UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COSTCO WHOLESALE CORPORATION

and Case 05-CA-169958

TEAMSTERS LOCAL 592, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

On June 6, 2016, the Regional Director for the National Labor Relations Board (the Board), Region 5, issued a Complaint and Notice of Hearing (the Complaint) based on a charge filed by Teamsters Local 592, International Brotherhood of Teamsters (the Charging Party or the Union), alleging that Costco Wholesale Corporation (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by denying former employee Justin Daniels' (Justin's) request to be represented by a Union representative during an investigatory interview that he reasonably believed would result in discipline. The hearing took place on October 11, 2016, in Richmond, Virginia before the Honorable Donna N. Dawson.

During the hearing, counsel for the General Counsel moved to amend the Complaint to conform to the testimony elicited from Respondent's witness. Counsel for Respondent objected to the motion, asserting the elicited testimony was insufficient to constitute a violation of the Act and that the amendment was untimely. (Tr. 113: 2-8). After considering Respondent's objections, the Administrative Law Judge granted counsel for the General Counsel's oral motion to amend the Complaint pursuant to the Board's Rules and Regulations and Statement of Standard Procedures, Series 8, as amended (the Rules and Regulations). The Administrative Law Judge then offered Respondent's counsel additional time to prepare in light of the new allegation and her ruling on the motion to amend the Complaint; however, Respondent's counsel rejected the Administrative Law Judge's offer of additional time. (Tr. 117: 15-19). Ultimately, the Administrative Law Judge determined that her decision to grant counsel for the General Counsel's motion to amend the Complaint was consistent with Board precedent, and the testimony elicited during the hearing was a clear admission of a violation of Section 8(a)(1) of

the Act. See e.g., *Boeing Co.*, 362 NLRB No. 195, slip op. at 2 (2015) (applying *Caeser's Palace*, 336 NLRB 271, 272 (2001)).

As fully explained below, the Administrative Law Judge's decision is supported by the record evidence and is clearly consistent with well-established Board precedent, while Respondent's exceptions are contrary to both. Counsel for the General Counsel respectfully urges the Board to overrule Respondent's exceptions and adopt the recommended decision and order contained in the Administrative Law Judge's Decision (ALJD), as modified in accordance with the counsel for the General Counsel's cross-exception.

III. FACTS

A. Respondent's Business Operation.

Respondent is a corporation engaged in the sale and distribution of merchandise and services at its warehouse facilities, including its facility in Glen Allen, Virginia, which is known as its West Henrico facility. (GC Exh. 1-C ¶ 2(a), 1-E: ¶ 2(a); Tr. 64:5; 85:1-6). Respondent employs approximately 240 employees at its West Henrico facility. (Tr. 85: 21-23). At all material times, Marc Cibellis (Cibellis) has been Respondent's store manager and the highest ranking management official at Respondent's West Henrico facility. (ALJD 2: 15; Tr. 85: 24-25; 86: 1). Serving under Cibellis are three assistant managers, including Eddie Johnson (Johnson). (ALJD 2: 15-16; Tr. 86: 4-5; 91: 3).

Respondent's West Henrico facility is divided into several different departments, including a tire center. (Tr. 86: 4-10). Respondent employs approximately 18 employees within the tire center department. (Tr. 86: 17-18). Former employee Justin worked as a tire installer in the tire center department. (Tr. 23: 18-23).

B. The Charging Party's Representation of Respondent's Employees.

At all material times, the Eastern Area Teamsters has been the exclusive collective-bargaining representative of the following unit of Respondent's employees (the Unit), which constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> The employees of Respondent in classifications set forth in Appendix A of the collective-bargaining agreement between the Respondent and the Eastern Area Teamsters and who are employed in warehouse operations of Respondent located [in] Maryland, New Jersey, New York, and Virginia.

(ALJD 2: 18-27). Respondent's recognition of the Eastern Area Teamsters as the exclusive-bargaining representative of the Unit has been embodied in successive collective-bargaining agreements, the most recent being effective March 15, 2013, through February 1, 2016[1] (the CBA). (ALJD 2: 27-29; Jt. Exh. 2). The Union administers the CBA at Respondent's West Henrico facility. (ALJD; Jt. Exh. 1 ¶ 3).

