UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

INTERNATIONAL SHIPPING AGENCY, INC. d/b/a INTERSHIP, MARINE TERMINAL SERVICES, INC. and TRUCK TECH SERVICES, INC., single employer	Cases	24-CA-091723, 24-CA-104185, 12-CA-129846, 12-CA-133042, 12-CA-135453, 12-CA-135704, 12-CA-136480, 12-CA-142493, 12-CA-143597, 12-CA-144073
and		
UNION DE EMPLEADOS DE MUELLES (UDEM), LOCAL 1901, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO		

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. Statement of the Case

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel files the following Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision.

On March 30, 2016, Administrative Law Judge Robert A. Ringler (the ALJ) issued his decision in in the matter of International Shipping Agency, Inc., Marine Terminal Services, Inc., and Truck Tech Services, Inc., Cases 24-CA-097123 et al., reported at JD-24-16.

Respondent consists of International Shipping Agency, Inc. d/b/a Intership (Respondent Intership or Intership), Marine Terminal Services, Inc. (Respondent MTS or MTS) and Truck Tech Services, Inc. (Respondent TTS or TTS). The ALJ properly found Intership, MTS and TTS (collectively Respondent) to be a single employer. (JD 12:23 to 13:33).[1] These cases involve Respondent's prolonged egregious unfair labor practices with respect to its employees' activities on behalf of Union de Empleados de Muelles, Local 1901, ILA, AFL-CIO (the Union).

With respect to the alleged unlawful conduct in 2012 and 2013 concerning the closure of MTS and TTS and discharge of the employees at those operations, the ALJ properly found that Respondent made numerous threats of discharge and plant closure, interrogations and other statements in violation of Section 8(a)(1) of the Act, closed its MTS and TTS mechanical shops that served its Intership stevedoring operations, and discharged the MTS and TTS employees because of their union activities, in violation of Section 8(a)(3) and (1) of the Act, and that the MTS closure, discharges and subcontracting of MTS work also violated Section 8(a)(5) and (1) of the Act. (JD 13:35 to 16:32; 17:32 to 24:23).

[1] As used herein "JD" refers to the ALJ's Decision, followed by the page and line numbers; "Tr" refers to the transcript followed by the page and line numbers; "R. Brief" refers to Respondent's Brief in Support of Exceptions to the ALJ's Decision, "GC" refers to General Counsel's exhibits; "J" refers to joint exhibits; and "R" refers to Respondent's exhibits.

On May 27, 2016, the General Counsel and Respondent each filed exceptions to the Decision of the ALJ along with supporting briefs. Respondent excepted to the ALJ's findings regarding the various violations that resulted from Respondent's closing of its MTS and TTS subsidiaries. Respondent takes issue with the ALJ's findings that Respondent unlawfully subcontracted MTS' and TTS' work to other entities, that MTS' closure is not a "closing of a business," that the closure of MTS was "unaccompanied by a basic change in the nature of the employer's operation," that Respondent had a duty to bargain over its decision to close MTS, and that the subcontracting of MTS' and TTS' work was discriminatory. Respondent also excepts to the ALJ's finding that Respondent's physical violence towards a unit employee constituted a violation of the Act. For the reasons discussed below, the General Counsel urges the Board to reject each of Respondent's exceptions.[2]

Respondent did not file exceptions with respect to the ALJ's findings that Intership, MTS and TTS are a single employer, or with respect to the ALJ's findings, aside from the findings of physical violence by Chief Financial Officer Caraballo and Vice President of Maintenance Sosa on July 21, 2014, that Respondent committed numerous independent violations of Section 8(a)(1) of the Act, such as threats of job loss, interrogations and surveillance because of its employees' union activities. The undisputed Section 8(a)(1) findings strongly support the ALJ's findings that Respondent violated Section 8(a)(1) and (3) of the Act by discharging the MTS and TTS employees.

[2] This brief addresses all of Respondent's exceptions other than Respondent Exception F, which asserts that the ALJ erred in failing to apply *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) in this case. General Counsel's Exceptions and Brief in Support of Exceptions argue that Respondent violated Section 8(a)(1) and (3) of the Act under *Darlington*, as an alternative theory to the *Wright Line* analysis pursuant to which the ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging the MTS and TTS employees. General Counsel's analysis of the possible application of *Darlington* to this case is set forth in General Counsel's Brief in Support of Exceptions and is not repeated herein. (GC's Brief in Support of Exceptions at 11-16)

II. Respondent subcontracted MTS' work and redistributed Intership's chassis upkeep functions to Frank's Chassis. (Respondent Exception A).

Having concluded that MTS, TTS, and Intership were a single employer, the ALJ found that MTS was not a distinct and separate entity from Intership, but rather just a cog within Respondent's single employer enterprise.[3] (JD 12:25; 18:39-40). The ALJ further found that MTS' main role was to support Intership's stevedoring business by servicing its chassis, and Frank's Chassis continued to perform those services after MTS' closure. (JD 4:5-6; 18:40-41; GC 56-58). He properly concluded that the subcontracting of MTS' work to Frank's Chassis was discriminatory and violated Section 8(a)(3) of the Act. (JD 21:37).

Respondent argues that the ALJ's finding that Respondent subcontracted MTS' work or redistributed Intership's chassis upkeep functions to Frank's Chassis is unsupported by the evidence, because the ALJ did not make any reference to the transcript or other evidence in the record when making this finding. However, Respondent itself failed to cite any significant evidence that contradicts the ALJ's finding, and cited the evidence (as will be discussed below) that led to the ALJ's conclusion. Thus, Respondent's claim should be rejected.

First, Respondent argues that MTS was a distinct or separate operation from Intership, because MTS serviced chassis for outside clients, while Intership did not engage in that kind of business for profit. However, such outside service only constituted a small portion of MTS' work, and the vast majority of the work that the MTS subsidiary performed, as the ALJ properly found, was servicing chassis and equipment for Intership. (JD 3:5-6) (Tr. 73:2-11, 110:19-20). In addition, Respondent failed to establish that MTS ever performed significant repairs for outside companies, because there is no documentary evidence showing that MTS repaired

[3] Respondent expressly stated that it was not challenging the single employer status between MTS and Intership. (Tr. 10-11:1).

chassis for outside customers, or that such outside work constituted a significant portion of the overall business of MTS.

