

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

**MARQUEZ BROTHERS ENTERPRISES, INC.**

Respondent

and

**ALFONSO MARES**

**Case 21-CA-039581**

Charging Party

and

**JAVIER AVILA**

**Case 21-CA-039609**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S  
POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

Respondent unlawfully terminated employees Alfonso Mares (Mares) and Javier Avila (Avila) (collectively referred to as Discriminatees) on June 2, 2010 and December 2, 2010, respectively. Since that date, Respondent has failed to make them whole for the losses they incurred as a result of being unlawfully terminated. Both Mares and Avila are entitled to be made whole for the wages they lost, to be reimbursed for the interim expenses they incurred in searching-for or maintaining interim employment, and compensated for any additional income taxes they will incur as a result of their receipt of a lump-sum backpay payment in years different from when it should have been earned.

The issue before the Administrative Law Judge (ALJ) is solely to determine the backpay owed to the Discriminatees from the date of their unlawful terminations in 2010 through August 2016, when Respondent at last made them offers of reinstatement. The General Counsel's gross backpay calculations, based on Respondent's payroll records, closely approximate what Mares and Avila would have earned if Respondent had not unlawfully terminated their employment. Given the evidence adduced at trial, the General Counsel's gross backpay claims for the Discriminatees as outlined in the Amended Compliance Specification are thus reasonable.

Since the General Counsel has shown the gross backpay due in the Amended Compliance Specification is reasonable, Respondent has the burden of establishing affirmative defenses which would mitigate its liability, including willful loss of earnings and interim earnings to be deducted from the backpay award. However, the evidence adduced at the hearing will show that Respondent has failed to meet its burden of establishing that either Mares or Avila did not engage in reasonable efforts to find interim employment and to mitigate damages. Accordingly, Mares and Avila are entitled to the backpay amount specified in the Amended Compliance

Specification.<sup>1</sup>

## I. STATEMENT OF FACTS

### A. Mares' and Avila's Employment While Working for Respondent

Discriminatees Mares and Avila were employed by Respondent as perishable-sales drivers until they were terminated six months apart for engaging in union activity. (Tr. 408:23-25, 545:24-25, 546:1)<sup>2</sup> Mares had worked for over five years for Respondent before he was unlawfully terminated on June 2, 2010. (Tr. 408:3-4, 409:1-8, 12-15) And Avila worked for Respondent for about two and a half years until he was unlawfully terminated on December 2, 2010. (Tr. 545:20-21, 552:10-11; R Exh. 17) Mares and Avila were employed full-time (forty hours a week with regular overtime) and typically worked five days a week. (Tr. 546:2-8, 547:15-22, 1014:5-15). As perishable-sales drivers, Mares and Avila were responsible for delivering perishable goods to Respondent's customers. (Tr. 408:23-25; 546:17-25, 547:1-3) To start their work-day, Mares and Avila would first report to Respondent's warehouse where they would load their work-truck. (Tr. 409:1-8, 546:17-23) Then, after leaving Respondent's warehouse, Mares and Avila would spend their work-day driving to customer's stores where they would deliver the perishable goods. (Tr. 409:9-11, 547:4-5) While at a customer's store, Mares and Avila would remove old product from the shelves and replenish it with new product. (Tr. 409:1-8, 546:17-25, 547:1-3; R Exh. 21) Mares and Avila, along with the customer, would determine how much product to leave at a store. (Tr. 410:20-25, 686:20-22) While employed by

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<sup>1</sup> Except as noted otherwise in this brief to take into account the cut-off date for Discriminatee Avila's backpay claim and Avila's leave of absence from his interim employer while on paternity leave.

<sup>2</sup> All references to the hearing transcript are noted by "Tr." followed by the page number(s). All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to Respondents' exhibits are noted as "R Exh." followed by the exhibit number(s). All references to the Administrative Law Judge Exhibits are noted as "ALJ Exh." followed by the exhibit number(s). All references to Joint exhibits are noted as "Jt. Exh." followed by the exhibit number(s).

Respondent, Mares was paid an hourly rate of \$14.00 per hour.<sup>3</sup> (GC Exh. 3, pg. 3) Avila received \$9.00 per hour plus a 0.5 commission on sales. (Tr. 580:14-24; GC Exh. 11, pg. 4)

While working for Respondent, Avila, from time-to-time, would assist his father with his mobile-pressure washing-business. (Tr. 572:1-9) After being terminated by Respondent, Avila continued to assist his father with his business as he had done while employed by Respondent. (Tr. 572:20-25, 573:1-7, 625:23-24)

## **B. Discriminatees Mitigated Damages by Looking for Work After Being Unlawfully Terminated**

Mares' and Avila's terminations in 2010 coincided with the height of the unemployment market. (GC Exh. 27) In 2010, the unemployment rate in Los Angeles County, where both Mares and Avila lived during the backpay period, was at a staggering 12.5 percent, which persisted for a few years during the backpay period. (GC Exh. 27) Even though the unemployment rate impacted the Discriminatees' search-for-work efforts, Mares and Avila nonetheless diligently searched for work and eventually were able to successfully obtain interim employment. (GC Exhs. 6, 14)

### **1. After Being Terminated by Respondent, Mares Diligently Searched-For Interim Employment and Secured Interim Employment**

