

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

YP ADVERTISING & PUBLISHING LLC

and

Cases 20-CA-147219  
20-CA-167875  
20-CA-176151  
20-CA-177029  
20-CA-181140  
20-CA-181554  
20-CA-181851

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL 1269

COUNSEL FOR THE GENERAL COUNSEL'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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## TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.	1
II.	STATEMENT OF FACTS	2
	A. Background.	2
	B. Respondent Delayed Responding to Five Separate Union Requests for Information (RFIs)	3
	1. February 2, 2015 RFI Regarding Employee Coverage/Evaluations.	3
	2. October 5, 2015 RFI Regarding the New Sales Performance Plan “STARS”	4
	3. January 14, 2016 RFI Regarding the Discipline of Employee John Mimiaga .	5
	4. February 18 and March 21, 2016 RFIs Regarding Employee Carolyn Cook’s DSA Information	6
	5. March 23, 2016 RFI Regarding the Discipline of Employee Kathleen Charles.	7
	C. Respondent Unilaterally Implemented the Reduced Compensation Plan for ypDirect Products and Dealt Directly with Employees by Instructing Them to Sign the Corresponding Exception Agreement.	8
	1. Unilateral Implementation of the Reduced Compensation Plan and Instructing Employees to Sign the Exception Agreement	8
	2. Respondent Continued to Sell ypDirect Products and Instruct Employees to Sign the Exception Agreement After August 4, 2016.	11
	D. Respondent Dealt Directly with Employees by Allowing Two Clerical Employees to Work At Home.	12
III.	CREDIBILITY	14
IV.	ANALYSIS.	15
	A. Respondent Violated the Act by Delaying the Production of Relevant and Necessary Information	15
	1. Case Law.	15
	2. Respondent Delayed Producing the Information.	18
	a) Respondent Admitted The Information Was Relevant and Necessary.	18
	b) Respondent Delayed and Did Not Timely Explain the Delay or Offer to Bargain for an Accommodation .	19
	(1) Request No. 1--February 2, 2015 RFI Regarding Documentation Related to Employee Evaluations	19

(a) The RFI Was Not So Complex as To Justify Respondent’s Delay and Untimely Offer to Bargain.	21
(b) The ALJ Should Reject Respondent’s Broad Defense That it Was Busy Working on Other Union RFIs	22
(2) Request No. 2--October 5, 2015 RFI Regarding the STARS Plan .	23
(a) Respondent’s Belief That the RFI Was Not a Priority and Its Decision to Halt the STARS Plan Are Not Relevant.	25
(3) Request No. 3--January 14, 2016 RFI Regarding Information Pertaining to Unit Employee John Mimiaga .	26
(a) Sending the RFI to the “Wrong” Manager is Not a Defense.	27
(4) Request No. 4--February 18 and March 21, 2016 RFIs Regarding Unit Employee Carolyn Cook’s DSA .	28
(a) Respondent’s Plethora of Defenses Fail.	29
(5) Request No. 5--March 23, 2016 RFI Regarding Information Pertaining to Employee Kathy Charles	31
(a) The RFI Was Not Complex and Respondent Did Not Timely Notify the Union That It Was Complex or Offer to Bargain .	32
B. Respondent Violated the Act by Unilaterally Changing Employees’ Compensation While Simultaneously Dealing Directly With Employees About It.	32
1. Unilateral Change to Employees’ Compensation for Selling ypDirect Products .	32
a) Legal Standard .	32
b) Respondent Unilaterally Implemented the Reduced Compensation Plan Regarding Sales of ypDirect Products.	33
c) Announcing the Reduced Compensation Plan Violated the Act .	36
2. Respondent Violated the Act by Dealing Directly With Employees Regarding Their Compensation for ypDirect Products.	38
a) Legal Standard .	38
b) Respondent Directly Instructed Employees to Sign the Exception Agreement	39
3. Respondent Did Not Repudiate the Unilateral Change and Direct Dealing Concerning the Reduced Compensation Plan Pursuant to <i>Passavant</i> .	40
a) Prong 1 – Respondent’s Supposed Repudiation was Ambiguous and Not Specific to the Proscribed Conduct .	41

b) Prong 3 and 4 – Respondent Engaged in Further Proscribed Conduct and Failed to Give Assurances to Employees That It Will Not Interfere With Their Section 7 Rights in the Future	42
C. Respondent Bypassed the Union and Dealt Directly with Employees by Allowing Two Clerical Employees to Work at Home	42
V. REMEDY	47
VI. CONCLUSION	48

## TABLE OF AUTHORITIES

<i>A-1 Door &amp; Building Solutions,</i>	
356 NLRB 499 (2011).	17
<i>ABC Automotive Products Corp.,</i>	
307 NLRB 248 (1992).	37
<i>Allegheny Power,</i>	
339 NLRB 585 (2003).	17, 24
<i>Allied-Signal, Inc.,</i>	
307 NLRB 752 (1992).	39
<i>American Signature, Inc.,</i>	
334 NLRB 880 (2001).	16
<i>B.P. Oil,</i>	
256 NLRB 1107 (1981).	33
<i>Bottom Line Enterprises,</i>	
302 NLRB 373 (1991).	33
<i>Branch International Services,</i>	
310 NLRB 1092 (1993).	41
<i>Bundy Corp.,</i>	
292 NLRB 671 (1989).	.Passim
<i>John S. Swift Co., Inc.,</i>	
124 NLRB 394 (1959).	16
<i>CJC Holdings, Inc.,</i>	
320 NLRB 1041 (1996).	37
<i>Columbia College Chicago,</i>	
360 NLRB 1116	22
<i>Columbia University,</i>	
298 NLRB 941 (1990).	.Passim

<i>Conditioned Air Sys.</i> , 360 NLRB 789 (2014).	. 22
<i>Daikichi Sushi</i> , enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). 335 NLRB 622 (2001).	15
<i>Daimler Chrysler Corp.</i> , 331 NLRB 1324 (2000).	16, 17, 22
<i>Day Automotive Group</i> , 348 NLRB 1257 (2006).	. 25
<i>Dayton Newspapers</i> , 339 NLRB 650 (2003).	. Passim
<i>Detroit Edison</i> , 310 NLRB 564 (1993).	39; 44
<i>Duffy Tool &amp; Stamping, L.L.C. v. NLRB</i> , 233 F.3d 995 (7th Cir. 2000).	. 33
<i>Ellsworth Sheet Metal, Inc.</i> , 232 NLRB 109 (1977).	17, 25
<i>Farina Corp.</i> , 310 NLRB (1993).	. 33
<i>Fibreboard Paper Products v. NLRB</i> , 379 U.S. 203 (1964).	. 32
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).	. 33, 34
<i>Fred Stark</i> , 213 NLRB 209 (1974).	. 20, 21, 46
<i>George Koch &amp; Sons, Inc.</i> , 295 NLRB 695 (1989).	16
<i>Government Employees (IBPO)</i> ,	

327 NLRB 676 (1999).	15
<i>Harris-Teeter Super Markets, Inc.</i> ,	
310 NLRB 216 (1993).	.39
<i>Holly Farms Corp.</i> ,	
311 NLRB 273 (1993).	.42
<i>Houston Building Services</i> ,	
296 NLRB 808 (1989).	.33, 36
<i>In Re Summa Health Sys., Inc.</i> ,	
330 NLRB 1379 (2000).	18
<i>International Automated Machines</i> ,	
285 NLRB 1122 (1987).	14, 15
<i>Interstate Food Processing</i> ,	
283 NLRB 303 (1987).	16
<i>Intersystems Design Corp.</i> ,	
278 NLRB 759 (1986).	.33
<i>KLB Industries, Inc. d/b/a National Extrusion &amp; Manufacturing Company</i> ,	
357 NLRB 127 (2011).	.25
<i>Kurziel Iron of Wauseon, Inc.</i> ,	
327 NLRB 155 (1998).	.37, 38
<i>Mary Thompson Hospital</i> ,	
296 NLRB 1245 (1989).	16
<i>Michigan State Employees Association</i> ,	
364 NLRB No. 65 (2016).	.29, 32
<i>NLRB v. Acme Industrial Co.</i> ,	
385 U.S. 432 (1967).	16
<i>NLRB v. Katz</i> ,	
369 U.S. 736 (1962).	.32, 33, 34

<i>Obie Pacific,</i>	
196 NLRB 458 (1972).	. 38, 43
<i>Pan American Grain Co.,</i>	
343 NLRB 318 (2004).	18
<i>Parksite Group,</i>	
354 NLRB 801 (2009).	15
<i>Passavant Memorial Hospital,</i>	
237 NLRB 138 (1978).	. Passim
<i>Permanente Medical Group,</i>	
332 NLRB 1143 (2000).	. 38, 43
<i>Pine Lodge Nursing,</i>	
325 NLRB 98 (1997).	. 39, 44
<i>Postal Service,</i>	
308 NLRB 547 (1992).	18
<i>Postal Service,</i>	
359 NLRB 56 (2012).	18
<i>Postal Service,</i>	
363 NLRB No. 11 (2015).	18, 27, 29, 30
<i>Powelltown Coal Co.,</i>	
354 NLRB 419 (2009).	. 41
<i>Powelltown Coal Co.,</i>	
355 NLRB 407 (2010).	. 41
<i>Rangaire Co.,</i>	
309 NLRB 1043 (1992).	. Passim
<i>Rivers Casino,</i>	
356 NLRB 1151 (2011).	. 41, 42
<i>Samaritan Medical Center,</i>	

319 NLRB 392 (1995).	17
<i>San Diego Newspaper Guild v. NLRB</i> ,	
548 F.2d 863 (9th Cir. 1977).	16
<i>Southern California Gas Co.</i> ,	
316 NLRB 979 (1995).	38, 43
<i>Superior Protection, Inc.</i> ,	
341 NLRB 267 (2004).	17
<i>Toledo Blade Co.</i> ,	
343 NLRB 385 (2004).	33
<i>W-L Molding Co.</i> ,	
272 NLRB 1239 (1984).	16
<i>Wire Prods. Mfg. Corp.</i> ,	
326 NLRB 625 (1998).	37
<i>Woodland Clinic</i> ,	
331 NLRB 735 (2000).	16, 18
<i>Yeshiva University</i> ,	
315 NLRB 1245 (1994).	17

## I. STATEMENT OF THE CASE

On April 18, 2017, a hearing was held in San Francisco, California, before Administrative Law Judge<sup>1</sup> Amita Baman Tracy on a complaint issued by the Regional Director for Region 20. The Complaint alleges that Respondent violated Section 8(a)(1) and 8(a)(5) of the Act by 1) causing an undue delay in producing information requested by the Union; 2) dealing directly with employees by allowing two clerical employees to work at home and instructing employees to sign an exception agreement to be paid at a lower compensation rate; and 3) unilaterally implementing a reduced compensation plan for selling ypDirect products without first notifying or bargaining with the Union about the matter.

As will be shown, Respondent embarked on a pattern of conduct that bypassed and undermined the Union and violated its duty to bargain in good faith. The Union made five separate requests for information (RFI) that Respondent admitted was relevant. There is no dispute that Respondent failed to produce the requested information until several months later. With four of the five RFIs, Respondent never explained the delay to the Union or offered to bargain an accommodation. For the fifth RFI, although Respondent offered to bargain with the Union for an accommodation, the offer was made three months after the Union made the request. In short, Respondent unilaterally set its own time table of when the Union would receive the requested information.

Respondent planned to virtualize many of its offices, including its Redding and Concord, California offices, resulting in the closure of those offices and the sales representatives working at home (Virtualization Plan). During effects bargaining over this plan, on several occasions, the

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<sup>1</sup> Hereinafter referred to as the ALJ. All references to the transcript are noted by "Tr." followed by the page number(s). Exhibits will be referred to in the following manner, followed by the exhibit number and then the Bates page number(s): Joint exhibits as "JT Ex.," General Counsel exhibits as "GC Ex.," and Respondent exhibits as "R Ex." All dates refer to the year 2016 unless otherwise noted.

Union proposed that all affected clerical employees work virtually at home. Respondent consistently rejected the idea, stating that it had no interest in allowing clerical employees to work at home. Despite Respondent's continual rejection of the Union's proposal, it authorized two clerical employees (Jessica Durant and Carol Peterson) to work at home, without notifying or bargaining with the Union.