Although Intership may not perform chassis and equipment repairs for customers as MTS did, MTS performed a significant amount of repairs for Intership,[4] which contributed to the overall operation and profitability of Respondent as a whole (which, at that time, included MTS and TTS). Consistent with the ALJ's finding, Respondent concedes that "Intership sent chassis for refurbishing to MTS." (R. Brief at 15). Respondent further asserts, as found by the ALJ, that Intership sent eight to ten chassis to MTS for repairs every week. (JD 4, fn. 13; R. Brief at 18). (Tr. 955: 1-4) Although Respondent argues that MTS' refurbishing of chassis for Intership was not an essential part of Intership's business, it failed to provide any evidence to support that contention and refute the ALJ's finding.

In addition, Respondent also failed to cite any evidence in the record that contradicts the ALJ's finding that Respondent redistributed the work of repairing and maintaining chassis from MTS to Frank's Chassis, its subcontractor after it closed MTS. Although Respondent claims that there is no evidence to support such a finding, its own witness, Intership's Vice President of Terminal Operations, Jose "Joe" García, admitted that Frank's Chassis performs some of the work MTS had performed for Intership. (Tr. 632:2-16). Thus, Respondent admittedly has continually needed to repair and refurbish chassis since the closing of MTS in order to operate its main stevedoring business on a day-to-day basis. Also, Intership performs its own maintenance on chassis, and has subcontracted out both medium to heavy repairs, and the refurbishing or rebuilding of chassis, work that was previously performed by MTS employees.[5] (Tr. 891-894).

[4] See GC Ex. 56(b) and 57(b) for a representation of the amount of invoices MTS generated based on the repairs it performed for Intership.

[5] Garcia testified that "bump carts" are "mission-essential" chassis "that I need in order to operate the vessels …. For example, bump carts are needed for the daily operations. Anything that comes -- all the cargo that comes off the

Although at trial García claimed that in the past six months, i.e. approximately two and one-half to three years after the closing of MTS, Intership had only needed Frank's Chassis to repair between 15 to 20 "mission essential" chassis, this self-serving claim was not supported by any documentary evidence, and does not address the extent to which Respondent subcontracted chassis repairs at the time it closed MTS. Respondent incredulously asserts that, after its precipitous decision to close MTS two days after the MTS employees voted in favor of union representation, it suddenly had little or no need to perform the chassis repair work that MTS had performed for it. However, the record shows that Intership maintenance employees performed these repairs before Respondent created MTS and shifted that bargaining unit work to MTS, in violation of the collective-bargaining agreement between Intership and the Union.[6] (J Ex. 3b) Moreover, since the closing of MTS and TTS, Intership welders and mechanics have been performing certain chassis repairs at the port (Tr. 572-576, 595-597, 603-604, 609-611) and, as admitted by Respondent, Intership has contracted with Frank's Chassis for additional chassis repair work. Thus, the evidence shows that Respondent's ongoing need for the work that MTS employees used to perform, such as chassis and equipment repair, is essential to its stevedoring operations, and Respondent cannot legitimately argue that it had gone completely out of that business or that it completely closed the portion of its business that was formerly conducted by MTS.[7]

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ship or loading on the ship, we need those bump carts and we have 30 of them. So as they break down, I have to repair those in order for us to continue to work." (Tr. 893:25 to 894:7).

[6] Pursuant to two grievances filed by the Union, an arbitration hearing was held in 2010 and, on June 27, 2011, the arbitrator issued an award finding that Intership was in violation of the parties' collective-bargaining agreement (CBA), by subcontracting maintenance unit work to its own subsidiary, MTS, where the employees were unrepresented by then.

[7] After Respondent closed MTS, it continued to operate its nearby TTS facility, which performed a similar maintenance function, also mainly for Intership - repairing chassis, trailers, trucks and heavy equipment. [R. Ex. 26, page 6, R. Ex.54 (c)]. After MTS closed, in addition to subcontracting certain chassis repair duties to Frank's Chassis, Respondent transferred some of the duties of MTS employees to TTS employees, who had to go to Intership to pick up Intership's equipment for repair at TTS. (Tr. 391:12-20, 709:1 to 711:19).

Respondent's argument that Intership is now only contracting with Frank's Chassis to perform repairs on Respondent's own equipment, rather than on the equipment of outside clients, does not detract from the ALJ's correct finding that Respondent subcontracted the main portion of MTS' work – chassis repairs for its own stevedoring operation.

Respondent notes in its brief that the complaint does not allege that Intership subcontracted MTS' unit work. (R. Brief at 18). However, during administrative investigation of this case, in response to an investigative subpoena *duces tecum* seeking documentary evidence of subcontracting of the work of MTS, Respondent failed to disclose the fact that, since the closing of MTS, it had used a contractor to perform repair work that MTS previously performed, responding that no such evidence existed. [GC Ex. 58(c) and 58(d)]. Respondent's concealment of this evidence continued in its response to General Counsel's trial subpoena *duces tecum*. Thus, in paragraph 17 of that subpoena, Counsel for the General Counsel requested the "(n)ame and contact information of any individual, and/or entity, providing and/or performing the work and/or services the Respondent MTS customarily performed, provided and/or sold to Respondent [Intership]." (GC Ex. 58a). Respondent's answer was "None," and Respondent failed to produce any such documents. [GC Ex. 58 (b), 58(c) and 58(d)]. The first time Respondent conceded such subcontracting occurred was during the testimony of Respondent Vice President Garcia at the hearing. It should be further noted that, during the hearing, Respondent CFO María Caraballo was specifically asked to identify the entities that were providing the services that MTS used to provide for Intership. Her answer was "no one" (Tr. 1477:6-9), showing, once again, Respondent's attempt to conceal such fact, perhaps because if it was known that Respondent

subcontracted MTS' work, Respondent's legal theory under *Darlington* would succumb, weakening its overall case.[8]

