

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

WINGATE OF DUTCHESS, INC.	:	
	:	
	:	CASE NOS. 03-CA-140576
	:	03-CA-145659
and	:	
	:	
1199 SEIU UNITED HEALTHCARE	:	
WORKERS EAST	:	
	:	
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	:	

**RESPONDENT WINGATE OF DUTCHESS, INC.’S REPLY BRIEF IN SUPPORT OF  
ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

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The General Counsel's and Charging Party's briefs in opposition to Wingate's Exceptions<sup>1</sup> fail to respond to many critical points raised by Wingate and simply ignore pivotal facts in this case which undercut their ULP claims. With respect to Sandra Stewart, both the GC and CP: (1) ignore the fact that Wingate could have, but failed to, discipline Stewart for repetitive and escalating incidents of misconduct over a two-month period (including soliciting authorization cards during working time and in patient care areas and bullying those co-workers who declined to sign cards), which wholly undermines their claim that union animus motivated Wingate's decision to terminate her employment after reasonably concluding she had engaged in a most egregious form of misconduct – retaliation against a resident; (2) fail to provide any justification for and unreasonably minimize Stewart's numerous inconsistencies in her written statements, affidavits to the Board, and hearing testimony, which unequivocally demonstrate her complete and utter lack of credibility; (3) unjustifiably apply a "beyond a reasonable doubt" standard for determining whether Stewart engaged in the misconduct for which she was terminated; and (4) disregard that Wingate previously has terminated employees for patient abuse and/or neglect and that the Board has upheld terminations in cases closely analogous to this one. A fair review by the Board of Wingate's restraint in disciplining Stewart until her conduct became intolerable, her complete lack of candor for her actions, and Wingate's investigation and reasonable belief that she retaliated against S.M., must result in a finding that Wingate committed no ULP in terminating her employment.

As for their arguments with respect to the 2% wage increase and other at-issue benefits, both the GC and CP ignore well-established Board law that *actual* knowledge of Union

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<sup>1</sup> Cited herein as "GC Opp. at \_\_\_" and "CP Opp. at \_\_\_", respectively. Wingate's opening brief in support of its Exceptions is cited herein as "R Br. at \_\_\_." All other abbreviations and names used herein are the same as those used in Respondent's opening brief filed on January 11, 2016.

organizing is required to find a violation of the Act; espouse a timeline of Union activity at Dutchess and Wingate's alleged knowledge of such activity that is unsupported and actually belied by the evidence; unreasonably conflate Union activity at Ulster with activity at Dutchess, and commit the critical error of ascribing improper motives to Wingate's benefits and wage decisions without any record support for doing so. Similarly, the GC and CP's arguments with respect to surveillance demonstrate a fundamental misunderstanding of a leasee's property rights and ability to exclude trespassers and should therefore be rejected.

Finally, the GC and CP fail to sufficiently rebut Wingate's showing that a bargaining order is not warranted in this case, even if the alleged ULPs are upheld, as (1) there is no evidence a fair rerun election cannot be held; (2) almost all the alleged ULPs occurred prior to October 11, 2014, the date as of which the CP claims to have had majority status and seeks recognition back to; and (3) bargaining orders have been rejected by the Board where employers committed far more egregious violations than those alleged here. They also advance the unsupported position that all credibility determinations made by the ALJ are beyond scrutiny – that simply is not the case where, as here, the ALJ's irrational credibility determinations are contrary to the clear preponderance of the evidence.<sup>2</sup>

## **LEGAL ARGUMENT**

### **I. Wingate Did Not Violate the Act When It Disciplined Stewart for Leaving Patients Unattended and Terminated Her for Patient Abuse**

In the name of union organizing, the GC and CP would require Wingate to reinstate Stewart, a CNA responsible for the most basic needs of a vulnerable population of elderly and

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<sup>2</sup> In submitting this Reply, Respondent does not waive or concede any points or arguments not expressly addressed herein; rather, given its 30-page limit, it focuses on the most critical of errors, misrepresentations, and misstatements of fact and law made by the GC and/or CP in their opposition briefs.

infirm residents, even where the evidence clearly demonstrates she exhibited a pattern of escalating misconduct, which left her residents unattended, physically uncomfortable and mentally agitated. The labor laws are not served by condoning such misconduct in a nursing home environment, simply because Stewart was an active union organizer.

Wingate gave Stewart many chances to abide by its patient care rules and only escalated her discipline to termination when she flouted the express directive of Nelson, the Director of Nursing (“DON”), and chastised S.M. for complaining about his care. There can be no doubt from the record that Stewart felt emboldened by her Union organizing activity and engaged in a mounting pattern of conduct that this Board, regardless of its obligation to foster the Act or protect employee organizational rights, should not and cannot condone.

Stewart began her misconduct by soliciting union authorization cards on her work time in resident bathrooms, dining rooms, medication stations and hallways, instead of attending to her residents. She moved on to taking lunch when it suited her, ignoring her scheduled break time, resulting in her residents being left unattended. But even that was not enough. Stewart then failed to toilet S.M., lied about doing so, failed to cooperate with Nelson’s investigation of the complaint, pressured a co-worker to lie for her and ultimately lied to Nelson, claiming she had toileted S.M. when she had not. For none of these incidents, though, did Wingate fire or even seriously discipline Stewart. Wingate did not discharge Stewart until she ignored all rules and directives by calling S.M. out on his complaint, and making this 95 year-old incontinent, wheelchair-bound man feel even more vulnerable than he already was. Her conduct was deplorable – nothing anyone would want his or her elderly parent subjected to. Worse yet, Stewart evinced no remorse for her conduct and, with regard to the retaliation incident, instead made up an alibi, claiming she was with Angot at all times during October 3, 2014, including

when she shaved S.M. This alibi failed, however, because Angot's time card established she was on her lunch break at the time, and Angot refused to lie for Stewart, either during Wingate's investigation or during the hearing when she failed to appear to testify, despite the GC having subpoenaed her (a subpoena the GC then decided not to enforce).

The truth is Stewart felt her support of the Union gave her the right to put her own personal interests above those of her residents, which was not only evident by the toileting and retaliation episodes, but earlier by leaving patients unattended to take an unauthorized lunch break inconsistent with her schedule and by soliciting authorization cards in front of patients, rather than attending to them. The Act does not give a union activist the right to engage in such escalating and serious misconduct in the name of unionization, but that is exactly what the ALJ's Decision would allow if not reversed on this critically significant issue.