During this same time, the parties were bargaining for a successor contract. In those negotiations, Respondent unilaterally announced and implemented a new reduced compensation plan for selling ypDirect products (Reduced Compensation Plan) without first notifying and bargaining with the Union. The Union first learned of the plan from employees. When Respondent implemented the plan, it dealt directly with employees by instructing them to sign and obtain a Union representative's signature on an "Exception Agreement" that would allow them to sell the new product but at a lower commission rate. The Union immediately objected to Respondent's unilateral action, but Respondent continued to publicize the Reduced Compensation Plan and instruct employees to sign the Exception Agreement.

In short, Respondent has repeatedly violated its bargaining obligations under Section 8(a)(5) of the Act. An appropriate Remedy and Order should be issued to stop and rectify Respondent's violations of the law.

## **II. STATEMENT OF FACTS**

### **A. Background**

Respondent is in the business of selling print and digital advertisement. (Tr. 183.) It is the same business entity that sells the famed telephone directory book known as the Yellow

Pages. (Tr. 183, 235.) Respondent employs about 5000 employees that serve about 40 markets nationwide. (Tr. 235.)

The International Brotherhood of Electrical Workers, Local 1269 (Union) represents Respondent's 130 sales representatives and 21 clerical employees in Northern California and Reno, Nevada. (Tr. 43 – 44.) The parties' most recent collective-bargaining agreement expired on August 6, 2016. (Tr. 42-43; JT Ex. 17.) On January 13, 2017, the Union and Respondent signed an agreement to extend the contract to July 14, 2017. (Tr. 42 – 43; JT Ex. 17.) Before signing the extension agreement, the parties began bargaining for a successor contract on about July 7, 2016, and had bargaining sessions about two to three times per week until the parties signed the extension agreement. (Tr. 43.) Although Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit employees since 1964, its longtime owner AT&T sold Respondent to Cerberus Capital Management (Cerberus) in 2012. (Tr. 44.)

**B. Respondent Delayed Responding to Five Separate Union Requests for Information (RFIs)**

**1. February 2, 2015 RFI Regarding Employee Coverage/Evaluations**

On about February 2, 2015, Union Vice President of the Executive Board and Director of Operations Gerardo “Harry” Esquivel (Esquivel) emailed an eight item request for information (RFI) to Respondent's former San Francisco Branch General Manager Gabe Lopez (Lopez). (Tr. 114 - 115; JT Ex. 5; GC Ex. 8.) In summary, Esquivel requested 24-months' worth of employees' evaluations and related document to determine if Respondent conducted monthly employee evaluations and apprised employees of work expectations and areas of improvement, as required by the parties' negotiated-for Sales Performance Agreement Plan (SPA, aka Sales Performance Plan). (Tr. 115 – 116, 200 – 201; JT Ex. 5, 17: 99.) Esquivel requested the

information to determine if Respondent had properly conducted evaluations for employee Daniel Magno (Magno), who was facing possible termination, as well as for other employees in the San Francisco branch. (Tr. 115 - 116.) Respondent admitted in its Answer that the requested information was relevant and necessary. (GC Ex. 1(xx) paragraph 21.)

Esquivel sent follow-up emails to Respondent, whose response was limited.<sup>2</sup> On March 5, 2015, Senior Manager, Field Human Resources, Debbi Kristiansen (Kristiansen) emailed some of the requested information to Esquivel, but she did not explain why she was only providing some of the information, why there was a delay in producing the information, or offer to bargain for an accommodation to produce it. (GC Ex. 8, 9.)

During a conference call on about March 9, 2015, the Union informed Respondent that it had not fully satisfied the February 2, 2015 RFI. (Tr. 44 – 46, 120.) Respondent did not respond, so on May 26, 2015, Union Vice President Esquivel sent two follow up emails to Kristiansen on the same day. (Tr. 120 - 121; GC Ex. 10.)

On May 28, 2015, over four months after the request, Kristiansen emailed Esquivel, finally offering to bargain with the Union for an accommodation to produce the outstanding information. (JT Ex. 6.)

## **2. October 5, 2015 RFI Regarding the New Sales Performance Plan “STARS”**

On September 11, 2015, Respondent sent the Union its proposal to replace the agreed-upon sales performance plan with a new plan called STARS. (Tr. 250 - 251; R Ex. 11.) On October 5, 2015, Union Vice President Esquivel emailed an RFI to Respondent In-House

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<sup>2</sup> On February 20, 2015, Senior Manager, Field Human Resources, Debbi Kristiansen (Kristiansen) sent an email to Esquivel producing one of the eight requested items – “a list of all ‘New Hires’ who have completed a full cycle in the last 24 months.” (Tr. 117; GC Ex. 9.)

Counsel and Chief Negotiator, Keith Halpern (Halpern), requesting that Respondent explain and clarify certain definitions, standards, and formulas found in the STARS plan.<sup>3</sup> (Tr. 122 – 123, 250; JT Ex. 7; GC Ex. 11.) On October 9, 2015, Halpern replied that Respondent was working on the request and would produce the information when finished.

On January 14, 2016, without having produced the requested information, Halpern emailed that Respondent was going to roll out the new STARS plan later that week. (GC Ex. 11, 12) The same day, the Union objected to Respondent's plan, stating that it did not produce any of the information requested in the October 5, 2015 RFI and demanding that the information be provided before the implementation of the STARS plan. (GC Ex. 12.) Four days later, on January 20, Respondent produced the requested information but did not explain the delay. (R Ex. 13)

### **3. January 14, 2016 RFI Regarding the Discipline of Employee John Mimiaga**

On January 14, 2016, Union Vice President Esquivel emailed Respondent Sales Manager William Poulin (Poulin) a four item RFI requesting information related to the discipline and possible termination of unit employee John Mimiaga (Mimiaga) in order to determine if he had any factors to mitigate his discipline.<sup>4</sup> (Tr. 126 - 127; JT Ex. 8.) The Union requested:

<b>Item #</b>	<b>Requested Information</b>
1	OLSM Report for the coverage period of a minimum of 24 months or the time period used for the formal January 2016 SPE whichever is the greater of the two.

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<sup>3</sup> Respondent admitted in its Answer that the requested information was relevant and necessary. GC Ex. 1(xx) paragraph 21.

<sup>4</sup> Respondent admitted the requested information was relevant and necessary. (GC Ex. 1(xx) paragraph 21.)

2	Copy of all SPE coverages in the last 24 months or the time used for the January 2016 SPE whichever is the greater of the two.
3	Copy of Mr. Mimiaga's calendar for the evaluation period of the January 2016 SPE.
4	A listing of all of Mr. Mimiaga's TGR appeals approved, denied and the reason for denial.

(JT Ex. 8.)

After receiving only one of the requested items on January 15, Esquivel sent a follow up email to Respondent on July 18, 2016, demanding that Respondent produce the outstanding information and requesting additional information because Mimiaga was up for another formal evaluation, in which he faced possible termination again. (Tr. 128; GC Ex. 13:2, 4 - 5; JT Ex. 9.) Without explaining the reason for the delay to the Union or suggesting the need for an accommodation to produce the information, on August 12, Respondent finally produced some of the information; producing the rest of it on August 18, seven months after the request. (Tr. 129, R Ex. 10.)

#### **4. February 18 and March 21, 2016 RFIs Regarding Employee Carolyn Cook's DSA Information**

On February 18, 2016, Union Office Manager Joyce Salvador (Salvador) emailed an RFI to Respondent Manager, TLM Systems Reporting and Controls, Diane Francis (Francis), requesting information related to unit employee Carolyn Cook's (Cook) daily sales average (DSA). (Tr. 172 - 174; JT Ex. 10.) DSA is the average of an employee's sales commission in the last 26 payrolls, and it determines how much employees are paid during non-sales time, such as vacation.<sup>5</sup> (Tr. 174, 284; JT Ex. 17: 32, 46.) Salvador did not receive any response from

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<sup>5</sup> Respondent admitted the information was relevant and necessary. (GC Ex. 1(xx) paragraph 21)

Respondent, so she sent several follow-up emails<sup>6</sup> until Francis finally responded on March 21, 2016, stating that she would get to the RFI as soon as possible. (Tr. 176-177; GC Ex. 16:2.) Salvador sent several follow up emails to Respondent concerning her February 18 and March 21 RFIs; only one of which Francis responded to. (JT Ex. 16.) It wasn't until June 23, 2016, four months later, that Francis produced the requested information to Salvador. (Tr. 178; R Ex. 18, 19.)

**5. March 23, 2016 RFI Regarding the Discipline of Employee Kathleen Charles**

On March 23, 2016, Union Business Representative Michael Waltz (Waltz)<sup>7</sup> emailed an RFI to Managers Vitales and Kristiansen requesting information related to a grievance filed on behalf of unit employee Kathleen Charles (Charles) concerning a disciplinary action she obtained for receiving unsatisfactory performance polls when she was out on leave.<sup>8</sup> (Tr. 164 - 165; JT Ex. 11.) Waltz requested only five items of information.

<b>Item #</b>	<b>Information Requested</b>
1	SPE Premise Rep ranking reports for the Concord office from 1/1/2012 - 3/1/2016.
2	List of all accounts reassigned as "extra market Win/Loss" that were available to sales reps in the Concord office from 1/1/2012 - 3/20/2016.
3	List of all of my (Kathy Charles) accounts that were reassigned to other reps as Win/Loss as a result of my FMLA/Disability leave(s) that occurred between 2012-

<sup>6</sup> Salvador's March 21 follow-up email added two questions about Cook's DSA to her February 18 RFI. (GC Ex. 16.)

<sup>7</sup> Waltz began working for Respondent as a Premise Sales Representative on about March 2001. (Tr. 162.) When the parties began bargaining for a successor contract in 2016, he took a contractually approved leave of absence to work for the Union as a Business Representative until the parties reached a new contract. (Tr. 161 – 162) Before becoming a Business Representative, Waltz worked at Respondent's Chico and Redding offices and was a chief Union steward for about 10 years. (Tr. 161 – 162.)

<sup>8</sup> Respondent admitted the requested information was relevant and necessary. (GC Ex. 1(xx) paragraph 21)

	2016.
4	List of Key Account openings in Concord, San Jose and San Francisco from 12/1/2013 - 3/11/2016.
5	Total earnings for each sales rep that upgraded to the above open Key Account positions, including Joe Padrid in the Concord office.

(JT Ex. 11.) Receiving no response to his RFI, Waltz sent several follow up emails. (Tr. 165 – 166; GC Ex. 11.) Respondent finally responded to Waltz on May 2, stating that it was working on the RFI and should produce the information by the end of the week. (GC Ex. 11: 4.)

Respondent did not produce the information by the end of the week, and on May 12, Manager Kristiansen emailed Waltz mentioning for the first time that some of the information was challenging to gather and that production of the requested information would be in a few days. (GC Ex. 11: 4) Finally, on June 14, Respondent produced some of the requested information, producing the rest of it on June 23, three months after the Union’s request. (Tr. 166 – 167; GC Ex. 15: 1 and 3; R Ex. 6 and 7.)

**C. Respondent Unilaterally Implemented the Reduced Compensation Plan for ypDirect Products and Dealt Directly with Employees by Instructing Them to Sign the Corresponding Exception Agreement**

**1. Unilateral Implementation of the Reduced Compensation Plan and Instructing Employees to Sign the Exception Agreement**

Respondent sells a product called ypDirect, which is a direct mail product that includes print advertisements (i.e. flyers and brochures) that sales representatives sell to companies to help them solicit new customers. (Tr. 23 – 24, 46, 80, 102, 138, 256; JT Ex. 2.) Respondent began selling ypDirect products at least five years ago. (Tr. 23 – 24, 33.) Employees have always been compensated at the contractual rate for making sales of ypDirect products. (Tr. 24, 54; JT Ex. 17: 26 – 27.) A detailed explanation of how employees were compensated under the contractual rate is found in the Analysis section below.

As stipulated, on July 15, 2016, without advance notice to the Union, Respondent distributed to its sales employees a packet of information, announcing a reduced compensation plan for selling ypDirect products (Reduced Compensation Plan). (Tr. 24 – 25, 49, 139, 256 – 257, 268; JT Ex. 1, 2.) Respondent presented the Reduced Compensation Plan Packet to employees during “Monday meetings” and through email. (Tr. 103 – 104, 257; JT Ex. 2, 3, 12.) On the last page of the packet was an Exception Agreement that employees had to sign in order to sell ypDirect products to a specific customer, but at a lower rate. (Tr. 108; JT Ex. 2, 13.) Soon after Respondent announced the Reduced Compensation Plan to employees, employees began emailing Union officials Guthrie, Esquivel, and Waltz about the plan and forwarding the Reduced Compensation Plan Packet. (Tr. 46 - 47, 138 - 139; JT Ex. 2.)

