia. She specifically testified that the individual identified himself as being from the Union. Valdivia, in her affidavit, recalled that Hanson told her the individual who visited her identified himself as being from VDS. When she testified Valdivia could not recall whether Hanson had reported the individual was from VDS. I do not credit Hanson's testimony for the reasons discussed below regarding Aparicio and Sanchez' terminations, and because I find it unlikely that the Union would have visited her because she is a supervisor. Instead, I find this testimony, like her discredited testimony at the hearing that she regularly worked on the nigh tshift, was fabricated, and was an attempt to bolster an argument that the Union was harassing employees. I do not credit Valdivia's recollection because it is inconsistent, and as discussed herein, I find she was motivated to thwart the Union's efforts on behalf of her superiors. Even with these accounts discredited, however, Valdivia admittedly had heard about the Union visiting employees at home as of August 8.

[37] Indeed, there is no evidence that employees were instructed to freeze their credit files or place fraud alerts on their files.

I credit Rosa Lopez' testimony because it is unrefuted, and note that her recollection was buttressed by the fact that a call at home from Valdivia was unusual.[38] For the reasons stated above, I find the telephone call would tend to coerce Rosa Lopez, particularly considering she was one of the employees who spoke to coworkers about the Union to solicit their support.

2. Alleged wage increases—CNA Maria Ramirez and Housekeeper Romana Lopez

Paragraph 9(c) of the complaint alleges that the Respondent violated Section 8(a)(1) when, on October 10, 2013, it granted a wage increase.

CNA Maria Ramirez and Housekeeper Romana Lopez each received wage increases of 50 cents per hour beginning with the pay period ending September 30.

The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." As the Court explained in *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

(Footnote omitted.) It held that that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. It is well-settled that the *Exchange Parts* principles apply to promises and/or granting of wage increases or other benefits, if they are made in response to union organizational activity, regardless of whether a representation petition has been filed. *Network Dynamics*, 351 NLRB 1423, 1424 (2007); *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006).

Unlike most 8(a)(1) allegations, analysis of a claim that benefits were promised, announced, or granted to coerce employees in their choice of bargaining representative is motive-based. *Network Dynamics Cabling, Inc*., 351 NLRB 1423, 1424 (2007). The granting of benefits to employees during union organizational activity "is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election." *American Sunroof Corp*., 248 NLRB 748, 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981).

To establish such a claim, the General Counsel must first prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc*., 319 NLRB 916 (1995). If the General Counsel meets this burden, the employer must demonstrate a legitimate business reason for the timing of the benefit. One way to do this is to show the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof*, supra at 748; see also *Real Foods Co*., 350 NLRB 309, 310 (2007); *Holly Farms Corp*., 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1362 (4th Cir. 1995), affd. 517 U.S. 392 (1996); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087–1090 (2004).

Both CNA Maria Ramirez and Housekeeper Romana Lopez received 50 cents-per-hour raises, which, while relatively small on their own, were a relatively large percentage of their respective wage rates. The increase was only provided to two employees: a housekeeper and a CNA.

Turning to the General Counsel's burden, it is unclear how employees would view the benefit. Neither employee was asked how they viewed the raise, and there is no evidence either employee shared her raise with coworkers.[39] In fact, Valdivia told Maria Ramirez not to tell her coworkers about her raise. While the timing of the raises coincided with organizing activity, Romana Lopez admittedly did not become involved with the Union until October, yet the pay raise was effective the pay period ending September 30. Moreover, there was no evidence that, as of this time, either individual was a union supporter or was likely to steer her fellow employees in one direction or the other. Admittedly, wage increases were not given pursuant to any set schedule, so there was no deviation from an established past practice. Under these circumstances, I find the pay raises to these two individuals were not coercive at the time they were effected.[40] I therefore recommend dismissal of this complaint allegation.

3. Alleged interrogation and surveillance—CNA Maria Ramirez

Paragraph 9(d) of the complaint alleges that on or about October 14, Valdivia interrogated employees about their union activities and sympathies and the union activities and sympathies of other employees. Paragraph 9(e) alleges that at this same time and place, Valdivia created an impression of surveillance by telling employees about cards being circulated.

The exchange between Maria Ramirez and Valdivia on October 14 is detailed above in the statement of facts. In sum, Valdivia asked if "they" had been back to visit her, and said she knew who "they" were. Valdivia also asked about the cards that were being handed out. Maria Ramirez admitted that she had signed a list the employees would be taking to Valdivia, and told Valdivia she signed the list because she wanted to be valued and respected. Valdivia told her she could change her mind if she wanted to. Valdivia told Maria Ramirez that if she put her trust in the Union, the two of them would not be able to speak as they were doing. Maria Ramirez' testimony about the

[38] The General Counsel requests an adverse inference because Valdivia, who testified at the hearing, did not refute this allegation. (GC Br. 12.) I find an adverse inference is warranted. *Flexsteel Industries*, 316 NLRB 745, 758 (1995).

[39] Romana Lopez was not asked about the raise at all.

[40] Though I have found these raises not to be unlawful in and of themselves, I do consider the increases to be relevant evidence with regard to the pre-printed voluntariness forms Valdivia presented to them, and to the interrogation surveillance of Maria Ramirez, discussed directly below.

exchange is unrefuted, and I credit it.[41] Maria Ramirez responded to open-ended questions in a thoughtful manner. There was nothing in her demeanor to indicate she was fabricating her responses. As a current employee testifying against her own pecuniary interests, I find her testimony to be particularly reliable.

a. Interrogation

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005).

The Board also considers the timing of the interrogation and whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954). Another factor is whether adequate assurances were provided. See *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1223-1224 (2002). These factors "are not to be mechanically applied," they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, fn. 20.

Turning to the first *Bourne* factor, there is no evidence of a history of hostility toward union activity. While this would tend to weigh in the Respondent's favor, no evidence was presented that there had been union activity in the past. This factor, therefore, has no real mechanism for assessment.

The second *Bourne* factor weighs in the General Counsel's favor. Valdivia asked Maria Ramirez if "they" had visited her again, and stated she knew who "they" were. The evidence is clear that by this time Valdivia had reports of individuals from the Union visiting employees at home. This question, therefore, directly probed at Maria Ramirez's contacts with the Union. Valdivia's question about the authorization cards likewise was aimed directly at employees' union activity.

The identity of the interrogator weighs in the General Counsel's favor, as Valdivia was the top management official at VDS. The place and method of interrogation also weigh in the General Counsel's favor. The conversation began in the hallway, but Valdivia then asked Maria Ramirez to come to her office, where nobody else was present and doors were closed, and asked her directly about union activity. As to the last *Bourne* factor, the truth of the response, this is mixed. Maria Ramirez responded that she, too, knew who "they" were, but did not divulge information about the authorization cards.

The Respondent cites to *Rossmore House* for the following:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace.

269 NLRB at 1177, quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983). (R. Br. 11.) I note, however, that Valdivia is not akin to a production supervisor—she is the top administrator, two levels up from Maria Ramirez in the chain of command. In addition, this was not a casual conversation where the Union just happened to come up. The conversation began with a pointed question about whether Maria Ramirez had been visited again, and did not stray from the general topic of union activity.

The Respondent also points to the Supreme Court's statement in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), that the First Amendment protects employer speech during an organizing campaign "so long as such expression contains 'no threat of reprisal or force or promise of benefit'" in violation of the Act. (R. Br. 11.) This quote is taken somewhat out of context, however. The protection the Court was discussing was the employer's freedom "to communicate to his employees any of his general views about unionism or any of his specific views about a particular union," not the freedom to question employees about their and their coworkers' union activities. 395 U.S. at 618.

Considering the totality of the evidence, including the timing of events and the absence of assurances Valdivia gave regarding her questions, I find the General Counsel has met its burden to prove this allegation.

b. Surveillance

The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB,* 682 F.2d 98 (3d Cir. 1982)).

The Board has consistently held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. See *Fred'k Wallace & Son, Inc*., 331 NLRB 914, 915 (2000). For example, in *Metal Industries*, 251 NLRB 1523, 1523 (1980), the Board found no unlawful surveillance of employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the work-

[41] The General Counsel requests an adverse inference because Valdivia, who testified at the hearing, did not refute this allegation. (GC Br. 18.) I find an adverse inference is warranted, both as to the interrogation allegation and the surveillance allegation concerning Maria Ramirez. *Flexsteel Industries*, 316 NLRB 745, 758 (1995).

day. The employer's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice. See also *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003).

Employers may not, however, "do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003); See also *Partylite Worldwide, Inc*., 344 NLRB 1342 (2005); *Arrow Automotive Industries,* 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007). The Board's analysis thus focuses on whether the observations were ordinary or represented unusual behavior. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008).

When an employer tells employees it knows about their union activities but fails to cite its information source, Section 8(a)(1) is violated because employees must speculate about how such information was obtained, creating the impression of surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1296 (2009).