Respondent should not reap a benefit from its failure to furnish subpoenaed material establishing that it has contracted with another entity to perform the services MTS had performed. Respondent's self-serving argument should be rejected. First of all, Respondent wants us to believe that, because it decided to close MTS, it suddenly has no need to repair the same amount of chassis and equipment MTS personnel used to perform,[9] which continues to be "essential" to Intership's unchanged operation. Second, Respondent deprived itself from the benefit of being able to legitimately argue that MTS had gone completely out of business and that Intership only repairs "15 to 20" chassis with Frank's Chassis by concealing from the Government, since the administrative investigation of the instant matter, that there was an entity responsible for performing the same or similar work MTS used to perform for Intership. (GC Ex. 58(a) through 58(d)). Respondent should not be allowed to argue that the record is "devoid of any evidence capable of establishing Respondent's subcontract of the MTS work," as it did in its brief in support of its exceptions. (R. Brief at 12-18)

Respondent should not reap a benefit from its failure to furnish subpoenaed material establishing that it has contracted with at least another entity for the same or part of the services MTS used to perform and from providing self-serving and unsupported testimony as to the amount of chassis and equipment that is being repaired by said independent entity after MTS closed. In view of the admission that such subcontracting occurred, it is apparent that such documentation exists. In these circumstances, an adverse inference should be drawn against

[8] *Darlington* is not applicable where an employer does not cease operations, but rather transfers some work to another location and subcontracts the remaining work; *Darlington* explicitly distinguished discriminatory relocation and subcontracting from a partial closing. *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989).

[9] See GC Ex. 56(b) and 57(b) for a representation of the amount of Invoices MTS generated based on the repairs it performed for Intership.

Respondent for failing to comply with paragraph 17 of the trial subpoena, i.e. that the subpoenaed evidence of subcontracting the former work of MTS, if produced, would not be favorable to Respondent, the party withholding it. *Filene's Basement Store*, 299 NLRB 183, 204 (1990). A party has an obligation to make a good-faith effort to gather responsive documents upon service of a subpoena and a party who fails to do so, does so at its peril. *McAllister Towing & Transportation*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005); *Metro-West Ambulance Service*, 360 NLRB No. 124, slip op. at 2 (2014) (adverse inference drawn against a respondent who failed to produce accident reports in response to the General Counsel's subpoena).

Although the complaint does not mention the subcontracting of MTS work, paragraphs 13 and 15 of the complaint specifically allege that Respondent's closure of MTS and discharge of the MTS employees violated Section 8(a)(1) and (5) of the Act, in addition to violating Section 8(a)(3) of the Act. [GC Ex. 1(o)]. Thus, Respondent was effectively given notice and due process regarding its alleged unlawful subcontracting of unit work in conjunction to complaint allegations concerning the closing of MTS and discharge of the MTS employees. It is well established that the Board may find and remedy an unfair labor practice that is not specifically alleged in the complaint, "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F2d 130 2d Cir. 1990); *Gallup, Inc.*, 334 NLRB 336 (2001).[10] The issue of

[10] See also Bronx Metal Polishing Co., 268 NLRB 887, 893, fn. 3 and 4 (1984), citing *Omark-CCI*, 208 NLRB 469, (1974) (Although this allegation is not specifically alleged in the complaint, it is closely related to other allegations described in the complaint and was fully litigated… it involves conduct closely related to unfair labor practices set forth in the complaint and was fully litigated therein.); Weyerhaueser Co., 251 NLRB 574, 577 (1980) (While an implied threat of discharge was not specifically alleged in the complaint it is clear that the facts upon which this conclusion is based were fully litigated at the hearing in conjunction with the alleged interrogation. The Board and an administrative law judge are expected to pass upon an issue although it is not specifically alleged to be an unfair labor practice in the complaint if the matter was fully litigated.); *Meritor Automotive, Inc.*, 328 NLRB 813 (1999), citing *American Packaging Corp.*, 311 NLRB 482 (1993) (it is well settled that conduct that exhibits animus but that

whether Respondent's subcontracting of former MTS work violated the Act is closely connected and consistent with, if not subsumed by, the allegations of the complaint. Moreover, this issue was fully litigated by the parties and Respondent has not cited any additional evidence it would have produced if the complaint had specified that the subcontracting violated the Act. Thus, it is appropriate for the Board to make an unfair labor practice finding regarding Respondent's subcontracting of the MTS work. *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004); *Pergament United Sales*, at 334.

III. The ALJ properly found that the General Counsel made a *prima facie* showing under *Dubuque Packing Co*. that the closure of MTS was unaccompanied by a basic change in the nature of Respondent's operation or in the scope and direction of its enterprise. (Respondent Exception C).

The ALJ properly found that the GC made a *prima facie* showing under *Dubuque Packing Co.*, 303 NLRB 386 (1991) enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), pet. for cert dismissed 511 U.S. 1138 (1994), that there was no basic change in the scope and direction of Respondent's business. Thus, Respondent remained in the stevedoring business and continued to service the same clients and market the same stevedoring services. (JD 19:29-32). The ALJ further correctly found that the capital transactions that were present in the leasing of the MTS building, the sale of MTS equipment and the cessation of performing chassis repairs for outside clients, did not require a finding that Intership changed the nature or direction of its business. (JD 19:41-46).

In this regard, Respondent erroneously focuses its analysis on the closure of MTS' small business venture of repairing chassis for third parties, but ignores the significant chassis upkeep services it provided to Intership, which have been provided to Intership pursuant to its subcontracting relationship with Frank's Chassis, since the closure of MTS, and by maintenance

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is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful.)

and mechanical work that Intership's own unit employees perform to its chassis and other equipment.

Respondent's decision to close its MTS operation and subcontract MTS' bargaining unit work to Frank's Chassis was essentially a mere substitution of one group of employees for another to continue performing the same kind of work, and did not result in the alteration of Respondents' basic operation. Respondent's cessation of its limited business venture involving MTS' chassis repairs for outside clients does not change the fact that Respondent's basic operation, stevedoring, and the attendant need for maintenance and repair of chassis, was essentially untouched by the closure of MTS. (JD 18:40-42).