About July 20, 2016, the parties met for contract bargaining. (Tr. 49) During this bargaining session, the Union initiated discussions about the Reduced Compensation Plan, telling Respondent that it was the exclusive bargaining representative of the employees and Respondent was bargaining directly with employees by presenting them with the Reduced Compensation Plan. (Tr. 50.) Chief Negotiator and In-House Counsel Keith Halpern (Halpern) told the Union that was not its intent. (Tr. 50 – 51) The parties did not reach an agreement regarding the Reduced Compensation Plan at this meeting or anytime thereafter. (Tr. 51.) Even after the Union objected to the Reduced Compensation Plan, Respondent continued announcing the plan to employees and instructing them to sign the Exception Agreement. Later that same night, Respondent emailed a revised version of the Reduced Compensation Packet to employees, noting that the Union had to agree to the Reduced Compensation Plan and sign the corresponding Exception Agreement if the employees wanted to sell ypDirect products. (JT. Ex. 3.)

On July 21, 2016, Respondent Sales Manager Raymond Salais (Salais) sent an email to unit employees attaching the Reduced Compensation Plan Packet and forwarding Respondent's answers to employees' questions about the plan. (Tr. 34, 40 - 41; JT Ex. 12.) Salais's email included an email from unit employee Sarah McEwen (McEwen) to Sales Manager James Smith (Smith), asking Smith questions about the Reduced Compensation Plan, which he answered. Unit employee Jeff Butler (Butler) recalled that about a day or two after receiving Salais's email, he received another copy of the Reduced Compensation Plan Packet via email from Respondent. (Tr. 40 - 41; JT Ex. 2.)

On July 26, 2016, Respondent Executive Market Manager Rick Kliment (Kliment) sent an email to Sales Representatives, managers, and clerical employees, attaching a copy of the Exception Agreement and telling employees that it had to be signed for them to be paid commissions on sales of ypDirect products. (Tr. 25 - 27, 91; JT Ex. 1, 13.) Later that same day, unit employee Chuck Ziolkowski (Ziolkowski) forwarded Kliment's email to Union President Guthrie, asking if employees were now negotiating their own commissions with the company. (Tr. 48; GC Ex. 3.) Also later that same day, unit employee Steven Clark (Clark) forwarded Kliment's email to Union Representative Waltz.<sup>9</sup> (Tr. 27 - 28; GC Ex. 2.)

About July 27, 2016, the Union and Respondent met for contract bargaining and discussed the Reduced Compensation Plan. (Tr. 51 - 52.) Union President Guthrie told Respondent that the parties were negotiating for a new successor contract, but Respondent was dealing directly with employees by presenting them with the Reduced Compensation Plan without bargaining with the Union. (Tr. 52, 140.) Guthrie also told Respondent that its

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<sup>9</sup> Clark recalls that about one to two weeks before or after he received the Reduced Compensation Plan Packet, he attended a Monday Meeting, in which Sales Manager Steve Hall (Hall) discussed the Reduced Compensation Plan, but did not discuss the Union at all. (Tr. 28 - 29.)

compensation proposal of July 8, 2016, did not contain the Reduced Compensation Plan and that the Union objected to what Respondent was doing. (Tr. 52.) Respondent Chief Negotiator Halpern simply told the Union that Respondent would fix it. (Tr. 52, 140.)

Also on July 27, 2016, unit employees Nick Gilbert (Gilbert) and Lelani Kinzler (Kinzler) submitted to the Union signed copies of the Exception Agreement regarding a new sale of ypDirect product, which was sent to them and signed by Kliment. (Tr. 86, 90, 181 - 182; GC Ex. 7.)

About July 28, 2016, the parties met for contract bargaining and again discussed the Reduced Compensation Plan. (Tr. 52 – 53, 140.) Respondent Chief Negotiator Halpern told the Union that it was suspending the sale of ypDirect products because the parties had no agreement on the Reduced Compensation Plan and Respondent could not afford to pay the rates in the parties' contract. (Tr. 53, 141.) On August 4, 2016, Respondent Senior Vice President, Sales – West Region, Matt Crowley (Crowley) sent a mass email to employees announcing that Respondent was suspending all new sales of ypDirect product and continuing its negotiations with the Union concerning the appropriate commission rate for new sales of ypDirect products. (Tr. 263; JT Ex. 4.)

## **2. Respondent Continued to Sell ypDirect Products and Instruct Employees to Sign the Exception Agreement After August 4, 2016**

Despite telling the Union and employees on August 4, 2016, that all new sales of ypDirect were suspended, Respondent continued selling ypDirect and asking employees to sign the Exception Agreement. (Tr. 268.) On February 9, 2017, Marketing Manager Scott MacDonald (MacDonald) sent an email to Business Operations Department Manager Wanda Chiu (Chiu) asking her for the “new ypdirect approval form,” which she provided later that day.

(JT Ex. 15: 2 – 3.) MacDonald immediately forwarded Chiu’s email and the Exception Agreement to unit employee Frank Yun Quan Pan (Pan) for a sale of ypDirect product. (JT Ex. 15.) Pan then emailed MacDonald a copy of his signed Exception Agreement for a new sale of ypDirect product. (JT Ex. 15.)

On March 31, 2017, Manager Chiu sent an email to Manager Poulin stating that employees had to sign the Exception Agreement for all new sales of ypDirect products. (Tr. 104 - 105; JT Ex. 16: 2.) On April 3, Poulin forwarded Chiu’s email and the Exception Agreement to unit employee Joevanie Domantay (Domantay), instructing him to sign and return it to be paid for a new sale of ypDirect product. (Tr. 104 - 105; JT Ex. 16.)

**D. Respondent Dealt Directly with Employees by Allowing Two Clerical Employees to Work At Home**

Clerical employees<sup>10</sup> support sales representatives in fulfilling their sales function. (Tr. 58, 131) About December 1, 2015, Respondent notified the Union of its plan to close its Pleasanton, California telephone sales office. (Tr. 58, 130; GC Ex. 4) On about February 8, 2016, Respondent emailed the Union notifying them of its plan to virtualize many of its sales offices, including its Concord and Redding offices, resulting in those offices closing and sales representatives working virtually at home (Virtualization Plan). (Tr. 59, 130 – 131, 185, 222, 236; GC Ex. 5.)

On February 17, 2016, the parties met to discuss the future of the clerical employees affected by the closure of the Pleasanton facility and the Virtualization Plan. (Tr. 59, 60 – 61, 131 – 132.) At this meeting, the Union submitted a written proposal to Respondent to allow the clerical employees affected by the Pleasanton shut down and the Virtualization Plan to work

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<sup>10</sup> Also known as Customer Associates and Supervisory Assistants.

virtually at home. (Tr. 61 – 62, 132; GC Ex. 6.) Respondent rejected the proposal, stating that it had no interest in allowing clerical employees to work at home. (Tr. 62 – 63, 133.) Respondent did not tell the Union that it was considering allowing the clerical employees in its Redding and Concord offices to work at home. (Tr. 63, 133.) Sometime thereafter, the parties ceased effects bargaining for the Pleasanton office closure but continued effects bargaining over the Virtualization Plan. (Tr. 243.)

On April 18, 2016, Esquivel emailed Respondent a copy of the Union's February 17, 2016 "Customer Associate Virtual Position" proposal allowing all clerical employees affected by the Virtualization Plan to work at home. (Tr. 133 – 134; GC Ex. 14.) Respondent never responded. (Tr. 134.)

On May 4, 2016, the parties met for bargaining and discussed the future of the clerical employees affected by the Virtualization Plan. (Tr. 63 – 64, 135.) The Union reiterated its proposal to allow all clerical employees affected by the Virtualization Plan to work at home, and once again, Respondent rejected the Union's proposal, stating that it had no interest in allowing clerical or support employees to work at home. (Tr. 64, 135, 242 – 243.) Again, Respondent did not tell the Union that it was considering allowing the clerical employees in its Redding and Concord offices to work at home. (Tr. 64 – 65, 135.)

As stipulated by the parties, in May 2016, without giving the Union advance notice and an opportunity to bargain, Respondent allowed unit clerical employee Jessica Durant (Durant) to work at home following the closure of its Concord office. (JT Ex. 1; Tr. 66, 136 – 137.) The Union only learned about Durant working at home when her co-workers informed them and expressed their anger for not being allowed to also work at home. (Tr. 65 – 66, 136.) After learning about Durant, Union President Guthrie confronted Manager Kristiansen about it, stating

that Respondent rejected the Union's proposal to allow all clerical employees affected by the Virtualization Plan to work at home and Union members were upset that Durant was allowed to work at home while they were not. (Tr. 66 – 67.) Kristiansen simply told Guthrie that she would look into the situation. (Tr. 67.) Respondent never explained to the Union why it allowed Durant to work at home, while all other clerical employees from the same office had to transfer to Respondent's Oakland Office for work. (Tr. 69.)

As stipulated by the parties, in approximately June 2016, without giving the Union advance notice, Respondent allowed unit clerical employee Carol Peterson (Peterson) to work at home following the closure of its Redding office. (JT Ex. 1; T. 67, 78, 168.) To date, Peterson is still working at home. (JT Ex. 1.) Respondent made the decision to allow Peterson to work at home several weeks before closing its Redding, California office. The Union only learned about Peterson working at home in about June 2016 from employees, including Peterson herself. (Tr. 67, 169 – 170.) After learning about Peterson, Union President Guthrie confronted Respondent Chief Negotiator Halpern and Manager Vitales about it, stating that the Union had made several proposals to allow all clerical employees affected by the Virtualization Plan to work at home and each time Respondent rejected them. (Tr. 67 – 68.) Respondent told Guthrie that it had no interest in having clerical employees work at home, but it failed to explain why it allowed Peterson to work at home. (Tr. 68 – 69.)

### **III. CREDIBILITY**

Respondent failed to call material witness Chief Negotiator and In-House Counsel Keith Halpern. A judge may draw an adverse inference when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (adverse inference was warranted for respondent's failure to call its

production manager to testify about significant disputed matters), *enfd. mem.* 861 F.2d 720 (6th Cir. 1988); *Parksite Group*, 354 NLRB 801, 805 (2009) (failure of respondent to call its manager who evaluated the alleged discriminatees for rehire was subject to an adverse inference; the General Counsel was not required to subpoena the manager); and *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999), *enfd. mem.* 205 F.3d 1324 (2d Cir. 1999).

Here, the testimony from the General Counsel's and Respondent's witnesses show that Respondent's Chief Negotiator and In-House Counsel Keith Halpern (Halpern) was heavily involved with the parties discussions about Respondent's implementation of the Reduced Compensation Plan. (Tr. 49 – 53, 139 – 141, 257 - 263.) Halpern was also deeply involved in Respondent's Virtualization Plan and rejection of the Union's proposal to allow all affected clericals work at home. (Tr. 60 -65, 68 - 69, 131 – 135.) Respondent failed to call him as a witness for trial. The General Counsel requests that the ALJ draw a negative inference from Respondent's failure to call Halpern and find that his testimony would have been consistent with the testimony of Guthrie and Esquivel regarding Respondent's unilateral implementation of the Reduced Compensation Plan and direct dealing with employees by allowing Durant and Peterson to work at home.<sup>11</sup>

#### IV. ANALYSIS

##### A. Respondent Violated the Act by Delaying the Production of Relevant and Necessary Information

###### 1. Case Law

A labor organization having an obligation to represent employees in a bargaining unit is entitled, upon request, to information relevant to and necessary for the performance of that

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<sup>11</sup> *Daikichi Sushi*, 335 NLRB 622 (2001), *enf.* 56 Fed. Appx. 516 (D.C. Cir. 2003); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd. mem.* 861 F.2d 720 (6th Cir. 1988).

duty.<sup>12</sup> *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Where the information requested involves the terms and conditions of employment related to a union's bargaining unit employees, such as wages and 401K plans, the information is presumptively relevant to the Union's representative function.<sup>13</sup> In determining whether such information is relevant, the Board uses a liberal discovery type standard.<sup>14</sup>

Once a good faith demand is made for relevant information, it must be made available promptly and in useful form. Even though an employer has not expressly refused to furnish the information, its failure to make diligent effort to obtain or to provide the information “reasonably” promptly may be equated with a flat refusal.<sup>15</sup> The duty to supply requested information includes the duty to provide the information in a timely fashion. *Woodland Clinic*, 331 NLRB 735, 736 (2000) (“An unreasonable delay in furnishing [requested relevant] information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all”); *Mary Thompson Hospital*, 296 NLRB 1245 (1989); *American Signature, Inc.*, 334 NLRB 880, 885 (2001).