I find Valdivia's question to Maria Ramirez about whether "they" had visited her house, coupled with her comment that she knew who "they" were created the impression that Maria Ramirez's union activity was being monitored. Valdivia's question about authorization cards, the existence of which Maria Ramirez had not disclosed to her, is further evidence that union activities were being watched. Valdivia never revealed the source of the information about the union cards or how she knew who "they" were. Moreover, as discussed in the section on interrogation above, Valdivia's statements were part of a casual conversation, but instead were pointed comments about Union activity she herself did not observe in the ordinary course of her work.

Accordingly, I find the General Counsel proved, by preponderant evidence, that Valdivia engaged in unlawful surveillance as alleged.

4. Alleged interrogation—Housekeeper Carmelina Perdomo

Complaint paragraph 9(g) alleges that the Respondent, by Rosa Valdivia, on about October 14, 2013, in Rosa Valdivia's office, interrogated its employees about their union activities.

As set forth above, around October 19, at about 3:15 p.m., Valdivia asked Housekeeper Carmelina Perdomo if someone had given her a card to sign. Perdomo responded that Mayorga had given her a card but she had not signed it. Valdivia told her to let her know if she was forced to sign a card. Previously, in mid-September, Valdivia had asked Perdomo if anyone had visited her at her home. Perdomo responded she had been visited. Valdivia asked the name of the individual, and Perdomo told her it was Jose Manzano.[42]

The legal standards for interrogation cited above apply. The analysis of the first four *Bourne* factors, i.e., the employer's background, the nature of the information sought, the identity of the interrogator, and the method and place of interrogation, is virtually the same for Perdomo as for Maria Ramirez. By October 19, however, Valdivia's questions are against a backdrop of hostility toward and discrimination against the Union, as discussed below. The Moreover, the conversation at issue took place entirely in Valdivia's office. Perdomo was not an open union supporter, and Valdivia had by this time seen that she had not signed the petition. The question aimed at ascertaining the identity of the individual who gave Perdomo a card goes directly toward protected activity. Moreover, the timing of the conversation took place 2 days after the Union filed its petition for representation.

Considering the totality of the evidence, including and the absence of assurances Valdivia gave regarding her questions, I find the General Counsel has met its burden to prove this allegation.

5. Alleged interrogation and coercion—Maintenance Worker Genaro Meza

Complaint paragraph 9(j) alleges that Valdivia, on or about October 18, 2013, in Rosa Valdivia's office, interrogated its employees about their union activities and sympathies and about what the Union had promised employees. Complaint paragraph 9(k) alleges that on this same date and in this same location, Valdivia told employees she did not trust them.

About 8 days after October 14 the march, Valdivia and Meza met in Valdivia's office. Valdivia asked Meza if he knew what he had done, and asked if they had forced him to sign the petition. She handed him a copy of the voluntariness form, and told him he could sign it if he had felt the Union had forced him to sign. He did not respond, and Valdivia said she did not trust him anymore. She asked what the Union was offering the employees. He responded that was in favor of the Union because when he would go to the office to speak with her, she would not give him attention. (Tr. 322–325.)

The legal standards for interrogation cited above apply, and the analysis of the first four *Bourne* factors mirrors that Valdivia's interrogation of Perdomo. Meza was an open Union supporter, as his name had appeared on the petition. Valdivia's questions to Meza, asking him if he knew what he had done by signing the petition and asking what he thought the Union offered employees, go directly to his union activity. The questions took place within days of the march and presentation of the petition, and within days of Union filing its petition for representation.

Turning to the comment that Valdivia no longer trusted Meza, this is tantamount to equating support of the union with betrayal and disloyalty, and is therefore coercive. See *Hialeah Hosp*., 343 NLRB 391, 391 (2004) (hospital official telling the employees that he felt "betrayed" and "stabbed in the back" because they had contacted the Union sent message that Union support was tantamount to disloyalty and was implied threat); see also *Rosewood Mfg. Co*., 269 NLRB 782, 785 (1984); *Operating Engineers Local 12*, 237 NLRB 1556, 1558 (1978).

Considering the totality of the evidence, including and the absence of assurances Valdivia gave regarding her questions, I find the General Counsel has met its burden to prove these allegations.

6. Alleged interrogation—Maria Ramirez

Complaint paragraph 11 alleges that on October 20, 2013,

[42] Again, this testimony is unrefuted and, for the reasons set forth above, I find an adverse inference is warranted based on Valdivia's failure to testify about this conversation. (GC Br. 26.)

Respondent, by Arcadio De Borja, in the utility room, interrogated its employees about their union membership

Around October 20, during break time, Charge Nurse Arcadio DeBorja and Maria Lopez were in a small room referred to as the utility room. DeBorja asked Maria Ramirez whether she was a member of the Union. Maria Ramirez was quiet in response, and DeBorja said, "Tell me." She responded yes, and said she was prepared to be fired.[43]

The legal standards for interrogation, set forth above, apply to this allegation. Applying the *Bourne* factors, I first find that the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity, by this point weighs against the Respondent based on the conduct articulated throughout this decision. The nature of the information sought was whether Maria Ramirez supported the Union, which weighs against the Respondent. The identity of the interrogator was a charge nurse, who stood in direct supervision of Maria Ramirez in the organizational hierarchy. The place and method of the interrogation was a closed room with nobody else present. Maria Ramirez did not bring up the Union during the conversation and did not otherwise invite the topic. This weighs against the Respondent. While Maria Ramirez responded truthfully, she also stated she thought her union support would get her fired.

Considering the totality of the evidence, including and the absence of assurances DeBorja gave regarding his question, I find the General Counsel has met its burden to prove this allegation.

7. Alleged interrogation—Genaro Meza

Complaint paragraph 12 alleges that, around October 23, 2013, Respondent, by Ester Cuellar, near Ester Cuellar's office or the laundry area, impliedly threatened its employees with unspecified reprisals in response to their union activities

Around October 23, Cuellar and Meza had a conversation by the laundry room. Cuellar asked Meza if he was going on vacation, and he replied that Valdivia had not approved his vacation request. Cuellar said she felt sorry for them because Valdivia was well prepared. Mayorga overheard the conversation.

The comment, on its face and taken in context, is more cautionary than explicitly threatening. This does not, however, make the comment lawful. I note that the comment was made about a week after the employees presented the petition to Valdivia, and the Union filed the petition for representation with the Board.

In *Jordan Marsh Stores Corp*., 317 NLRB 460, 462–463 (1995), the Board found that cautionary advice from a supervisor to an employee to watch her back "might have been all the more ominous" coming "from a friend sincerely concerned for the employee's job security." See also *Olney IGA Foodliner*, 286 NLRB 741, 748 (1987), enfd. 870 F.2d 1279 (7th Cir. 1989) (threats possibly intended as "friendly advice" found violative); *Trover Clinic*, 280 NLRB 6 fn. 1 (1986) ("keep a low profile" and "be quiet about it"); *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) (holding a "be careful" statement by a supervisor in context of union activity unlawful).

Cuellar's cautionary comment about Valdivia's preparedness is similar to the comments above, which were found to constitute threats of unspecified reprisals. Accordingly, I find this comment violates Section 8(a)(1) of the Act as alleged.

8. Telling employees to leave the premises

Complaint paragraph 9(f) alleges that, on or about October 14, by the nurses' station, Valdivia told off-duty employees they had to leave the premises.

Valdivia's instructions to employees to leave the facility during the presentation of the petition on October 14 are detailed in the statement of facts.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that an employer's rule barring off-duty employees access to their employer's facility is valid only if it: "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity."

In the instant case, the evidence fails to show the Respondent had published or disseminated to its employees any no-access rule concerning off-duty employees. The only employees who were told to leave the building were those who participated in the march. Moreover, as set forth in the statement of facts above, employees were permitted to come to the facility for other non-work reasons, and therefore Valdivia's instruction to leave the facility was focused on the employees' Section 7 activity.

The Respondent asserts that Valdivia was justified in telling the employees to leave because, as a care facility, it must provide a peaceful and secure environment for its patients. (R. Br. 12.) Recognizing the need for hospitals to provide a tranquil atmosphere to carry out its primary function of patient care, the Supreme Court and the Board have recognized some special considerations when it comes to Section 7 activity in a hospital setting. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978); *St. John's Hospital & School of Nursing, Inc*., 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1997). As such, hospitals "may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *St. John's Hospital*, supra. As to other areas, a hospital may place prohibitions on employees who engage in Section 7 activities only if it proves the prohibition is needed to prevent patient disturbance or disruption of health care operations. Id.; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781–787 (1979).

[43] This testimony is unrefuted and DeBorja did not testify. The General Counsel asks for an adverse inference based on De Borja's failure to testify. (GC Br. 44.) The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). I therefore grant this request and find De Borja's testimony would have been harmful to the Respondent.