In addition to the high unemployment rate in 2010—when Mares was terminated—Mares' age, schooling, and English proficiency also impacted his ability to find work right away. (Tr. 418:3-5, 453:14-15, 490:4-5; GC Exhs. 6, 27) For example, when Mares was terminated, he was fifty-years old. (Tr. 453:14-15) Furthermore, Mares received limited formal schooling and did not complete high-school. (Tr. 490:4-5) Mares' primary language is Spanish, and he understands and speaks limited English. (Tr. 418:1-5) As a result, Mares relied

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<sup>3</sup> Mares did not receive a commission from Respondent. (GC Exh. 3, pg. 3)

extensively on his wife's help in looking for interim employment, including building his resume, speaking with prospective employers on his behalf, and filling-out job applications. (Tr. 418:21-25, 419:1-3, 424:18-25, 425:1-8, 456:7-11)

In the first few weeks after being terminated by Respondent, Mares immediately sought the services of Work Source; a state service where they helped Mares look for jobs and build his resume. (Tr. 418:21-25, 420:5-9) After being terminated by Respondent, from about June 2, 2010 through the end of December 2010, Mares was unemployed and received unemployment benefits from the State of California. (Tr. 182:7-10, 183:12-25, 184:11-14, 426:14-18; GC Exh. 9) In accordance with the State's requirement, every two weeks Mares completed a form confirming that he was eligible to continue to receive unemployment benefits by providing the State with the efforts he undertook to look for work. (Tr. 427:3-1; GC Exh. 9)

After his unlawful termination by Respondent, Mares actively sought to find comparable positions to his perishable sales-driver position with Respondent. (Tr. 423:13-23, 450:13-24) For example, during the seven-month period that Mares was unemployed, Mares made every effort to secure interim employment, including visiting about thirty-six prospective employers seeking work. (Tr. 425:15-25; GC Exh. 6) In addition, Mares also called employers via telephone to see if they were hiring. (Tr. 425:15-20) Ultimately, it was by responding to a job-ad displayed on a road-truck that Mares was able to secure interim employment with employer Pacific Foods. (Tr. 429:8-13) From about January 11, 2011 through the present, Mares has been employed by Pacific Foods as a sales driver. (Tr. 429:8-20)

At Pacific Foods, for the entirety of the backpay period, Mares performed essentially the same job duties to the ones he performed while working for Respondent; every morning when he arrived at Pacific Foods, he picked-up his work-truck, drove to various customers' stores

throughout the day where he then removed expired perishable goods and replenished it with new product. (Tr. 430:6-15, 25, 431:1-2) At Pacific Foods, from 2011 through 2016, Mares was employed full-time (forty hours per week) and regularly worked ten hours of overtime per week. (Tr. 1014:1-15) Mares' compensation at Pacific Foods changed throughout the years, ranging from \$8.50 to \$11.00 per hour. (GC Exh. 29) Then, around the beginning of 2014, in addition to his hourly rate of \$8.50 per hour, Mares started receiving a 1.75 percent commission on total sales, which was later reduced to 1.5 percent. (Tr. 1013:1-15; GC Exh. 29, pg. 4) While Mares was employed by Pacific Foods, Mares continued to look for other driver positions. (Tr. 455:18-25, 456:1-19) During the backpay period, around 2015, Mares received one offer of employment from employer LA Specialty. (Tr. 455:18-25, 456:1-19, 497:14-20) Mares declined the job offer because it did not pay as much as Pacific Foods paid him. (Tr. 455:18-25, 456:1-19, 497:14-20)

At no point during the backpay period did Mares work for any other employer other than Pacific Foods. (Tr. 433:19-21)

## **2. After Being Terminated by Respondent, Avila Diligently Searched-For Interim Employment and Secured Interim Employment**

### **a. Avila's Employment with AT&T**

Like Mares, the high unemployment rate and his limited schooling similarly limited Avila's ability to immediately secure employment after he was unlawfully terminated by Respondent on December 2, 2010. (Tr. 573:13-14; GC Exhs. 14, 29) Avila was unemployed from about December 2, 2010 through June 2012. (Tr. 549:3-10, 550:13-16; GC Exh. 14, pgs. 1-7) During this time, Avila received unemployment benefits from the State of California. (Tr. 219:25, 220:1-25, 222:2-11; GC Exhs. 22, 37) Every two weeks Avila verified via telephone that he was eligible to continue to receive unemployment benefits by providing the State with the

efforts he undertook to look for work. (Tr. 549:11-25, 550:1-4; GC Exhs. 22, 37) During the time that Avila was unemployed, Avila actively looked for interim employment. (GC Exh. 14) While unemployed, in addition to speaking with friends and family members about job opportunities, Avila contacted more than twenty-six employers either in-person or online, and attended a job fair inquiring about work opportunities. (Tr. 550:17-25, 551:1-25, 552:1-9, 553:21-23, 685:12-25, 686:1-2; GC Exhs. 14, 23)