An employer cannot simply ignore a union's information request.<sup>16</sup> An employer must timely respond to a union's request for information even when it believes it has grounds for not

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<sup>12</sup> Respondent admitted in its Answer that all of the requested information here was relevant and necessary. (GC Ex. 1(xx) paragraph 21.)

<sup>13</sup> *George Koch & Sons, Inc.*, 295 NLRB 695 (1989); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

<sup>14</sup> *NLRB v. Acme Industrial Co.*, *supra*; *W-L Molding Co.*, 272 NLRB 1239 (1984).

<sup>15</sup> *NLRB v. John S. Swift Co., Inc.*, 124 NLRB 394 (1959), *enfd.* in part and denied in part 277 F.2d 641 (7th Cir. 1960).

<sup>16</sup> See *Daimler Chrysler Corp.*, 331 NLRB 1324, 1329 (2000); *Interstate Food Processing*, 283 NLRB 303, 304 at fn. 9 (1987).

providing the information.<sup>17</sup> As the Board made clear in *Columbia University*, “an employer must respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory.” 298 NLRB 941, 945 (1990), citing *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977). In *Ellsworth Sheet Metal*, the Board found that the employer’s delay of three months without responding to the request for information was sufficient, in itself, to establish a violation. The Board explained that once the request for information was received, it was incumbent on the employer to react in some manner to the request, and that the union was not required to do more as a precondition to establishing its right to have the information produced. 232 NLRB at 109.

While there is no per se rule regarding timeliness of furnishing information, the law requires a “reasonable good faith effort to respond to the request as promptly as circumstances allow.”<sup>18</sup> The complexity and extent of the information sought, its availability, and the difficulty in retrieving the information are factors in determining whether an employer has responded with reasonable promptness.<sup>19</sup> The Board does not hesitate to scrutinize an employer's explanation to

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<sup>17</sup> See, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499 (2011) (employer with legitimate confidentiality defense to disclosure has affirmative duty to respond and seek accommodation); *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004), enfd. 401 F.3d 282 (5th Cir. 2005), cert. denied 546 U.S. 874 (2005) (if employer believes request is ambiguous or overbroad, it must seek clarification or comply with request to extent it encompasses relevant information); *DaimlerChrysler Corp.*, 331 NLRB 1324, 1329 (2000), enfd. 288 F.3d 434 (D.C. Cir. 2002) (although employer may have had legitimate objections to providing requested information, it was obliged to make those objections known to the union in a timely fashion); *Yeshiva University*, 315 NLRB 1245, 1248 (1994) (where employer had information in form not requested by the union, employer was required to so notify the union so that it could modify request).

<sup>18</sup> *Allegheny Power*, 339 NLRB 585, 587 (2003).

<sup>19</sup> *Id.*, citing *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

determine whether the delay was reasonable. In *Bundy Corp.*, 292 NLRB 671, 672 (1989), the employer defended its delay by arguing that its officers were preoccupied with an impending acquisition, the union did not repeat its request in the numerous telephone calls between the parties, and the request was made by the chief negotiator's assistant. In rejecting the employer's defense, the Board characterized the employer's explanation for the two and one-half month delay as "specious" when the information requested consisted of documents readily available in the employer's files.

The Board viewed a delay of about six weeks as unlawful in *Postal Service*, 363 NLRB No. 11 (2015). In that case, the Board rejected the employer's defense that its delay was reasonable because the union did not submit the request for information to the correct manager. The Board found that the supposedly "incorrect" manager never told the union that she could not receive the request for information or that the request had to be sent to another manager. *Id.* The Board also rejected the employer's defense that it was short staffed and busy working on other matters, adopting the judge's finding that the "[manager] felt her other tasks were more important than responding promptly to the [union's] information request. *Id.* The Board has also found multi-month delays in providing information unreasonable and unlawful.<sup>20</sup>

## **2. Respondent Delayed Producing the Information**

### **a) Respondent Admitted The Information Was Relevant and Necessary**

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<sup>20</sup> See *Postal Service*, 359 NLRB 56 (2012) (1-month delay); *Postal Service*, 308 NLRB 547, 551 (1992) (4-weeks delay); *Pan American Grain Co.*, 343 NLRB 318 (2004), *enfd.* in relevant part 432 F.3d 69 (1st Cir. 2005) (3-month delay was unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (2.5-month delay); *Woodland Clinic*, *supra*, 331 NLRB at 737 (7-week delay); *Postal Service*, 308 NLRB 547 (1992) (7-week delay); *In Re Summa Health Sys., Inc.*, 330 NLRB 1379 (2000) (two-month delay).

As noted throughout, Respondent admitted in its Answer to the Amended Consolidated Complaint that the information at issue here was relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative of the employees. (GC Ex. 1(xx), paragraph 21.)

**b) Respondent Delayed and Did Not Timely Explain the Delay or Offer to Bargain for an Accommodation**

**(1) Request No. 1--February 2, 2015 RFI Regarding Documentation Related to Employee Evaluations**

Union Vice President Esquivel's February 2, 2015 RFI to Manager Lopez requested eight items of information pertaining to employees' evaluations that were required under the parties' agreed-to sales performance plan. (JT Ex. 5) Receiving no response, on February 12, 2015, Esquivel sent Lopez a follow-up email. On February 19, 2015, Lopez responded to Esquivel stating that the Union should receive the requested information soon. (GC Ex. 8: 1.) Later that same day, Esquivel sent an email to Lopez questioning why Respondent had taken so long to respond to the RFI. (GC Ex. 8: 1.) On February 20, 2015, Manager Kristiansen emailed Esquivel, producing only one of the eight requested items.<sup>21</sup>

On March 5, 2015, Manager Kristiansen emailed Esquivel 90-days' worth of the employees' evaluation documentation sought by the Union, rather than the requested 24-months' worth. (Tr. 118 – 119; GC Ex. 8.) Kristiansen did not provide copies of the requested coaching management journals, which would have included coaching notes, improvement plans, and other

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<sup>21</sup> "A list of all 'New Hires' who have completed a full cycle in the last 24 months." (Tr. 117; GC Ex. 9.)

documents pertaining to Respondent's evaluation of employees, or any of the other information requested on February 2, 2015.<sup>22</sup> (Tr. 119.)

About March 9, 2015, Esquivel and Union President Stefen Guthrie (Guthrie) had a conference call with Respondent Senior Manager of Labor Relations Ralph Vitales (Vitales) and Kristiansen, during which they discussed that Respondent had not provided the employee evaluation documentation requested in the Union's February 2, 2015 RFI.<sup>23</sup> (Tr. 44 – 46, 120.) Neither Kristiansen nor Vitales said there was no more information to produce or offered to bargain with the Union for an accommodation to produce the remainder of the information. (Tr. 44 - 46, 120.)

On May 26, 2015, Esquivel emailed Respondent repeating that it had only produced 90-days' worth of the employees' evaluation documentation, and it needed to produce the remainder of the requested information. (Tr. 120 - 121; GC Ex. 10: 1.) Later that same day, Esquivel sent an email to Manager Kristiansen reminding her that the Union wanted the documentation for the informal employee evaluations even though she had already provided documentation for the formal evaluations. (Tr. 121; GC Ex. 10: 5.)

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<sup>22</sup> Kristiansen did produce 24-months' worth of formal evaluation documentation for employees who received unsatisfactory ratings, but did not provide any documentation for the informal evaluations for the same employees, which the Union requested. (Tr. 118 – 119; GC Ex. 8.)

<sup>23</sup> Respondent's counsel failed to ask Vitales and Kristiansen about this conference call. The General Counsel asks the ALJ to draw an adverse inference from Respondent's failure to ask its own witnesses about the conference call that they would testify consistently with the General Counsel's witnesses. Also, where the General Counsel presents evidence which, if accepted, establishes a material fact, the failure of a respondent to produce evidence, including testimony, in its possession or control with respect to the existence or nonexistence of the fact is a relevant consideration in determining whether to find the fact. *Fred Stark*, 213 NLRB 209, 214 (1974), *enfd.* 525 F.2d 422 (2nd Cir. 1975), *cert. denied* 96 S.Ct. 1463 (1976).

On May 28, 2015, Manager Kristiansen emailed Union Vice President Esquivel stating that Respondent was going to search further for documents responsive to the Union's RFI and when that search was done, she would discuss with the Union any additional steps needed to fulfill the request.<sup>24</sup> (JT Ex. 6.) At that point, Respondent ceased its unlawful delay in producing the information because it offered to bargain with the Union for an accommodation to produce the remaining information.

Nevertheless, Respondent violated Section 8(a)(5) of the Act by delaying nearly four months before asking to bargain an accommodation for providing the remainder of the information, and by never explaining why there was a delay in production and in the offer to bargain for the accommodation to produce the information.<sup>25</sup> (Tr. 122.)

**(a) The RFI Was Not So Complex as To Justify Respondent's Delay and Untimely Offer to Bargain**

Respondent may argue that the request was complex. At trial, Manager Kristiansen testified that it was supposedly difficult to obtain the requested documentation concerning employee evaluations because several managers no longer worked for Respondent, and Vitales<sup>26</sup> had to search through various types of documents (i.e. notes, emails, calendars). (Tr. 203 – 204.)

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<sup>24</sup> This was the last pertinent communication Respondent had with the Union about the February 2, 2015 RFI. Kristiansen claimed that after sending her email, she spoke with Manager Vitales about the Union's RFI, and Vitales said he would conduct a further search for documents, which subsequently resulted in no additional documents that were responsive to the RFI. (Tr. 240 – 241) But neither Kristiansen nor Vitales informed the Union that Respondent had completed the additional search for documents and there was no more information to produce. (Tr. 328.)

<sup>25</sup> *Columbia University*, 298 NLRB 941.

<sup>26</sup> Respondent failed to ask Vitales if he searched for documents that were responsive to the February 2, 2015 RFI, and, if he did, whether it was difficult to obtain the requested information. The General Counsel requests that the ALJ draw a negative inference from Respondent's failure to ask Vitales about this and find that his search relating to the February 2, 2015 RFI was not difficult. *Fred Stark, supra*.

Respondent never asserted prior to trial that the information was difficult or burdensome to compile to justify its delay in producing the information. While Kristiansen briefly mentioned the turnover in management in her March 5, 2015 email to Esquivel, she did not timely give the Union a comprehensive explanation of the cause of the delay or seek a timely accommodation to produce the information.<sup>27</sup> (Tr. 122; JT Ex. 6; GC Ex. 8 – 10.)

**(b) The ALJ Should Reject Respondent’s Broad Defense That it Was Busy Working on Other Union RFIs**

An employer cannot justify delays in supplying information on the basis of other, unrelated, information requests.<sup>28</sup> If an employer declines to supply relevant information on the grounds that it would be unduly burdensome to do so, the employer must not only timely raise this objection with the union, but also must substantiate its defense.<sup>29</sup> Respondent will likely make the broad claim that its delays in responding to all of the Union’s RFIs, including the February 2, 2015 RFI, were due to the Union propounding many other RFIs.<sup>30</sup> Respondent did not raise this defense until the hearing. At no time, did Respondent inform the Union that its delays were due to its efforts in fulfilling other Union RFIs. (Tr. 326, 330.) Moreover, Respondent is not a small “mom and pop” business with a tiny staff that is incapable of handling

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<sup>27</sup> See *Columbia University, supra*; *Bundy Corp., supra*.

<sup>28</sup> *Columbia College Chicago*, 360 NLRB 1116 (2014), citing *Daimler Chrysler Corp.*, 344 NLRB 1324, 1330 (2005).

<sup>29</sup> *Conditioned Air Sys.*, 360 NLRB 789 (2014).