As noted above, the ALJ correctly found that the main role of MTS was to service Intership. Intership's primary business, stevedoring, was effectively unchanged by the transfer of those services from MTS to Frank's Chassis. MTS only had a few outside clients. (JD 3:6). (Tr. 73:2-11, 110:19-20). Thus, it cannot be logically concluded that the cessation of a minor portion of MTS' operation, servicing chassis for outside clients, constituted an alteration in Respondent's main business operations. The MTS capital investment found by the ALJ is not significant enough to be deemed as having changed the scope and direction of Respondent's stevedoring business. Given the "essential continuity in Respondent's operations," Respondent's argument should be rejected and the ALJ's conclusion should be affirmed.

Respondent also argues that it litigated this case under the theory that the General Counsel expressed it was presenting, that the subcontracting violated Section 8(a)(5) of the Act under *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), and has been "chastised for not litigating a case that the General Counsel said [it] was not putting forward and in fact did not." (R. Brief 23, fn. 11, citing Tr. 871-872, 887). Although when questioned by the ALJ as to

whether the theory of violation was under *Fibreboard* or *Dubuque*, the General Counsel ultimately responded *Fibreboard*, the General Counsel did not renounce a *Dubuque* theory, as Respondent asserts. Moreover, the Board has established that the General Counsel is not required to plead his evidence or the theory of the case in the complaint. *McDonald's USA, LLC*, 362 NLRB No. 168 (2015); *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1226 fn. 3 (2003), and cases cited therein. See also *Boilermakers Local 363 (Fluor Corp.),* 123 NLRB 1877, 1913 (1959). In any event, Respondent was given the full opportunity to litigate all aspects of the alleged unlawful closure of MTS, and in fact, presented all of its available defenses during the hearing.

In addition, as mentioned above, Respondent withheld evidence with respect to the entity that continued performing MTS' work after MTS closed, and it was not until during the hearing that the subcontracting to Frank's Chassis was made known to the General Counsel. Thus, Respondent itself presented evidence of the subcontracting of MTS' work and has failed to cite any other evidence it would have introduced under a *Dubuque* theory of violation. For that reason, Respondent's argument is without merit.

IV. The Union did not waive its right to bargain about the closure of MTS. (Exceptions D and E).

The ALJ found that, on October 19, 2012, Respondent closed MTS without providing notice to the Union. Thereafter, on October 30, 2012, the Union sought to bargain over Respondent's decision to close MTS and the effects of such decision, a request that was not granted by Respondent. (JD 6:5-8; J Ex. 15, 16, and 20, paragraph 2). The ALJ further concluded that Respondent's closing of MTS was a mandatory subject of bargaining and that Respondent violated Section 8(a)(5) of the Act by unilaterally closing MTS without offering the Union a chance to bargain over that matter. (JD 17:34-37; 20:24-27).

Respondent argues that, because the Union had not requested to bargain with MTS by the time it closed on October 19, 2012, it did not have a duty to bargain or violate the Act by failing to bargain. Respondent argues that by "waiting" until eleven days after MTS' closure to send Respondent a letter requesting to bargain, the Union waived any right to bargain. Both of Respondent's arguments are plainly without merit and should be rejected.

It is well established that an employer must bargain with its employees' collective-bargaining representative over mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962). An employer's "obligation to bargain before making changes commences not on the date of certification, but **on the date of the election**." (emphasis added). *Ramada Plaza Hotel*, 341 NLRB 310, 310, fn.1, 315-316 (2004); *Mike_O'Connor Chevrolet*, 209 NLRB 701, 703-704 (1974). Therefore, Respondent's bargaining obligation arose when the unit employees voted for the Union as their bargaining representative, on October 17, 2012. As the ALJ properly found, Respondent's closing of MTS was not a complete closure in view of its continuation of the MTS functions through the subcontract and through the work Intership's maintenance employees perform. There is no evidence or claim that Respondent gave the Union notice of its decision to close. Rather, the Union did not learn about that decision until after the fact.

Even in cases of a complete plant closure, which the ALJ correctly found was not the situation here, an employer must provide the union with timely notice and an opportunity to bargain "in a meaningful manner and at a meaningful time." See *First National Maintenance Corporation v. NLRB*, 452 U.S. at 681-682; *Metropolitan Teletronics Corp.*, 279 NLRB 957, 959 and fn. 14 (1986), enfd. mem. 819 F.2d 1130 (2d Cir. 1987). In addition, there has been no

proof that Respondent was faced with exigent circumstances that required it to close MTS immediately, without giving the Union notice or an adequate opportunity to bargain.

Yet, Respondent failed to notify the Union about its decision to close its MTS operation prior to implementing the decision on October 19, 2012, thus presenting the Union with a *fait accompli*, and depriving the Union of a meaningful opportunity to bargain about the decision to close MTS, discharge the MTS unit employees, and subcontract MTS work. For these reasons, any waiver claimed by Respondent is without merit and, as the ALJ correctly found, Respondent was under an obligation to notify and bargain with the Union over the decision and the effects of MTS' closing prior to implementing its decision.

V. The ALJ properly found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging the MTS and TTS employees. (Respondent Exceptions G through J).

A. The ALJ's finding and Respondent's contentions.

Applying *Wright Line*, 251 NLRB 1083 (1980), the ALJ correctly found that Respondent discriminatorily discharged the MTS employees and subcontracted out MTS' work. (JD 23:35-36). He further correctly concluded that Respondent failed to show that it would have contracted out the MTS chassis repair work, absent the MTS employees' activities, and found that Respondent's contention that it subcontracted out the MTS work for financial reasons was unpersuasive. (JD 23:24-25). The ALJ discredited the testimonies of Respondent President David Segarra's and CFO Maria Caraballo about Respondent's economic rationale for closing MTS. (JD 6:32-25).