Here, the group of 31 employees and union organizers approached the nurses' station and presented the petition. There is no evidence they were loud or disruptive to patient care. The only potentially disruptive actions of record are an individual shouting, "we're in, we're in" on the way out the door, which was after they had been told to leave. I do find that, at this point, Valdivia was justified in ensuring they left the facility. I also find that even a peaceful group of 31 employees congregating for a lengthy period by the nurses' station would be eventually be disruptive to VDS's operations. This allegation turns on conduct occurring within a very small time window, but within that window, I find the General Counsel has met its burden to prove interference with Section 7 activity.

9. Promulgation and enforcement of rules

a. Rule Prohibiting Logos

Complaint paragraph 9(h) alleges that the Respondent, by Rosa Valdivia, about October 15, 2013, in Rosa Valdivia's office, told its employees it would more strictly enforce its uniform policy and/or implicitly prohibited its employees from wearing union insignia.

As detailed in the statement of facts, a series of meetings were held with employees in the wake of the October 14 march and presentation of the petition to Valdivia. Numerous current and former employees recounted that they were told they could not wear clothing with logos or words to work. The employees all agreed that no such rule had been announced or enforced at VDS before.

In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. In other words, the relevant inquiry under Section 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981).

In *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801–03 (1945), the Supreme Court held that employees have a protected right to wear union buttons and other insignia at work. This right is balanced against the employer's right to maintain order, productivity and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where the employer proves that "special circumstances" exist. Id. at 797-98; see also *Sam's Club,* 349 NLRB 1007, 1010 (2007).

I find the rule violations Section 8(a)(1) under many of the *Lutheran Heritage* criteria. First, I find it expressly restricts the Section 7 right to display union insignia at work. Assuming it is not an express restriction, however, I find employees would reasonably construe it to prohibit wearing union logos or insignia. The evidence also shows that the rule was promulgated in response to Section 7 activity. The meetings where the rule was announced occurred just on the heels of the employee march and presentation of petition, where the employees all wore matching T-shirts with the Union's logo. The absence of any prior announcement of such a rule, and the absence of any explanation for the timing of its promulgation, is telling. As the record is devoid of evidence of special circumstances, I find the General Counsel has established this allegation.

The Respondent contends that only nursing department employees were at these meetings, citing to its attendance records. (GC Exhs. 66–67.) This does not account for the unrefuted and corroborative testimony of numerous housekeeping employees, which I credit, that they too went to such meetings. No foundation was established as to how (or if) housekeeping meetings were recorded. Moreover, Respondent previously admitted that it "told employees . . . that logos were now prohibited." (GC Exh. 88, p. 23.)

The Respondent has also asserted that the rule prohibiting logos was not enforced. However, "[t]he mere existence of an overly broad rule tends to restrain and interfere with employee rights under the Act even if not enforced." *Staco, Inc.,* 244 NLRB 461, 469 (1979); see also *Automated Products, Inc*., 242 NLRB 424 (1979); *Custom Trim Products*, 255 NLRB 787, 788 (1981).

Based on the foregoing, I find the preponderant evidence establishes the announcement of the rule against wearing logos violated the Act as alleged.

b. Rule more strictly enforcing tardiness policy

Complaint allegation 10 alleges that, around the week of October 14, 2013, Respondent, by Rosa Valdivia and Jeri Warner, at meetings at Respondent's facility, told its employees it would more strictly enforce its tardiness policy in response to their union activities.

As detailed in the statement of facts, a series of meetings were held with employees in the wake of the October 14 march and presentation of the petition to Valdivia. Numerous current and former employees recounted that they were told they would no longer be permitted the same grace period, their attendance would be monitored more closely, and being tardy would result in progressive discipline. The employees all agreed that no such rule had been enforced at VDS before, and employees routinely clocked in beyond the grace period and were not disciplined.

The legal framework for workplace rules and the legal precedent set forth above applies here.

The announcement that the tardiness policy, which had been previously been ignored, would now be enforced, is not an explicit restriction on Section 7 rights. I find, however, that the second *Lutheran Heritage* criteria applies, i.e. the rule was promulgated in response to union activity. The timing of the announcement, on the heels of the march and presentation of

the petition to Valdivia, is strong evidence that it was a response to such.

The Respondent contends that ensuring the employees work their scheduled shift is extremely important in a patient care setting, and tardiness has been an ongoing problem it has attempted to address before any union activity began. (R. Br. 7–8.) I do not doubt the Respondent's assertions. I find, however, the fact that the rule was announced but never enforced shows it was not implemented for a legitimate reason, such as an urgent business need to ensure employees show up to work on time. Instead, the evidence persuades that it was an attempt to coerce employees in the wake of the Union coming forward with evidence of majority status.

10. Alleged unlawful polling

Complaint paragraph 8 alleges that from about October 17–21, 2013, the Respondent, by letter, interrogated and polled employees about their union sympathies. Complaint paragraph 9(i) alleges that, during this same time period, the Respondent, at its facility, interrogated and polled employees about their union sympathies.

The voluntariness form, and the manner in which it was presented to various employees, is detailed in the statement of facts.

Polling employees about their union sympathies can constitute a form of interrogation. *Vaughan Printers*, 196 NLRB 161, 164 (1972). For the polling to be lawful, all of the safeguards required under *Struksnes Construction Co*., 165 NLRB 1062 (1967), must be applied as follows:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Id. at 1063. See also *Johnnie's Poultry*, 146 NLRB 770, 775 (1964); *HTH Corp*., 356 NLRB No. 182, slip op. at 8 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012). "[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." *Struksnes Constr. Co.,* supra.

In *Struksnes*, the Board concluded that a "poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found violative of Section 8(a)(1) of the Act." *Struksnes*, 165 NLRB at 1063.

I find that the voluntariness form constituted polling, as it was clearly aimed at finding out employees' union sympathies. Valdivia stated she formulated and distributed the letter because she was concerned about the reports from employees of visitors to their homes. Under the analysis applicable to this claim, Valdivia's stated reason for conducting the poll is not a relevant factor. Regardless, I find the timing of the poll, more than two months she learned employees were visited at their homes, and right after the march and presentation of the petition, undermines Valdivia's stated motivational rationale.

I find I further find that the polling was *per se* unlawful under *Struksnes*, because it occurred after the union had presented its petition to Valdivia on October 14, 2013, and while a petition for a Board election—filed October 17, 2013—was pending.

Assuming it was not unlawful per se, I find the polling, both by the voluntariness form itself and the various conversations Valdivia had about it, did not contain the requisite safeguards. Most clearly, the polling was not conducted by secret ballot, no assurances against reprisal were given, and the poll was conducted in the context of other unfair labor practices and a coercive atmosphere.

The Respondent contends the voluntariness form cannot be considered polling because there was no requirement that the employees return it. (R. Br. 10.) Employees need not be required to fill out and return a document for its distribution to be considered unlawful polling. See *Walters, William, Inc*., 179 NLRB 709, 710 (1969) (unlawful poll found where questionnaire was distributed to employees to return if they desired).

The Respondent also contends that responses were not coerced. This is belied by the promise to Rosa Lopez that she could have her job as long as she wanted if she stated she had been forced to sign the petition, and by Romana Lopez' belief that she needed to sign the form indicating she had been forced to sign the petition in order to retain her job. Even for the employees who resisted signing, I find that, from an objective standpoint, the voluntariness form was coercive and did not meet the standards set forth in *Struksnes*, supra. As such, I find the General Counsel has met its burden to prove this allegation.

11. Interrogation and promise of enhanced job security—Housekeeper Rosa Lopez

Complaint paragraph 9(l) and (m) alleges that, on or about October 21, Valdivia, in her office, interrogated employees and promised greater job security if the employees rejected the Union.

On October 21, Valdivia gave Housekeeper Rosa Lopez a copy of the voluntariness form with her name typed onto it. Valdivia read the letter to Rosa Lopez in English and explained it in Spanish. Valdivia told Rosa Lopez she was worried about the employees being forced to sign the petition, and told her to sign the letter if she had felt forced to sign the petition. Valdivia said that if Rosa Lopez signed the letter stating that she had been forced, she would have her job as long as she liked. Rosa Lopez said she had not been forced, and she wanted the Union.[44]

The legal standards for interrogation cited above apply, and

[44] Again, this testimony is unrefuted and, for the reasons set forth above, I find an adverse inference is warranted based on Valdivia's failure to testify about this conversation applicable both to the interrogation allegation and the promise of increased job security allegation. (GC Br. 46, 48.)

the analysis of the *Bourne* factors mirrors Valdivia's interrogation of Meza. As with Meza, Rosa Lopez, who had signed the petition, was questioned about it by Valdivia, the highest management official at VDS. The questioning occurred in Valdivia's office, behind closed doors, with nobody else present. The march had occurred just a week before, and the Union had filed the petition for representation just days before.

Considering the totality of the evidence, including and the absence of assurances Valdivia gave regarding her questions, I find the General Counsel has met its burden to prove this allegation.