C. Respondent's Investigatory Interviews and Justin's Termination.

On February 4, Justin was involved in a verbal altercation with other tire center employees. (ALJD 2: 41). On February 6, Justin's immediate supervisor informed Cibellis of the verbal altercation. (ALJD 2: 41-42).

On or about February 8, Cibellis, the highest ranking official at the West Henrico facility, summoned Justin to his office to question Justin about the February 4 verbal altercation. (ALJD 3: 2-5). After questioning Justin in the presence of Assistant Store Manager Johnson, Cibellis requested Justin provide a written statement, and Justin complied. (ALJD 3: 4; Tr. 26:

[1] All dates referenced herein are in 2016, unless otherwise noted.

17; 91: 15-16). Cibellis testified during the hearing that at the end of this investigatory interview, he "instructed Justin not to 'have any conversations with anyone else pertaining to this incident.'" (ALJD 3: 5-6; Tr. 111: 2-5). Subsequently, Cibellis interviewed and received statements from other tire center employees concerning the February 4 verbal altercation. (ALJD 3: 9-10).

On or about February 10, Cibellis informed Justin that he was going to have a second investigatory interview with Justin on February 11, to ask follow-up questions concerning the February 4 verbal altercation. (ALJD 3: 12-13). On the evening prior to the February 11 investigatory interview, Justin informed Raymond Daniels (Raymond), Justin's father and a shop steward at the West Henrico facility, about the pending investigatory interview. (ALJD 3: 14-15). Raymond advised Justin that he had the right to Union representation at the February 11 investigatory interview. (ALJD 3: 16-17).

On February 11, Justin arrived at the West Henrico facility for the investigatory interview with Cibellis, and he approached Raymond and asked if Raymond, as a shop steward, would attend the investigatory interview. (ALJD 3: 18-19). Raymond explained that Justin must first make the request for Union representation before Raymond could attend the meeting. (ALJD 3: 19-21). Justin testified during the hearing that he requested Union representation immediately prior to the meeting on a staircase near Cibellis' office, but Cibellis testified that Justin did not request a Union representative "at any time before or during the interview."[2] (ALJD 3: 24-29).

Immediately after the February 11 investigatory interview, Justin informed Raymond that he asked for Union representation for the meeting, and he was denied. (ALJD 4: 19-20). Raymond responded by contacting the Union's President, Jim Smith (Smith), and informing

[2] The Administrative Law Judge credited Cibellis' version of events immediately prior to and during the February 11 investigatory interview.

Smith that Justin's request to have a Union representative present during an investigatory interview was denied. (ALJD 4: 20-21). Either that same day or the following day, Justin met with Smith to discuss the facts and circumstances surrounding the February 11 investigatory interview. (ALJD 4: 29-30). Smith then spoke to the Union's attorney to file an unfair labor practice charge concerning Justin's request for a Union representative being denied and another unrelated allegation. (ALJD 4: 37-40). The charge in the instant case was signed by the Union's attorney, Jonathan Axelrod, on February 12. (GC Exh. 1(a)).

On February 13, Respondent suspended Justin, and on February 18, Respondent discharged Justin. (ALJD 5: 20-22).

D. Counsel for the General Counsel Amends the Complaint at the Hearing.

During cross-examination of Cibellis, counsel for the General Counsel asked Cibellis about his recollection of the February 8 investigatory interview. Specifically, the following was asked:

> Q. Now, turning your attention to the first meeting with Justin Daniels, you mentioned it occurred on Monday, February 8th, correct?
> A. Yes.
> Q. And during this meeting, you asked Justin about what happened on February 4th, correct?
> A. Yes.
> Q. And Justin gave you a written statement, right?
> A. Yes.
> Q. And then you also told Justin that he not have any conversations with anyone else pertaining to this incident. Isn't that true?
> A. Yes.