**A. There Is No Evidence of Union Animus Motivating Wingate's Disciplinary Decisions Towards Stewart**

Both the GC and the CP purposely ignore the overwhelming evidence that Wingate took particular care with respect to disciplining and ultimately terminating Stewart and, in fact, gave her greater consideration and leniency because of its awareness of her union activity. Stewart's termination followed two months of her blatantly disregarding workplace rules and procedures, ignoring her supervisors, and bullying her co-workers, all in pursuit of union activism, and without any disciplinary action being taken. For example, both the GC and CP conveniently fail to address the undisputed evidence that beginning in the last week of July 2014, Stewart repeatedly and admittedly (Tr. 436) violated Wingate's Solicitation/Distribution policy by soliciting Union authorization cards during work time and in patient care areas, such as in the residents' dining room and in their rooms and bathrooms, which upset numerous employees to such an extent that they complained to Nelson. (R Br. at 20-22) (detailing: (1) Maylath

complaint that Stewart followed her into patient's room and persisted in soliciting her to sign card in presence of patient even after Maylath said that was inappropriate; (2) Martinez complaint that Stewart constantly "pestered" her to sign a card while they were on the unit taking care of patients; (3) Preti complaint that Stewart was following her and forcing her to sign a card; and (4) Benedict complaint that she was approached by Stewart to sign a card while feeding residents lunch in the dining room and after refusing to do so, Stewart yelled at her and called her "selfish" in presence of residents). Stewart was not disciplined for any of this misconduct, much of which occurred even after Nelson had appropriately (as even the ALJ conceded)<sup>3</sup> instructed Stewart to stop soliciting cards in patient's rooms and other patient care areas. (R Br. 21). These facts underscore that Wingate was not out to get Stewart for her union activity, regardless of its desire to prevail in the election.

The GC and CP further ignore the multiple other instances of misconduct for which Stewart was never disciplined by Wingate, including Benedict's subsequent complaint, as corroborated by multiple CNAs, that Stewart intentionally elbowed a cup of water into her face because she had refused to sign a union authorization card; unit secretary Pamela Godshall's complaint about an altercation with Stewart regarding a medicine cart that she felt occurred due to her refusal to sign an authorization card; and resident L.G.'s complaint about Stewart making

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<sup>3</sup> The CP's assertion that Wingate had an "alleged" rather than an actual no-solicitation policy (CP Opp. 13) is unsupported by the record and was directly rejected by the ALJ. (ALJD p. 13). Another blatant misrepresentation in the CP's brief includes its description of the nature of the verbal warning Stewart received on August 12, 2014 for excessive unscheduled absences. (CP Opp. 20). While the warning does address absences dating back to April, it was issued on August 12 because Stewart's unscheduled absences on July 9, July 16, and August 9 brought her to a total of six (6) unscheduled absences for the year. Per Wingate policy, four (4) unscheduled absences in a year warrant a verbal warning, and six (6) warrant a written warning. Rather than give Stewart a written warning for her excessive absences, which it clearly was entitled to do, Wingate again was lenient toward Stewart and gave her only a verbal warning. (CP Ex. 14).

a threat of legal action, as well as S.M.'s complaint that he was not toileted. (R Br. at 22-23, 27 n.17).

That Wingate exercised particular restraint with respect to Stewart in connection with each of these incidents undermines any possible suggestion that union animus motivated its subsequent actions and further indicates Wingate would have taken the same actions even in the absence of protected conduct. For the same reasons, Stewart's self-serving assertion that she was being "harassed" based on her union activity every time Wingate attempted to legitimately address the series of workplace violations in which she was engaging, and the CP's contention that Wingate failed to address that assertion, are wholly without merit. If Wingate really wanted to rid itself of a Union supporter, it had ample opportunity to do so. Wingate instead allowed Stewart every opportunity to continue and succeed at Wingate, only terminating her employment after its investigation revealed she had committed the most serious of offenses – retaliation against a resident for making a complaint about his care.<sup>4</sup>

The GC's failure to address *any* of the above-referenced evidence is telling. It confirms the GC's conclusion that Wingate was motivated by union animus in its disciplinary actions toward Stewart is, at best, based on mere speculation, and, at worst, on the GC's desire to reinstate a Union supporter at any cost. The GC is required to establish by a preponderance of the evidence that Wingate's discharge of Stewart was motivated by animus – a showing it did not and could not make because Wingate did not take any actions against Stewart on such basis.

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<sup>4</sup> Indeed, as noted above, Wingate did not even discipline Stewart for failing to toilet S.M. on September 20. Although a PIP was prepared based on the results of the investigation of that incident, largely due to Stewart's admitted refusal to cooperate with Nelson's investigation, that PIP was never issued. Both the GC and CP willfully ignore these key facts. (Tr. 1233-34, 1236, 1825-26).

**B. Critical Inconsistencies in Stewart's Testimony and Throughout Wingate's Investigations Demonstrate Stewart Was Not Credible About the Incidents for Which She Was Disciplined**

The evidence unequivocally establishes Stewart was not a credible witness and, as such, her testimony, particularly on the penultimate issues of whether she engaged in the misconduct which led to her discharge and whether union animus played any role in her discipline and termination, should be disregarded. Stewart flip-flopped numerous times on the witness stand and her testimony was impeached on the following issues:

- Whether Angot was in the room with her when she shaved S.M. on October 3 (Stewart first testified Angot was not in the room with her, in direct contradiction to her statement to Nelson during the investigation that Angot was with her, and then when shown her statement, she changed her testimony and said Angot was in the room with her, which was in direct contradiction to her sworn affidavit to the Board stating Angot was not with her, and when then shown her Board affidavit, Stewart changed her testimony again to say Angot was not with her);
- Whether Nelson instructed her not to speak to S.M. about the September 20th incident (in her sworn affidavit to the Board Stewart asserted Nelson gave her no instruction not to speak to S.M. about his complaint, but she subsequently testified at the hearing, in direct contradiction to her sworn affidavit, that Nelson did give her that directive);
- When she learned about S.M.'s toileting complaint (she incredibly testified she had "no idea" about S.M.'s September 20th complaint until Nelson told her about it days later, even though the credible evidence demonstrates she approached Benedict on September 21 to provide

justification for not toileting S.M. the prior day and sought to pressure Tardella to say she toileted S.M. with her)<sup>5</sup>;

- Whether Stewart was justified in taking an unscheduled lunch break that left residents unattended (upon being shown the Locust Grove unit assignment sheet for September 26, which was prepared early and only had three names on it, Stewart suddenly claimed to recall the unit was one CNA short that day, causing her to make a special three-way lunch coverage arrangement with the other two CNAs to cover her scheduled 12:30 lunch shift so she could take an early lunch at 11:15; but when she was then shown the final master scheduling evidencing that four CNAs were working on Locust Grove, she changed her story, conceding she left it to everyone else to figure out when they would go to lunch because she “always” took the early lunch, contrary to her meal break records); and
- Whether she solicited cards during working time and in patient care areas, as confirmed by the multiple complaints from her co-workers, outlined above (she first denied soliciting cards during working time, testifying she never solicited cards from employees unless both she and they were on break time, later qualified that she did not know if the employees she was soliciting were on break time, and finally admitted to soliciting employees in patient care areas, including the residents’ dining room, residents’ rooms, and residents’ bathrooms, while still incredibly contending that patient care was not being provided at the time).