<sup>30</sup> Respondent witnesses testified that the Union did not consult with them before setting deadlines for Respondent to produce the requested information. However, this claim is irrelevant because the Union had no obligation to consult with Respondent before setting these deadlines. Moreover, Respondent never told the Union that it could not meet the deadlines or offered to bargain for a mutually acceptable date of production.

multiple RFIs. Rather, Respondent is a large corporation with thousands of employees serving many markets and offices nationwide. (Tr. 235.) Furthermore, Respondent failed to produce evidence showing that the Union's other RFIs created an undue burden<sup>31</sup> or caused its delays in producing the requested information.<sup>32</sup> Finally, as discussed throughout, Respondent never timely offered to bargain with the Union for an accommodation to produce the information.<sup>33</sup> In short, Respondent failed to meet its burden of showing that it timely raised this defense or presented evidence to substantiate it.<sup>34</sup>

**(2) Request No. 2--October 5, 2015 RFI Regarding the STARS Plan**

The Union's October 5, 2015 RFI requested information relating to Respondent's plan to implement the new sales performance plan called STARS. (JT Ex. 7; GC Ex. 11.) On October 9, 2015, Union Vice President Esquivel sent Respondent Chief Negotiator Halpern a follow-up email concerning the RFI, which Halpern responded to later that day stating that Respondent was working on the request and the Union would receive the information after Respondent was finished. (GC Ex. 11:2 and 3.) Later that same day, Esquivel emailed Halpern explaining that the Union needed the requested information in a timely manner in order to negotiate a mutually agreed-upon sales performance plan and to counter Respondent's proposal to implement the

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<sup>31</sup> Manager Kristiansen testified that in February 2016, Respondent created a list to track all of the Union's RFIs dating back to March 2015, and updated that list as it received and responded to RFIs. (Tr. 189, 191; R Ex. 1) This list and Respondent's maintenance of it shows that Respondent was prepared and equipped to respond in a more timely manner to the Union's RFIs at issue here.

<sup>32</sup> Manager Kristiansen testified that the Union's sister, local branch in Southern California, Local 2139, made fewer RFIs than the Union did during the same time frame. (Tr. 199.) This claim is irrelevant and does not show that the Union's other RFIs caused Respondent's delay in producing the requested information.

<sup>33</sup> *Columbia University, supra.*

<sup>34</sup> *See Columbia University, supra; Bundy Corp., supra.*

STARS plan. (GC Ex. 11. 1 – 2.) Halpern ignored Esquivel’s October 9, 2015 email. (Tr. 124; GC Ex. 11.)

Even though Respondent produced none of the requested information, on January 14, 2016, Halpern emailed Union Business Manager Karen Gowdy (Gowdy) stating that Respondent intended to roll out the STARS plan that week. (Tr. 125; GC Ex. 12: 3.) Later that same day, Gowdy emailed Halpern objecting to the roll out of the STARS plan. (GC Ex. 12: 2.) In another email later that same day, Gowdy further objected to Respondent’s plan by telling Halpern that Respondent never responded to the Union’s October 9, 2015 RFI and the Union needed the information to bargain about the STARS plan before Respondent implemented it. (Tr. 125; GC Ex. 12: 1 – 2.) On January 15, Manager Vitales emailed Gowdy stating that Respondent was halting the implementation of the STARS plan to address the Union’s RFI. (R Ex. 12.)

On January 20, 2016, over three months after the request, Respondent finally produced the information requested in the October 9, 2015 RFI. (R Ex. 13.) There was no evidence showing, and Respondent did not claim, that the requested information was difficult to gather or that it needed an accommodation. Indeed, although the Union requested over 33 items of information, Respondent produced the information just six-days after the Union’s January 14, 2016 follow up email informing Respondent that it had not responded to the RFI. Respondent’s quick production of information shows that the requested information was readily available and the delay unnecessary.<sup>35</sup> Respondent’s three-month delay without explanation violates Section 8(a)(5) of the Act. (Tr. 126; GC Ex. 11, 12.) *Columbia University, supra*.

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<sup>35</sup> *Allegheny Power*, 339 NLRB 585 (2003); *Bundy Corp.*, 292 NLRB 671.

**(a) Respondent's Belief That the RFI Was Not a Priority and Its Decision to Halt the STARS Plan Are Not Relevant**

Respondent will likely argue that its delay in producing the requested information was due to its belief that the Union did not need the information quickly because the Union had not continually reminded Respondent about the RFI. This argument is irrelevant because the Union had no obligation to continually remind Respondent of its legal duty to produce the requested information.<sup>36</sup> Respondent never asked the Union if it needed the information immediately or told the Union that it delayed production because the Union failed to remind Respondent about the RFI.<sup>37</sup> Moreover, the Union never told Respondent that its RFI was not a priority or that it could delay responding to it. (Tr. 275.) Indeed, it strains credulity for Respondent to claim that the requested information was not a priority for the Union when the requested information concerned Respondent's implementation of a new sales performance plan, a subject that the parties historically had bargained for and as a component of employees' evaluations would be of utmost importance to the Union. (Tr. 123.) Furthermore, Respondent's delay in producing the information was even more egregious because the parties were engaged in on-going negotiations for a successor contract at that time, and the Union needed the information to properly evaluate and counter Respondent's proposal regarding the STARS plan.<sup>38</sup>

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<sup>36</sup> *Bundy Corp.*, 292 NLRB 671; *Ellsworth Sheet Metal*, *supra*.

<sup>37</sup> Manager Vitales testified that the Union usually sent follow up emails to Respondent when it truly wanted requested information. (Tr. 275.) Other than Vitales's general claim that this was something the Union supposedly did, Respondent did not offer specific evidence to support the claim and, as discussed above, the Union had no obligation to do so. *Bundy Corp.*, *supra*.

<sup>38</sup> An employer's statutory obligation includes furnishing the union with requested information related to contract negotiations. *Day Automotive Group*, 348 NLRB 1257, 1262 (2006). More particularly, an employer's duty to bargain includes the obligation to provide the union with requested information that would enable the union to assess the validity of claims that the employer made in contract negotiations. *KLB Industries, Inc. d/b/a National Extrusion & Manufacturing Company*, 357 NLRB 127 (2011).

Respondent may also argue its delay in producing the information did not violate the Act because it did not implement the STARS plan in January 2016, after the Union notified them that it had not fulfilled the Union's October 5, 2015 RFI. (Tr. 252 – 253; R. Ex. 12.)

Respondent's decision to delay implementation of the STARS plan is irrelevant because it occurred about three-months after the Union's request and only because the Union demanded that Respondent fulfill the RFI before implementing the plan. (Tr. 125; GC Ex. 12; R Ex. 12.)

In fact, Manager Vitales admitted that Respondent would have rolled out the STARS plan if the Union had not demanded production of the requested information. (Tr. 273.) Thus, Respondent violated Section 8(a)(5) of the Act by delaying in providing the requested information without timely explaining to the Union why there was a delay in producing the information or offering to bargain for an accommodation to produce the information.<sup>39</sup>

**(3) Request No. 3--January 14, 2016 RFI Regarding Information Pertaining to Unit Employee John Mimiaga**

The Union's January 14, 2016 RFI consisted of only four items relating to the discipline and possible termination of employee Mimiaga. On January 15, Manager Poulin emailed Esquivel a copy of Mimiaga's calendar for the evaluation period of the "January 2016 SPE" -- satisfying one of the request items. (Tr. 128; GC Ex. 13: 2.) Not receiving any further response from Respondent and with Mimiaga facing another formal evaluation, on July 18, 2016, Esquivel sent an email to Poulin and Manager Traci Nelson (Nelson) demanding that Respondent produce the outstanding information and requesting additional information pertaining to Mimiaga's possible termination. (Tr. 128; JT. Ex. 9; GC Ex. 13: 4 – 5.)

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<sup>39</sup> *Columbia University*, 298 NLRB 941.

About August 12, Respondent produced some of the requested information, producing the rest of it on August 18, seven months after the request. (Tr. 129, R Ex. 10.) There is no evidence indicating, and Respondent did not contend, that obtaining the requested information was complex or difficult. Indeed, the information seems to have been readily available as Respondent produced the information less than a month after Esquivel's July 18 follow-up email. Moreover, before submitting the January 14 RFI, Esquivel had requested similar information from Respondent, and it had never taken over six months for Respondent to produce the information. (Tr. 130, 147.) Respondent never told the Union there would be a delay in providing the information and never explained after-the-fact, why there was a delay in production or offered to bargain for an accommodation to produce the information, thus violating Section 8(a)(5) of the Act.<sup>40</sup> (Tr. 129 – 130; GC Ex. 13.)

**(a) Sending the RFI to the “Wrong” Manager is Not a Defense**

At trial, Manager Kristiansen gave two varying explanations about why there was a delay in responding to the January 14, 2016 RFI. At one point, she admitted that she did not know why there was a delay. (Tr. 232) Later in her testimony, she claimed that the delay was due to the Union not directly sending her the RFI. As noted earlier, sending an information request to the wrong manager is not a valid defense.<sup>41</sup> (Tr. 233.)

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<sup>40</sup> *Columbia University*, 298 NLRB 941.

<sup>41</sup> *Postal Service*, 363 NLRB No. 11 (rejecting delay defense that request was sent to the wrong manager). Even if this were a valid defense, Kristiansen testified that she and Manager Vitales shared responsibility for responding to Union RFIs, but Respondent provided no evidence showing that only they were responsible for or capable of responding to the Union RFIs. When called to testify, Respondent did not ask Vitales whether the Union had to submit RFIs to him and Kristiansen to be properly processed. The General Counsel asks that the ALJ draw a negative inference from Respondent's failure to ask Vitales about this and find that Union RFIs did not need to be submitted to Vitales and Kristiansen to be properly processed. Moreover, Esquivel sent the January 14, 2016 RFI to Manager Poulin, whom Respondent

**(4) Request No. 4--February 18 and March 21, 2016 RFIs  
Regarding Unit Employee Carolyn Cook's DSA**

The Union's February 18, 2016 RFI requested information relating to unit employee Cook's daily sales average (DSA) calculations. (GC Ex. 16.) Receiving no response to that RFI, Salvador reiterated her RFI on March 2 and March 21, adding two additional questions to the March 21 follow up email. (Tr. 176-177; GC Ex. 16: 3 and 7.) Later on March 21, Salvador received a response from Manager Francis that she would tend to her RFI as soon as possible. (GC Ex. 16: 2) On March 29, Salvador sent another follow up email. (GC Ex. 16: 2.) Later that same day, Francis responded stating that she was busy with other business and did not know that one of her contacts was out of the office when she sent her March 21 email to Salvador. (GC Ex. 16: 2.)

On April 5, Salvador sent her fourth follow-up email to her February 18 and March 21 RFIs, which Respondent, again, ignored. (Tr. 175; GC Ex. 16: 1.) Receiving none of the requested information from Respondent, Salvador escalated the RFIs to Union Vice President Esquivel on May 2 and 16. (Tr. 175; GC Ex. 16: 1.)

Four months later, on June 23, Kristiansen finally produced all of the information requested in the February 18 and March 21 RFIs. (Tr. 178; R Ex. 18, 19.) Respondent never explained why there was a delay or suggested a need for an accommodation. (Tr. 178; GC Ex. 16.) Respondent, therefore, delayed in producing the requested information in violation of Section 8(a)(5) of the Act.<sup>42</sup>

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admitted was a supervisor and agent as defined by the Act. (GC Ex. 1(xx).) Respondent provided no evidence showing that Poulin was unable or unauthorized to respond to the RFI. There was nothing to stop him from forwarding the RFI to Kristiansen or Vitales. Finally, Kristiansen never informed Esquivel that his not sending the RFI to her was the cause of the delay. (Tr. 326 – 327.)

<sup>42</sup> *Columbia University*, 298 NLRB 941.

**(a) Respondent's Plethora of Defenses Fail**

Manager Francis testified to four reasons that made it difficult for her to obtain the requested information and timely respond to the February 18 and March 21 RFIs. Francis blamed everything from her workload, to having to manually calculate employee Cook's DSA, to her belief that the RFI was not "formal," to the RFIs being sent to the wrong person. Francis's excuses ring hollow as they parallel the defenses used in *Bundy Corp., supra* and *Postal Service*, 363 NLRB No. 11. Even if calculating Cook's DSA was complex because Respondent had to manually calculate it as opposed to having the third party vendor do it, the calculation only involved one employee, and Respondent never told the Union it would have to manually calculate it.<sup>43</sup> Respondent never asked to bargain for an extension of time to provide the information.<sup>44</sup> (Tr. 178, 323 – 324.) Indeed, each time Union Office Manager Salvador contacted Respondent about the RFIs, Manager Francis simply replied that she was busy and would send the information soon. (GC Ex. 16.) Respondent did not even have the courtesy to respond to Salvador's April 5 and May 6, 2016 follow-up emails.<sup>45</sup> (GC Ex. 16.)