Although Avila attempted to secure a perishable sales-driver position—similar to the job he held while working for Respondent—at first Avila was unable to obtain a sales driver job. (Tr. 551:21-25, 552:1) Nonetheless, around July 2012, Avila was hired by AT&T as a full-time telesales representative, working five-days a week. (Tr. 593:25, 594:1-7, 1083:6-10; GC Exh. 14) In that position, Avila spent his work-day at a call-center selling AT&T's products and services to customers over the telephone. (Tr. 554:12-25, 555:1; R Exh. 53) As a telesales representative, Avila was responsible for meeting monthly and quarterly sales quotas. (Tr. 555:2-7) Employees who failed to meet their sales quota were subject to discipline. (Tr. 555:8-15) While working at AT&T, Avila continued to look for other jobs. (Tr. 560:22-25, 561:1-25, 562:1-2) For example, on about March 14, 2013, Avila attended a job fair in an effort to find other employment.<sup>4</sup> (Tr. 562:3-25, 563:1-18; GC Exh. 23)

Ultimately, due to the stress caused by working at AT&T, in October of 2014 Avila ended-up leaving his employment with AT&T. (Tr. 559:22-25, 560:1-1-2) While working at

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<sup>4</sup> At the hearing, Avila testified that from about February 9, 2013 through April 23, 2013 while working for AT&T, he went on paternity leave. (Tr. 1097:10-25, 1098:1-12; GC Exh. 37) This was the first time General Counsel learned that Avila had taken paternity leave. As a result, excluding gross backpay for that period from the backpay calculation, General Counsel finds that Avila is not entitled to backpay for the first and second quarters of 2013 (Net Backpay for the first quarter of 2013 = \$5516.00, Net Backpay for the second quarter of 2013 = \$3108.00) and interim expenses (twelve weeks x \$75.00=\$900.00) for the period of time he was on paternity leave. Thus, Avila's backpay claim should be reduced by \$9524.00 (\$5516.00 + \$3108.00+ \$900.00). (GC Exh. 1(J) Exhibit B)

AT&T, on two separate occasions in 2014, due to the stress levels of having to meet his sales quotas, Avila went on leave covered by the Family Medical Leave Act (FMLA). (Tr. 559:1-4, 22-25, 690:25, 691:1-25) The first time Avila went on leave, Avila took three days of FMLA. (Tr. 690:25, 691:1-7) Then, in October 2014, Avila took five days of FMLA. (Tr. 691:10-11) After the second time of being on FMLA due to stress, Avila no longer desired to continue working for AT&T and left his employment. (Tr. 559:22-25, 560:1-21) When Avila last worked for AT&T, he was making \$16.00 per hour, plus commission. (Tr. 598:5-10; 1081:11-25, 1082:1; GC Exh. 35).

#### **b. Avila's Employment with Macy's**

After Avila left his employment with AT&T, he created a resume online through the online website Indeed.com. (Tr. 1115:2-3; R Exh. 53) Avila also spoke with friends about any job leads they might have for him. (Tr. 563:19-23) Shortly thereafter, around November 2014, for a few weeks, Avila was hired by Macy's as a part-time sales associate making about \$12.00 per hour. (Tr. 563:19-25, 564:1-14, 569:5-9; 1089:2-3) As a sales associate, Avila was responsible for assisting customers at the store and maintaining the store's appearance. (Tr. 565:4-14) While working at Macy's, a family friend referred Avila to 24HR Personnel, a temporary staffing agency who referred Avila to work at LA Corr. (Tr. 566:4-14, 567:12-22) As a result, Avila ended-up leaving his job with Macy's to work at LA Corr, where he was offered full-time employment. (Tr. 566:4-6; 1091:8-16)

#### **c. Avila's Employment with LA Corr**

From about December 2014 through about March 21, 2015, Avila worked at LA Corr where he performed warehouse work. (Tr. 207:18-21, 568:3-21; GC Exh. 14, pg. 18; R Exh. 16) At LA Corr, Avila worked as a full-time employee, making \$11.00 per hour. (Tr. 1091:8-16)

While working for LA Corr, in response to his Indeed online resume, Avila was contacted by employer Helados La Tapatia. (Tr. 1108:24-25, 1109:1-5) Shortly thereafter, Avila left his employment with LA Corr to work for Helados la Tapatia. (Tr. 569:15-21, 1108:24-25, 1109:1-5)

**d. Avila's Employment with Helados La Tapatia**

Avila worked for Helados La Tapatia from about April 7, 2015 through June 12, 2015 as a sales driver. (Tr. 569:24-25, 570:1-5, 627:13-15; GC Exh. 14, pg. 19) Similar to his job duties with Respondent, as a sales driver for Helados La Tapatia, Avila was responsible for driving to the employer's customers' stores and delivering ice-cream. (Tr. 569:24-25, 570:1-5) At Helados La Tapatia, Avila worked as a full-time sales driver, working six-days a week. (Tr. 1092:12-13) At Helados La Tapatia, Avila was a salaried employee and was paid \$80.00 per day plus a 3 percent commission on total sales. (Tr. 1092:14-25, 1093:1-2; R Exh. 11) In addition, Avila also received \$80.00 for every new account that he opened.<sup>5</sup> (Tr. 1093:6-11; R Exh. 11) While working for Helados La Tapatia, Avila was recruited by employer Mel-O-Dee. (Tr. 570:6-13) Thereafter, Avila left his employment with Helados La Tapatia to go work for Mel-O-Dee, where they would pay him higher wages. (Tr. 350:10-25, 351:1-5, 570:6-13, 628:16-18; R Exhs. 7, 8)