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<sup>5</sup> There was nothing implausible about Tardella’s oral and written statements to Nelson or her testimony given what occurred here. Stewart conceded to Benedict that she did not toilet S.M. However, when Stewart learned S.M. complained she did not toilet him, she tried to use Tardella as an alibi to say she did and then tried to pressure Tardella (as she had so many other employees) into saying she toileted S.M. with Stewart, which is directly contradicted by Stewart’s own POC system entries on September 20. (R. Ex. 62-a). Tardella, like Angot, was between a rock and a hard place, not wanting to lie to Nelson but not wanting to be responsible for Stewart getting in trouble.

(Tr. 232-33, 237-38, 432-36, 451-53, 459-60, 467-70, 533, 1306-07, 1703-05; R Exs. 8-d, 9-a, 16-c, 16-d).

Both the GC and CP make perfunctory attempts to explain away and/or minimize these critical inconsistencies.<sup>6</sup> It is no coincidence that these inconsistencies pertain to the very issues resulting in Stewart's discharge. Indeed, Stewart's initial explanation to Nelson that Angot watched her shave S.M. on Oct. 3 "*because she did not know his routine for shaving*" (R. Ex. 11-c) is unbelievable, on its face. It is one thing for Stewart to contend another person was in the room with her when she shaved S.M.; it is quite another to provide such a specific reason for that person's alleged presence, particularly when that reason is so incredible. The only logical conclusion is that Stewart subsequently and repeatedly flip-flopped on Angot's alleged presence during her shave of S.M. on October 3 because she initially believed she could use Angot as an alibi in Nelson's investigation of S.M.'s complaint of retaliation – until, of course, she learned Angot did not corroborate her claims about the incident, at which point she changed her story.<sup>7</sup> And once she had told the first lie about this issue, of course it became difficult for Stewart to keep her varying stories straight.

In an effort to minimize additional evidence of Stewart's lack of credibility with respect to her interactions with S.M., the GC even goes so far as to make the ridiculous and wholly unsupported assertion that Stewart, who had been using Wingate's POC system for years as part

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<sup>6</sup> It is telling that the GC and CP both downplay these multiple inconsistencies in their key witness' testimony and statements, while at the same time highlighting and relying upon alleged, superficial inconsistencies within Wingate's evidence as somehow indicative of bad behavior on Wingate's part.

<sup>7</sup> Both the GC and CP note Angot did not testify, even after the GC subpoenaed her. (GC Opp. 5, fn. 4, CP Opp. 27). Notably, the GC did not insist upon her testifying or attempt to enforce the subpoena, presumably because it knew Angot's testimony would not support its version of the events.

of her job, suddenly became incompetent in using that system and/or simply misunderstood how it worked during the September 20th through October 3rd period in question.

While one or two inconsistencies, in isolation, perhaps could be explained away, the multiple inconsistencies in Stewart's testimony and behavior, particularly when considering the issues she lied about, and against the backdrop of her pattern of obstructive conduct throughout Wingate's investigations, simply cannot be explained away. The only logical conclusion is Stewart lacked candor, and the ALJ committed critical error in concluding otherwise.

**C. Wingate Conducted an Appropriate and Fair Investigation Under the Circumstances and Reasonably Believed Stewart Engaged in Conduct Warranting Termination**

The totality of the information generated by Wingate's investigations of the September 20th and October 3rd incidents, and Stewart's obstructive conduct in connection with those investigations, clearly demonstrate Wingate had a "reasonable belief" that Stewart, who indisputably was responsible for caring for S.M. on September 20, failed to toilet him that day, and that she retaliated against him in response to his reporting her lack of care by calling him "the Great Reporter" or "News Reporter."<sup>8</sup> Indeed, despite the GC's and CP's attempts to confuse the issue by focusing on alleged, superficial discrepancies in witness statements, it is uncontroverted that Stewart, and not some other Wingate employee, shaved S.M. on October 3. It is similarly undisputed that after having been shaved by Stewart on October 3, S.M. complained to his daughter that the person who shaved him that day (i.e., Stewart) had called him the "Great Reporter" or the "News Reporter." (R. Ex. 11-g). That Wingate's social worker reported S.M. told her he was called the "Great Reporter" at some earlier time *is no matter* –

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<sup>8</sup> Contrary to the GC's and CP's misrepresentation of Wingate's position with respect to the events of September 20, Wingate has never contended its investigation substantiated that Stewart expressly *refused* to toilet S.M. on September 20, only that its investigation substantiated she was responsible for toileting and changing him and failed to do so.

indeed, the likelier scenario is that Stewart, who was assigned to care for S.M. throughout the period between September 20 and October 3, referred to S.M. in this manner on multiple occasions.<sup>9</sup>

The GC's and CP's positions unreasonably would require Wingate to suspend all logic and common sense and, in lieu of drawing reasonable inferences from the totality of the information it gathered from its investigations, clear up each and every potential inconsistency and discrepancy that inevitably arise when a resident complaint is raised and different individuals, with different perspectives, recollections, and manner of receiving and conveying information, are involved and consulted. The law does not countenance such an irrational outcome. Any such investigation, by its very nature, contains inconsistencies. It is up to the investigator in each case, in good faith, to weigh the evidence and determine witness credibility to reach a logical conclusion, which is exactly what occurred here. (Tr. 1660-61). Notably, and as the GC and CP ignore, "[I]t is not within the province of the Board to tell an employer how to investigate allegations of employee misconduct. The fact that an employer does not pursue an investigation in some preferred manner before imposing discipline does not establish an unlawful motive for the discipline." *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1558 (2004) (quoted in *San Gabriel Transit, Inc.*, 2011 NLRB LEXIS 391, \* 27, n. 17 (2011), adopted by *San Gabriel Transit, Inc.*, 2012 NLRB LEXIS 120 (NLRB Mar. 9, 2012)).