Manager Francis testified that she did not immediately respond to the February 18, 2016 RFI because she believed it was not a "formal" request because it did not come from a Union representative or include Managers Kristiansen and Vitales. (Tr. 287.) This is not a valid

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<sup>43</sup> Before submitting the February 18 RFI, Salvador had requested similar information regarding employees' DSA from Respondent, who normally produced the information in two to three days. (Tr. 176.)

<sup>44</sup> See *Michigan State Employees Association*, 364 NLRB No. 65 (2016).

<sup>45</sup> Manager Francis claimed that about a week before May 18, 2016, she spoke to Union Office Manager Salvador on the phone about another issue and during that conversation, she told Salvador that it was going to take more time to produce the information. (Tr. 304.) Salvador denied having that conversation with Francis. (Tr. 324.) In any event, Francis did not testify that she offered to bargain with the Union for an accommodation to produce the information. (Tr. 304.)

defense. The Board in *Bundy Corp.* rejected a similar defense, in which the employer claimed that it did not believe that it had to respond to the union's request for information because it was sent by the union chief negotiator's assistant. 292 NLRB 671. Moreover, even if she believed the RFI was not a formal request, she should have forwarded it to Kristiansen or Vitales to seek guidance, but she did not. She just let the RFI sit on her desk. Furthermore, Francis never told Salvador that she considered the February 18 RFI to not be formal and that was the cause of the delay. (Tr. 319.)

Francis testified that when AT&T owned Respondent, she told Salvador to submit RFIs to Respondent's labor department. (Tr. 288, 313.) Respondent will try to spin this testimony to argue that the delay was caused by Salvador's failure to send the RFI to its labor department. This is not a valid defense. The Board rejected a similar defense in *Postal Service*, 363 NLRB No. 11. During Francis's cross examination testimony, she admitted that she could not recall the last time she told Salvador to submit RFIs to the labor department before February 18, 2016. (Tr. 313.) When pressed on cross examination, Francis admitted that she could not recall telling Salvador this after 2012, when AT&T sold to Cerberus. (Tr. 44, 314 – 315.) Moreover, Francis never told Salvador that the February 18 RFI should have been submitted to Respondent's labor department to avoid the delay in production. (Tr. 315.) Francis's claim that she told Salvador to send RFIs to Respondent's labor department is not a valid defense<sup>46</sup> and just self-serving to justify the unlawful delay.

In sum, Respondent's defenses for the delay are inconsistent, not supported by the law, and were never timely given to the Union. Accordingly, Respondent violated Section 8(a)(5) of the Act by its delay in providing the requested information or otherwise responding to the

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<sup>46</sup> *Postal Service*, 363 NLRB No. 11.

February 18, 2016 RFI by at least informing the Union of the complexities or offering to bargain for an accommodation.<sup>47</sup>

**(5) Request No. 5--March 23, 2016 RFI Regarding Information Pertaining to Employee Kathy Charles**

The Union's March 23, 2016 RFI related to a grievance filed on behalf of employee Charles concerning a disciplinary action. (GC Ex. 15: 6 - 7; JT Ex. 11.) Because the union received no response to its March 23 request, Union Representative Waltz sent follow up emails on April 14, 21, and 27, 2016. (Tr. 165 – 166; GC Ex. 11.) Manager Kristiansen finally responded on May 2, stating that she and Manager Vitales were working on the request; they had obtained some of the requested information; and the Union should receive the requested information by the end of the week. (GC Ex. 11. 4.) Respondent did not meet that date.

On May 12, Kristiansen emailed the Union stating for the first and only time that some of the older information was challenging to gather, but that Respondent was aiming to produce the information in the next few days. (GC Ex. 11. 4.) Respondent did not elaborate on why some of the information was challenging to gather or offer to bargain with the Union for an accommodation. (Tr. 167; GC Ex. 11:4.) Finally, on June 14, 2016, Respondent produced some of the information; producing the rest of it on June 23. (Tr. 166 – 167; GC Ex. 15: 1 and 3; R Ex. 6 and 7.)

Respondent violated Section 8(a)(5) of the Act by its three-month delay in providing the information, by waiting six weeks to advise the Union that the older information was challenging

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<sup>47</sup> *Columbia University*, 298 NLRB 941.

to gather, by never fully explaining the delay in production, or offering to bargain for an accommodation to provide the information.<sup>48</sup> (Tr. 167.)

**(a) The RFI Was Not Complex and Respondent Did Not Timely Notify the Union That It Was Complex or Offer to Bargain**

Respondent will likely claim that it was difficult to obtain some of the information because it spanned back four years and Manager Kristiansen had to contact several different managers. As noted earlier, Respondent must timely raise this defense and substantiate it.<sup>49</sup> Respondent did not meet its burden. Respondent waited six weeks to assert that there was some difficulty in compiling the older information and never requested an accommodation. Moreover, Respondent never produced sufficient evidence showing that the complexity of the RFI made its delay reasonable.<sup>50</sup> (Tr. 167; GC Ex. 11, 15: 4.)

**B. Respondent Violated the Act by Unilaterally Changing Employees' Compensation While Simultaneously Dealing Directly With Employees About It.**

**1. Unilateral Change to Employees' Compensation for Selling ypDirect Products**

**a) Legal Standard**

An employer whose employees are represented by a union violates Section 8(a)(5) by making unilateral changes to employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Employers must bargain with the union with respect to mandatory subjects of bargaining or it violates Section 8(a)(5). *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209-210 (1964). Mandatory subjects of bargaining include those delineated in Section 9(a) as

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<sup>48</sup> *Columbia University*, 298 NLRB 941; *Bundy Corp.*, 292 NLRB 671.

<sup>49</sup> *Id.*; *Columbia University, supra*; *Bundy Corp., supra*.

<sup>50</sup> See *Michigan State Employees Association*, 364 NLRB No. 65 (2016).

"rates of pay, wages, hours of employment, or other conditions of employment" and in Section 8(d) as "wages, hours, and other terms or conditions of employment."<sup>51</sup> So long as the change materially, substantially, and significantly impact terms and conditions of employment, bargaining is required.<sup>52</sup>

An employer violates Section 8(a)(5) of the Act when it unilaterally makes a change in "wages, hours, or other terms and conditions of employment" without giving the employees' collective-bargaining representative notice and an opportunity to bargain over the change. *Houston Building Services*, 296 NLRB 808 (1989); *see also NLRB v. Katz*, 369 U.S. 736, 743 (1962). Notice must be timely, and it must not merely be a fait accompli. *Intersystems Design Corp.*, 278 NLRB 759 (1986).

When parties are engaged in negotiations for a successor agreement, the employer is obligated to refrain from unilateral action unless and until overall impasse has been reached in bargaining for the agreement as a whole. *Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 999 (7th Cir. 2000); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* 15 F.3d 1087 (9th Cir. 1994); *Farina Corp.*, 310 NLRB 320 (1993).

**b) Respondent Unilaterally Implemented the Reduced Compensation Plan Regarding Sales of ypDirect Products**

The Reduced Compensation Plan for ypDirect products was a mandatory subject of bargaining<sup>53</sup> because it greatly reduced the commission employees received for selling the

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<sup>51</sup> *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *NLRB v. Katz*, *supra*. (changes to pay are mandatory subjects of bargaining); *B.P. Oil*, 256 NLRB 1107 (1981) (changes to shift differential pay is a mandatory subject of bargaining), *enfd.* 681 F.2d 804 (3rd Cir. 1982).

<sup>52</sup> *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

<sup>53</sup> In its Answers to the Consolidated Complaint (GC Ex. 1(ss) and the Amended Consolidated Complaint (GC Ex. 1(vv)), Respondent admitted that the Reduced Compensation Plan was a mandatory subject of

product and set a cap on how much they could earn in bonuses.<sup>54</sup> (Tr. 37, 56 - 57; JT Ex. 2, 3.) Before the Reduced Compensation Plan, employees were paid for selling ypDirect products according to the contractual rate set forth under the “Premise-Advertising Sales Representative – Sales Commission Plan” in the CBA. (Tr. 24, 54 – 56, JT Ex. 17: 26 – 27.) Unit employee Jeff Butler and President Guthrie testified how the Reduced Compensation Plan reduced employees’ compensation. (Tr. 37, 56.) According to Butler, under the contractual rate, an employee would earn about \$4000 for making a \$2000 monthly sale of ypDirect product to a new customer. (Tr. 37.) Under the Reduced Compensation Plan, an employee would only earn about \$528 for the same sale. (Tr. 37; JT Ex. 2, 17: 27.) Furthermore, the Reduced Compensation Plan included a monthly commission cap of \$3000, whereas no such cap existed under the parties’ contract. (Tr. 57 – 58.) In conclusion, as a change in employee compensation, the Reduced Compensation Plan was a mandatory subject of bargaining.

Here, the Union and Respondent were engaged in negotiations for a successor contract when Respondent implemented the Reduced Compensation Plan on July 15, 2016. **Respondent admitted that it presented the Reduced Compensation Plan Packet to employees without first giving the Union notice or an opportunity bargain about the plan.** (Tr. 267 – 268.) The Union learned about the plan after-the-fact from unit employees and confronted Respondent

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bargaining. See paragraph 22 of Respondent’s Answer (GC Ex. 1(uu)), and paragraph 26 of Respondent’s Answer (GC Ex. 1(xx)). The General Counsel inadvertently failed to plead that the Reduced Compensation Plan was a mandatory subject of bargaining in the Amendment to the Amended Consolidated Complaint. (GC Ex. 1(yy)) Assumedly, Respondent would have admitted again that the Reduced Compensation Plan was a mandatory subject of bargaining in its Answer to the Amendment to the Amended Consolidated Complaint. Moreover, Respondent made no claim at trial that the matter was not a mandatory subject of bargaining. Nonetheless, the General Counsel will show that the Reduced Compensation Plan was a mandatory subject of bargaining.

<sup>54</sup> *Ford Motor Co.*, 441 U.S. 488; *NLRB v. Katz*, *supra* (changes to pay are mandatory subjects of bargaining).

about the plan at the parties' July 20, 2016 bargaining session. Union President Guthrie objected to the plan, stating that the Union was the exclusive bargaining agent for the employees and that Respondent was bargaining directly with employees by presenting them with the Reduced Compensation Plan Packet. Respondent Chief Negotiator Keith Halpern's defense was that Respondent did not intend to do that. The parties did not reach an agreement concerning the plan at the July 20 meeting or anytime thereafter. Nonetheless, Respondent did not rescind the Reduced Compensation Plan and instead distributed a revised Compensation Plan Packet starting on July 20, 2016. Although the revised packet indicated that the Union had to agree to the plan before any changes to compensation would occur, the packet continued to promote the plan and instruct employees to sign and obtain a Union representative's signature on the Exception Agreement for each new sale of ypDirect product. (JT Ex. 3.) Moreover, Respondent emailed the Exception Agreement directly to employees, stating that they had to sign it to be paid, and sent mass emails to employees answering employee questions about the plan. (JT Ex. 12, 13, 14.) Even after Respondent supposedly suspended new sales of ypDirect products on August 4, 2016, it continued to directly engage employees about the plan.<sup>55</sup> (JT Ex. 15, 16.) There is no dispute that Respondent implemented the Reduced Compensation Plan without giving the Union

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<sup>55</sup> Manager Vitales's testimony should not be credited in general, or where it conflicts with Union President Guthrie and Vice President Esquivel concerning the Reduced Compensation Plan. Vitales's testimony about the issue is internally inconsistent. First, in one part of his cross-examination testimony, Vitales stated that Respondent still made new sales of ypDirect products after August 4, 2016, and requested that employees sign the Exception Agreement. (Tr. 268) Later in his cross-examination testimony, he stated that he does not recall there being any new sales of ypDirect products after August 4, 2016. (Tr. 269 – 270, 278.) Moreover, the evidence shows that Respondent instructed employees to sign the Exception Agreement for new sales of ypDirect product after August 4, 2016. (JT Ex. 15, 16.) Vitales's shifting testimony about whether there had been any new sales of ypDirect product and its contradiction with the documentary evidence shows that his testimony was only self-serving and not credible.

notice and an opportunity to bargain. Thus, Respondent committed a unilateral change to employees' compensation in violation of Section 8(a)(5) of the Act.<sup>56</sup>

Respondent will likely argue that its labor relations department did not approve of the Reduced Compensation Plan Packet when its sales department began presenting the packet to employees on July 15, 2016. (Tr. 257.) This is not a valid defense. An employee would reasonably believe that policies announced by the sales department were Respondent's own policies and have no reason to believe otherwise. Indeed, there is no evidence showing that Respondent's sales department did not speak for it. To the contrary, Respondent's labor relations department knew that the Reduced Compensation Plan had been implemented when the Union objected to the plan on July 20, and it continued to promote the plan and instruct employees to sign the Exception Agreement. Respondent's admitted supervisors and agents presented the Reduced Compensation Plan Packet to employees.<sup>57</sup>

**c) Announcing the Reduced Compensation Plan Violated the Act**

Respondent may argue that it did not violate the Act because it simply announced the Reduced Compensation Plan but never implemented it. Even if Respondent never compensated employees at the lower rate, Respondent announced the Reduced Compensation Plan to employees and instructed employees to complete the corresponding Exception Agreement for each new sale of ypDirect products. An announced unilateral change to a mandatory subject of bargaining is unlawful, even if it is not actually implemented, where the announcement would

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<sup>56</sup> *Houston Building Services*, 296 NLRB 808.