The ALJ reasoned that Respondent had accepted and endured MTS' financial losses for several years without any intervention, and only suddenly closed MTS in response to the employees' vote in favor of the Union, two days after that vote. (JD 23:26-27). The ALJ considered that Respondent conspicuously failed to show that it saved any money when it

subcontracted MTS' work, despite having alleged that the subcontracting was because of Respondent's mounting losses. (JD 23:29-30). The ALJ also relied on the extensive evidence of animus, and specifically relied on the fact that "Intership repeatedly told the MTS unit that it would close if they unionized and then fulfilled its promise within 2 short days of the Union's election victory; [thus] its anti-Union sentiments became blatant." (JD 23:32-35).

The ALJ also found that Respondent discriminatorily discharged the TTS employees and subcontracted out TTS' work. (JD 23:40). For similar reasons that led to his finding regarding MTS, the ALJ concluded that Respondent failed to prove that it would have subcontracted out TTS' work, absent the union activity of the TTS employees. (JD 24:6-23). The ALJ considered that TTS accepted its mounting losses for years and only reacted to such losses once TTS employees began considering unionizing; that Respondent made no showing that it saved money by subcontracting TTS work to Tribo Tech; and that the record contains extensive evidence of animus. (JD 24:14-20). In concluding that the subcontracting of the TTS work was motivated by the union activities of the TTS employees, which were testified to by former TTS supervisor Darren Ryan, the ALJ also relied on the fact that Respondent's unlawful subcontracting of the MTS work "demonstrates a common scheme to use unlawful subcontracts and work transfers to thwart unionization." (JD 24:21-23).

Respondent argues that the ALJ's findings are unsupported by the evidence. Respondent claims that it was able to prove that it would have closed MTS because it could not have continued financing it. Respondent further argues that the ALJ's findings are contradictory, inasmuch as the ALJ credited Respondent's testimonies regarding its (current) financial situation, yet failed to find that MTS would have closed because of its fiscal deficit. Respondent claims that for the same reason, the record shows that it would have closed TTS, irrespective of

employees' protected activities. Respondent's arguments are without merit. The Board should affirm the ALJ's finding that, despite the fact that Respondent's financial records showed that MTS and TTS were unprofitable, it discharged the MTS and TTS employees and subcontracted their work because of their union activities, in violation of the Act.

B. Respondent's economic defense for closing MTS is a pretext. (Respondent Exception G).

The evidence establishes that Respondent's economic defenses for closing MTS and TTS are pretexts. Respondent claimed that it decided to close MTS because MTS was "bleeding" the parent company (Intership). (Tr. 1344:4-22). It claims that, since at least 2010, CFO Caraballo had been insisting to Respondent President Segarra that they do something about MTS because it had been carrying and accumulating losses for a long time. (Tr. 1344:17 to 1345:3, 1346:5-10). Referring to MTS' tax return forms for years 2009 through 2011, Caraballo stated that MTS operated with losses and Intership lent MTS "all the money needed" to operate. (Tr.1354:11-24).

However, Respondent conceded that, since Intership purchased MTS in 2001, MTS lost money every year. (Tr.1346:3-4, 1559:5-9). Thus, **Respondent tolerated the losses of its MTS subsidiary for 11 years** before closing MTS two days after its employees voted for the Union. Until the MTS employees organized into the Union, MTS' losses did not prevent or discourage Intership from continuing to invest in MTS, nor did it prevent Intership from investing $2.1 million in purchasing TTS, which performed work that was very similar to the work performed by MTS. [Tr.1450:24-25; R Ex. 7(a), 7(b), 38]. The ALJ correctly reasoned that "[i]f MTS' deep losses were a valid reason, Intership would have subcontracted out the MTS operation vastly sooner," instead of reacting only immediately after MTS unionized. (JD 23:26-29).

Although Respondent contends that MTS had to be closed because it was bleeding money from the parent company, according to Respondent's financial records, MTS was not the only subsidiary Intership was financially subsidizing. In fact, in 2011, the year before MTS closed, Intership's Board of Directors restructured the finances of its subsidiaries TTS, Oceanic and Sea Air, in addition to MTS. (Tr. 1457-1458:12-13). As admitted by Respondent, MTS was the only one of these four Intership subsidiaries where the Union petitioned to represent employees, and the employees of the other three subsidiaries were not being organized by the Union (as of October 2012). (Tr. 1468-1469:15-17).

In 2011, Intership not only restructured MTS' debt, but also the debt of its subsidiaries Sea Air, TTS, and Oceanic.[11] With these financial conversions or restructuring, Respondent basically deleted the accounts payable by its subsidiaries to Intership. [Tr. 1458:8 to 1462:3; R Ex. 60, page numbered 14, Item 11, Related Parties Transactions (cont.), R Ex. 62, page numbered 14, Item 11, Related Parties Transactions (cont.)].

Respondent alleged that, after the restructuring of the debt, MTS continued to "lose money," since, by the end of 2011, MTS had accumulated a new debt to Intership of $449,265. However, the evidence shows that by 2011, all four of the subsidiaries whose finances had been restructured by Intership continued to accumulate losses in the form of accounts payable to Intership and all four continued to operate in deficit. The end of the year deficit in 2011 for each of the subsidiaries was: Oceanic $389,082; MTS $524,881, TTS $661,689, and Sea Air $1,035,588. (GC Ex. 54, p.3). Thus, by the end of 2011, Sea Air and

[11] Sea Air's debt of $1,692,530 was restructured by converting $750,000 into long-term debt at an interest rate of 3.5%, and converting the remaining debt of $942,530 in capital; TTS's debt of $1,221,000 was restructured by converting $621,050 to long-term debt, payable at a five percent (5%) interest rate, and converting the remaining $600,000 to additional investment (paid in capital); and the debt of Oceanic of $1,151,790 was restructured by converting $500,000 to a long-term debt and the remaining $651,790 to additional investment. The MTS debt of $1,895,000 was also restructured. [Tr. 1458:8 to 1462:3; R Ex. 60, page numbered 14, Item 11, Related Parties Transactions (cont.), R Ex. 62, page numbered 14, Item 11, Related Parties Transactions (cont.)].

TTS each had deficits or losses substantially higher than those of MTS. In fact, Sea Air's deficit (or losses) almost equaled the combined losses of MTS and TTS.[12] Nevertheless, in October 2012, Respondent closed MTS, but not Sea Air or TTS.