Like the ALJ, both the GC and CP give mere lip service to the "reasonable belief" standard, while actually applying a much more exacting "beyond a reasonable doubt" standard.

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<sup>9</sup> As part of its investigations, Wingate allowed Stewart full opportunity to respond to these reported complaints, contrary to the CP's assertions, including by requesting a statement from her in connection with the September 20 toileting incident, which Stewart unreasonably refused to provide, and by obtaining a written statement from her in connection with the October 3 complaint from S.M. and his daughter.

Wingate, however, is not a judicial body, nor is it an investigative body or law enforcement agency. Rather, it is a skilled nursing facility responsible for the care and welfare of approximately 160 elderly residents, many of whom are unable to provide for their most basic daily needs, including feeding, dressing, toileting, and hygiene. (R Br. 5-6). Wingate must, in order to continue to operate, concentrate its efforts on taking care of its residents in accordance not only with its own high standards, but also in compliance with applicable law. Its management has neither the time nor the resources to conduct the kind of full-scale, weeks-long (if not months-long) investigation both the GC and CP would require of them to eliminate any and all potential questions or discrepancies in statements and/or recollections, regardless of their materiality. Indeed, the investigation of a resident's and/or his family member's complaint about improper care is not a murder investigation! Wingate is not required to, nor should it, prove beyond a reasonable doubt that a CNA about whom a resident and/or his family members complain did, in fact, engage in the conduct alleged by the resident and/or his family members. That is exactly what the GC and CP propose and what the ALJ's decision would require, yet it is directly contrary to Board law and common sense. See, e.g., *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on *mistaken* belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to *prove* misconduct actually occurred to meet burden and show it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief employees had engaged in misconduct was sufficient).<sup>10</sup> Here,

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<sup>10</sup> In reaching their misguided and unsupported conclusions about Wingate's investigations, the GC and CP ignore, as did the ALJ, critical evidence of, for example, Benedict's credible testimony that other nurses informed her they had noticed S.M.'s call bell go unanswered for a

Wingate made an overwhelming factual showing of not only its good faith belief of Stewart's culpability, but of her actual culpability, which is more than what is legally required.

**D. Other Terminations for Patient Abuse and/or Neglect Show Wingate Would Have Terminated Stewart Regardless of Any Union Activity**

Wingate's decision to terminate Stewart was consistent with previous terminations of employees for patient abuse and/or neglect. The GC's attempt to distinguish the terminations of Walker, Knowles, and Powell (notably, the GC disregards the fact that each was, in fact, terminated for patient abuse and/or neglect) demonstrates a fundamental misunderstanding of patient retaliation and why it is imperative that a healthcare facility like Wingate do everything within its power to prevent it. Indeed, the GC likens the retaliation in which Stewart engaged to mere "disrespect" or negative attitude. (GC Opp. 21). Stewart's calling a 95-year old, incontinent and wheelchair-confined resident a "Great Reporter" or "News Reporter" – after learning he had complained about her lack of care and after expressly being directed not to approach him on that subject – is far more than disrespect or negative attitude. It is threatening, retaliatory behavior, and its meaning is unmistakable. *Indeed, S.M. and his daughter in fact perceived it as such, which was the very basis of their complaint and insistence that Stewart not be assigned to S.M. or even to the Locust Grove Wing ever again!* (R Ex. 11-g).

That Walker, Knowles and/or Powell received other forms of discipline for previous misconduct or poor performance is immaterial. For example, Powell's one-day suspension occurred more than ten years ago in 2005, before Nelson even began working at Wingate and at

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substantial period of time on September 20 and had instructed Stewart several times to answer it, and, more importantly, that Stewart told Benedict, on September 21, that she did not change S.M. the previous day, allegedly because S.M. had been in an activity and returned toward the end of her shift. (Tr. 1306-07; R. Ex. 9-a). Of course, Stewart told Nelson a different story altogether, *i.e.*, that she had changed S.M. that day, with Tardella, after which she claimed S.M. went to bingo. (R. Ex. 9-d).

the direction of a different manager altogether. Additionally, Stewart's lack of cooperation, lying, and obstructive conduct in connection with Wingate's investigations, and her failure to accept responsibility for her actions, were significant to Wingate's decision and distinguish her situation from the disciplinary actions taken against Walker, Knowles, and Powell, where similar conduct was not exhibited. In addition, Stewart herself was not terminated for the toileting incident. The GC and CP fail to acknowledge or address these points in any way, all of which reinforce Stewart would have been terminated even in the absence of any union activity. See, e.g., *Fresenius USA Mfg., Inc.*, 326 NLRB No. 130, 2015 NLRB LEXIS 483 (2015) (upholding discharge where employee's dishonesty was second and independent basis for termination).

Moreover, that Wingate found it necessary to terminate Stewart's employment, as opposed to issuing some lesser form of discipline, does not demonstrate discriminatory motive or pretext. "[I]t is not the role of the administrative law judge to second guess the degree of punishment an employer thinks warranted." *San Gabriel Transit, Inc.*, 2011 NLRB LEXIS 391, \*28 (2011). Indeed, the Board repeatedly has upheld terminations in contexts that are similar to, but less serious than, Stewart's misconduct, finding the employer at issue would have terminated the employee regardless of any union support or activity. (R. Br. at 56) (citing cases). Neither the GC nor the CP makes any attempt to distinguish any of these cases, nor could they reasonably do so.

In short, the Board should not countenance conduct, even when taken by a Union organizer, that requires employers, particularly nursing homes, to relax their resident care protocols or their residents' rights. The ALJ's decision on the reinstatement of Stewart is wrong and must be set aside.

## **II. Wingate Had No Knowledge of Union Activity Until July 25, 2015, at the Earliest**

Contrary to the GC's contention, knowledge of protected activity is an "essential and requisite element of a 8(a)(1) violation." *Meijer, Inc. v. NLRB*, 463 F.3d 534 (6th Cir. 2006) (vacating portion of Board's order and finding, contrary to Board's position, violation of § 8(a)(1) requires knowledge on the part of an employer and the test *must* have a subjective element) (emphasis added). Wingate had no knowledge of any union activity at Dutchess prior to the last few days of July 2014.