(Tr. 110: 18-25; 111: 1-5).[3] Immediately after Cibellis testified that he instructed Justin not to have any conversations with anyone else pertaining to this incident, counsel for the General Counsel moved to amend the Complaint to conform to Cibellis' testimony. (ALJD 8: 1-2;

[3] The basis for counsel for the General Counsel's line of questioning as provided above stemmed from a document responsive to a trial subpoena duces tecum received one business day prior to the hearing. Critically, this line of questioning was responsive to testimony elicited by Respondent on direct examination. (Tr. 90-94).

Tr. 111: 12-14). Counsel for the General Counsel informed the Administrative Law Judge that a document in response to a trial subpoena duces tecum led to Cibellis' cross-examination concerning his instruction to Justin, and Cibellis' admission at the hearing was the basis for the motion to amend the Complaint. (Tr. 111: 10-14). Counsel for Respondent objected to the motion, alleging that it was untimely and Cibellis' instruction to Justin was not a violation of the Act. (Tr. 113: 2-8). The Administrative Law Judge asked counsel for the General Counsel when he received the document in response to the subpoena that led to the above-referenced line of questioning on cross-examination, and counsel for the General Counsel explained that it was received sometime during the evening of October 6, 2016. (Tr. 116: 2-6). The Administrative Law Judge then granted the oral motion to amend the Complaint and solicited the specific allegation to be amended into the Complaint. (Tr. 116: 13-17). Counsel for the General Counsel explained the Complaint should be amended to include the following allegation: "[O]n or about February 8th, Respondent, by and through Marc Cibellis, at Respondent's facility, . . told an employee that . . . he not have any conversations with anyone else pertaining to this incident[,]" and "that conduct described in that particular addition to the complaint would show Respondent has been interfering with, restraining, and coercing employees in exercise of their rights guaranteed in Section 7 of the Act in violation of 8(a)(1) of the Act." (Tr. 116: 19-25; 117: 1-5). The Administrative Law Judge then offered additional time to Respondent's counsel in light of the amendment to the Complaint. (Tr. 117: 15-16). Counsel for Respondent rejected the Administrative Law Judge's offer. (Tr. 117: 17-19). The Administrative Law Judge then explained that because of the amendment to the Complaint, she would allow questions normally asked on direct. (Tr. 118: 21-24). Respondent's counsel explained that he understood; however, he chose not to elicit any evidence in response to the new allegation.

IV. ARGUMENT

Respondent's exceptions primarily argue that the Administrative Law Judge abused her discretion when she granted counsel for the General Counsel's oral motion to amend the Complaint, and she misapplied Board precedent. Respondent, however, improperly applies and misconstrues extant Board precedent. As fully described below, counsel for the General Counsel respectfully urges the Board to overrule Respondent's exceptions and adopt the Administrative Law Judge's findings and conclusions that Respondent violated Section 8(a)(1) of the Act, as modified pursuant to the counsel for the General Counsel's limited cross-exception.

A. The Administrative Law Judge Properly Followed the Rules and Regulations in Granting the Motion to Amend the Complaint.

Initially, Respondent attacks the Administrative Law Judge's interpretation of the Rules and Regulations, alleging that counsel for the General Counsel violated the Rules and Regulations in orally amending the Complaint. In doing so, Respondent ignores the Board's Rules and Regulations and mischaracterizes the transcript. Accordingly, Respondent's contention that the motion should have been disposed of on procedural grounds is meritless.

Section 102.17 of the Rules and Regulations, provides that a complaint may be amended, upon motion, by the Administrative Law Judge designated to conduct the hearing if the amendment is "just." Section 102.24 of the Rules and Regulations explains that the moving party must state the grounds for the motion.