Turning to the allegation that Valdivia told Rosa Lopez that if she signed the voluntariness form stating that she had been forced, she would have her job as long as she liked, the legal standards set forth in *NLRB v. Exchange Parts Co*., articulated in the section on the October wage increases for Maria Ramirez and Rosa Lopez, apply. I find this is was an unlawful promise of increased job security in exchange for repudiating the Union. See *Dyncorp*, 343 NLRB 1197, 1198 (2004), citing *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994). See also *Sequoyah Spinning Mills*, 194 NLRB 1175, 1192 (1972).

There is no question an employee would reasonably view such a comment as an attempt to interfere with or coerce her in her choice on union representation. There can be no conceivable legitimate business justification for such a promise. In fact, by any reasonable construction, it is an implied threat that failing to sign the form stating her support for the Union was forced will result in diminished job security.

By telling Rosa Lopez she could have her job as long as she wanted if she signed the voluntariness form to indicate she was forced into signing the petition, the Respondent has violated Section 8(a)(1).

12. Threat of Facility Closure

Complaint paragraph 13 alleges that, on October 9, 2014, the Respondent, by a letter from its attorney, threatened employees with closure of its facility and job loss for engaging in protected concerted and/or union activities.

Counsel for the Respondent sent the letter to the counsel for the General Counsel, copied to the Union's counsel. It stated, in relevant part:

> Please accept the following as a reply to both the proposals for settlement as well as the warnings if settlement fails. . . . We strongly suggest that the Board ensure that the employees are made aware of these offers and that they have a say in the decision. They may not like the alternative. . . . the only alternative VDS will have is to close down its facility. In such a situation, . . . the remaining of the 60 employees will lose their employment. . . . This letter is been [sic] sent to the Union's Counsel as well in the hope that she makes the Claimants aware of all alternatives so they have the opportunity to make informed selfless decisions.

Union Organizer Paul Vellanoweth showed the letter to employees.

Statements connecting union activity to plant closure violate Sec. 8(a)(1) unless such statements are based on objective fact. "Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." *NLRB v. Sinclair Co*. 397 F.2d 157, 160 (1st Cir. 1968), cited with approval by *NLRB v. Gissel Packing Co.*, supra. "As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.'" *Gissel Packing*, quoting *NLRB v. River Togs, Inc*., 382 F.2d 198, 202 (C.A.2d Cir. 1967).

The October 9, 2014, letter explicitly threatens that employees should accept settlement or VDS will close the facility. It gives no explanation of the objective facts underlying such a prediction. I find, therefore, that the letter constitutes an unlawful threat of closure.

The Respondent contends the letter is a privileged settlement document. Under Rule 408 of Federal Rules of Evidence, offers of compromise in settlement discussions are not admissible. The rule does not, however, prohibit the introduction of evidence of threats during a settlement discussion. *Miami Systems Corp.,* 320 NLRB 71, 76 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997).

The Respondent also contends that the Union was cc'd only at the Board's request. Regardless of why the Union was cc'd, the letter plainly expresses the Respondent's intent that its offer and the consequences for refusing it be shared with employees.

Accordingly, I find the October 9, 2014 letter was an unlawful threat, as alleged in complaint paragraph 13.

C. 8(a)(3) allegations

Complaint paragraph 15 alleges that numerous employees were discharged because of their union activities.

1. CNAs Martha Aparicio and Delfina Sanchez

In analyzing alleged discriminatory personnel actions in mixed-motive cases, the Board applies the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burned to prove, by preponderant evidence, that the employees engaged in protected activity, the employer knew about it, and the adverse employment action at issue was motivated by it. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp*., 294 NLRB 924, 956 (1989).

Both Martha Aparicio and Delfina Sanchez engaged in union activity by signing authorization cards and signing the petition. Aparicio also attended union meetings and participated in the march to present the petition to Valdivia on October 14. The Respondent was aware of this activity, as it is undisputed Valdivia saw the employees participate in the march, saw the peti-

tion, and forwarded it to VDS's corporate offices.

There is ample evidence that the terminations were motivated by union activity. Unlawful employer motivation may also be established by circumstantial evidence. A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc*., 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc*., 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc*., 328 NLRB 1107 (1999)(statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999)(disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

The Board will infer an unlawful motive or animus where the employer's action is "'baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.'" *J. S. Troup Electric*, 344 NLRB 1009 (2005) (citing *Montgomery Ward*, 316 NLRB 1248, 1253 (1995)); See also *ADS Electric Co*., 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The timing of the terminations, four days after Valdivia received the petition from the employees and the day after the Union filed its petition for representation, is strong evidence of unlawful motivation. See *Best Plumbing Supply*, 310 NLRB 143, 144 (1993); *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984). Final checks for both CNAs were prepared on October 15, the day after the march and presentation of the petition. Moreover, the timing of the adverse employment actions occurred concurrently with interrogations and threats that I have found violated the Act. *Cal Western Transport,* 316 NLRB 222, 223 (1995); *Richardson Bros.*, 312 NLRB 534 (1993).

Delay can be evidence of pretext. *Doctor's Hospital of Staten Island, Inc.* 325 NLRB 730, 738 (1998); *New Haven Register*, 346 NLRB 1131, 1143 (2006) (suspension on January 7, 2005 for events that occurred on December 23–24, 2004). I find the delay in terminating Aparicio and Delfina Sanchez is further evidence of unlawful motivation and pretext. Importantly, the CNAs were not terminated until more than 10 days after they were photographed sleeping, and they continued to work during this time period. Meanwhile, they were provided with assurances from the director of nursing and the charge nurse that they should not worry, and the practice going forward would be to make sure the CNAs did not take their breaks at the same time.[45] It was not until after the employees marched and presented their petition to Valdivia that the Respondent took action to terminate Aparicio and Delfina Sanchez. *Care Manor of Farmington*, 314 NLRB 248, 255 (1994); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). And, it was not until October 30 or 31, after the terminations had already occurred, that Valdivia requested a statement from Adelman.

The Respondent asserts that the terminations were effectuated as soon as they were approved by "corporate." It is undisputed that Valdivia had authority to terminate employees. No evidence was presented about any corporate approval process, and it is unclear who from corporate was involved in any such process. Nobody from corporate signed off on the terminations. I therefore find this justification for the delay fails to withstand scrutiny.

The lack of meaningful investigation into the incident is further evidence of unlawful motivation. "The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are [likewise] clear indicia of discriminatory intent." See *New Orleans Cold Storage & Warehouse Co., Ltd*., 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir.2000). Prior to October 18, nobody interviewed Aparicio or Sanchez about the incident to determine whether they were on their breaks when Adelman photographed them. There is likewise no evidence that Abaunza was ever interviewed. The failure to interview the individuals present that night as part of a good faith in-depth investigation is baffling and highly indicative of pretext. *Clinton Food 4 Le*ss, supra.

Adelman reported to Valdivia that he had seen five individuals sleeping—the hospice worker in his mother's room and four nurses at the nurses' station. Despite this, nobody at VDS apparently made any attempt to figure out who the fourth nurse was. Instead, VDS was content to rely on the pictures of Aparicio, Delfina Sanchez, and Abaunza, and leave it at that. It would have been extremely easy to simply ask Abaunza, Aparicio, and/or Delfina Sanchez the identity of the CNA who had been sleeping but not photographed. It would have been extremely easy to look at the timecards, see that Maria Lopez was working, and ask her if she was the other individual Adelman saw sleeping. If the goal was to ensure CNAs who slept while working were disciplined, VDS's cursory investigation does not make sense. If the goal was to seize upon the photographs to terminate the employees who supported the Union, without taking the care to discern what had really occurred, it does.[46] I find the Respondent's assertion that it was entitled to rely on its business records to determine who was working that night is a convenient justification for ignoring an easily discoverable truth about what actually happened.

There is evidence that the Respondent's disciplinary policy was not applied consistently, further pointing to pretext. *Tubu-*

[45] It is undisputed the director of nursing and charges nurses are admitted supervisors under Sec. 2(11), and have the authority to suspend and discharge employees.

[46] Abaunza was terminated on October 28, after the Union filed its initial unfair labor practice charges on October 23.

lar Corp. of America, 337 NLRB 99 (2001). As noted above, Maria Ramirez was admittedly sleeping at the same time and in the same manner as Aparicio and Delfina Sanchez, yet she was not terminated or even disciplined. The Respondent was aware of this at least as of October 18, as the undisputed evidence shows Delfina Sanchez informed Warner that Maria Ramirez was also asleep. Notably, Maria Ramirez did not sign the petition, participate in the march, or otherwise notify management that she supported the Union. Other evidence of inconsistent application is that employees continued to sleep while on their breaks during the weeks following Aparicio and Delfina Sanchez's terminations, yet they were not disciplined. This is particularly telling in light of the fact that cameras were installed.