No evidence was presented or adduced by any party at the hearing, nor was any such evidence cited to by the ALJ, that Wingate had any knowledge of Union activity at Dutchess, prior to the last few days of July 2014. That is because the evidence established there was no union activity openly taking place at the Dutchess facility prior to Stewart's solicitation of authorization cards, which she testified began after she signed her card on July 25, 2014.

However, in an effort to try to establish Wingate's motive behind the change in payroll frequency, the institution of the attendance bonus, and the wage increase was to squelch a nascent organizing campaign at Dutchess, the GC and CP continue to conflate union activity at Wingate's Ulster facility with knowledge of purported union activity at Dutchess.<sup>11</sup>

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<sup>11</sup> Respondent's reference to June 13, 2014 (rather than July 13, as set forth at page 26 of the Decision) as the date the ALJ found it could be inferred Wingate suspected union activity at the Dutchess facility is an understandable typographical error, given the ALJ's reference to knowledge on July 13 directly followed his reference to Wingate having knowledge of Union activity at Ulster after the petition was filed there on June 12. (R Br. at 59). Regardless, there is no evidence at all that Wingate had any knowledge of organizing at Dutchess by June 13 or July 13, and it did not. The inference Wingate suspected union activity was going on at the Dutchess facility is improper and unreasonable at any date before there was evidence that Wingate either observed or was informed of such activity, which did not occur until the very end of July 2014. Knowledge of organizing at Ulster, a separate facility 25 miles away from Dutchess, is not evidence of actual organizing or management's knowledge of organizing at Dutchess.

The CP goes so far as to argue that it would have been reasonable for the ALJ “to infer” Respondent “suspected” union activity was being conducted at Dutchess as far back as June 13, just one day after the Union filed the petition at the Ulster facility! (CP Opp. at 32). In support of this assertion, the CP cites testimony by Schuster elicited in response to being asked what involvement he had in connection with the Union’s campaign at the *Ulster facility*. The CP also relies on Harbby’s testimony that he was instructed in mid-June to see if any staff at Dutchess would voluntarily speak at Ulster, yet conveniently omits his explicit testimony that at the time he asked employees at Dutchess to speak in mid-July, he was unaware of any union activity at Dutchess. (Tr. 2059).

The GC separately argues that Ed Blake, Wingate’s Vice President and Regional Director of Operations, had knowledge of facts indicating union activity was ongoing at Dutchess in early July. In support of this assertion, the GC points to conversations Blake had with Harbby and Nelson in connection with the Ulster campaign about union organizers and the possibility they would trespass on Wingate’s property at Dutchess. These conversations were a direct result of union activity *at Ulster* and if anything, they imply Blake was merely preparing for the possibility of union activity at Dutchess, not that he was already aware union activity was ongoing at Dutchess. The two are fundamentally different.

Both the CP and GC refer to the week of July 7, alleging events took place that put Wingate on notice of union organizing activity at Dutchess. Specifically, they reference a July 7 conversation Allen allegedly had with Harbby, where she claimed to have told him people at Dutchess felt they were “in the same boat” as those at Ulster. Harbby denied Allen ever made such a statement and, contrary to the CP’s claim, never acknowledged Allen raised concerns about campaigning at Ulster. (CP Opp. at 33). Instead, Harbby testified Allen said she did not

want to speak at Ulster because “her friends at Ulster told her to keep her Black-ass out of it.” (Tr. 2058). Regardless, even if Allen did tell Harbby she and others felt they were in the same boat as the employees at Ulster, it is a huge and unsustainable leap to conclude such a statement provided Harbby with *knowledge* of facts indicating union organizing was taking place at Dutchess. The law requires more than supposition and innuendo in establishing an employer’s actual knowledge of union activity for purposes of establishing a violation of Section 8(a)(1) of the Act.

Indeed, the only evidence introduced at trial of any union organizing taking place at Dutchess before the very end of July was informal employee discussions about interest in the Union and Stewart’s alleged efforts to have employees sign a list she claimed she faxed to the Union showing there would be interest in a union at Dutchess. On the first point, the CP refers to an informal discussion that allegedly took place between Stewart, Allen and two other employees on the week of July 7. The CP contends it was shortly after this meeting that Stewart and Allen contacted Massara about their interest in the Union, even though Massara testified Stewart and Allen did not contact her until July 22, 2014. (Tr. 49). Regardless of the date of the alleged employee conversation, there was no testimony by anyone that any manager or supervisor of Wingate was aware of it and, in fact, they were not.

On the second point, the GC and CP both make reference to a list of 35 signatures collected by Stewart during the following week, which she allegedly faxed to Massara. The GC argues, without any factual or evidentiary basis, it is “highly unlikely that Respondent was entirely unaware of Stewart’s organizing efforts, especially given the short timeframe (less than a week) in which she collected all 35 signatures, and given that the majority of her efforts to collect signatures took place at the Dutchess facility.” (GC Opp. at 25). To begin with, there

was no testimony that any manager or supervisor was, in fact, aware of this list. Indeed, neither the GC nor the CP produced this list at trial, to the extent it even existed. Presumably if it did exist, either Stewart or the CP, or both, would have had a copy to produce.<sup>12</sup> Further, even assuming, *arguendo*, it did exist, contrary to the GC's assertion, Stewart's testimony regarding her method of obtaining signatures for this list and her method of transmitting the list to Massara illustrates she went above and beyond to ensure Wingate management *would not know* what she was doing. Specifically, Stewart testified she wrote at the top of the paper "a party list" (Tr. 208), in case it got displaced and got back to management, and when she showed the paper to employees to sign she folded over the part of the paper that said "a party list." (Tr. 209). She also testified she faxed it to the Union from Office Depot at a mall. (Tr. 207). Given the aforementioned, it is implausible to conclude Wingate was aware of Stewart's organizing efforts prior to Maylath complaining to Nelson about her solicitation of an authorization card during the last few days of July (Tr. 1768), especially given the lengths she went to conceal them.

In sum, it cannot logically be concluded that Wingate knew or even suspected any union activity at Dutchess until the last few days in July, at the very earliest.

### **III. Wingate's Attendance Bonus Did Not Violate the Act**

Wingate announced the perfect attendance bonus on July 14, 2014, well before it knew or suspected any union organizing activity was taking place at Dutchess. The CP alleges the only prior mention of an attendance bonus was in an email from the Administrator at Ulster, dated June 3, 2014, proposing to offer an attendance bonus in response to employees' complaints about wage rates. (R. E. 34A). However, there was testimony on the record by both Harbby and

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<sup>12</sup> Stewart testified she no longer had the list and did not know where it was (Tr. 207) and it was not offered into evidence by CP or the GC, nor produced in response to Wingate's subpoena duces tecum which sought all documents related to the Union's organizing efforts at Dutchess.