Furthermore, whereas the MTS' accounts payable to Intership only increased relatively slightly from 2011 to 2012, from $449,265 to $522,051, an increase of $72,786 [R Ex. 54(c); GC Ex. 55], the TTS accounts payable to Intership almost doubled, from $556,049 (at the end of 2011) to $1,027,307 (at the end of 2012), an increase of $471,258. (R Ex. 26). Thus, the increase in its accounts payable to Intership was significantly lower than the increase in TTS' accounts payable to Intership. Once again, Respondent's financial reports show that TTS and Sea Air were in poorer financial condition than MTS as of 2012, but Respondent only closed MTS at that time.[13]

Respondent further alleged that, in order to evaluate MTS' financial situation, in 2011, it ordered an appraisal of MTS's real estate property. (Tr. 1362:10-18; R Ex. 51, 52). Without presenting any evidence, Caraballo self-servingly argued that when she compared the 2011 appraisal with a prior appraisal from 2008, which was not offered in evidence, the property value of MTS had decreased. (Tr. 1365:13-24). However, the 2011 appraisal Respondent submitted, which was not from a financial institution, valued the MTS property as being worth more than $4.5 million, whereas Respondent's investment in MTS had been $2.8 million. (Tr. 1450:18-23). Moreover, although Respondent asserts that it commissioned an auditor's report regarding the effects of closing MTS, it failed to establish what, if any, impact the report had on

[12] Additionally, by the end of 2011, the before taxes net losses of MTS were only $139,359, whereas the before taxes net losses were much higher for Sea Air ($207,562) and TTS ($276,328). (GC Ex. 54, p.3).

[13] Respondent's financial records show that, even after Respondent closed the MTS portion of its business, the MTS subsidiary continued to be charged with accumulating losses and MTS funds were used to pay off debt to Intership. The MTS financial statement shows that by December 31, 2013, MTS had a before tax loss of $174,084, a higher amount than when MTS was operating. (GC Ex. 55, page numbered 2). Respondent provided no explanation for these aspects of its financial records.

Respondent's decision to close, and also failed to establish any recommendations by the auditor. Rather, Caraballo merely claimed that she considered the auditor's opinion. (R Ex. 52; Tr. 1363:23 to 1364:13). It is also significant that Respondent provided no explanation as to why it waited more than a year after receiving that report (but just two days after the MTS employees voted for the Union) to take any action with regard to MTS.

In support of its claim that it was considering its options with regard to the future of MTS, Respondent submitted into evidence a copy of Intership's Board of Director's Meeting Minutes dated November 15, 2011, which simply states, "Several meetings have been conducted regarding the future of this subsidiary." (R Ex. 53, Page 2). These minutes do not indicate that Respondent was contemplating closing MTS, nor did Respondent introduce any documents showing further action or decision making regarding the future of MTS. A corporation of the size of Respondent would undoubtedly have documents showing the decision to close such a significant portion of its business, if that decision was for legitimate financial reasons, and Respondent's failure to provide any such documents also demonstrates that its economic defense is pretext.

In sum, as the ALJ properly concluded, Respondent failed to provide any credible economic rationale for closing MTS. (JD 23:24-26; 6:32-33). The evidence, plus the credited evidence of Respondent's many threats to TTS employees that they would be discharged like the MTS employees if they supported the Union,[14] supports the ALJ's finding that Respondent would not have closed MTS, absent the employees' union activity.

[14] See ALJ's chart finding threats by TTS manager Sosa and supervisors Dávila and López between November 2012 and February 2013. (JD 14-15; Tr. 392, 394, 716, 807-808). As noted above, Respondent did not file exceptions to the ALJ's findings that these statements were made and violated Section 8(a)(1) of the Act.

C. Respondent closed TTS, discharged the TTS employees, and subcontracted the TTS work because of the TTS employees' union activities. (Respondent Exception H).

The ALJ properly relied on the largely undisputed evidence of Section 8(a)(1) statements repeatedly made to the TTS employees and other evidence of discussions of the TTS manager and supervisors which show that Respondent was very concerned with the union activities of the TTS employees. Shortly after MTS closed, the TTS managers and supervisors threatened the TTS employees by telling them that MTS had closed because it unionized and that if the TTS employees selected the Union, Respondent would lock the gate to TTS. (Tr.392-394, 396-397, 409, 421-424, 806-809). Just two weeks before TTS closed, employee Alejandro told supervisor López that the company was behaving badly (toward the employees), and the employees needed to bring in the Union. López replied that he would place a big lock on the gate and that, if Alejandro kept talking about them (i.e. the Union), he would see what would happen. (Tr. 422: 14-25).

Similarly, both TTS supervisor Dávila and TTS General Manager (now Intership Vice President for Maintenance) Sosa told TTS supervisor Ryan that the MTS employees were fired because they voted for the Union. (Tr.713-715, 735-736). Ryan undisputedly testified that, around March 2013, about a month before the closing of TTS, Dávila told Ryan that if the TTS employees unionized and/or had conversations with the Union, they would have the same fate as MTS. Dávila also asked Ryan to spread the word and let employees know what would happen to them if they unionized. After Ryan refused to follow Dávila's advice, Dávila told Ryan that he (Dávila) would then spread the word. (Tr.716-717). According to Ryan, Sosa also told him that it was in Ryan's best interest to let everyone at TTS know that they should not unionize because Respondent would simply close the gate. Thus, there is evidence that TTS supervisors feared

that the TTS employees were talking to the Union at the time that Respondent closed TTS and subcontracted its work.

In these circumstances, the ALJ properly found that although Respondent claimed that its actions regarding MTS and TTS were based on economics, its books had shown losses for a number of years, yet nothing had been done to close those subsidiaries of Intership until immediately after the MTS employees voted for the Union, and until TTS employees began considering unionizing. (JD 23:24-25; 24:15-16). The timing of the closures, Respondent's abrupt decision to close MTS, coupled with the widespread evidence of its unlawful motivation, including repeated plant closure threats, amply support the ALJ's conclusion that Respondent closed its MTS and TTS facilities and discharged the employees and subcontracted their work because of their union activities, and that Respondent failed to meet its burden of showing that it would have taken these actions in the absence of the employees' Section 7 activities.

