UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

U.S. COSMETICS CORPORATION,

Respondent,

and

TYLER HOAR, an individual,

and

WILLIAM ST. HILAIRE, an individual,

Charging Parties.

Case Nos. 01-CA-135282 and 01-CA-139115

Respondent's Response in Opposition to the General Counsel's Limited Cross-Exceptions to the Administrative Law Judge's Decision

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U.S. COSMETICS CORPORATION'S RESPONSE IN OPPOSITION TO COUNSEL FOR THE GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent U.S. Cosmetics Corporation ("USCC"), by and through its undersigned counsel, respectfully submits this Response in Opposition to Counsel for the General Counsel's Limited Cross-Exceptions to the Decision of the Administrative Law Judge.[1]

I. INTRODUCTION

As set forth in USCC's Exceptions to the Administrative Law Judge's Decision and Brief in Support, the Administrative Law Judge ("ALJ") committed myriad factual and legal errors in concluding, *inter alia*, that USCC violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the "Act") when it terminated William St. Hilaire ("St. Hilaire") and Tyler Hoar

[1] The name of Respondent recently changed to Miyoshi America, Inc.

("Hoar").[2] The ALJ's decision, however, was correct in one respect: the ALJ correctly applied almost eighty years of National Labor Relations Board (the "Board") precedent to conclude that, had USCC violated Section 8(a)(3) with respect to St. Hilaire and Hoar, they are not entitled to recover "search-for-work and work-related expenses that they have incurred while searching for work regardless of whether they received interim earnings for a particular quarter." ALJD at 47:27-35. In her Limited Cross-Exceptions to the Decision of the Administrative Law Judge (the "Limited Cross-Exceptions"), Counsel for the General Counsel provides no reason for the Board to depart from nearly eight decades of precedent and to reverse the ALJ's decision.

II. ARGUMENT

A. The ALJ's decision denying search-for-work and other work-related expenses without regard to interim earnings is correct under current Board law.

Current Board law does not permit an award of job search and other work-related expenses independent and regardless of interim employment earnings. Under well-established Board precedent, such search-for-work expenses are calculated as deductions from interim employment earnings and are not considered as separate expenses. *See e.g., D.L. Baker, Inc*., 351 NLRB 515, 537 (2007); *Cibao Meat Prods*., 348 NLRB 47, 50 (2006); *Coronet Foods, Inc*., 322 NLRB 837, 837 (1997); *Rainbow Coaches*, 280 NLRB 166, 190 (1986); *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965); *West Texas Utilities Co.*,109 NLRB 936, 939 n.3 (1954). The ALJ correctly applied current Board law in denying the General Counsel's request for the additional remedy of search-for-work expenses without regard to interim earnings. ALJD at 47:27-35 (citing *West Texas Utilities*, 109 NLRB at 939 n.3; *Pathmark Stores, Inc*., 342 NLRB 378, 378 n.1 (2004);

[2] If the Board grants USCC's exceptions and reverses the ALJ's findings that USCC terminated St. Hilaire and Hoar in violation of the Act, then the ALJ's Limited Cross-Exceptions are moot and need not be considered.

Waco, Inc., 273 NLRB 746, 749, n.14 (1984)).

The General Counsel fails to provide any reason for the Board to depart from its well-settled precedent either generally or in this case in particular. In support of its Limited Cross-Exceptions, the General Counsel merely restates verbatim the unpersuasive arguments and authority from her Post-Hearing Brief, which, in turn, the General Counsel copied directly from General Counsel Griffin's January 30, 2015 clarification of Memorandum GC 11-08 and proposed draft brief language regarding search-for-work expenses. *Compare* GC's Limited Cross-Exceptions at 3-6; GC's Post-Hearing Brief at 72-75; *and* Memorandum GC 15-01 at 3-5. Notably, the General Counsel's Limited Cross-Exceptions do not address the ALJ's decision ***in this case***, do not discuss why that decision should be reversed ***in this case***, and do not analyze why search-for-work related expenses should be awarded to St. Hilaire and Hoar ***specifically***.