First, Respondent alleges that the amendment was not "just" within the meaning of Section 102.17 of the Rules and Regulation. As will be more fully discussed below, the amendment was "just" within the meaning of Rules and Regulation and extant Board precedent. Next, Respondent argues that counsel for the General Counsel "falsely alleged Cibellis told *employees* after an investigatory meeting that they should not *mention* that *employees* have any

conversations with anyone pertaining to this incident . . . ." (Exceptions Br. at 8) (emphasis in original). Respondent appears to be arguing that counsel for the General Counsel used the term "employees" rather than "employee." Respondent fails to properly quote the transcript which states the allegation being amended into the Complaint was "[O]n or about February 8th, Respdonent, by and through Marc Cibellis, at Respondent's facility, . . . told an employee that . . . he not have any conversation with anyone else pertaining to this incident." (Tr. 116: 19-25). Counsel for the General Counsel then explained that this conduct "would show Respondent has been interfering with, restraining, and coercing employees in [the] exercise of their rights guaranteed in Section 7 of the Act in violation of [Section] 8(a)(1) of the Act." (117: 1-5). Accordingly, counsel for the General Counsel's motion to amend the Complaint conformed to the Rules and Regulations, and the Administrative Law Judge properly interpreted and applied the Rules and Regulations.

B. The Administrative Law Judge Did Not Abuse Her Discretion in Granting the Motion to Amend the Complaint, and Her Decision Comports with Longstanding Board Precedent.

Pursuant to Section 10(b) of the Act, a complaint "may be amended . . . at any time prior to the issuance of an order based thereon." See also *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319, 323 (2014), *enfd.* 833 F.3d 824 (7th Cir. 2016). As previously mentioned, Section 102.17 of the Rules and Regulations, provides that a complaint may be amended, upon motion, by the Administrative Law Judge designated to conduct the hearing if the amendment is "just." See also *Stagehands Referral Service*, 347 NLRB 1167, 1171 (2006); *Folsom Ready Mix, Inc.*, 338 NLRB 1172, 1172 n. 1 (2003). The Administrative Law Judge is afforded "wide discretion" in granting motions to amend a complaint, and if respondent is given the opportunity to fully litigate the new allegation and the amendment conforms to the evidence, the motion should be

granted. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8 (2015), *enfd.* 651 Fed. Appx. 34 (2d Cir. 2016); *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), *enfd.* 998 F. 2d 1004 (3d Cir. 1993). When determining whether an administrative law judge properly exercised their discretion in granting a motion to amend a complaint, the Board considers three factors: "(1) whether there was a surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated." *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8; *Stagehands Referral Service*, 347 NLRB at 1171.

In the current case, there was no "surprise or lack of notice." *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8. Immediately after Cibellis admitted to instructing Justin not to "have any conversations with anyone else pertaining to this incident," counsel for the General Counsel moved to amend the Complaint to conform to the testimony elicited during the hearing. (ALJD 8: 1-6; Tr. 111: 2-14). Respondent ignores that the document alluded to in the Administrative Law Judge's decision was not relied upon for the violation of the Act. The document was never introduced into evidence. (Tr. 118: 10-12). Indeed, the document solely provided a reason to ask a question on cross-examination and only with Cibellis' admission under oath was there sufficient evidence supporting the motion to amend the Complaint.[4] (ALJD 8: 1-6; Tr. 111: 2-14). Respondent had ample opportunity to prepare Cibellis for cross-examination, and was offered, and declined, the opportunity for additional time. Respondent's assertion that counsel for the General Counsel chose not to make a motion or address the issue in his case-in-chief disregards that the evidence supporting the violation was obtained during the

[4] To the extent that the document was relied upon, Respondent argues that the General Counsel had the information for five days prior to the hearing; however, Respondent ignores that the document was provided during the evening of Thursday, October 6, 2016, and Monday, October 10, 2016, was Columbus Day, a federal holiday. 5 U.S.C. § 6103; (Tr. 116: 5-6). Accordingly, counsel for the General Counsel had the document, which provided a basis for asking Cibellis a question on cross-examination, for a total of 1 business day before the hearing in this matter.

cross-examination of Cibellis. Counsel for the General Counsel in the instant case immediately moved to amend the complaint as soon as the basis for the violation "came to light." *Cf. Stagehands Referral Service*, 347 NLRB at 1172. Moreover, as will be discussed more fully below, Cibellis' instruction to Justin during an investigatory interview to "not have any conversations with anyone else pertaining to this incident" was directly related to the initial allegation that Justin was denied a Union representative during a corresponding investigatory interview, and therefore, Respondent knew the conduct during the investigation into the February 4 verbal altercation was the crux of the hearing. *Id.*; (Tr. 111: 2-5). Accordingly, the first factor weighed by the Board in determining whether the Administrative Law Judge abused her discretion weighs in favor of her decision to grant the motion. (ALJD 8: 9-10).