D. Respondent's economic defense for closing TTS is a pretext. (Respondent Exception J).

With regard to Respondent's economic claims, when CFO Caraballo was confronted with the fact that, at the time Respondent decided to close MTS, TTS had double the losses of MTS, to justify Respondent's unlawful actions with regard to MTS, she claimed that "*TTS started in 2009*[15] *and you normally give five years to a business to move on and progress*." (Tr.1467:23 to 1468:2). However, this explanation for the closing of MTS despite the greater losses of TTS does not withstand scrutiny, and further, does not support the purported rationale for closing TTS. Thus, Respondent closed TTS just six months later, after only four years, on April 26,

[15] The parties stipulated that approximately in 2009, Intership bought all of the assets of Commonwealth Spring and Equipment Co. of Puerto Rico, Inc. and in around 2010, it formally changed the name to Truck Tech Services, Inc., or TTS. (J Ex. 1, paragraphs 40, 41).

2013, without providing TTS with the five year period for growth that Caraballo asserted a business is normally given.

In addition, Respondent claims that, in 2013, TTS was impacted by the loss of a client—the United States Postal Service (USPS). It claims that on April 8, 2013, the USPS notified TTS that it was no longer going to use TTS' services. (Tr.1205-1210; R Ex. 36). It further claims that TTS General Manager Enrique Sosa expeditiously tried to reverse the USPS decision, but his attempts were unsuccessful.[16] (R. Brief p. 9; Tr. 1210:2-12; R Ex. 37). However, Respondent President Segarra testified that the USPS business had been regained. According to Segarra, thanks to Sosa, "whatever business [they] had lost with the Post Office, [they] were able to regain for a time, through Sosa and TTS, but it went kaputz." (Tr.1549:18-22). Moreover, Respondent failed to establish the size of the USPS contract, the percentage of the overall business of TTS that the USPS work represented, or how the loss of USPS as a client impacted TTS' financial situation. In this regard, it is submitted that the loss of this client is not sufficient to justify the closing of the TTS operation, since it is reasonable to expect a business to gain and lose clients and, as Respondent admitted, this was not the first time TTS had lost a client. (Tr.1286:17-24).

Although the Union was not trying to organize TTS employees, the closing of TTS should be viewed in the context of the plant closure threats and interrogations found by the ALJ, showing that Respondent feared that TTS employees would seek union representation. Additionally, it is undisputed that the Union, through President Mercado, protested the fact that unrepresented TTS employees were performing unit mechanical and maintenance repairs for Intership. Thus, on February 21, 2013, Mercado proposed to Intership VP of Operations García

[16] Respondent only submitted Sosa's April 9, 2013 e-mail to USPS to support his assertion, but failed to produce USPS' response.

that the TTS employees who came to Intership's port facility should be included in the parties' existing bargaining unit.[17] (Tr.843:12-23) (GC's Brief in Support of Exceptions at 9). Thereafter, on April 15, 2013, the Union filed charges against Intership in Case 24-CA-102920,[18] alleging that it was unilaterally subcontracting unit mechanical work to its subsidiary TTS. (Tr.846:4-10).[19] Thus, like the closing of MTS, the closing of TTS was also in the context of the ongoing dispute between Intership and the Union over Intership's attempt to transfer unit work to its non-union subsidiaries.[20] Furthermore, TTS' closing also took place at a time when Respondent's violations of the Act with regard to the closing of MTS had not been remedied and after Respondent told the TTS employees that MTS was closed because it unionized.

In sum, the ALJ also properly discredited Respondent's economic defense for the closing of TTS as being unpersuasive and concluded that Respondent was not able to prove that it would have closed TTS absent the union activities of the TTS employees. (JD 8:4-5; 23:40 to 24:1; 24:12-13).

[17] Through Mercado's letter dated February 21, 2013, the Union also let Respondent know that the fact that TTS' employees were performing mechanical and maintenance repairs for Intership was relevant to the charges filed by the Union concerning the discharges of MTS employees.

[18] Counsel for the General Counsel respectfully urges the Board to take administrative notice of the charge in Case 24-CA-102920. (GC Rejected Ex. 40). This charge is relevant to the timing of Respondent's decision to close TTS, since it shows that, at the time of the closing of TTS, the Union was objecting to TTS employees doing unit work.

[19] It should also be noted that on April 17, 2013, in connection with the administrative investigation of the charge alleging the unlawful closing of MTS, Intership was asked to provide the Region with the location and line of business of each of its subsidiaries. (R Ex. 6, portion of the chain of e-mails dated April 23, 2013). Respondent requested an extension of time until April 30, 2013, to comply, which was granted until April 29, 2013. (R Ex. 6, e-mail portion dated April 19, 2013). On April 29, 2013, the next business day after it closed TTS, Respondent provided the Regional office with the information concerning its subsidiaries other than MTS, but did not provide any information concerning TTS, and instead simply reported that TTS had been closed. (R Ex. 6, attachments-Additional Information requested by the NLRB, Case #24-CA-091723). It appears that one motivation for the closing of TTS was to bolster Respondent's economic defense regarding the closing of MTS, because TTS' financial picture, according to Respondent's books, appeared to be direr than that of MTS. Accordingly, it is not surprising that Respondent not only withheld the requested information that would have been detrimental to its defense to the charges regarding MTS, but also closed TTS in an attempt to make its economic defense appear to be viable.

[20] It should also be noted that all Union officers were also Intership's employees. Except for Union President Mercado, all union officers continued to work for Intership in their regular unit positions at the same time they held union office. (Tr. 625-627, 830-831).

E. Respondent subcontracted TTS work to Tribo Tech. (Respondent Exception I).

The ALJ found that Respondent discriminatorily subcontracted out TTS' work. (JD 23:40). He found that Respondent is now using Tribo Tech to perform the services TTS used to perform – servicing Intership's Kalmar equipment. (JD 4: 6-8). The ALJ stated that "TTS was not a partial closure; it was simply a work relocation or subcontract of a single employer's (i.e., Intership) in-house Kalmar servicing division (i.e., TTS) to Tribo Tech (i.e., the new subcontractor), which left Intership's core business function (i.e., stevedoring) essentially unchanged." (JD 23, fn. 61). Respondent argues that the ALJ's finding regarding TTS' subcontract is unsupported by the evidence and that there is no allegation in the Complaint asserting the illegal transfer of TTS work. Its arguments should be rejected.