<sup>57</sup> Respondent admitted that Managers Kliment, Poulin, Bartell, MacDonald, Ireland, Salais, Smith are supervisors and agents as defined by the Act. (Tr. 9; GC Ex. 1(xx).) These managers presented the Reduced Compensation Plan and/or corresponding Exception Agreement to employees. (JT Ex. 12, 13, 14, 15, 16.)

cause a reasonable employee to view the change as effectively implemented.<sup>58</sup> In *ABC Automotive Products Corp.*,<sup>59</sup> the Board concluded that an employer violated Section 8(a)(5) of the Act when it told striking employees that they must return to work by a certain date and that, when they returned, the employer planned to implement its final offer, under which the employer would terminate contributions to the union health fund and would provide its own health plan. The Board reasoned that, in the eyes of the employees, the unilateral change in the health plan was “effectively implemented when it was announced,”<sup>60</sup> as employees would think that new health plan was in place if they were to return to work.<sup>61</sup> The Board rejected the employer’s argument that no unlawful unilateral change occurred because it took no additional action to implement the plan, reasoning that “[t]he damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment.”<sup>62</sup> Thus, when an employer announces a change in terms and conditions of employment, the Board views the damage to the bargaining relationship as accomplished because the employer has diminished the union’s relevance as the employees’ bargaining representative.<sup>63</sup>

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<sup>58</sup> See *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992); *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 156 (1998); *CJC Holdings, Inc.*, 320 NLRB 1041, 1041 (1996).

<sup>59</sup> 307 NLRB 248 (1992).

<sup>60</sup> *Id.* at 250.

<sup>61</sup> See *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See *Id.* at 250; *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155 (1998) (finding 8(a)(5) violation where manager showed employees a “Reminder Memo” stating that lunch breaks were ten minutes shorter than in the past, even though shortened break period was never actually enforced); *Wire Prods. Mfg. Corp.*, 326 NLRB 625, 627 (1998), *enfd. sub nom. NLRB v. R.T. Blankenship Assocs.*, 210 F.3d 375 (7th Cir. 2000).

Here, Respondent announced the Reduced Compensation Plan to employees by giving them the original packet and revised packet and telling them to sign the Exception Agreement. Like in *ABC Automotive*, even if Respondent did not implement the Reduced Compensation Plan, its announcement of the plan damaged the parties' bargaining relationship because it diminished the Union's relevance as the employees' bargaining representative. Therefore, Respondent unilaterally implemented a change to employees' compensation in violation of Section 8(a)(5) of the Act.

**2. Respondent Violated the Act by Dealing Directly With Employees Regarding Their Compensation for Direct Products**

**a) Legal Standard**

In considering whether an employer has engaged in unlawful direct dealing, the Board examines whether 1) the employer was communicating directly with union-represented employees; 2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and 3) whether such communication was to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific*, 196 NLRB 458, 459 (1972).<sup>64</sup> Direct dealing, by its very nature, improperly affects the

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<sup>64</sup> Employers must bargain exclusively with the designated union representatives of its employees. An employer who deals directly with its unionized employees regarding terms and conditions of employment violates Section 8(a)(1) and (5) of the Act. *Harris-Teeter Super Markets, Inc.*, 310 NLRB 216, 217 (1993) (direct dealing violation found when employer presented a proposed work-schedule change to employees and asked if they liked it or had any comments about the change); *Allied-Signal, Inc.*, 307 NLRB 752, 753-754 (1992) (“[g]oing behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions. . .plainly erodes the position of the designated representative.”); *Obie Pacific, Inc.*, 196 NLRB 458, 459 (1972) (“while, under appropriate circumstances, an employer may communicate to employees the reasons for his actions and even for his bargaining objectives, he may not seek to determine for himself the degree of support, or lack thereof, which exists for the stated position of the employees' bargaining agent”).

bargaining relationship. A union must be given sufficient time to consider proposals and bargain about them.<sup>65</sup>

**b) Respondent Directly Instructed Employees to Sign the Exception Agreement**

Respondent engaged in unlawful direct dealing by instructing employees to sign and obtain a Union representative's signature on the Exception Agreement as a condition of making new sales of ypDirect products, without notifying the Union or obtaining the Union's consent.<sup>66</sup>

It is undisputed that before Respondent began distributing the Exception Agreement to employees on July 15, it never notified the Union that it would require employees to sign the Exception Agreement; thus meeting prongs 1 and 3 of the direct dealing test described above.

Respondent's conduct undermined the Union in three separate ways, thereby satisfying prong 2 of the direct dealing test. First, even after the Union objected to the Reduced Compensation Plan during the parties' July 20 and 27, 2016 bargaining sessions, Respondent ignored the Union and continued to distribute the Exception Agreement, instructing employees to sign it.<sup>67</sup> Second, by instructing employees to sign and obtain a Union representative's signature on the Exception Agreement as a condition of making new sales of ypDirect products,

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<sup>65</sup> *American Pine Lodge Nursing & Rehab. Ctr.*, 325 NLRB 98 (1997), enf. denied in relevant part, 164 F. 3d 867 (4th Cir. 1999); *Detroit Edison*, 310 NLRB 564 (1993).

<sup>66</sup> *See Rangaire Co.*, 309 NLRB 1043, 1053 (1992) (after unlawfully modifying collective-bargaining agreement, employer approaching unit employees and obtaining written agreements allowing employer to make the desired modification "of itself violate[d] the Act because it constitute[d] direct bargaining with represented employees in complete disregard of their designated bargaining agent"); *see also Dayton Newspapers*, 339 NLRB 650, 653 (2003) (employer's attempt to obtain waiver directly from drivers in exchange for returning to work constituted direct dealing).

<sup>67</sup> Vitales's claim that he did not know from reading JT Ex. 16 if the sale of ypDirect product had been completed is irrelevant because JT Ex. 16 clearly shows that unit employee Domantay had at least initiated a new sale of ypDirect product and Respondent instructed him to sign the corresponding Exception Agreement.

Respondent forced the Union “into a corner” to accept the Reduced Compensation Plan. If the Union refused to sign the Exception Agreement, employees would reasonably blame the Union for preventing them from making new sales of ypDirect products; thus, taking money out of their “pocket.” Finally, Respondent’s instruction to employees to sign the Exception Agreement undermined the Union because after being instructed to sign the Exception Agreement, employees asked the Union if it knew about the plan and whether employees were now negotiating their own sales commission rates. (GC Ex. 2, 3.)

Respondent’s distribution of the Exception Agreement and instruction to employees to sign it constituted direct dealing in violation of Section 8(a)(5) of the Act.<sup>68</sup>

### **3. Respondent Did Not Repudiate the Unilateral Change and Direct Dealing Concerning the Reduced Compensation Plan Pursuant to *Passavant***

Respondent will likely argue that it repudiated its unilateral change and cured its direct dealing concerning the Reduced Compensation Plan and Exception Agreement when it sent employees the July 20, 2016 email attaching the revised Reduced Compensation Plan Packet, and the August 4, 2016 email suspending new sales of ypDirect products. (JT Ex. 3, 4.)

An employer may repudiate its unfair labor practices, but must do so in a certain manner. *Passavant Memorial Hospital*, 237 NLRB 138 - 139 (1978). Under *Passavant*, an employer may relieve itself of liability from unlawful conduct by: "(1) repudiating that conduct—as long as such repudiation is timely, unambiguous, and specific to the coercive conduct; (2) adequately publishing the repudiation to the employees; (3) not engaging in any further proscribed conduct; and (4) giving employees assurances that in the future, the employer will not interfere with the exercise of their Section 7 rights." *Id.*

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<sup>68</sup> *Rangaire Co.*, 309 NLRB 1043; *Dayton Newspapers*, 339 NLRB 650.

Here, Respondent's July 20 and August 4, 2016 emails and the revised Reduced Compensation Plan Packet do not meet prongs 1, 3, and 4 set forth in *Passavant*.

**a) Prong 1 – Respondent's Supposed Repudiation was Ambiguous and Not Specific to the Proscribed Conduct**

The Board has found that language seeking to “clarify” any “misunderstandings” does not satisfy *Passavant*. For example, in *Branch International Services*, 310 NLRB 1092 (1993), *enfd* 12 F.3d 213 (6th Cir. 1993), the employer's president told the union's president that he would not discuss any grievances which had been pending under an expired contract and that those grievances were “dead.” The employer's president subsequently sent the union a letter stating, “to clarify if there has been a misunderstanding, the Company is ready and willing to have any meeting on any outstanding grievance under the old contract.”<sup>69</sup> The Board found that the employer's reference to clarifying a misunderstanding did not satisfy the test for repudiation set forth in *Passavant* because it was “couched in terms to avoid the admission of wrongdoing.”<sup>70</sup>

Here, in its July 20 and August 4, 2016 emails and revised Compensation Plan Packet, Respondent did not admit wrongdoing or disavow its unlawful unilateral change and direct dealing with employees concerning the Reduced Compensation Plan and Exception Agreement.

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<sup>69</sup> *Id.* at 1105.

<sup>70</sup> *Id.* at 1106. *See also Rivers Casino*, 356 NLRB 1151 (2011) (telling employees that an earlier instruction to remove union buttons was “a misunderstanding” failed to meet the *Passavant* requirements because the repudiation was not sufficiently clear since the employer did not admit any wrongdoing); *See Powelltown Coal Co.*, 354 NLRB 419 (2009), incorporated by reference in *Powelltown Coal Co.*, 355 NLRB 407 (2010) (finding unlawful conduct was not repudiated by document that refers to clearing up “confusion”); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (finding that repudiation did not negate the coercive effect of an unlawful unilateral change where the employer did not admit to wrongdoing and the repudiation did not occur in an atmosphere free from other coercive conduct), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *affd.* on other grounds 517 U.S. 392 (1996).

Like the cases cited above, Respondent simply attempted to portray its misconduct as mere confusion to avoid the admission of wrongdoing; thus, failing to meet prong 1 of the *Passavant* test.<sup>71</sup>

**b) Prong 3 and 4 – Respondent Engaged in Further Proscribed Conduct and Failed to Give Assurances to Employees That It Will Not Interfere With Their Section 7 Rights in the Future**

Respondent's July 20 email and attached revised Reduced Compensation Plan Packet did not meet prongs 3 and 4 of the *Passavant* test. Although the email stated that Respondent will not and cannot deal directly with employees, the email and attached packet re-announced to employees the Reduced Compensation Plan and instruction that they complete the Exception Agreement – furthering Respondent's unilateral change and direct dealing with employees (prong 3) and erasing any assurances that Respondent would not deal directly with employees in the future (prong 4).