**e. Avila's Employment with Mel-O-Dee**

From July 2015 through the present, Avila has been employed by Mel-O-Dee as a sales driver. (Tr. 570:21-22; GC 14, pg. 20) As a sales driver, similar to when he worked for Respondent, Avila was responsible for delivering ice-cream to Mel-O-Dee's customers throughout the day. (Tr. 570:23-25, 571:1-3). At Mel-O-Dee, during the backpay period, Avila

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<sup>5</sup> During his employment with Helados La Tapatia, Avila opened about one new account. (Tr. 1093:6-14)

was employed as a full-time employee, working five-days a week. (Tr. 1094:11-16) During the backpay period, Avila was a salaried employee and received \$100.00 per day plus about \$500-\$700.00 in commissions per week. (Tr. 350:10-25, 351:1-5, 628:16-18; R Exhs. 7, 8)

### **C. The General Counsel's Backpay Calculations are Reasonable**

Compliance Officer Marene Steben (Steben) is responsible for ensuring compliance with settlements, administrative law judge decisions, and Board orders and judgments. (Tr. 150:9-16) Steben was also responsible for drafting the Amended Compliance Specification in this case for Discriminatees Mares and Avila. (Tr. 150:9-16, 151:5-6)

#### **1. The Compliance Officer Reasonably Calculated the Discriminatees' Gross Backpay Based on the Payroll Records Provided by Respondent**

The purpose of the backpay calculation is to determine how much the Discriminatees would have earned if they had continued working for Respondent, but for their unlawful termination. In situations like these, compliance officers will often rely on the discriminatee's or comparable employee's payroll records to reasonably calculate a discriminatee's gross backpay. Mares' backpay claims spans from June 2, 2010, the date he was unlawfully terminated, through August 23, 2016, the date Mares was to respond to Respondent's offer of reinstatement. (GC Exh. 2) Avila's claim spans from December 2, 2010, the date he was unlawfully terminated, through August 8, 2016.<sup>6</sup> (GC Exh. 10; R Exh. 31)

Steben used three different sets of payroll records to calculate the backpay for each of the Discriminatees, all of which were provided by Respondent; the Discriminatees' payroll records

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<sup>6</sup> At the hearing, the General Counsel learned for the first time that Avila had declined Respondent's offer of reinstatement on August 8, 2016. Based on that testimony, Counsel for the General Counsel finds that Avila's backpay claim should end on August 8, 2016. Given that from August 8, 2016 through August 23, 2016, the General Counsel was only seeking \$405.00 (three pay periods x \$135.00) for interim expenses incurred by Avila, \$405.00 should be deducted from Avila's backpay claim for that period. (Tr. 635:1-9; GC Exh. 1(J))

prior to their termination, comparable perishable sales drivers' payroll records, and sales employees' payroll records.<sup>7</sup> (Tr. 155:25, 156:1-13, 195:1-6; GC Exhs. 3, 4, 11, 12)

First, from the date of the Discriminatees' termination through the end of August 2011, relying on the Discriminatees' payroll records one year prior to their terminations, in order to project the Discriminatees' gross backpay Steben relied on formula one of the Board's Casehandling Manual Part 3, Compliance Proceedings (Compliance Manual). (Tr. 165:13-25, 166:1-23, 197:23-25, 198:1-5, 23-25, 199:1-5; Jt. Exh. 1 Section 10540) Formula one uses a discriminatees' average earnings (or hours) prior to the unlawful termination to project the gross backpay. (Jt. Exh. 1 Section 10540) By using this method, Steben calculated each Discriminatees' average earnings per pay period (excluding any pay period were no monies were reported or appeared to be outliers) and used this figure as the average amount of earnings the Discriminatees would have made from the date of their terminations through August 2011. (Tr. 165:13-25, 166:1-23, 197:23-25, 198:1-5, 23-25, 199:1-5)

Second, in determining the gross backpay from September 1, 2011 through mid-May 2012, Steben used the comparable perishable sales driver's payroll records provided by Respondent. (GC Exh. 1(j), Exhibits E, F, 3, 12) Again, Steben took the total earnings for this time period and divided the total earnings by the number of pay periods in this time period, which in turn provided an average amount of earnings per pay period. (GC Exh. 1(j) Exhibits E, F, 3, 12)

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<sup>7</sup> When Respondent split the perishable sales-driver position into salesmen and drivers in about mid-May 2012, in order of seniority, Respondent allowed employees to choose which position employees wanted to perform thereafter. (Tr. 858:8-17) Because it is unknown what position Mares or Avila would have selected, in order to better ascertain the backpay owed, Compliance Officer Steben requested the payroll information of both salesmen and drivers, which Respondent refused to provide. (GC Exh. 26) Instead Respondent provided only the payroll records of the two employees Respondent claims performed the route that Mares and Avila would have performed respectively. (Tr. 858:18-21, 859:3-6; 952:1-9; GC Exh. 26)