Second, counsel for the General Counsel provided the Administrative Law Judge with "a valid excuse for the delay in moving to amend" the Complaint. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8. Specifically, counsel for the General Counsel explained that the documents uncovered by the General Counsel's subpoena duces tecum coupled with Cibellis' testimony provided a basis for the delay in amending the Complaint. (Tr. 111: 11-12). The Administrative Law Judge acknowledges the document that led to a cross-examination question and Cibellis' admission during the hearing provided a "valid" reason for the delay in moving to amend the Complaint. (ALJD 8: 10). Therefore, the second factor weighed by the Board supports a finding that the Administrative Law Judge did not abuse her discretion in granting the motion to amend the Complaint.

Finally, the matter was fully litigated at the hearing. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8. After counsel for the General Counsel moved to amend the Complaint, the Administrative Law Judge offered Respondent's counsel additional time due to

the amendment. (Tr. 117: 15-16). Counsel for Respondent *rejected* the Administrative Law Judge's offer. (Tr. 117: 17-19). Similar to *Amglo Kemlite Laboratories, Inc.*, counsel for the General Counsel moved to amend the complaint to conform to the testimony at the hearing, and Respondent's counsel "failed to question the official who made the remark, despite that official testifying after the evidence about the statement was admitted." 360 NLRB at 323-24 (cases cited therein). Respondent was given and had ample opportunity to elicit additional testimony from Cibellis or call another witness (e.g., Justin). Respondent's decision to not seek any evidence whatsoever concerning the new allegation is insufficient to show that the matter was not fully litigated. *Id.* at 323-24. Accordingly, the third factor considered by the Board weighs heavily in favor that the Administrative Law Judge did not abuse her discretion in granting the motion to amend the Complaint.

C. The Allegation Amended into the Complaint was Timely.

Since the initial allegation in the Complaint and the amended allegation are intimately intertwined, involve the same legal theory, and arise out of the same set of facts and sequence of events, the amended allegation falls into the *Redd-I*, 290 NLRB 1115 (1988) exception to Section 10(b) of the Act. Accordingly, both allegations are timely under Section 10(b) of the Act.

Section 10(b) of the Act prohibits a "complaint from issuing based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." However, an otherwise untimely allegation may be found timely under the Board's three-prong test as set forth in *Redd-I, Inc*., 290 NLRB 1115. See also *Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017, 1021 (D.C. Cir. 1995) (giving deference to the Board's interpretation of Section 10(b)

of the Act and three-prong test as described in *Nickels Bakery of Indiana, Inc.*, 296 NLRB 927, 928 (1989)). Under the three-prong test, the Board: "(1) considers whether the timely and untimely allegations involve the same legal theory; (2) considers whether the otherwise untimely allegation arises from the same factual situation or sequence of events as the allegations in the timely charge; and (3) 'may look' at whether respondent would raise the same or similar defenses to the timely and untimely allegations." *Earthgrains Co.*, 351 NLRB 733, 734 (2007).

1. The Administrative Law Judge correctly determined that the initial allegation and the amended allegation involve the same legal theory.

The Complaint initially alleged that Cibellis denied Justin's request for a Union representative during the second investigatory interview into the February 4 verbal altercation—a violation of an employee's right as announced in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The amendment to the Complaint alleges that Cibellis instructed an employee to "not have any conversations with anyone else pertaining to this incident" while Cibellis was conducting the first investigatory interview into the February 4 verbal altercation. (Tr. 116: 19-25). Both allegations involve Justin's Section 7 right to seek the assistance of another individual, either fellow employees or a Union representative, while he was being investigated for a disciplinary action. Respondent argues that the Administrative Law Judge erred in finding the amended allegation and the allegation initially contained in the Complaint involved the same the legal theory. (Exceptions Br. at 9-10). Respondent's arguments are without merit, and the Administrative Law Judge's determination should be upheld.