Moreover, there is evidence that VDS had Union animus, and was intent on taking actions to ensure the Union did not come to VDS. I find Warner's string of text messages to Remedios Lopez, set forth fully above, is strong evidence of animus. Warner stated: "Rosa did get rid of house keeping and laundry because she said the CNA will need 50% vote"; "I am writing corporate to let them know that Rosa was retaliating against the CNA formation of the union"; "[S]he was so mad about this union business Rosa did (sic) even want 2 do employee of the month which I said should be u and Marcos. Nope she wAs 2 mad"; and "I think rosa is gonna blame things on me & I need to make sure she does not & I do need to let the labor board know that rosa fired them as retaliation. If u know anything let me know." I find the text messages from Warner are not hearsay. Federal Rule of Evidence 801(d)(2)(D) provides that a statement is not hearsay if it is offered against an opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship." To fall within the scope of Rule 801(d)(2)(D), the General Counsel must show that the statement was made by an "agent or servant" of VDS. Here, it is undisputed that Valdivia was an agent of VDS. Her statements concerning the termination of employees and unwillingness to designate an employee of the month clearly are within the scope of her employment duties.[47]

Cuellar's statement that there were new CNAs for the night shift because Valdivia "wants to get rid of all the people who signed the union thing" is additional evidence of animus, as is Zelaya's statement that "some people tried to talk Rosa out of what she was doing but she did not listen." These statements were made to Castillo. Cuellar did not refute this statement when she testified, and Zelaya did not testify. I find Castillo's recollection of these conversations was credible.[48] She left VDS voluntarily to go back to school, and has nothing to gain or lose by being truthful. She testified in an open-ended manner, without embellishment or exaggeration, and I find her testimony was candid. Her testimony is corroborated by other evidence of animus apparent from the interrogations and other coercive conduct discussed above in connection with the Sec. 8(a)(1) allegations.

Based on the foregoing, I find the General Counsel has easily met its initial *Wright Line* burden.

The Respondent now bears the burden to prove that it would have terminated Aparicio and Delfina Sanchez even if they had not engaged in union activity. The Respondent asserts that it was merely complying with its disciplinary policy, which states that sleeping on the job results in termination, and the Union activities of Aparicio and Delfina Sanchez were not a factor. There are several problems with this justification. In addition to the anomalies above, there is abundant evidence that the established practice on the night shift was for employees to make their rounds, clock out for their ½-hour break around 12:30–1 a.m., but then take their actual breaks later when things were quieter, typically around 3 or 4 a.m. Charge Nurse Castillo, who regularly worked the nightshift, admitted this was the practice. Nobody who worked the nightshift testified otherwise.

Valdivia, Cuellar, and Hanson denied that that employees' actual breaks occurred later than when the clocked out. Valdivia and Cuellar did not work the nightshift, however, so while they were versed in VDS's formal policies, there was no evidentiary foundation to support that they had knowledge of actual practices. Accordingly, I do not credit their testimony on this point as to the actual practices on the night shift. Hanson's testimony on the matter is wholly incredible. She initially testified that she worked the night shift 3–4 times per month. On cross-examination, she said she worked the night shift 3 times per month or less. The evidence shows, however, that between January 1, 2013, and October 31, 2013, Hanson worked the 11 p.m. to 7 a.m. shift on only one occasion. It is clear Hanson fabricated her testimony in an attempt to buttress the Respondent's argument about its break policy. I find her testimony as a whole lacks credibility and strongly indicates pretext regarding the Respondent's statements about practices on the night shift.

It undisputed that the CNAs were permitted to nap during their breaks. There was no evidence presented as to any particular location the CNAs were required to take breaks, whether or not they were napping. The Respondent did not refute testimony that Aparicio had received permission from Abaunza to take their breaks.

I find the departure from established past practice is strong evidence of pretext. See *Bryant & Stratton Business Institute,*

[47] The General Counsel attempted to subpoena Warner to testify at the hearing, but the certified letter to her last known address was not picked up and she did not respond to telephone messages. (Tr. 539–540.) Assuming the statements attributed to Valdivia from Warner's text are considered hearsay, I find the statements reliable. I note that Remedios Lopez was very credible in his explanation about how the texts were received, and there is nothing to refute that Warner sent them to him. The statements are supported by other evidence of record relating to animus, and I note Valdivia did not refute much of what Warner conveyed. *RC Aluminum Industries, Inc*., 343 NLRB 939, 940 (2004).

The Respondent plainly misunderstands the scope of Rule 801(d)(2)(D) by asserting that the statements attributed to Valdivia are hearsay because Warner was had been terminated when she sent the text to Remedios Lopez. (R. Br. 13.)

[48] For the same reasons articulated regarding DON Warner's texts, I find Rule 801(d)(2) applies and the comments attributed to Cuellar and Zelaya are not hearsay. Assuming they are considered hearsay, I find it is reliable hearsay because it is corroborated and unrefuted. *RC Aluminum Industries, Inc*., supra.

321 NLRB 1007, 1026–1028 (1996), enfd, 140 F.3d 169 (2d Cir.1998) (unlawful to discipline faculty members who ended class early where discipline had not previously been imposed for that reason); *Thill, Inc*., 298 NLRB 669, 670 (1990) (singling out two employees for warnings regarding conduct for which no other employee had been warned). The fact that no other employees were disciplined despite the Respondent's knowledge that other employees, and particularly Maria Ramirez, had committed the same offense, coupled with the evidence unlawful motivation above, convince me that the Respondent seized upon the opportunity to discharge known union supporters Martha Aparicio and Delfina Sanchez. See *Sanderson Farms*, *Inc.*, 340 NLRB 402, 402–03 (2003) (Pretextual reason for discharge defeats employer's attempt to show it would have discharged employee absent his union activities).

Accordingly, I find that the General Counsel proved that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged with regard to Martha Aparicio and Delfina Sanchez.

2. Housekeepers and maintenance employee

As detailed above, the Respondent entered into a contract on October 3, 2013, to outsource its housekeeping department. All six housekeepers and maintenance worker Genaro Meza were discharged between October 25–27, 2013.[49] They were replaced by five Pro-Clean employees.

The *Wright Line* framework applies to this allegation. The General Counsel need not prove the employer's knowledge of any specific employee's opinion or sympathies in the context of a mass discharge conducted with the unlawful purpose of discouraging union membership. See *Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179–1180 (6th Cir.1985). The mass discharge itself is unlawful rather and the General Counsel therefore is "not required to show a correlation between each employee's union activity and his or her discharge." *Pyro Mining Co*., 230 NLRB 782 fn. 2 (1977).[50] Instead, the General Counsel's burden is to establish that the mass discharge was ordered to discourage union activity or in retaliation for the protected activity of some. "A power display in the form of a mass layoff, where it is demonstrated that a significant motive and a desired effect were to 'discourage membership in any labor organization,' satisfies the requirements of § 8(a)(3) to the letter even if some white sheep suffer along with the black." *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964). See also *Delchamps, Inc*., 330 NLRB 1310, 1317 (2000); *Weldun International*, 321 NLRB 733, 734 (1996) (violation where the employer did not select employees for layoff based on their support for the Union, but the layoff was part of an effort to discourage employees from supporting the Union), enfd. mem. in part 165 F.3d 28 (6th Cir. 1998).

Turning to the General Counsel's initial *Wright Line* burden, it is clear there was an ongoing organizing drive and the that Respondent had knowledge of employees' union activity at the time it terminated the employees, between October 25–27, 2013. The fact that one of the discharged housekeepers did not openly support the Union does not defeat employer knowledge in the context of a mass discharge.

The Respondent contends that the General Counsel has failed to prove that, on October 3, when VDS and Pro-Clean executed the contract, VDS was aware of Union activity. More specifically, citing to *Bayliner Marine Corp.*, 215 NLRB 12 (1974), the Respondent contends that management officials had heard nothing more than rumor. I find the instant case is distinguishable. Here, unlike in *Bayliner*, by August 2013, Valdivia had specifically been told that individuals claiming to be from the Union were visiting employees at home. She had held meetings with employees warning them not to open their doors to individuals claiming to be from the Union because they might be thieves. Valdivia also reported that in mid-September, Perdomo told her she was being called a traitor and had no friends at work because she did not want to sign with the Union.[51] (R. Exh. 3.) I find this is sufficient to prove the Respondent had knowledge of Union activity when VDS and Pro-Clean contracted for services.

The statements from VDS's supervisors regarding animus articulated in the discussion of the terminations of Aparicio and Delfina Sanchez, apply here. Warner's text to Remedios Lopez goes to the heart of VDS's motivation for discharging the housekeepers and Meza. The existence of other 8(a)(1) violations reinforces a finding of animus.

The evidence further reflects suspicious timing. The contract with Pro-Clean was signed on October 3, 2013, with performance under its terms to begin that same day. Yet, VDS did not start implementing the contract's terms by bringing in any Pro-Clean employees until October 27. Moreover, the schedule for November was posted in late October, reflecting VDS employees scheduled to work, and vacation requests having been granted.