Third, from about mid-May 2012 (when the perishable sales driver position split) through August 23, 2016 (when the Discriminatees were to respond to the offers of reinstatement), in continuing to calculate the gross backpay, Steben relied on the payroll records provided by Respondent for the comparable sales employee. (Tr. 160:16-25, 161:1-25, 162:1-25, 163:1-25, 200:21-25, 201:1-9; GC Exhs. 4, 11) In calculating the average earnings per pay-period, Steben took the total earnings for each year and divided that figure by the number of pay periods for the year (excluding pay periods for which no records were provided or appeared to be outliers), which provided the average earnings per pay period for both Mares and Avila. (Tr. 160:16-25, 161:1-25, 162:1-25, 163:1-25, 200:21-25, 201:1-9; GC Exhs. 4, 11) Once the average earnings were calculated per pay period, Steben used these average earnings as the earnings for pay periods where the records were either missing or seemed to be outlier earnings. (Tr. 162:25, 163:1-14, 201:10-14; GC Exhs. 4, 11)

## **2. The Compliance Officer Accounted for the Discriminatees' Interim Earnings and Expenses Incurred During the Backpay Period**

Generally, all compensation earned by a discriminatee following the unlawful termination must be considered as interim earnings. (Jt. Exh. 1, Section 10550.1 Interim Earnings Overview) Thus, to calculate net backpay, in order to make each Discriminatee whole in compliance with the Administrative Law Judge's Decision and Board's Order in this case, Steben adjusted the gross backpay by subtracting the Discriminatees' interim earnings. (GC Exh 1(J), Exhibit A pgs. 1-10, Exhibit B pgs. 1-9) Furthermore, in order for Mares and Avila to be made whole for their losses, it is appropriate for them to receive full reimbursement for expenses incurred in searching-for or maintaining interim employment. (Jt. Exh. 1 Section 10555 Reimbursement of Search for Work or Interim Employment Expenses) In the case of Mares and Avila, since both incurred additional mileage costs—a reimbursable expense—in searching-for

or maintaining interim employment, Steben similarly computed the additional costs incurred by each Discriminatee as described below. (GC Exhs. 6, 8, 14, 15, 16)

**a. Mares' Interim Earnings and Additional Mileage Incurred While Searching-For or Maintaining Interim Employment**

Mares' backpay claim expands from June 2, 2010 through August 23, 2016. (Tr. 185:2-18, 152:1-7) During the entirety of the backpay period, Mares worked for only one interim employer—Pacific Foods. (Tr. 170:19-21, 429:18-20) In calculating Mares' interim earnings, Steben relied on Mares' W-2 Wage and Tax Statement provided by Mares for the years 2011 through 2016. (Tr. 169:1-18; GC Exh. 5) Since backpay is computed on a quarterly basis, in order to determine the proper interim earnings for each quarter, Steben took the wage information reported in each of Mares' W-2s and divided the total earnings for each year by four quarters.<sup>8</sup> (Tr. 170:19-25, 171:1-10; GC Exhs. 1(j) Exhibit A, 5)

The only backpay expenses that were factored in the backpay calculation were the additional mileage Mares incurred in searching-for and maintain interim employment. (Tr. 175:23-25, 176:1-6, 179:8-23; GC Exhs. 6, 8) While working for Respondent and during the entire backpay period, Mares lived at the same address. (Tr. 455:4-14) In order to determine interim expenses, using Google Maps, Steben first determined the total number of miles Mares traveled from his home to the various places he traveled to while searching-for interim employment. (Tr. 179:22-25, 180:1-25, 181:1-18; GC Exhs. 6, 8) The additional miles that Mares traveled per quarter in looking for work were then multiplied by the reimbursement rate in accordance with the U.S. General Services Administration (GSA) Automobile Rates for each

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<sup>8</sup> To the extent that Mares' Income Tax Returns includes his wife's earnings, his wife's earnings should not be used to offset Mares' gross backpay. (GC Exhs, 5, 32; R Exhs. 14, 24) Similarly, as noted later in the brief, settlements monies issued by Respondent to Mares to settle claims for issues that arose during Mares' employment with Respondent should also not be used to offset Mares' backpay claim.

applicable year, which provided the additional mileage cost Mares incurred in searching-for work. (Tr. 175:23-25, 176:1-6, 176:4-17, 180:5-14, 181:7-17; GC Exhs. 6, 17) Second, once Mares found work, again using Google Maps, Steben determined the total number of miles that Mares traveled while working for Respondent and the total number miles Mares traveled to work at Pacific Foods. (Tr. 181:7-18) Then, to arrive at the additional mileage, Steben subtracted the miles traveled to work at Respondent's from the miles Mares traveled to work for Pacific Foods. (Tr. 179:22-25, 180:1-25, 181:1-18, 377:22-25, 378:2-5) Since Mares worked the same number of days for Respondent and Pacific Foods, Steben multiplied the total number of additional miles traveled per day times the GSA Automobile Rate for the year, times five (number of days Mares traveled to work), which provided the additional cost Mares incurred per week to work at Pacific Foods. (Tr. 175:23-25, 176:1-17, 180:5-14, 181:7-17, 369:6-25, 370:1-4, 1014:13-15; GC Exhs. 6, 8, 17)

**b. Avila's Interim Earnings and Additional Mileage Incurred While Searching-For or Maintaining Interim Employment**

In calculating Avila's interim earnings and expenses, Steben used a similar approach to that of Mares. In the case of Avila, Steben relied on Avila's Social Security Statement submitted by Avila and the interim earnings reported by Avila for his work at Mel-O-Dee.<sup>9</sup> (Tr. 204:14-25,