Nelson, which the ALJ acknowledged, that Nelson spoke to Harbby about granting the attendance bonus back in June. (Tr. 1934, 2072). As explained by Nelson, and as evidenced by the referenced June 3 e-mail, the announcement of such a bonus requires approval, which does not happen overnight. The fact that the bonus was announced on July 14, 2014 is evidence in and of itself that it was in the works well before that date – long before any actual or known organizing activity at Dutchess.

Regardless of timing, Wingate’s decision to implement a perfect attendance bonus was offered pursuant to an established practice and made solely for the purpose of improving staffing levels at the Dutchess facility. The ALJ, GC and CP all ignore the multiple examples of incentive bonuses offered by Wingate over the course of the last several years that were implemented to alleviate staffing issues at Wingate’s facilities. (R. Ex. 22, 23, 24). They argue Wingate’s announcement of the 2014 Dutchess bonus in mid-July was “incongruous” with its goal of enhancing attendance during the summer. To begin with, the bonus period covered July 18 to September 18, which includes the heart of the summer months. Further, the purpose of implementing a perfect attendance bonus is to increase attendance *at a time* when attendance is low, which is not always at the same time from year to year. The 2008 and 2011 attendance bonuses are evidence of this fact, since one began in April and the other began in May. (R. Ex. 22, 23). The timing of a perfect attendance bonus depends upon when Wingate is experiencing staffing shortages and following a period of time where the requested bonus is reviewed, approved and implemented by Wingate management.

The CP also argues Wingate’s reference to “loyalty” in its announcement of the attendance bonus was a secret message to employees they were receiving the bonus in return for not supporting the Union. This is a perfect example of the kind of overreaching by the CP in this

case to try and establish Wingate had an improper motive. A perfect attendance bonus, by its very nature, rewards employees for their loyalty to their job and for showing up to work when scheduled. Employees were not just being handed a bonus, they were being given the opportunity to receive one if they met the attendance criteria. If a perfect attendance bonus is meant to remind employees of anything, it is that hard work is recognized and rewarded, regardless of union affiliation.

#### **IV. The Change Back to a Weekly Payroll Did Not Violate the Act**

As established above, the decision to change back to a weekly pay period at the Dutchess and Beacon facilities in mid-July 2014 preceded any actual, and certainly any known organizing activity at the Dutchess facility. The CP and GC continue to argue the timing of the change suggests it was not made in response to vocal employee dissatisfaction, but rather to squelch union organizing at Dutchess. The CP speculates the announcement of the change at the July 23, 2014 round-the-clock meeting held to address rumors about the organizing drive at Ulster shows that the decision to make the change was “reasonably calculated” to interfere with organizing activity at Dutchess. But that cannot be for the simple reason that if any organizing had started at Dutchess, Wingate was unaware of it and no evidence was offered otherwise. If the timing of the announcement, after the petition was filed at Ulster and during a meeting held to address rumors about the drive at Ulster, can logically be deemed related to union activity at all, based on the facts and evidence, it could only be related to such activity at Ulster. Even if Wingate implemented the change in response to employee dissatisfaction and in the hopes of diminishing the appeal of unionization to the Dutchess employees before any organizing activity began, it had a right to do so. This is not a violation of the Act, and neither the GC, the CP, nor the ALJ, cite any case to the contrary.

V. **The Wage Increase Did Not Violate the Act**

It is undisputed that discussions by Wingate management regarding the need for a wage increase began as far back as April 2014, and the process of implementing the wage increase was fully underway prior to any union activity at any of Wingate's New York facilities. There was no basis to discredit the testimony of Ianiro and Schuster on this issue, which was supported by objective evidence, *i.e.*, e-mails and wage data. The ALJ acknowledges Wingate "began to seriously examine whether to grant an additional wage increase" after the petition was filed in Ulster in June 2014, prior to Wingate's knowledge of any Union activity at Dutchess. (ALJD p. 35).

The GC and CP offer no direct evidence to the contrary, because there was no such evidence, but instead argue the timing of the announcement and distribution of the wage increase, after Wingate learned of Union organizing at Dutchess, establishes Wingate's motive was to interfere with that effort. But the law recognizes when the process for implementation of a wage increase is fully underway, an employer's hands are not tied simply because a union has begun to attempt to organize employees. See *Adams Super Markets Corp.*, 274 NLRB 1334, 1339 (1985) (affirming ALJ's finding the employer had legitimate business justifications for changing its handbook and medical plans when, among other things, it had long planned the changes in response to frequent complaints by employees); *Greenbrier Valley Hospital*, 265 NLRB 1056, 1056 (1982) (dismissing allegation that provision of improved sick pay benefits constituted violation of Section 8(a)(1) where it was "evident that the decision-making process was fully under way well before the onset of any organizing activity at this facility" and the benefit was provided for employees nationwide). In this case, the known organizing at Dutchess was minimal as of August 12, when the final wage increase plans were confirmed and put into

motion. No demand for recognition was made, and no petition was filed – indeed, the petition was not filed for another two months.

Further, implementation of the 2% wage increase was necessary for Wingate’s New York facilities to be competitive with comparable New York healthcare facilities, which data showed they were not at the time. The CP’s note that the increase was not implemented at Ulster or any of Wingate’s Massachusetts’s facilities is misplaced. Wingate could not have implemented the increase at Ulster because it was in a status quo position, as the Union had won the election for the technical unit and an election petition was then pending for the RN unit. Wingate did not implement the change at its Massachusetts facilities because the data showed it was Wingate’s New York facilities, not its Massachusetts facilities, that were not competitive.

The CP also notes that in announcing the increase, Schuster did not attribute it to Wingate’s financial successes. (CP Opp. at 39). But to say the increase was given *because of* Wingate’s financial successes would not be accurate. The increase was given because Wingate’s wage rate was not competitive with other New York facilities, the exact reason cited by Schuster in his announcement (GC Ex. 17) and consistently testified to by both Schuster and Ianiro. (Tr. 1462-63, 1151). Wingate’s financial success was what made it possible to finally implement the increase.

