UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NAPLETON 1050, INC. D/B/A NAPLETON CADILLAC OF LIBERTYVILLE

and

Cases 13-CA-187272
13-CA-196991
13-CA-204377

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

and

WILLIAM GLEN RUSSELL II, An Individual

Counsel for the General Counsel's Opposition to
Respondent's Request for Permission to File a Special Appeal and Appeal

Counsel for the General Counsel submits this Opposition to Napleton Cadillac of Libertyville's ("Respondent") Request for Special Permission to Appeal and Appeal from Administrative Law Judge Goldman's application of his sequestration order to Respondent's Counsel and witness, James Hendricks.

On January 3, 2017, before the commencement of testimony in the hearing of this matter, Counsel for the General Counsel moved to invoke the sequestration rule, which Judge Goldman granted. Judge Goldman read the sequestration order into the record. Upon entry of the sequestration order, Respondent's Counsel, Michael MacHarg, indicated that he anticipated calling his co-counsel, James Hendricks, as a witness during the hearing, and requested relief from the sequestration order on his behalf. Counsel for the General Counsel objected to the request for relief, and Judge Goldman sustained the objection, enforcing the sequestration order against Hendricks. Respondent's designated representative, Anthony Renello, who was also a witness at the hearing, remained in the hearing room for the duration of the proceedings, and MacHarg represented Respondent at the hearing.

Counsel for the General Counsel submits that Respondent's request for leave to file its Special Appeal should be denied inasmuch as the underlying unfair labor practice hearing has concluded, and Respondent suffered no harm as a result of Judge Goldman's ruling. Should the Board grant Respondent's request and consider Respondent's Appeal at this time, Respondent's appeal should be denied on the merits.

The centuries-old practice of excluding witnesses from the courtroom is intended to prevent witnesses from tailoring their testimony to that of earlier witnesses in order to reduce the risk of fabrication, collusion, and inaccuracy. See 6 Wigmore §§ 1837-1838 (3d ed., 1940); see also advisory notes to Federal Rule of Evidence 615. Respondent's argument that the

sequestration of Hendricks was prejudicial to Respondent because Hendricks served as counsel throughout the events leading to the instant proceedings illustrates the wisdom of state bar rules discouraging attorneys from serving as counsel in matters in which the attorney is likely to be called as a witness at trial. See Rule 3.7 of the ABA Model Rules of Professional Conduct ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; . . . ."). Indeed, during various pre-hearing conference calls, MacHarg represented to Counsel for the General Counsel that he would serve as Respondent's Counsel at hearing—which he did—inasmuch as Hendricks was a prospective witness. Thus, the conflict was both foreseeable and avoidable. Accordingly, any arguable prejudice to Respondent as a result of Judge Goldman's sound ruling was a result of Counsel for Respondent's own actions and lack of foresight. However, as noted, Respondent was not prejudiced or harmed in any way by Judge Goldman's ruling. Specifically, MacHarg continued his representation of Respondent throughout the hearing as he had during pre-hearing conference calls while Hendricks was called to testify on behalf of Respondent regarding contested events in which he played a role and which were the subject of the unfair labor practices at issue, in accordance with Respondent's litigation strategy. As such, Judge Goldman's ruling that his sequestration order applied to Hendricks was proper.

For these reasons, counsel for General Counsel respectfully requests that Respondent's Appeal be denied.

Respectfully,

/s/ Emily C. O'Neill

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Dated: January 9, 2018