The General Counsel's Office, through its counsel, has been advocating, as a policy, for this additional category of damages, but the Board consistently refuses to award it. *See Casworth Enterprises, Inc.*, 362 NLRB No. 131, slip op. at 2 n.2 (2015) (holding that such relief would involve a change in Board law); *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op. at 1 n.2 (2015); *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 n.5 (2015); *The H.O.P.E. Program*, 362 NLRB No. 128, slip op. at 2 n.1 (2015); *Island Management Partners, Inc.*, 362 NLRB No. 158, slip op. at 3 n.4 (2015). In fact, as recently as June 14, 2016, the Board denied the same exception to Administrative Law Judge Kenneth W. Chu's refusal to award search-for-work expenses regardless of interim earnings, noting that "awarding such expenses would require a change in Board law, and we are not prepared at this time to deviate from our current remedial practice." *Long Island Assoc. for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.3 (2016). The Board again should reject the General Counsel's boilerplate effort to

convince the Board to depart from decades-old precedent and affirm the ALJ's denial of this additional category of damages.

B. The plain language of the Act precludes an award of search-for-work and other job-related expenses regardless of interim earnings.

The General Counsel's request for an award of search-for-work and other job-related expenses without regard to interim earnings is contrary to the plain language of the Act. With regard to remedies, the Act provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees ***with or without back pay,*** as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee ***back pay*** may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him ….

29 U.S.C. § 160(c) (emphasis added) ("Section 10(c)"). By its plain terms, Section 10(c) limits monetary remedies to "back pay" without reference to ***damages*** of any kind, including compensatory, consequential, or punitive damages or attorneys' fees, costs, or front pay.

In asking the Board to award search-for-work and other job-related expenses as a separate category of damages, the General Counsel asks the Board to award not only "back pay," which generally is limited to lost wages, but also "compensatory damages," which, as noted above, are not provided for under Section 10(c). *See e.g., Pappas v. Watson Wyatt & Co.*, No. 3:04CV304 (EBB), 2007 U.S. Dist. LEXIS 86077, *5-6 (D. Conn. Nov. 20, 2007) (defining compensatory damages as pecuniary losses, including moving expenses and job search expenses); BLACK'S LAW DICTIONARY 445 (9th ed. 2009) (defining "compensatory damages" as "[d]amages sufficient in an amount to indemnify the injured person for the loss suffered.");

Office of Legal Counsel, Equal Employment Opportunity Commission, Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992), *available at* https://www.eeoc.gov/policy/docs/damages.html ("Compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm)…. [Pecuniary loss includes] moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct.").[3] Thus, in effect, the General Counsel requests that the Board expand the scope of the Act's remedies to include compensatory damages in contravention of the plain language of Section 10(c). Absent a Congressional amendment to the Act, the Board does not have such authority. *See Gourmet Foods*, 270 NLRB 578, 588 (1984) (citing *H.K. Porter Co. v. NLRB* 397 U.S. 99 (1970)).

Indeed, federal courts consistently have rejected the Board's attempts to expand the Act's remedies to those not specifically identified in Section 10(c), *i.e.*, reinstatement and back pay. *See e.g., Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 645 (1958) ("The power to order affirmative relief under [Section 10(c)] is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 804 (D.C. Cir. 1997) (holding that the Board may not expand the Act's remedies

[3] As discussed below, the General Counsel's reliance on Equal Employment Opportunity Commission guidance in support of the requested expansion of the Act's remedies is unavailing. Even applying the General Counsel's analogy to the approach taken by the Equal Employment Opportunity Commission, however, the Board should not extend the remedies available under the Act to include search-for-work expenses regardless of interim earnings because the Board lacks statutory authority to do so.

to include attorneys' fees); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 196 (6th Cir. 1978) (noting that neither punitive damages nor compensatory damages are allowed under the Act). Less than two months ago, the Court of Appeals for the District of Columbia again reaffirmed the principle that the Board lacks authority to order monetary relief not specifically enumerated in Section 10(c). *HTH Corp. v. NLRB*, Nos. 14-1222, 14-1283, 2016 U.S. App. LEXIS 9226, *22-28 (D.C. Cir. May 20, 2016) (striking the Board's award of litigation expenses).