## **VI. Wingate Did Not Engage in Unlawful Surveillance**

### **A. The Access Easement Granted to Summit Court 1 and 2 Does Not Limit Wingate’s Right to Exclude Trespassers From Summit Court**

It is undisputed that Wingate’s lease includes Summit Court. There is no distinction in property rights to prevent trespass between an owner and leasee. See *International Business Machines Corp.*, 333 NLRB 215, 219 (2001). Both the GC and CP wrongly assert Wingate’s right to prevent trespass on Summit Court is limited by the access easement granted in the lease

to Summit Court 1 and 2, and Wingate failed to present evidence it had the right to prevent such trespass.

Black's Law Dictionary (9th ed. 2009) defines easement as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)." Summit Court 1 and 2 have an access easement to use Summit Court only for their benefit, such as using it for their employees or guests. No additional evidence is needed to demonstrate Wingate could prevent trespassers from Summit Court, because the only limit to Wingate's property interest was this easement. Taken to its logical conclusion, the GC's and CP's argument would mean Wingate has no right to prevent *anyone* from trespassing on Summit Court. Such a result is absurd and completely nullifies Wingate's property interest in Summit Court.

There is no doubt Union organizers trespassed on Summit Court to engage in shift change activities on Summit Court itself or to access the parking lot of Summit Court 2. Summit Court 2 is only accessible from Summit Court.<sup>13</sup> The CP states Wingate could not seek to remove Union organizers when they were at the parking lot of Summit Court 2 because Wingate has no property interest in Summit Court 2. (CP Opp. at 48-49. This completely ignores the fact these Union organizers had to use Summit Court to enter and exit Summit Court 2. Any Union organizer standing at the parking lot of Summit Court 2 had already trespassed on Summit Court to get there and would trespass again to leave. Wingate acted within its property rights and the Act to prohibit this trespass.

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<sup>13</sup> The GC gets it backwards, stating Summit Court 1 is only accessible from Summit Court. (GC Opp. at 38). The CP incorrectly states Summit Court 2 could be accessed from another roadway. (CP Opp. at 49). Review of the map of the property confirms Summit Court 2 is the property only accessible from Summit Court. (R Exs. 71, 71A; GC Ex. 8).

**B. Wingate Acted Lawfully in Observing Union Trespass, Calling the Police to Prohibit Such Trespass, and Photographing Union Organizers Who Were Trespassing**

The ALJ's holding that Wingate violated the Act by engaging in surveillance and calling the police to remove Union organizers is premised on the incorrect notion that Wingate had no property interest to prevent Union organizers from trespassing on Summit Court itself or when the Union organizers trespassed on Summit Court to access the parking lot of Summit Court 2. As discussed above and in Wingate's opening brief, such a premise is incorrect. It is well established that an employer does not violate the Act where it "monitors protected activity because of a reasonable concern about a recurrence of trespassing." See *Smithfield Foods, Inc.*, 347 NLRB 1225 (2006); *Hoschton Garment Co.*, 279 NLRB 565 (1986); *Washington Fruit and Produce Co.*, 343 NLRB 1215 (2004). An employer similarly does not violate the Act when it calls the police to remove union trespassers or takes photographs to document trespassory activities. *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974); *Washington Fruit and Produce Co.*, 343 NLRB 1215, 1218 (2004). Here, Wingate's actions in observing Union organizers on its property, seeking to remove them by calling the police, and photographing them to document trespass did not violate the Act.

The CP argues that if Wingate had a property interest to exclude Union organizers, it discriminatorily enforced such right. (CP Opp. at 49). The GC or CP had the burden to show Wingate discriminatorily enforced its property interest against trespass. See *Campbell Soup Company*, 159 N.L.R.B. 74, 82 (1966) (in analogous work rule context, holding GC had burden to show discriminatory application). The CP cites to no evidence that Summit Court had been consistently trespassed on prior to the summer of 2014 and Wingate either allowed or ignored it. The CP relies on Nelson (without any citation to the record) first observing Wingate preventing trespass in the summer of 2014 as evidence Wingate had no history of enforcing its property

rights. However, even if such a statement was made, it does not establish that any prior trespass was observed by Wingate and ignored. To the contrary, Nelson testified when a relative of a resident began soliciting for the Jehovah's Witness faith on Wingate's property (in essence turning a legitimate visit into a trespass), she immediately stopped it. (Tr. 1941). There is no basis to infer Nelson or any other Wingate manager would have allowed any known trespass activity to occur anywhere on its property.

**VII. Even if ULPs are Upheld, They Do Not Warrant Imposition of a Bargaining Order**

Even if ULPs are upheld, a bargaining order is not warranted in this case because: (1) there is no evidence a fair rerun election cannot be held; (2) almost all alleged ULPs occurred prior to October 11, 2014, the date the CP claims to have had majority status and seeks recognition as of; and/or (3) bargaining orders have been rejected by the Board in cases where employers committed far more egregious violations than those alleged in this case (and many of the alleged ULPs may not be sustained). The ALJ ignored these arguments in the Decision, and the GC and CP fail to persuasively rebut them in their respective briefs.

If the Board holds ULPs occurred sufficient for the Board to set aside the election, the appropriate remedy would be a rerun election, not a *Gissel* bargaining order. In responding to Wingate's Exceptions, neither the GC nor the CP provides sufficient justification to warrant imposition of a bargaining order in this case.

A rerun election is the preferred remedy when an election result needs to be set aside. See *Harpercollins San Francisco*, 79 F.3d 1324, 1331 (2d Cir. 1996); *Abramson, LLC*, 345 F.3d 171 (2005). While the GC and the CP generally state, without any evidence, how the alleged ULPs affected the bargaining unit, neither party explains why a fair rerun election is not possible. The GC has not alleged any unfair labor practices have occurred in the nine months since the election, which is a significant factor considered by the Board in determining whether a

bargaining order is warranted. See *Jewish Home for the Elderly of Fairfield Cnty*, 343 NLRB 1069 (2004) (considering only one violation occurred after the election in denying Gissel bargaining order); Cf. *Evergreen America Corp.*, 348 NLRB 178 (2006) (“post election action demonstrates Respondent’s continuing propensity to violate the Act and indicates that the coercive effect of its unlawful conduct are likely to linger, making it highly unlikely that a free fair election can be held”); *Garvey Marine, Inc.*, 328 NLRB 991 (1999) (“[i]t is also significant that the Respondent did not desist in its unlawful conduct even after the Union lost the election”). At Ulster, Wingate accepted the Union’s two victories and is collectively bargaining with the Union in good faith without any alleged ULPs, which fact further undercuts the need for a bargaining order in lieu of a rerun election. The significant workforce turnover at Wingate and the passage of time since the last alleged ULP further evidence a fair rerun election can be held, an argument not responded to by either the GC or the Union. See *JLM Inc. v. NLRB*, 31 F.3d 79, 84 (2d Cir. 1994). There is simply no evidence a fair rerun election cannot be held.