Likewise, Respondent's August 4 email did not meet prongs 3 and 4 of the *Passavant* test. After sending the email, Respondent continued to have employees make new sales of ypDirect products and instructed them to sign the Exception Agreement - continuing Respondent's unilateral change and direct dealing with employees (prong 3) and obliterating any assurances that Respondent would not engage in such misconduct in the future (Prong 4). Respondent's two emails and revised Reduced Compensation Plan Packet failed to meet prongs 3 and 4 of the *Passavant* test.

**C. Respondent Bypassed the Union and Dealt Directly with Employees by Allowing Two Clerical Employees to Work at Home**

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<sup>71</sup> *Rivers Casino*, 356 NLRB 1151.

The legal precedent regarding when an employer bypasses the union and deals directly with employees is explained above in Section IV(B)(2)(a) of the brief.<sup>72</sup> Here, Respondent bypassed the Union and engaged in direct dealing with employees by allowing two clerical employees (Jessica Durant and Carol Peterson) to work at home without notifying or bargaining with the Union.<sup>73</sup>

Initially, the parties engaged in effects bargaining over Respondent's closure of its Pleasanton office and Virtualization Plan. During the parties' February 17, 2016 bargaining session, the Union first presented its proposal to allow all affected clerical employees to work at home.<sup>74</sup> (Tr. 61 – 62, 132; GC Ex. 6.) Respondent rejected the Union's proposal, stating that it had no interest in allowing clerical employees to work at home. (Tr. 61 – 62, 132.)

Sometime thereafter, the parties ceased effects bargaining for the Pleasanton office closure, but continued effects bargaining for the Virtualization Plan. (Tr. 243.) The Union resubmitted its February 17 proposal to allow all affected clericals to work at home on April 18 via email, but Respondent did not respond. (Tr. 133 – 134; GC Ex. 14.)

During the parties' May 4 bargaining session, the Union again resubmitted its proposal to allow all clerical employees affected by the Virtualization Plan to work at home. Respondent

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<sup>72</sup> In considering whether an employer has engaged in unlawful direct dealing, the Board examines whether 1) the employer was communicating directly with union-represented employees; 2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and 3) whether such communication was to the exclusion of the union. *Permanente Medical Group*, 332 NLRB 1143 (2000); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific*, 196 NLRB 458, 459 (1972).

<sup>73</sup> *Rangaire Co.*, 309 NLRB 1043; *Dayton Newspapers*, 339 NLRB 650.

<sup>74</sup> The Union's proposal clearly included the clericals affected by the Virtualization Plan, as it cited the "YP Sales Transformation" language, which Respondent used on the very first page of its packet concerning the Virtualization Plan. (GC Ex. 5, 6:3.)

again rejected the proposal, stating that it had no interest in allowing clerical employees to work at home. (Tr. 64 - 65, 134 – 135.)

Despite Respondent's repeated rejection of the Union's proposal, it bypassed the Union and dealt directly with employees by authorizing two clerical employees (Durant and Peterson) to work at home, without giving the Union any notice or opportunity to bargain. (Tr. 66, 136 – 137.) The Union only learned about Durant and Peterson working at home from other unit employees. (Tr. 65 – 66, 67, 136, 169 – 170.) Respondent even admitted that the parties did not have an agreement to allow Durant and Peterson to work at home.<sup>75</sup> (Tr. 241, 245.) Respondent's bypass of the Union to directly authorize Durant and Peterson to work at home meets prongs 1 (communicating directly to employees) and 3 (communication was to the exclusion of the union) of the direct dealing test as described above.<sup>76</sup>

Furthermore, Respondent's decision to reject the Union's proposal to allow all affected clerical employees to work at home and "cherry-pick" Durant and Peterson to work at home undermined the Union as the employees' bargaining representative, thus satisfying prong 2<sup>77</sup> of the direct dealing test. First, Durant was the only clerical employee from the Concord office who was allowed to work at home, while the rest of the clerical employees from that office had to report to Respondent's San Francisco office at that time. (Tr. 69, 226.) As a result, those clerical employees expressed anger at the Union because they believed it had negotiated with Respondent to allow only Durant to work at home while they were not allowed to do the same.

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<sup>75</sup> *American Pine Lodge Nursing & Rehab. Ctr.*, 325 NLRB 98 (1997), enf. denied in relevant part, 164 F. 3d 867 (4th Cir. 1999); *Detroit Edison*, 310 NLRB 564 (1993).

<sup>76</sup> *Rangaire Co.*, 309 NLRB 1043; *Dayton Newspapers*, 339 NLRB 650.

<sup>77</sup> The decision was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining.

(Tr. 66 – 67.) Second, Respondent constantly rejected the Union’s proposal to allow all affected clerical employees to work at home, saying it had no interest in allowing them to work at home, but then it circumvented the Union by choosing two clerical employees to work at home – a quintessential example of undermining a union as the employees’ bargaining representative.

Respondent will likely defend by arguing that its decision to allow Durant and Peterson work at home was consistent with the Union’s proposal to allow all clerical employees affected by the Virtualization Plan to work at home. This argument is disingenuous and meritless. On multiple occasions, the Union made written and oral proposals to Respondent to allow **all** affected clerical employees (not just a select few) to work at home, and Respondent rejected the proposal every time, saying it had no interest in allowing them to work at home. (GC Ex. 6, 14.) Nonetheless, Respondent “cherry-picked” Durant and Peterson to work at home, while forcing all other affected clerical employees to work at one of their remaining open offices. How was allowing only two clerical employees to work at home consistent with the Union’s proposal to allow all affected clerical employees to work at home? Moreover, Respondent never told the Union that it decided to allow Durant and Peterson to work at home because it was consistent with the Union’s proposal. When Union President Guthrie confronted Managers Vitales and Kristiansen about allowing Durant to work at home, Kristiansen simply told Guthrie that she would look into the situation. (Tr. 67.) Neither Managers Kristiansen nor Vitales told Guthrie that Respondent’s decision was consistent with the Union’s proposal.<sup>78</sup> Similarly, when Guthrie confronted Respondent about allowing Peterson to work at home, Managers Vitales and Halpern

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<sup>78</sup> General Counsel asks that the ALJ draw a negative inference from Respondent’s failure to have Vitales testify about his and Kristiansen’s discussion with Guthrie and find that his testimony would have been consistent with Guthrie’s testimony about the conversation. *Fred Stark*, 213 NLRB 209, 214 (1974), *enfd.* 525 F.2d 422 (2nd Cir. 1975), *cert. denied* 96 S.Ct. 1463 (1976).

simply stated that Respondent had no interest in allowing clerical employees to work at home and never stated that it made the decision because it was consistent with the Union's proposal.<sup>79</sup> (Tr. 68.) Respondent's decision to allow only Durant and Peterson to work at home was inconsistent with the Union's proposal to allow all clerical employees affected by the Virtualization Plan to work at home.

Kristiansen testified that in response to the Union's proposal, Respondent told the Union that its long term plan was not to have clerical employees work at home. (Tr. 224, 242.) Respondent may try to spin this testimony to show that it did not reject the Union's proposal completely and that it might consider a short term plan for clericals to work at home. But Union President Guthrie and Vice President Esquivel both credibly testified that Respondent continually rejected the Union's proposal, stating that it had no interest in allowing clerical employees to work at home. No one testified that the parties discussed temporary work at home. Furthermore, Respondent never informed the Union that it was considering allowing Durant and Peterson to work at home, even on a temporary basis. Finally, Peterson is still currently allowed to work at home, cutting against any claim that Respondent somehow proposed to allow clerical employees to work at home temporarily. (Tr. 242; JT Ex. 1.)

Kristiansen testified that clerical employee Durant's manager, Executive Market Manager Matt Condensa (Condensa), authorized her to work at home, not its human resources or labor relations department. (Tr. 226 - 227, 244) This is not a valid defense. Notwithstanding the

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<sup>79</sup> General Counsel asks that the ALJ draw a negative inference from Respondent's failure to have Vitales testify about his and Halpern's discussion with Guthrie and find that that his testimony would have been consistent with Guthrie's testimony about the conversation. *Fred Stark*, 213 NLRB 209, 214 (1974), *enfd.* 525 F.2d 422 (2nd Cir. 1975), *cert. denied* 96 S.Ct. 1463 (1976).

veracity of the claim, the parties stipulated that Condensa was a supervisor of Respondent as defined by the Act, so it is responsible for his managerial decisions. (Tr. 243.)

In summary, Respondent's defenses do not withstand scrutiny. Indeed, Respondent bypassed the Union and dealt directly with employees by allowing clerical employees Durant and Peterson to work at home; thus Respondent violated Section 8(a)(5) of the Act.<sup>80</sup>

## **V. REMEDY**

The General Counsel seeks a remedy which would require Respondent to cease and desist from 1) delaying the production of requested information; 2) bypassing the Union and dealing directly with employees; and 3) unilaterally changing employees' terms and conditions of employment without first notifying and bargaining with the Union. The General Counsel seeks a remedy which would also require Respondent to 1) if requested by the Union, rescind the Reduced Compensation Plan; and 2) make whole all employees who lost wages and other benefits due to the Reduced Compensation Plan.

The remedy should also require Respondent to post notices to employees at its facilities, via email, and its internal intranet (Interconnections Website), in which employees are assured of their Section 7 rights and in which Respondent promises to cease and desist from its unlawful conduct, and any other remedy deemed appropriate.<sup>81</sup> The parties stipulated that Respondent regularly communicates to its employees via email. (Tr. 20 – 21.) Respondent also regularly communicates to employees through an internal intranet called the Interconnections Website, which contains information regarding rules, policies, training, forms, company announcements,

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<sup>80</sup> *Rangaire Co.*, 309 NLRB 1043; *Dayton Newspapers*, 339 NLRB 650.

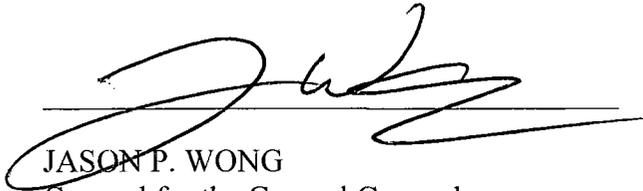
<sup>81</sup> See Appendix A for the Notice proposed by the General Counsel.

and other work related issues. (Tr. 22 – 23, 32 - 33, 163.) The evidence indicates that including electronic notice posting in the remedy is appropriate here. (Tr. 20 – 21.)

## **VI. CONCLUSION**

The General Counsel has established that Respondent has violated Section 8(a)(1) and 8(a)(5) of the Act as alleged, and that all appropriate relief should be granted.

DATED AT San Francisco, California, this 24<sup>th</sup> day of May, 2017.



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**APPENDIX A**  
**PROPOSED NOTICE**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local 1269 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit (Unit):

All sales force employees of Respondent in the Northern California Region and all clerical employees of Respondent in the Northern California Region having the title classifications listed in below, excluding all other employees and all supervisors as defined in the National Labor Relations Act, as amended.

Sales and Clerical employees: Account Executive New Media, Advertising Sales Representative, Customer Associate, Directory Representative, Directory Sales Representative, Field Sales Collector, Key Account Executive, Office Assistant, Supervisor's Assistant, Telephone Sales Representative, Universal Support Associate.

**WE WILL NOT** bypass your Union and deal directly with you concerning changes in your wages, hours and working conditions.

**WE WILL NOT** refuse to meet and bargain in good faith with your Union any proposed changes in wages, hours and working conditions before putting such changes into effect.

**WE WILL NOT** unreasonably delay in providing the Union with information that is relevant and necessary to its role as your bargaining representative.

**WE WILL NOT** fail to offer to bargain over reasonable accommodations concerning circumstances under which requested information could be provided.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL**, if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining with the Union.

**WE WILL** pay you for the wages and other benefits lost, if any, because of the changes to terms and conditions of employment that we made without bargaining with the Union.

**WE HAVE** provided the Union with the information it requested on October 5, 2015; and January 14, February 18, March 21, and March 23, 2016.

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

YP ADVERTISING & PUBLISHING, LLC

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 1269,

Case 20-CA-147219  
20-CA-167875  
20-CA-176151  
20-CA-177029  
20-CA-181140  
20-CA-181554  
20-CA-181851

**AFFIDAVIT OF SERVICE OF: Counsel for the General Counsel's Brief to the  
Administrative Law Judge**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on May 24, 2017, I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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May 24, 2017

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Date

Susie Louie, Designated Agent of NLRB

\_\_\_\_\_  
Name

*Susie Louie*

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Signature