After MTS closed, Intership continued to receive and perform maintenance services through TTS and by subcontracting with third parties (e.g. Frank's Chassis). When Respondent closed its TTS facility, it subcontracted part of the work TTS employees had performed to an outside company, Tribo Tech, which work Intership continues to oversee through Intership Maintenance Vice President and former TTS General Manager Enrique Sosa. Sosa admitted that, since TTS closed, a company by the name of Tribo Tech has been servicing the Kalmar equipment for Intership. Sosa has carried on largely the same role he used to perform for TTS, by approving Tribo Tech's invoices, overseeing its repairs, and helping Tribo-Tech personnel diagnose malfunctions in the Kalmar equipment. (Tr.178:4 to 181:10). In summary, the record strongly supports the ALJ's finding that Respondent subcontracted TTS' work to Tribo-Tech and terminated the employment of the TTS employees because of their Union and other protected activities, in violation of Section 8(a)(1) and (3) of the Act. Respondent failed to establish that it

would have taken these actions notwithstanding the TTS employees' actual and feared union activities.

With regard to Respondent's claim that the complaint does not allege that Respondent subcontracted TTS' work, the complaint alleges the Section 8(a)(1) and (3) discharge of the TTS employees because of their union activities. [(GC Ex. 1(o), paragraphs 14(a) and 14(b)]. The fact that Respondent subcontracted the TTS work is evidence supporting the conclusion that its motivation for discharging the TTS employees violated Section 8(a)(1) and (3) of the Act. Though it could be viewed as a separate violation of the Act, it need not have been plead as a separate Section 8(a)(3) violation in order to find the discharges of the TTS employees unlawful.

The issue of whether Respondent's subcontracting of former TTS work violated the Act is closely connected and consistent with, if not subsumed by, the allegations of the complaint that Respondent discharged the TTS employees in violation of the Act. As was the case with respect to the MTS subcontracting, the issue regarding the TTS subcontracting was fully litigated by the parties and Respondent has not cited any additional evidence it would have produced if the complaint had specified that the subcontracting violated the Act. Thus, it is appropriate for the Board to make an unfair labor practice finding regarding Respondent's subcontracting of the MTS work. *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004); *Pergament United Sales*, 296 NLRB 333, 334 (1989) enfd. 920 F. 2d 130 (2d. Cir. 1990).[21]

VI. Respondent violated Section 8(a)(1) of the Act by engaging in physical violence against a picketing unit employee. (Respondent Exception K).

The ALJ credited employee Rene Concepción's testimony regarding the events of July 21, 2014, over the testimonies of Respondent's Chief Financial Officer Maria Caraballo and

[21] See also *Gallup, Inc.*, 334 NLRB 336 (2001); *Bronx Metal Polishing Co.*, 268 NLRB 887, 893, fn. 3 and 4 (1984); *Weyerhaueser Co.*, 251 NLRB 574, 577 (1980).

Vice President of Maintenance Enrique Sosa. (JD 9:14-22). The ALJ further found that Respondent violated Section 8(a)(1) of the Act when Sosa and Caraballo grabbed and pushed employee Concepción, respectively, while he was telling a trucker about the Union's labor dispute and picketing against Respondent. (JD 16:27-28). The ALJ further concluded that it is unlawful for an employer to physically assault or abuse employees because of their protected activities, and Respondent Sosa and Caraballo's actions were aimed to thwart Concepción's lawful discourse about the labor dispute; therefore, Respondent's actions were unlawful. (JD 16: 29-32).

Respondent argues that the kind of physical violence found by the ALJ does not amount to a violation of the Act. Its argument should be fully rejected.

The Board has established that "if an employer assaults or otherwise physically abuses its employees because of said employees' protected activities, such conduct violates Section 8(a)(1) of the Act." *Kenrich Petrochemicals*, 294 NLRB 519, 535 (1989) citing *Graves Trucking*, 246 NLRB 344 (1979), enfd. in pertinent part 692 F.2d 470 (7th Cir. 1982). Acts involving physical touching of employees engaged in protected and concerted activity, such as pushing, grabbing an employee's arm, and shaking a fist at an employee, may violate Section 8(a)(1) of the Act. *Fortuna Enterprises*, 355 NLRB 602 (2010), incorporating by reference, 354 NLRB 843 (2009) ; see also *Impressive Textiles, Inc.*, 317 NLRB 8, 13 (1995); *Rike's, a Div. of Federated Department Stores*, 241 NLRB 240, 252 (1979).

In this case, the ALJ found that CFO Caraballo pushed employee Concepción in order to stop him from speaking to a truck driver as part of his picketing activity, and Maintenance VP Sosa grabbed Concepción by the arm while demanding that Concepción state whether he was the leader of the Union's demonstration. Caraballo's and Sosa's conduct not only interfered with,

restrained and coerced employee Concepción in the exercise of his Section 7 right to engage in union activity, but also violated the Act because they engaged in this conduct in the presence of other picketing employees. The Board has found that such conduct has the tendency to intimidate and coerce employees, especially when it occurs in the presence of other employees exercising their rights. See *Fortuna Enterprises*, *supra*. Thus, Respondent's physical assault undoubtedly constitutes a violation of the Act, as the ALJ properly concluded. Respondent's exception should be denied.

VII. Conclusion

For the above reasons, Counsel for the General Counsel respectfully urges the Board to deny Respondent's exceptions to the ALJ's decision in their entirety.

Dated at San Juan, Puerto Rico, this 17th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, in the matter of International Shipping Agency, Inc., Marine Terminal Services, Inc. (MTS), and Truck Tech Services, Inc. (TTS), a single employer, Cases 24-CA-091723 et al., was electronically filed with the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 17th day of June 2016.

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