Furthermore, consistent with the Supreme Court's holding in *Russell*, the Board also previously recognized that its power to award affirmative relief under Section 10(c) "*is not* intended to award *full compensatory damages* for injuries caused by wrongful conduct," but is limited to the relief specifically identified in Section 10(c). *Int'l Union of Operating Engineers, Local 513*, 145 NLRB 554, 563 (1963) (emphasis added). Stated simply, if Congress intended the Act to provide discriminatees the relief the General Counsel now requests, then it would have included language in Section 10(c) regarding such relief. To date, Congress has not included such language, and the General Counsel's position still finds no support in the text of the Act. Accordingly, the General Counsel's request for search-for-work expenses without regard to interim earnings must be denied.

C. The General Counsel's reliance on the approach taken by the Equal Employment Opportunity Commission (the "EEOC") and Department of Labor (the "DOL") is unavailing.

In support of its request for an extra-statutory remedy, the General Counsel relies almost entirely on "the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor." Limited Cross-Exceptions at 5. The General Counsel's reliance on this "approach," however, is ineffective.

First, the General Counsel's citation to the EEOC's enforcement guidance on damages available under § 102 of the Civil Rights Act of 1991 is highly disingenuous. The General Counsel relies on the remedies available under Title VII of the Civil Rights Act of 1964 ***following*** the 1991 amendments to the statute. Prior to the 1991 amendments, however, compensatory damages (including search-for-work and other work-related expenses) ***were not available*** to Title VII plaintiffs. *See Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1151-53 (10th Cir. 1976); *see also Curran v. Portland Superintending School Committee*, 435 F. Supp. 1063, 1078 (D. Me. 1977) (collecting cases and concluding that "[w]hile there is a split of authority on the issue, the clear majority of federal courts, upon an analysis of the language and statutory history of Title VII, have concluded that neither compensatory nor punitive damages are available in a Title VII case ….").

The General Counsel conveniently fails to mention that the pre-1991 remedy provisions of Title VII were modeled on the back pay provisions of the Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *Harrington*, 585 F.2d at 196. And, like the Act, the pre-1991 remedy provisions of Title VII ***did not*** permit plaintiffs to recover compensatory damages, including search-for-work expenses. As the Court of Appeals for the Sixth Circuit explained in *Harrington*:

> Although not conclusive, the similarity of [Title VII and the Act] and the fact that Congress was aware that neither punitive nor compensatory damages were allowed under the National Labor Relations Act leads to the firm belief that Congress did not intend that any money damages other than back-pay would be granted under the present statute …. No reference has been made in either Title VII or the Title VIII statutes to compensatory damages.

585 F.2d at 196. Thus, as *Harrington* makes clear, Congress did not intend ***any money damages other than back pay*** to be recoverable under the Act or Title VII, as Title VII existed before the 1991 amendments.

In 1991, Congress amended Title VII to make compensatory and other damages recoverable. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 247 (1994) ("The Civil Rights Act of 1991 [ ] creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964."). Congress, however, has not similarly amended the Act. Absent such Congressional expansion of available remedies, the General Counsel's reliance on the amended version of Title VII is unpersuasive and actually militates against the Board adopting its position. In short, because the Act, unlike the amended Title VII on which the General Counsel relies, does not provide for compensatory damages, the "EEOC approach" does not justify the General Counsel's requested expansion of the Act's remedies.

The General Counsel's reliance on *Hobby Georgia Power Co.*, 2001 WL 168898, *29 (Feb. 2001) (i.e., "the DOL approach") is equally misplaced. In *Hobby*, the DOL's Administrative Review Board considered an administrative law judge's damages award under the Energy Reorganization Act's whistleblower provision. Unlike Section 10(c), however, that provision specifically states that, in addition to other remedies, including back pay, "the Secretary may order [the charged party] to provide ***compensatory damages*** to the complainant." 42 U.S.C. § 5851(b)(2)(B) (emphasis added). In other words, "the DOL approach" on which the General Counsel relies in support of its exception is based on statutory language ***specifically providing for compensatory damages***. On the other hand, the Act does not so provide.