There is also evidence of shifting reasons for outsourcing the housekeeping department. See *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."). During the 10(j) injunction proceedings in this matter, the Respondent's stated reason was its "president operates several facilities, all of which subcontract these services," and that it "simply brought this facility in line with [its president's] other business practices." (GC Exh. 88, p. 31.) This reason was rejected by the judge, and accorded no weight due to the lack of any evidentiary support behind it. At the hearing, the Respondent asserted an economic justification, stating that the housekeeping department was losing money at a time when VDS as a whole was consistently losing money. While the shifting defenses alone are enough to raise a red flag, the economic justi-

[49] The employees had no expectation of recall, so I do not find they were laid off.

[50] For this reason, the Respondent's arguments that the layoffs did not target union supporters fail.

[51] Though I have credited Perdomo's version of the mid-September conversation, by Valdivia's own account, Perdomo discussed the Union.

fication standing on its own fails to withstand scrutiny.

As the General Counsel points out, the estimated $831.08 per month in savings did not take into account the retention of Ramon Lopez, who earned at least about $1800 per month. (GC Exhs. 6, 100 pp. 1–3.) This additional cost only increased when Pro-Clean increased its monthly from the contracted amount of $15,406.00, to $16,387.66, nine months into the contract. (Tr. 748–750; GC Exhs. 56, 98 pp. 1–7.) The General Counsel also points out that it would have saved more money to discharge 2 VDS employees rather than replace seven VDS employees with five Pro-Clean employees. (GC Br. 87; GC Exhs. 56, 59.)

The Respondent asserts that costs for both maintenance and housekeeping should be factored into the accounting, resulting in a monthly decrease from $30, 384 to $16,387.66. There is no evidence, however, that maintenance costs, other than Meza's salary and benefits, decreased because of Meza's discharge. The contract does not obligate Pro-Clean to absorb VDS's maintenance costs. (GC Exh. 56.) Valdivia admittedly was not versed in the accounting, and nobody else testified about the costs that comprised the maintenance budget. The Respondent has the burden of persuasion to prove its asserted legitimate reason for contracting with Pro-Clean. Absent evidence explaining what costs, if any, other than housekeeping and laundry the contract with Pro-Clean replaced, this burden is not met.

There have also been shifting reasons for retaining Ramon Lopez instead of Meza to perform maintenance work. The Respondent asserted in its position statement to the Board in November 2013, that Pro-Clean services were only for housekeeping not maintenance. In its response to a subpoena in July 2014, the Respondent stated that Pro-Clean could not provide afternoon or weekend maintenance. In its December 2014 memorandum of points and authorities, the Respondent again asserted that Pro-Clean services were only for housekeeping not maintenance. (GC Exhs. 84, 86–88, 32). At the hearing, Valdivia stated the Respondent retained Ramon Lopez because Pro-Clean does not provide services 24 hours per day and because Ramon Lopez also performs security guard duties.[52] (Tr. 720–721.)

Finally, I find it highly significant that the Respondent did not call the decision maker or decision makers to explain the reasons for subcontracting housekeeping to Pro-Clean, and, more particularly, the timing of this action. Valdivia's testimony about her decision-making capacity in this regard is conflicting. She initially said, both in her affidavit and at the hearing, that the decision to subcontract out housekeeping to Pro-Clean was made by corporate, not by Valdivia, and she had no input. (Tr. 72, 704; GC Exh. 89.) At another point in her testimony, she said she was part of the discussions about the decision, and recommended that they subcontract housekeeping, but could not recall who at corporate she spoke with about this. (Tr. 89.) What is clear is that she did not have the authority to make the decision. Her statement that she had no input into the decision is much more plausible than her statement that she was part of discussions about the topic and made a recommendation, but she could not recall with whom at corporate these discussions took place.

Preimesberger did not testify, nor did anyone from the elusive "corporate." Therefore, it is appropriate to draw an adverse inference from the Respondent's failure to call these decision makers to explain why they subcontracted the work of the housekeeping department and discharged VDS's housekeeping employees. *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999); *United Parcel Services of Ohio*, 321 NLRB 300, 308–309 (1996); *Ready Mixed Concrete*, 317 NLRB 1140, 1143, fn. 16 (1995); *Dorn's Transportation*, 168 NLRB 457, 460 (1967), enfd. in pert. part 405 F.2d 706, 713 (2nd Cir. 1969) (failure of the decision maker to testify "is damaging beyond repair"); *The Southern New England Telephone Co*., 356 NLRB No. 118 (2011) (failure to call decisionmaker warrants adverse inference); *Interstate Circuit v. United States*, 306 U.S. 208, (1939) "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse").

I find the Respondent has failed to meet its burden to prove, by preponderant evidence, that its decision to subcontract out housekeeping and discharge the housekeeping employees and Meza was economically motivated. I further find the General Counsel has proved that the Respondent's stated reason for discharging the housekeepers and Meza was pretext to mask its anti-union motivation.

3. December 2013 wage increase

Complaint paragraph 14 alleges that the Respondent granted a wage increase in December 2013 because the employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, in violation of Section 8(a)(3) and (1).

a. Timeliness

I will first address the Respondent's contention that the charge asserting this allegation was not filed within the 6-month time period set forth in Sec. 10(b) of the Act. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The charge in Case 31–CA–137770 was filed on September 26, 2014, which is more than 6 months from the December 2013 alleged unfair labor practice. (GC Exh. 1(jjjj).)

Citing to *Redd-I, Inc*., 290 NLRB 1115, 1116–1117 (1988), the General Counsel contends the charge is nonetheless timely because it is closely related to other timely charges alleging unlawful inducements. (GC Br. 74, fn. 12.)

The charge in Case 31–CA–118685, filed on December 9, 2013, alleges violations of Sec. 8(a)(1) for inducements and promises of benefits, among other conduct. (GC Exh. 1(xxx)). The first amended charge in that case, filed on October 21, 2014, again alleges unlawful inducements and promises of benefits, among other conduct. (GC Exhs. 1(aaaa) and (llll).) The instant charge was filed as an original charge on September

[52] Meza had worked for VDS since 1993, had more seniority than Ramon Lopez, no discipline in his record, and there is no evidence Ramon Lopez had a better performance record. Meza was not offered the opportunity to change to the shift VDS apparently needed covered in order to retain his job.

26, 2014, and assigned Case 31–CA–137770. (GC Exh. 1(jjjj).) It alleges that the December 2013 wage increase violated Sec. 8(a)(3) and (1) of the Act.

The General Counsel contends that a wage increase is a type of inducement and therefore the allegation about the December 2013 wage increase involves the same factual situation.

The Board's case law for dealing with an amended charge filed outside the 10(b) period is well-established. "[T]he timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge." *Pankratz Forest Industries*, 269 NLRB 33, 36–37 (1984), enfd. mem. sub nom. *Kelly-Goodwin Hardwood Co. v. NLRB*, 762 F.2d 1018 (9th Cir. 1985).

In the instant case, however, the untimely charge was not filed as an amended charge, but rather as an original charge. Because the General Counsel included the allegation from the charge in Case 31–CA–137770 in its complaint, however, regardless of the form or timing of the charge, I must determine whether it relates back to conduct that was timely charged and also encompassed in the complaint. This is because the General Counsel's complaint is not restricted to the precise allegations of a charge. If there is a timely charge, the complaint may allege any matter sufficiently related to or growing out of the charged conduct. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959).

To determine whether a later charge relates back to an earlier charge, the Board applies the three-prong "closely related" test set forth in *Redd-I, Inc*., 290 NLRB 1115, 1118 (1988). See *Peerless Pump Co*., 345 NLRB 371, 374 (2005). The Board considers:

> (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge;
> (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and
> (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations.

Redd-I, supra. Though *Redd-I* concerns the similarity of amended charges, the relatedness test applies to allegations in initial complaints. *Nickles Bakery of Indiana,* 296 NLRB 927, 927–928 (1989).

With respect to the first *Redd-I* factor, the allegations in the complaint stemming from the timely charges rest on a legal theory of inducement and promises of benefits aimed at coercing employee in their exercise of Section 7 rights in violation of Section 8(a)(1). The allegation that employees were granted a wage increase rests on this same legal theory, as well as a theory that the wage increase was unlawfully motivated under Section 8(a)(3). An untimely allegation need not involve the same section of the Act as the other alleged violations. *Nickles Bakery of Indiana*, supra, fn. 5.

With regard to the 8(a)(1) allegation encompassed in complaint paragraphs 14(a) and 18, the same legal theory clearly applies. The more difficult question is whether the 8(a)(3) allegation in complaint paragraphs 14(b) and 19 encompasses the same legal theory. I find that it does. First, both allegations share a common legal theory based on the Respondent's animus in opposing to the Union's organizational campaign. The timely charges and the untimely 8(a)(1) charge allege coercive inducements manifesting a general animus against union activity. The untimely 8(a)(3) charge alleges a wage increase motivated by animus against employees' union activity. The common aspect of animus in such circumstances is sufficient to meet the *Redd-I* requirement that essentially similar legal theories underlie the different allegations. See *Fiber Products*, 314 NLRB 1169 (1994), enfd. *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 941 (4th Cir. 1995). Moreover, Unlike most 8(a)(1) allegations, analysis of a claim that benefits were promised, announced, or granted to coerce employees in their choice of bargaining representative is motive-based. *Network Dynamics Cabling, Inc*., supra. Thus, analysis of both the (8)(a)(1) and 8(a)(3) allegations concerns whether the evidence as a whole, including any proffered legitimate reason for the wage increase, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with Section 7 rights.