Respondent ignores the legal reasoning behind an employee's *Weingarten* rights, namely that the Act "guarantees the right of employees to act in concert for mutual aid and protection," and "the action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of [Section] 7" of the Act.

Weingarten, 420 U.S. at 256-57, 260; see also *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048, 1048 (1982) *enfd.* in relevant part 711 F.2d 134 (9th Cir. 1983) ("employees have a Section 7 right to consult with their representative before any interview to which *Weingarten* rights attach."). The legal underpinnings of *Weingarten* explain that an employee is afforded the right to a union representative to seek guidance or assistance while an employer is investigating a disciplinary matter involving the employee because Section 7 of the Act provides that employees may act in concert for mutual aid and protection.

Similarly, the Board has long held that Section 7 of the Act affords employees the "right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers[, and s]uch discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer." *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op at 2 (2015) *enfd. in part and remanded in part* 851 F.3d 35 (D.C. Cir. 2017); *Boeing Co.*, 362 NLRB No. 195, slip op. at 2 (2015) (applying *Caeser's Palace*, 336 NLRB 271, 272 (2001)); *Philips Electronics North America Corp.*, 361 NLRB No. 16, slip op. at 2 (2014) (applying *Verizon Wireless*, 349 NLRB 640, 658 (2007)). Prohibiting employees from speaking to coworkers concerning discipline, disciplinary investigations, or other terms and conditions of employment violates Section 8(a)(1) of the Act. See e.g., *Philips Electronics North America Corp.*, 361 NLRB No. 16, slip op. at 2.

Accordingly, the denial of an employee's *Weingarten* rights rests on the same legal theory as an employer's prohibition on employees speaking to coworkers or union representatives concerning discipline or disciplinary investigation. Both violations interfere with employees' right to engage in concerted activity for mutual aid or protection, and therefore, the first prong of the *Redd-I* test is met.

2. The Administrative Law Judge correctly determined that the amended allegation and the initial allegation arise from the same factual circumstances and sequence of events.

Respondent argues that the meetings on February 8, and 11, are separate and distinct meetings, while recognizing that both meetings were part and parcel of the investigation into the February 4 verbal altercation. (Exceptions Br. at 9; Tr. 91-94). As Cibellis acknowledged during the hearing, the first investigatory interview with Justin was an integral component to the subsequent investigatory interview. (Tr. 94: 12-25; 95: 1-2). Essentially, Cibellis "saw some inconsistencies" during his investigation into the February 4 verbal altercation, so he called a second investigatory interview with Justin. (Tr. 97: 15-18). During the first interview, Cibellis admitted that he instructed Justin to "not have any conversations with anyone else pertaining to this incident." (Tr. 111: 2-14). During the second interview, the allegation initially in the Complaint alleged Cibellis denied Justin a *Weingarten* representative—the opportunity to discuss the incident under investigation and the investigation itself with a Union representative prior to and during an investigatory interview. Factually, both allegations arise from the same circumstances and sequence of events, Cibellis' comprehensive investigation into the February 4 verbal altercation and preventing Justin from seeking the assistance of coworkers or Union representatives throughout the investigation. See e.g., *Carney Hospital*, 350 NLRB 627, 630-31 (2007) (requiring a "causal nexus between the allegations" and being a part of a progression of events, or part of an overall plan to undermine employees' Section 7 rights to satisfy the second prong of the *Redd-I* test). Therefore, the second-prong of the *Redd-I* test has been satisfied.

3. Respondent misconstrues the third-prong of the Redd-I *test.*

Respondent claims that the Administrative Law Judge erred by misapplying the third prong of the *Redd-I* test; however, Respondent ignores extant Board precedent explaining that the third prong is not a requirement for the amended allegation to be considered timely.