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<sup>9</sup> While the taxable income in Avila's Social Security Statement differs from Avila's Internal Revenue Service Account Transcripts (Account Transcript), to the extent that the Account Transcripts includes unemployment benefits, these are deemed collateral benefits, as such they are not interim earnings and are not used to offset the gross backpay. (Jt. Exh. 1, Section 10554.1; GC Exh. 13; R Exh. 62) For example, Avila was unemployed all of 2011. (Tr. 549:3-10, 550:13-16; GC Exh. 14, pgs. 1-7) Thus, regardless of the fact that Avila's Account Transcript for tax year 2011 includes a taxable income of \$24,300.00, which represents Avila's unemployment benefits for the year (26 pay periods x \$900.00 equals \$23,400.00, plus the retroactive pay for 2010, amounts to about \$24,300.00), these monies should not be used to offset his gross backpay. (Tr. 548:13-25, 549:1-12, GC Exhs. 13, 37; R Exh. 62) Similarly, to the extent that the Account Transcript for tax year 2012 includes unemployment benefits, these benefits should not be used to offset Avila's gross backpay. (GC Exh. 13; R Exh. 62) In 2012, Avila received about \$10,440.00 in unemployment benefits. (GC Exh. 37) Thus, the only difference between Avila's

205:19-22, 209:20-25, 210:1, 210:18-25, 211:1-11, 214:10-20, GC Exh. 13; R Exh. 7) Since the Social Security Statement reported Avila's taxable earnings for each year, Steben took the total taxable earnings for each year (2012 through 2015)<sup>10</sup> and divided that amount by four quarters. (Tr. 204:19-25; GC Exh. 13) For the third and fourth quarters of 2015 and for the year 2016 (up until August 23, 2016), in determining interim earnings for interim employer Mel-O-Dee, Steben relied on the information that Avila provided to her via telephone; that he was receiving a salary of \$100.00 per day (five times a week), plus \$500.00-\$700.00 in commission. (Tr. 205:23-25, 206:1-25, 210:18-25, 211:1-9; R Exhs. 7, 8) Since Avila provided a range in his commission rate, in calculating his interim earnings, Steben used the figure of \$600.00 per week as Avila's average commission. (Tr. 351:3-12; R Exhs. 7, 8) Given that for some quarters Avila earned more working for interim employer Mel-O-Dee than what he would have made with Respondent, Steben had no reason to doubt Avila's reported interim earnings. (Tr. 214:7-20; GC Exh. 1(J) Exhibit B pgs. 1-9)

As to interim expenses, Avila's backpay claim likewise only seeks the additional mileage expenses that Avila incurred in searching-for and maintaining interim employment. (Tr. 215:17-25, 216:1-25, 217:1-12, 219:4-12; GC Exhs. 14, 15, 16). During the backpay period, Avila lived at two places; from his termination through about February 2013 he lived at one address and

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Social Security Statement and his Account Transcript for 2012 appear to be his unemployment benefits, which again should not be used to offset Avila's gross backpay. (GC Exh. 37; R Exh. 62)

<sup>10</sup> Avila was unemployed in 2011. (Tr. 549:3-10; GC Exhs. 14, 37) Despite Respondent's argument that Compliance Office Steben failed to take into account interim earnings from interim employer Macy's, the evidence shows that the wages from Macy's were factored in the backpay calculations. (Tr. 317:11-16) Avila's Social Security Statement, which Steben relied on as interim earnings figures, shows that for work year 2014, his taxed social security earnings were \$34,344.00 (GC Exh. 13) This equals the amounts reported in the Forms W-2 Wage and Tax Statements for the three interim employers for 2014: AT&T \$32,824.48, Macy's \$309.88, and LA Corr (24 Hours Personnel Services, Inc.) \$1210.01. (R Exh. 16)

from February 2013 through August 23, 2016 he lived at another address.<sup>11</sup> (Tr. 214:1-12, 372:11-14, 552:15-25, 553:1-4) To determine interim expenses, using Google Maps, Steben first determined the total number of miles Avila traveled from his home to the various places he traveled to while looking for interim work. (Tr. 215:1-22, 216:1-25, 214:1-21; GC Exhs. 14, 15, 16) The total mileage traveled to each place looking for work was then multiplied by the GSA Automobile Rate for that particular year, which provided the additional mileage costs Avila incurred in looking for work. (Tr. 331:18-25; GC Exh. 17) Second, Steben determined the total number of miles that Avila traveled while working for Respondent and the total miles traveled to work for his various interim employers. (Tr. 215:22-25, 216:1-25, 217:1-12; GC Exhs. 14, 15, 16) To arrive at the additional mileage, Steben subtracted the miles Avila traveled to work at Respondent's from the miles Avila traveled to work at each of his interim employers.<sup>12</sup> (Tr. 216:18-25; GC Exhs. 14, 15, 16) Since Avila worked the same number of days for Respondent and his various interim employers, Steben multiplied the total number of additional miles traveled per day times the GSA Automobile rate for the year, times five (number of day Avila traveled to work), which provided the additional mileage expenses that Avila incurred per week to work for his interim employers during the backpay period. (Tr. 369:6-25, 370:1-4; 1083:9-10, 1092:12-3, 1094:15-16; GC Exhs. 14, 15, 16, 17; R Exhs. 7, 8)

### **3. Other Backpay Figures**

In making the Discriminatees' whole for their unlawful termination, Steben also calculated the excess tax and the incremental tax owed to the Discriminatees.