Turning to the second factor, it is abundantly clear the otherwise untimely allegation arose from the same factual situation or sequence of events outlined above. It is a continuation of a pattern of unlawful conduct aimed at keeping the Union away.

Finally, with regard to the third factor, similar defenses would apply in that Respondent would attempt to explain both a promise of a benefit and the grant of a benefit as legitimate actions taken for reasons unrelated to the Union.

The Respondent points out that, under *Redd-I*, complaint amendments outside the 10(b) time period may are only permitted if the untimely allegations are closely related timely violations named in the charge and occurred within 6 months before the filing of the charge. This test from *Redd-I*, however, which applies to complaint amendments, does not appear in *Nickles Bakery*, which concerns allegations in initial complaints. In any event, the increase, which began on December 1, 2013, occurred within 6 months before the charge in Case 31–CA–118685, which was filed on December 9.

In sum, it would defy any measure of logic and common sense to say an allegation that actual benefits conferred on employees is not sufficiently related to or an outgrowth of an allegation regarding the promise of benefits. *NLRB v. Fant Milling Co*., supra. I therefore find the General Counsel has met its burden to prove the allegation is timely.

b. Merits of the allegation

With regard to the 8(a)(1) allegations, the legal standard framework for wage increases, governed by *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964), is set forth above in the section addressing the October wage increases of CNA Maria Ramirez and Housekeeper Romana Lopez. And because a 8(a)(1) claim regarding a wage increase is motive based, many of the same factors are considered for both the 8(a)(3) and (1) claims.

I find the employees would reasonably view the December

wage increase as an attempt to interfere with or coerce them in their choice on union representation. *Southgate Village Inc*., supra. The wage increase was implemented while the petition for a Board election was still pending, on the heels of the unfair labor practices described above. Significantly, wage increases at VDS are not on a set schedule and depend on VDS's financial state. Yet the wage increase followed the replacement of the housekeeping employees with contractors—a move made ostensibly because VDS was experiencing financial hardship. Most of the employees had not received a raise in a more than 5 years, so an across-the-board wage increase of this magnitude certainly sent a message. Given the other coercive conduct over the preceding months, I easily find the employees would reasonably view the wage increase as an attempt to steer them away from the Union.

The employer must demonstrate a legitimate business reason for the timing of the benefit. No such reason was forthcoming.

As to the 8(a)(3) allegations, the General Counsel has met its initial burden under *Wright Line* for the reasons set forth in the analyses of the terminations and discharges. As noted directly above, the Respondent has not come forward with a legitimate reason for the wage increase, and I therefore find the General Counsel has met its burden to prove this allegation.

D. Request for Bargaining Order

In complaint paragraph 16, the General Counsel has requested a remedial bargaining order pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969). Though such a remedy is extraordinary, I find the General Counsel has met its burden to prove it is appropriate under the circumstances present here.

The purpose of a remedial bargaining order is "to remedy past election damage [and] deter future misconduct." *Gissel*, supra. The Supreme Court had sanctioned the issuance of such a bargaining order "where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined the union's majority. . . ." *Gissel*, 395 U.S. at 610; see also *NLRB v. Katz*, 369 U.S. 736, 748, (1962). The Board thus has the authority to order an employer to recognize and bargain with a union even if the employees have not voted for union representation in an election.

The Supreme Court in *Gissel* identified two categories of employer misconduct that might implicate a bargaining order. "Category I" cases involve outrageous and pervasive unfair labor practices that make a fair election impossible. "Category II" cases involve less extraordinary and less pervasive unfair labor practices, which have nonetheless undermined majority union support, once expressed through authorization cards, rendering the possibility of a fair election slight. See *Register Guard*, 344 NLRB 1142, 1146 (2005); *Milum Textile Services*, 357 NLRB No. 169, slip op. at 11 (2011).

As to Category I, the pervasiveness of the unfair labor practices is described fully above and need not be reiterated here. The unfair labor practices included highly coercive hallmark violations such as a mass discharge of the housekeeping department, threats of job loss and facility closure, and discriminatory terminations. See *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980); *General Fabrications Corp*., 328 NLRB 1114, 1116 fn. 17 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). The Respondent also implemented the first across-the board wage increase for its CNAs, the largest group of employees, in more than 5 years, while the petition for a Board election was still pending. "Such unlawful wage increases have a particularly long lasting effect because the Board's traditional remedies do not require that an employer rescind its wage increase. . . . Because such increases regularly appear in employees' pay checks, they are a continuing reminder that 'the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged." *Overnight Transportation Co*., 329 NLRB 990 (1999), quoting *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964). See also *NLRB v. Jamaica Towing*, supra ("hallmark violations," including Section 8(a)(3) granting of benefits, are regarded as highly coercive and are "likely to have a lasting inhibitive effect on . . . the work force")

These threats and other actions came from high levels of management and continued over several months. "Neither the threat nor the mass layoff is likely to be forgotten by the employees. To the contrary, these are the types of dire warnings and concrete measures certain to exert a substantial and continuing coercive impact on any employee, whether current or subsequently hired, contemplating a vote in favor of unionization." *Weldun Intern., Inc.*, 321 NLRB 733, 734, and 748 (1996), enfd. mem. in relevant part 165 F.3d 28 (6th Cir. 1998).

I am persuaded that these violations, which occurred in a relatively small unit, make it unlikely that traditional Board remedies will create the conditions required for a fair and reliable election. Based on the foregoing, I find, therefore, that based on the severity and pervasiveness of the unfair labor practice, a bargaining order is warranted under Category I. *Electro-Voice, Inc*., 320 NLRB 1094 (1996).

E. 8(a)(5) Allegations

Complaint paragraphs 17 and 20 allege that the Union violated Section 8(a)(5) of the Act by failing to bargain over the discharges and the December 2013 wage increase.

The Act, at Section 8(a)(5), provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in Section 8(d) as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The Act does not define "terms and conditions" of employment. Regarding topics other than wages, hours, or other terms and conditions of employment, "each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Warner*, 356 US 342, 349 (1958).

First, I find the following employees of VDS are an appropriate bargaining unit for purposes of Section 9(b) of the Act:

> Included: All full-time, part-time, and on-call Certified Nurse Assistants (CNA), restorative nurse assistants (RNA), caregivers, Housekeeping, Laundry, Cooks, Dietary aids, maintenance, and activity assistants.
>
> Excluded: All other employees, confidential employees, man-

agers, office, clerical employees, professional employees, guards and supervisors as defined in the [A]ct.

Having determined that the Union represented the majority of the employees in the appropriate unit as of October 13, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's demand for recognition.

When the Union has obtained signed authorization cards from a majority of employees, as here, the obligation to bargain attaches when the employer embarks on a campaign of unfair labor practices. *Parts Depot, Inc.,* 332 NLRB 670, 678 (2000), enfd. 24 Fed.Appx. 1 (D.C. Cir. 2001). I find, therefore, that the duty to bargain attached no later than October 14, 2013.

1. Terminations of CNAs Martha Aparicio and Delfina Sanchez

I have found these October 18, 2013, terminations violated Section 8(a)(3), and will order reinstatement of Martha Aparicio and Delfina Sanchez. In the event a reviewing authority disagrees with my 8(a)(3) findings, however, I find that the terminations are a mandatory subject of bargaining. *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) (termination of unit employees is a mandatory subject of bargaining, even if the parties have not yet negotiated a collective-bargaining agreement); *N.K. Parker Transport, Inc*., 332 NLRB 547, 551 (2000). It is undisputed that the Respondent did not give notice to the Union and an opportunity to bargain over the decision to terminate Martha Aparicio and Delfina Sanchez, or the effects of those terminations. I therefore find the General Counsel has established a violation of Section 8(a)(5).

2. Termination of Maintenance Worker Meza

Though the Respondent linked the discharge of Meza to the decision to subcontract out housekeeping to Pro-Clean and discharge the housekeepers, I find no proof in the record that maintenance fell under the contract with Pro-Clean. I find that Meza's termination was a mandatory subject of bargaining. It is undisputed that the Respondent did not give notice to the Union and an opportunity to bargain over the decision to terminate Meza or the effects of this termination. I therefore find the General Counsel has established a violation of Section 8(a)(5).

3. Discharge of housekeeping employees

The discharge of the housekeeping employees occurred after the Respondent's entered into an agreement subcontract its housekeeping department to Pro-Clean, on October 3, 2013. The discharges themselves, however, did not occur until October 27–29.