A bargaining order is also not warranted because the vast majority of the ULPs occurred prior to October 11, 2014 when the GC claims the Union had majority support. The wage increase was announced nearly two months before October 11. Stewart was suspended for the conduct that led to her termination on October 4, 2014. If the goal of a bargaining order is to return to the status quo, these alleged hallmark violations occurred *before* the date the GC seeks to return to. Violations occurring prior to the Union having majority support are not relevant to determining whether a bargaining order should be issued because they did not prevent the Union from obtaining and/or maintaining majority support. *Jewish Home*, 343 NLRB at 1121; see also *Novelis Corp.*, 2015 NLRB LEXIS 60 (Rosas, M., ALJ) (Jan. 30, 2015).

The ALJ ignored Wingate's *Jewish Home* argument, and the CP completely fails to respond to it. The GC tries to downplay *Jewish Home* by citing to the Board's general statement "we do not necessarily adopt his entire rationale." 349 NLRB 1069. However, the Board affirmed the ALJ and this holding has since been relied upon as Board law because it is a sensible holding. See *Novelis Corp.*, 2015 NLRB LEXIS 60 (quoting *Jewish Home* for this proposition, but issuing bargaining order where employer also committed multiple hallmark violations after majority date and during critical period).

Also relevant is the fact that the Board has declined to issue bargaining orders in cases involving far more egregious violations than those alleged in this case. The GC and CP attempt to distinguish these cases by incorrectly stating they involve less widespread violations than those involved in this case, but a review of the facts in those cases establishes their claim is not true. In all of the cases relied upon by Wingate, the employer was found to have either threatened employees with plant closure or mass job loss, a hallmark violation the Board has found to have a widespread effect on employees. See *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57 (2011) ("Threats of job loss and plant closure are 'hallmark' violations, long considered by the Board to warrant a remedial bargaining order because their coercive effect tends to destroy election conditions, and to persist for longer periods of time than other unfair labor practices.") There is no allegation Wingate made a threat of closing the facility or widespread layoffs if the Union was elected.

The GC and the CP's position that widespread violations occurred here is contradicted by the fact that one of its two alleged hallmark violations – the termination of Stewart – involved one employee in a 140-person bargaining unit and one visible union supporter amongst a group of visible union supporters. Amazingly, the GC states Stewart's termination had a stronger

impact on employees in this case than the two lead union organizers terminated in an 11-person bargaining unit in *Desert Aggregates*, 340 NLRB 289 (2003). In comparison, Stewart's termination equates to 0.7% of the bargaining unit, while 18% of the bargaining unit was terminated in *Desert Aggregates*. If Wingate had such ardent hostility towards Union supporters, it does not make sense Stewart would have been the only employee terminated during the Union campaign. Other employees, such as Allen and Newkirk were key Union supporters, and yet there are no similar allegations of retaliation against them.

In sum, a bargaining order is not an appropriate remedy for the ULPs alleged here.

#### **VIII. The ALJ's Credibility Determinations Are Contrary to the Clear Preponderance of the Evidence**

Throughout its Decision, the ALJ finds Wingate committed ULPs based, in part, on credibility determinations contrary to the clear preponderance of the evidence. While the GC and CP imply such credibility determinations are sacrosanct, the Board is clear credibility determinations will be reversed when they are contrary to the clear preponderance of the evidence. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). In finding Schuster told employees he would not sign a labor agreement at the November 10, 2014 meetings, the ALJ disregarded explicit testimony from five Wingate witnesses, including one non-management employee, instead crediting the testimony of Burns who could not even remember what Schuster discussed at the meeting. In finding Lewis interrogated Burns and told her Union activity was incompatible with employment during the August 13, 2014 shift change, the ALJ credited the testimony of Massara as a corroborating witness, despite finding her not credible as to who was actually present during the shift change and her patent animus toward Wingate. In finding Aniya Williams more credible than Clifton as to whether a threat was made about per diem hours, the ALJ discredited a seasoned professional in labor matters and

credited a woman who had no understanding of the meeting she attended as evidenced by her belief Clifton was a representative of the Labor Board.<sup>14</sup> These credibility determinations, contrary to the clear preponderance of the evidence, are rampant throughout the Decision, evidence bias on the part of the ALJ, and should be reversed by the Board.

**IX. Wingate Fully Addressed Its Exceptions in Its Opening Brief**

The GC argues certain Exceptions not listed in Wingate’s “Statement of Issues” should be disregarded. These Exceptions relate to other briefed Exceptions, the ALJ’s Remedy or are clearly disputed based on Respondent’s arguments. For example, the GC states Wingate did not brief Exception #2 (the ALJ “carefully considered all testimony in contradiction to [his] factual findings and have discredited such testimony”), but clearly Wingate argues throughout its opening brief the ALJ’s credibility determinations were wrong and contrary to the overwhelming evidence. *See* R. Br. at 1, 41, 44, 47, 48, 52, 75, 80, 83-85. Similarly, the GC states Wingate did not brief Exception #335, Wingate’s exception to the Remedy, even though Wingate devotes an entire section in its opening brief to the remedy being unwarranted. Wingate fully addressed its 343 Exceptions to the Decision in its opening brief, and no Exception should be disregarded.

**CONCLUSION**

For all the reasons set forth herein, and in Respondent’s opening brief, Respondent respectfully requests the Board uphold each of Respondent’s Exceptions and dismiss the Amended Complaint in its entirety. Should it be determined that some or all of the alleged violations did occur, Respondent respectfully submits only traditional remedies, rather than a bargaining order, are warranted.

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<sup>14</sup> The CP attempts to capitalize on the ALJ’s erroneous crediting of Williams over Clifton and even tries to take it one step further by incredibly asserting that Wingate had Clifton “pose” as an NLRB representative. (CP. Opp. 3). This is utterly baseless and unsupported by any evidence.

Respectfully submitted,

DUANE MORRIS LLP

Dated: New York, New York  
February 22, 2016

/s/ Eve I. Klein

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**CERTIFICATE OF SERVICE**

This is to certify that on February 22, 2016, I electronically filed the foregoing document with the National Labor Relations Board pursuant to the NLRB E-Filing System and have also served a copy of this document to the individuals listed below in the manner specified therein:

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