The third prong of the *Redd-I* test explains that the Board "*may look* at whether Respondent would raise the same or similar defenses to the timely and untimely allegations." *Earthgrains Co.,* 351 NLRB at 734 (emphasis added) (internal citations omitted); *Carney Hospital,* 350 NLRB at 628. The use of the term "may" demonstrates that that "the third-prong of the *Redd-I* test is not mandatory." *Earthgrains Co.,* 351 NLRB at 737 n. 18; *Carney Hospital,* 350 NLRB at 628 n. 8.

Respondent's defense to the timely allegation was Justin failed to request a Union representative for the second investigatory interview. Respondent did not make the same or similar defense to the amended allegation because Cibellis testified under oath that he told Justin, during an investigatory interview, to "not have any conversations with anyone else pertaining to this incident." (Tr. 111: 2-14). This is a clear admission by Respondent of the allegation which was amended into the Complaint at the hearing, so Respondent would be unable to raise the same or similar defense. However, as the Administrative Law Judge acknowledges in her opinion, the third-prong to the *Redd-I* test is not mandatory. (ALJD 9: 24-25); see also *Earthgrains Co.,* 351 NLRB at 737 n. 18. Accordingly, although Respondent would not have the same defense to the amended allegation, the amendment to the Complaint meets the first two prongs of the *Redd-I* test, and moreover, Respondent would be unable to provide any factual defense to a clear admission made under oath. Therefore, the Administrative Law Judge appropriately considered the amended allegation timely under Section 10(b) of the Act.

D. The Administrative Law Judge's Order is Appropriate and Consistent with Board Precedent.

Respondent argues the Administrative Law Judge's Order is overbroad because it does not include a caveat that permits Respondent to insist on confidentiality during investigations involving extraordinary circumstances. The Administrative Law Judge's Order is consistent with several Board cases that touch upon similar violations.

In *Bellagio, LLC*, 362 NLRB No. 175 (2015), the Board determined a supervisor instructing an employee that the employee could not discuss with other employees a suspension pending investigation with other employees was a violation of Section 8(a)(1) of the Act. The Board's order stated that the respondent would cease and desist "[i]nstructing employees that they cannot discuss disciplinary matters with other employees." 362 NLRB No. 175, slip op. at 3; see also *Lucky Cab Co.*, 360 NLRB 271, 277-78 (2014) ("Cease and desist from . . . instructing employees not to discuss their discipline with coworkers."). Similarly, in *Casino San Pablo,* 361 NLRB No. 148, slip op. at 8 (2014) the Board stated in its order that respondent "[c]ease and desist from . . . telling employees not to discuss their investigations with other employees."

In the current case, the Administrative Law Judge's Order directs Respondent to "[c]ease and desist from (a) instructing employees not to discuss disciplinary investigations or other terms and conditions of employment with others." In light of Cibellis' admission to "not have any conversations with anyone else pertaining to this incident" during an investigatory interview and the Administrative Law Judge's finding this statement violated Section 8(a)(1) of the Act, the Order is reasonable because it directly addresses the statement found to be unlawful. Moreover, it is consistent with the Board precedent referenced above. Accordingly, the Administrative Law Judge's Order should be upheld.

E. The Administrative Law Judge Appropriately Applied Board Precedent Regarding Prohibitions on Discussing Disciplinary Investigations.

Respondent argues the Administrative Law Judge inappropriately applied *Banner Estrella Medical Center*, 362 NLRB No. 137 and *Hyundai America Shipping Agency*, 357 NLRB 860 (2011), *enfd. in part and rev'd in part*, 805 F. 3d 309 (D.C. Cir. 2015). Respondent's arguments are without merit because Respondent ignores longstanding Board precedent and the Administrative Law Judge's conclusions.