Consequently, neither "the approach taken by the Equal Employment Opportunity Commission [nor] the United States Department of Labor" supports the General Counsel's position, and neither approach justifies reversing the ALJ's decision on search-for-work expenses.[4]

[4] In a footnote, the General Counsel erroneously claims that "[a]ward of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred

D. Awarding search-for-work and other work-related expenses without regard to interim earnings frustrates the purposes the Act.

Aside from not being permitted under current Board law, the General Counsel's requested expansion of the Act's remedies would punish employers and provide discriminatees with a potential windfall—both of which are contrary to the purposes of the Act. Back pay awards under the Act are intended to make the employee "whole," to the extent consistent with the purposes of the Act; conversely, back pay awards cannot serve to punish the employer or to provide a windfall to the discriminatee. *See* e.*g., NLRB v. Douglas & Lomason Co.*, 443 F.2d 291, 295 (8th Cir. 1971) (Board's remedy "should not smack of punitive action against the employer."); *Starcon Int'l v. NLRB*, 450 F.3d 276, 277-78 (7th Cir. 2006) ("The National Labor Relations Act is not a penal statute, and windfall remedies—remedies that give the victim of the defendant's wrongdoing a benefit he would not have obtained had the defendant not committed any wrong—are penal.").

A discharged employee's search-for-work and other work-related expenses are directly related to his mitigation efforts. Indeed, the longstanding purpose of analyzing a discharged employee's search-for-work efforts in awarding back pay is to determine whether the employee has fulfilled his obligation to mitigate losses. *See Wright Elec., Inc.*, 334 NLRB 1031, 1032

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by discriminatees …." Limited Cross-Exceptions at 5 n.8 (citing *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 516 (1953)). In *Knickerbocker*, the Board's remedial order required the employer to reimburse unlawfully discharged employees for any medical and hospitalization expenses they incurred which otherwise would have been covered by the employer's health benefit plans. *Id.* Unlike search-for-work expenses, these expenses were due directly to the employer's discriminatorily motivated cancellation of health benefit coverage. Because there was no link between the health benefit expenses and the generation of interim earnings, the Board properly included these expenses in the gross back pay calculation without deducting them from interim earnings. In contrast, search-for-work expenses share a direct causal connection with a discharged employee's interim earnings and therefore should be deducted therefrom. Furthermore, as discussed *infra*, unlike search-for-work expenses, which by their nature are speculative, unnecessary, and subject to abuse, medical expenses are definitive, objective, and verifiable.

(2001) ("It is very well-settled that, in compliance proceedings, the General Counsel has the burden to establish the gross amount of backpay owed to the employee. Then, the burden shifts to the employer … to produce evidence that would mitigate its liability."). Nevertheless, the General Counsel requests that these damages be removed from the employee's mitigation efforts and be awarded regardless of the employee's interim earnings. The General Counsel's proposed unlawful expansion of the Act's remedial scheme is illogical and would punish employers, while providing a windfall to discharged employees, in contravention to the Act's purpose in granting back pay awards.

If employees' search-for-work expenses are analyzed without regard for employees' search-for-work efforts and interim earnings, then employees have no incentive to seek ***legitimate and realistic*** employment opportunities. By removing a discharged employee's search-for-work efforts from his or her interim earnings, the General Counsel asks the Board to hold employers liable for all of the employee's search-for-work efforts, regardless of how outlandish and unreasonable those efforts may be. In effect, according to the General Counsel's position, a discharged employee from the continental United States may fly to Hawaii to interview for a position he or she has no realistic chance of obtaining, and then hold his or her former employer responsible for the costs of his or her "vacation." Similarly, a discharged employee could accept interim employment in a high-priced housing market and claim the increased housing costs as work-related expenses for which his or her employer would be liable regardless of interim earnings. There are countless ways for discharged employees to "game the system" and claim reimbursement for the costs of trips and vacations under the pretense that the expenses associated with such trips and vacations were incurred as part of their search-for-work efforts. In that regard, the General Counsel's proposed expansion of the Act's remedies provides

discharged employees the potential windfall of recovering supposed search-for-work expenses that are neither legitimate nor incurred in good faith efforts to obtain employment. Simply put, permitting discharged employees to recover search-for-work expenses without regard to interim earnings would do nothing to encourage discharged employees to be reasonable and faithful in their search for work, as the Act and public policy contemplate.[5] Instead, extracting an employee's search-for-work expenses as a separate category of damages would grant the employee a potential windfall and would penalize employers in contravention of the Act's purposes.