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<sup>11</sup> If Avila lived anywhere else during the backpay period, it appears that it was for an insignificant period of time. (Tr. 583:4-14)

<sup>12</sup> No interim expenses are being claimed during the time periods that Avila worked for interim employers Macy's or LA Corr.

Steben set forth the General Counsel's methodology for calculating the excess tax that a discriminatee needs to pay when receiving a lump-sum backpay award, which likely puts the discriminatee into a higher tax bracket for that income.<sup>13</sup> Steben explained that Amended Compliance Specifications Exhibits G and H reflect the excess tax the Discriminatees will incur as a result of paying income taxes in a different year from when the income was earned. (Tr. 229:25, 230:1-7; GC Exh. 1(J) Exhibits G and H; Jt. Exh. 1, Section 10556 Compensation for Excess Taxes Owed). Here, the excess tax was determined first by taking the Net Backpay and Expenses figure for each tax year. (GC Exh. 1(J) Exhibits G and H) Second, for each tax year, the federal and state taxes were calculated as if the Discriminatees would have received the monies in the tax year that it was earned. (GC Exh. 1(J) Exhibits G and H)<sup>14</sup> Third, the Discriminatees' federal and state taxes were determined based on the monies being paid in 2017. The excess tax was then calculated by taking the difference between what the Discriminatees would have paid in taxes had Respondent paid them in the respective tax years that the monies were earned versus receiving a lump-sum payment in a year different from when the monies were earned. (GC Exh. 1(J) Exhibits G and H)

Because Mares' and Avila's backpay awards include compensation for excess tax liability, they are also entitled to incremental tax. (GC Exh. 1(J) Exhibits G and H) Incremental taxes are taxes that Mares and Avila will owe on the excess tax payment. (Tr. 231:8-11; GC Exh. 1(J) Exhibits F and G) In the cases of Mares and Avila, incremental tax was calculated by using the federal tax rate used for calculating taxes for the backpay award and that average

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<sup>13</sup> See Jt. Exh. 1, Section 10556 Compensation for Excess Taxes Owed.

<sup>14</sup> The federal and state taxes were calculated using the federal and state tax rates for the appropriate tax years. (GC Exh. 1(J) Exhibits G and H) Mares' and Avila's federal tax rates were based on Mares and Avila filing their taxes as Married Filing Jointly/Widow. (GC Exh. 1(J) Exhibits G and H)

state tax rate for 2017. (GC Exh. 1(J) Exhibits G and H)

Finally, Steben explained that the interest was not included in her backpay calculations as interest cannot be calculated until payment is received. (Tr. 231:12-16)

## II. ARGUMENT

It is settled law that when the Board finds an unfair labor practice was committed, it is presumptive proof that backpay is owed. *Minette Mills, Inc.*, 316 NLRB 1009, 1010-11 (1995); *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987) *enfd.* 876 F.2d 678 (8th Cir. 1989). Here, in a compliance proceeding, “the sole burden on the General Counsel is to show the gross amounts of backpay due, that is the amounts the employees would have received but for the employer’s unlawful conduct.” *U.S. Can Co.*, 328 NLRB 334, 338 (1999). Gross backpay is computed by the General Counsel through a backpay specification which shows the money and benefits the employees would have received but for the respondent’s unlawful conduct. Such calculations must be formulated in a reasonable and non-arbitrary manner that complies with accepted procedures and is supported by appropriate documentation. *Mastro Plastics Corp.*, 136 NLRB 1342, 1346-47 (1962); *See Performance Friction Corp.*, 335 NLRB 1117, 1117-18 (2001) (Board applies a “broad standard of reasonableness in approving numerous methods of calculating gross backpay.”) Therefore, the General Counsel may utilize any method that places the discriminatee in the same position he would have enjoyed absent the unlawful actions by respondent as long as the method is not unreasonable or arbitrary. *La Favorita, Inc.*, 313 NLRB 902, 903 (1994) *enfd. mem.* 48 F.3d 1232 (10th Cir. 1995).

In computing gross backpay, the Board recognizes it may be nearly impossible to calculate “precise figures.”<sup>15</sup> *U.S. Can Co.*, 328 NLRB 334, 337 (1999). Accordingly, the Board

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<sup>15</sup> General Counsel need not show an exact amount; rather an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 36 (1991).

has determined that any ambiguities, doubts, or uncertainties should be “resolved against” respondent, the wrongdoer, because the respondent cannot “profit from any uncertainty caused by its discrimination.” *Minette Mills, Inc.* at 1010-11. The evidence in this case overwhelmingly shows the General Counsel has met its burden in establishing the gross backpay that Respondent is obligated to pay to the Discriminatees. Furthermore, Respondent has failed to establish any facts or present any compelling evidence which would negate or limit its liability.