As detailed above, nobody with decision-making authority testified as to why or when the decision was made to discharge the housekeeping employees. Valdivia signed the contract with Pro-Clean on October 3, and by its terms, it took effect the same day. Nobody from corporate testified about when the decision to discharge the employees, which occurred about 3 weeks after the contract was signed, was finalized. For the reasons set forth above, I am drawing an adverse inference based on the decision makers' failure to testify, and I find the decision was made after October 13, 2013.

Accordingly, I both the decision to discharge the employees and the effects of the discharges were mandatory subjects of bargaining, and I therefore find the General Counsel has established a violation of Section 8(a)(5).

F. Respondent's Request for Litigation Fees

The Respondent asserts the Board and the Union acted in bad faith, and therefore should pay the Respondent's litigation fees. (R. Br. 14–18.) I have addressed the alleged witness coaching and the settlement communication above. With regard to a charge that was dismissed, the proper procedures for addressing this are set forth in Rule 102.19 of the Boards Rules and Regulations.

I have considered all of the Respondent's arguments. No evidence was presented at trial to support these arguments, and I cannot rule based solely on the Respondent's assertions set forth in its brief. I therefore decline to grant the remedy of litigation fees due to the lack of record evidence regarding bad faith on the part of the Union or Board.

CONCLUSIONS OF LAW

1. By instructing employees not to talk to the Union, interrogating employees about union activities, threatening employees with unspecified reprisals for engaging in union activities, engaging in surveillance of employees' union activities, telling employees engaging in Section 7 activities to leave the premises, promulgating a rule prohibiting logos, announcing a rule to employees that attendance would be more strictly enforced, polling employees about their support for the Union, promising enhanced job security for saying the Union forced employees to support them, threatening closure of the facility for supporting the Union, terminating CNAs Martha Aparicio and Delfina Sanchez, discharging the housekeeping staff, discharging Maintenance Workers Genaro Meza, implementing an across-the-board wage increase for CNAs, and by implementing the terminations, discharges, and the across-the-board wage increase unilaterally, without notice and an opportunity to bargain with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the conduct described above, the Respondent has violated Section 8(a)(5), (3), and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having instructed employees not to talk to the Union, the Respondent will be ordered to cease and desist from these actions.

Having interrogated employees about union activities, through questioning and polling, and having threatened employees with adverse consequences, including facility closure, for engaging in union activities, the Respondent will be ordered to cease and desist from these actions.

Having engaged in surveillance of employees' union activities, the Respondent will be ordered to cease and desist from this action.

Having told employee engaging in protected Section 7 activities to leave the premises, the Respondent will be ordered to

cease and desist from these actions.

Having promulgated a rules prohibiting logos and threatening to enforce stricter attendance standards, the Respondent will be ordered to cease and desist from these actions.

Having promised an employee greater job security for saying the Union obtained her support by force, the Respondent will be ordered to cease and desist from these actions.

Having implemented an across-the-board wage increase for CNAs while a petition for election was pending before the Board, the Respondent will be ordered to cease and desist from this action.

Having unlawfully discharged CNAs Martha Aparicio and Delfina Sanchez, the housekeeping employees, and Genaro Meza, the Respondent will be required to restore the status quo ante by rescinding their unlawful discharges and removing all references to them from the Respondent's files.

The Respondent, having discriminatorily terminated Martha Aparicio and Delfina Sanchez, and discharged the housekeeping employees and Genaro Meza, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 358 NLRB No. 94 (2012), reaffd. 361 NLRB No. 137 (2014); *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

In light of my finding above that a *Gissel* bargaining-order is appropriate, the Respondent will be ordered to, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment.

The reinstatement of the terminated and discharged employees is also an appropriate remedy for its failure to provide notice to the Union and provide an opportunity to bargain. Restoration to the status quo ante is presumptively appropriate to remedy unlawful unilateral changes. *Southwest Forest Industries*, 278 NLRB 228–228 (1986), enfd. 841 F.2d 270 (9th Cir. 1988). When bargaining unit work has unilaterally and unlawfully been removed, restoration of the work to the bargaining unit is the appropriate remedy, unless the employer demonstrates that restoration would be unduly burdensome. *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 216 (1964). No such showing has been made, and I therefore find restoration to the status quo ante, by reinstatement in the manner set forth above, is the appropriate remedy.

The Respondent shall be required to post a notice informing employees of its violations of the Act. The General Counsel, at complaint paragraph 21, has requested an order requiring the Respondent to post the notice in English and Spanish. Because a significant number of the Respondent's employees speak Spanish, the notice should be posted in English and Spanish. See *O.G.S. Technologies, Inc*., 356 NLRB No. 92, slip op. at 7 (2011); *Allied Medical Transport*, Inc., 360 NLRB No. 142, slip op. at 7.

The General Counsel, at complaint paragraph 21, has requested that the notice be read aloud by Valdivia or by a Board agent in the presence of Valdivia, DeBorja, Cuellar, Warner, Zelaya, Abaunza, and Castillo. The Board has required that notices be read aloud by high-ranking officials or a Board agent this remedy when numerous serious unfair labor practices have been were committed by a high-ranking management official. *Allied Medical Transport, Inc*., supra. at 6 fn. 9 (2014). When unfair labor practices are severe and widespread, having the notice read aloud to employees allows them to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007). I find the General Counsel has established that this remedy is required to enable employees to exercise their Section 7 rights free from coercion. The Respondent, therefore, will be ordered to have the notice read aloud by a Board agent in the presence of Valdivia, or by Valdivia or a higher-ranking official from VDS's corporate offices.

Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, Vista Del Sol Health Services, Inc., d/b/a Vista Del Sol Healthcare, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from telling employees not to talk to the Union, coercively interrogating any employee about union support or union activities, polling employees about their support for the Union, threatening employees with unspecified reprisals for engaging in union activities, engaging in surveillance of employees' union activities, telling employees engaging in Section 7 activities to leave the premises, promulgating a rule prohibiting logos, announcing a rule to employees that attendance will be more strictly enforced, promising enhanced job security for saying the Union forced employees to support them, threatening closure of the facility for supporting the Union, discharging or otherwise discriminating against any employee for supporting the Service Employees International Union, United Long Term Care Workers or any other union, implementing an across-the board wage increase because employees assisted the Union and engaged in concerted activities, and by implementing the terminations, discharges, across-the-board

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

wage increases, or any other changes to terms and conditions of unit employees' employment, unilaterally, without notice and an opportunity to bargain with the Union.

In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time, part-time, and on-call Certified Nurse Assistants (CNA), restorative nurse assistants (RNA), caregivers, Housekeeping, Laundry, Cooks, Dietary aids, maintenance, and activity assistants.
>
> Excluded: All other employees, confidential employees, managers, office, clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days from the date of the Board's Order, offer Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (nee Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo full reinstatement to their former jobs or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (nee Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix"[54] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2013.[55]

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be publicly read by a high-ranking responsible management official of the Respondent or by a Board agent in the presence of a high-ranking responsible management official of the Respondent.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 5, 2015

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT coercively question you about your union sup-

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

[55] The unfair labor practice was Valdivia's phone call to Rosa Lopez, which occurred in late July or early August. August 1 is therefore an approximation.

port or activities, including polling you about your union support.

WE WILL NOT promulgate a rule prohibiting logos, or announce a rule to that attendance will be more strictly enforced in response to union activity.

WE WILL NOT instruct you not to talk to representatives from the Service Employees International Union, United Long Term Care Workers or any other union.

WE WILL NOT threaten you with facility closure or with other reprisals for supporting the Service Employees International Union, United Long Term Care Workers, or any other union.

WE WILL NOT engage in surveillance of your activities involving the Service Employees International Union, United Long Term Care Workers, or any other union.

WE WILL NOT promise you enhanced job security for saying your support of the Service Employees International Union, United Long Term Care Workers or any other union was not voluntary.

WE WILL NOT order you to leave the facility when you are engaging in peaceful Section 7 activities that do not result in patient disturbance or disruption of healthcare operations.

WE WILL NOT grant wage increases in order to discourage and dissuade you from selecting of the Service Employees International Union, United Long Term Care Workers or any other union as your bargaining representative.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Service Employees International Union, United Long Term Care Workers or any other union.

WE WILL NOT unilaterally, without notice and an opportunity to bargain with the Service Employees International Union, United Long Term Care Workers, make and implement changes to your terms and conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> Included: All full-time, part-time, and on-call Certified Nurse Assistants (CNA), restorative nurse assistants (RNA), caregivers, Housekeeping, Laundry, Cooks, Dietary aids, maintenance, and activity assistants.
>
> Excluded: All other employees, confidential employees, managers, office, clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

WE WILL within 14 days from the date of this Order, offer Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (nee Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (nee Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (nee Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Martha Aparicio, Delfina Sanchez, Elisa Mayorga, Maria Isabel Valladares (nee Menjivar), Genaro Meza, Dafny Cobar, Romana Lopez, Rosa Lopez, and Carmelina Perdomo and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

VISTA DEL SOL HEALTH SERVICES, INC. D/B/A VISTA DEL SOL HEALTHCARE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-115318 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.