The Administrative Law Judge's Conclusions of Law explains, "By instructing employee Justin Daniels not to discuss the February 4 incident and investigatory interview with anyone else, Respondent violated Section 8(a)(1) of the Act." (ALJD 10: 19-20). Respondent misinterprets the Administrative Law Judge's conclusions by arguing that there is insufficient evidence to support a finding that a rule or policy prohibiting discussions concerning ongoing investigations exists. Neither the Administrative Law Judge found, nor did the counsel for the General Counsel argue, that a rule or policy prohibiting employees from discussing ongoing investigations existed. Rather, the Administrative Law Judge determined that Cibellis' instruction to Justin was coercive based on the Board's reasoning in *Banner Estrella Medical Center* and *Hyundai America Shipping Agency*. (ALJD 9-10). Moreover, longstanding Board precedent explains that "employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees." *Caeser's Palace*, 336 NLRB at 272; *Casino San Pablo* 361 NLRB No. 148, slip op. at 8 ("telling employees not to discuss their investigations with other employees" is a violation); *SNE Enterprises*, 347 NLRB 472, 472 (2006), *enfd.* 257 Fed. Appx. 642 (4th Cir. 2007) (prohibiting an employee "from speaking with coworkers about a disciplinary incident" is a violation). Accordingly, the Administrative Law Judge's conclusions

were limited to Cibellis' instruction to Justin and fully consistent with Board precedent, and therefore, her decision should be upheld.

F. Respondent's Argument that Banner Estrella Medical Center *is Wrongly Decided is Without Merit.*

Respondent inappropriately misconstrues the D.C. Circuit's holding in *Banner Health System v. NLRB,* 851 F. 3d 35 (D.C. Cir. 2017). In *Banner Health System v. NLRB,* the D.C. Circuit partially denied enforcement of the Board's Order in *Banner Estrella Medical Center,* 362 NLRB No. 137. At issue in *Banner Health System* was whether there was substantial evidence in the administrative record demonstrating a policy or rule prohibiting employees from discussing ongoing investigations existed. The record reflected that a human resources consultant occasionally read from a document to employees, "I ask you not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and spate facts from rumors." 851 F. 3d at 39. The D.C. Circuit determined that this was insufficient evidence to demonstrate Banner Estrella Medical Center "had a policy of categorically requesting nondisclosure regarding any particular kind of investigation." 851 F. 3d at 44. The court specifically did not make a decision on the lawfulness of the alleged rule, and it referenced its decision in *Hyundai America Shipping Agency, Inc. v. NLRB,* 805 F. 3d 309 (D.C. Cir. 2015).

In *Hyundai America Shipping Agency, Inc.,* the D.C. Circuit held that Hyundai maintained an oral rule prohibiting employees from revealing information about matters under investigation, and that rule "clearly limited employees' [Section] 7 rights to discuss their employment." 805 F. 3d at 314. Relying on the Board's decision in *Caeser's Palace,*[5] 336 NLRB 271, the D.C. Circuit concluded that Hyundai did not provide a legitimate business

[5] The D.C. Circuit inadvertently refers to this case as *Desert Palace Inc*.

justification for the oral rule, and therefore upheld the Board's determination that the rule was a violation of Section 8(a)(1) of the Act. 805 F. 3d at 314.

Accordingly, Respondent's reliance on the D.C. Circuit's remand of *Banner Health System* is misguided because the court did not rule on the merits of whether such a rule would tend to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act. Rather, the court remanded the matter to the Board because there was insufficient evidence establishing a categorical rule existed.

V. CONCLUSION

Based on the foregoing, the Administrative Law Judge's decision was consistent with extant Board precedent. It is undisputed that Respondent's highest ranking supervisor at its West Henrico facility, Cibellis, instructed an employee at the end of an investigatory interview to "not have any conversations with anyone else pertaining to this incident." Despite Respondent's arguments to the contrary, the Administrative Law Judge, consistent with the Rules and Regulations and Board precedent, properly exercised her wide discretion in permitting the counsel for the General Counsel to amend the Complaint at the hearing, an amendment which is closely-related to the timely allegation of the Complaint. Under longstanding Board law, Cibellis' instruction is a clear violation of Section 8(a)(1) of the Act. Respondent failed to put forth any evidence whatsoever demonstrating any special circumstances warranted Cibellis' instruction. It is respectfully urged that the Board overrule Respondent's exceptions, and adopt the judge's recommended decision and order, as modified pursuant to the counsel for the General Counsel's limited cross-exception.

Respectfully submitted,

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STATEMENT OF SERVICE

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