E. An award of search-for-work expenses without regard for interim earnings is speculative and wholly unnecessary.

A back pay award must be certain, not speculative. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) ("[I]t remains a cardinal, albeit frequently unarticulated assumption, that a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practice."). The General Counsel's requested expansion of the Act's remedies, on the other hand, is inherently speculative. Before the Board could calculate the amount of a discharged employee's search-for-work expenses, it would be required to guess as to, among other things, the time the employee spent searching for work, traveling to and from potential places of employment, and the time spent and cost of using the internet to search for work. The Board also would have to discount any illegitimate search-for-work expenses such as to avoid punishing the employer or providing a windfall to the discharged employee. Such speculation is not permitted by the Act.

[5] On the other hand, by linking employees' recovery of search-for-work expenses to their interim earnings to mitigate losses, the Board's current remedial structure encourages employees to seek employment in locations and jobs for which they are qualified and which they have a realistic chance to obtain. Consequently, offsetting a discharged employee's search-for-work expenses against his or her interim earnings is entirely consistent with the Act's purposes.

Furthermore, an award of search-for-work expenses without regard for interim earnings is wholly unnecessary in today's economy, as employees easily can find employment without incurring any, or virtually any, search-for-work expenses. As Administrative Law Judge Keltner W. Locke recently recognized:

> In a past age, a search for work might indeed have resulted in an expense for gasoline or, earlier, hay for the horse. However, the telephone and Internet make it possible to conduct a job search at no extra expense. Indeed, to a significant extent the Internet has transformed the process of looking and applying for a job. This technology has become many individuals' regular way of finding work, and the Board only requires a discriminatee to seek employment using his regular method.

Int'l Bhd. of Teamsters, Local 71, 2014 WL 4809567 (NLRB Division of Judges) (Sept. 26, 2014) (citing *Wright Elec., Inc.*, 334 NLRB 1031 (2001)). Because employees can search for work effectively and efficiently without incurring any (or *de minimis*) search-for-work expenses, there is no need to deviate from Board precedent in treating such expenses.[6] In *Browning-Ferris Indus. of California, Inc.*¸362 NLRB No. 131, slip op. at 5 n.14 (2015), the Board revisited and revised its joint employer standard because of the change in workplace employment relationships and the increase of the "procurement of employees through staffing and subcontracting arrangements." No similar "changed circumstances" exist in this case to revisit the Board's long-standing treatment of search-for-work expenses. If anything, the prevalence of employees searching for and finding employment through cost-free methods further supports the Board's current treatment of search-for-work and other work-related expenses as an offset from interim earnings. Therefore, the General Counsel's request for an award of search-for-work and other

[6] In fact, that most employees can and do search for work by telephone and/or internet only further increases the speculative nature of an award of search-for-work expenses without regard for interim earnings. There simply is no way to divide the cost of telephone and internet use to reimburse an employee only for those expenses associated with searching for work.

job-related expenses without regard to St. Hilaire's and Hoar's interim earnings is unsupportable and must be denied.

III. CONCLUSION

The ALJ's refusal to award St. Hilaire and Hoar search-for-work and other work-related expenses with regard to their interim earnings is consistent with current Board law from which there is no reason to depart. As such, USCC respectfully requests that the Board deny the General Counsel's Limited Cross-Exceptions.

Respectfully submitted this 12th day of July, 2016.

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CERTIFICATE OF SERVICE

This is to certify that today I served a true and correct copy of the **U.S. COSMETICS CORPORATION'S RESPONSE IN OPPOSITION TO THE GENERAL COUNSEL'S LIMITED CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** via electronic mail upon the following individuals:

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This the 12th day of July, 2016.

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