**A. The General Counsel’s Compliance Specification is Reasonable**

The substantial evidence adduced at hearing supports the General Counsel’s Amended Compliance Specification. As Compliance Officer Steben testified, in calculating the gross backpay, Steben relied on Respondent’s own payroll records for the Discriminatees and the comparable employees to reasonably calculate the gross backpay for the Discriminatees as accurately as possible while also following Board law and accepted practices outlined in the Compliance Manual. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980) (holding any formula that approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary given the circumstances). As demonstrated by the facts, Steben’s methods in calculating the gross backpay for the Discriminatees are reasonable. Moreover, it must be noted that Respondent did not dispute the General Counsel’s method for calculating the Discriminatees’ gross backpay. (GC Exh. 1(L)) Furthermore, during the compliance investigation, Respondent was asked to submit records from both sales employees and drivers from Respondent to help with the calculation of backpay. Respondent was given an opportunity to produce anything it wanted considered in the backpay calculations. With regards to the comparable employees, Respondent, however, only produced limited payroll records for the one comparable employee. Respondent argued the records

produced were for the sales route that the Discriminatees would have performed absent their termination. Thus, the General Counsel relied on all the information it had in its possession to accurately compute the Discriminatees' gross backpay during the compliance investigation. *Gimrock Constr., Inc.*, 356 NLRB 529, 538-39 (2011) (respondent's failure to cooperate during the compliance investigation also provides a basis for concluding that the General Counsel has satisfied its burden of establishing that the gross backpay calculations are reasonable and not arbitrary).

Furthermore, the Compliance Officer also factored the Discriminatees' interim earnings during the backpay period to offset the gross backpay.

Once the General Counsel has shown the gross backpay owed to each discriminatee, the burden shifts to respondent, as the proponent for a different result than that advocated by General Counsel, to establish any affirmative defenses based on proof of facts which would negate or limit its liability or otherwise show why any modifications should be made to the backpay specification. *Church Homes*, 349 NLRB 829, 838 (2007); *Centra*, 314 NLRB 814, 819-820 (1994). This burden cannot be satisfied, however, by conclusionary or self-serving statements. *W. C. Nabors*, 134 NLRB 1078, 1088 (1961). In seeking to prove backpay should be limited for any reason, respondent is not permitted to relitigate in a compliance proceeding issues that have been (or should have been) litigated in the underlying unfair labor practice proceeding. *Transportation Serv. Co.*, 314 NLRB 458, 459 (1994); *Sumco Mfg. Co.*, 267 NLRB 253, 254, fn. 2 (1983).

**B. Respondent Cannot Meet Its Burden of Persuasion that Backpay for the Discriminatees Should be Tolloed or Limited**

Respondent argues that the Discriminatees' backpay claim should be negated or limited for the following reasons: (1) Mares's backpay period should end October 2, 2010 and Avila's

backpay period should end April 2, 2011, dates by which Respondent claims that substantially equivalent jobs were readily available in the relevant geographic area; (2) Mares and Avila failed to exercise reasonable diligence to mitigate backpay loss by failing to search for interim employment and declining job offers, quitting or being terminated from interim jobs; (3) Mares and Avila did not incur interim search-for-work expenses, and any alleged search-for-work expenses must be limited to quarters in which Mares' and Avila's interim earnings equaled or exceeded their lost earnings and expenses; (4) no interest is owed, in the alternative, interest must be tolled for the Board's unreasonable and excessive delay in initiating backpay proceedings; (5) backpay should be cutoff (or offset) during the time that Mares and Avila received unemployment benefits; (6) any backpay should be cutoff (or offset) by the amount of monies that Mares and Avila received from a class action lawsuit against Respondent; (7) backpay should be cutoff (or tolled) during the period that Mares was incapacitated or limited to work due to an on-the-job injury or other medical condition as well as during the time that Mares received workers' compensation benefits; (8) backpay should be cutoff (or offset) once Mares removed himself from the workforce and started his own trucking company; (9) backpay must be tolled from the date that Mares agreed to a no-rehire provision with Respondent in a settlement agreement; (10) Mares and Avila did not accurately report interim earnings and/or concealed interim earnings; (11) Avila is no eligible for backpay because Avila signed a general release with Respondent, which released Avila's backpay claim; and (12) Avila is not eligible for backpay (or backpay should be tolled) because Avila left the country for at least six months and was not searching for work during that time.

Despite all of Respondent's claims, the evidence will show that Respondent has failed to raise a valid affirmative defense that warrants limiting or tolling the Discriminatees' backpay claims.

**1. Discriminatees Engaged in a Reasonable Search for Work Effort After Being Terminated**

To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. The discriminatee must put forth an honest, good-faith effort to find interim work; the law does not require that the search be successful. Doubts, uncertainties, or ambiguities are resolved against the wrongdoing respondent. *Midwestern Pers. Servs.*, 346 NLRB 624, 625 (2006) (citations omitted). Even though a discriminatee must attempt to mitigate his loss of income, the discriminatee is held only to a reasonable rather than to the highest standard of diligence. *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995). The sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period. *Grosvenor Resort*, 350 NLRB 1197, 1198 (2007).

**a. Expert Witness Failed to Establish that Substantially Equivalent Jobs Existed During the Backpay period**

In support of its contention that the Discriminatees failed to mitigate their damages, the Respondent called June Hagen (Hagen), a vocational expert, to testify about the conditions of the labor market during the backpay period. (Tr. 769:10-16) Hagen testified that in looking at the Department of Labor and Bureau of Labor Statistics, she determined the number of jobs and salary of "comparable" sales route driver positions in the Southern California geographical area. (Los Angeles, Orange, and San Bernardino Counties) (Tr. 774:19-25, 775:1-25, 777:22-25, 778:1-4; R Exh. 47) According to Hagen, during the backpay period, there were thousands of

sales route driver positions available in the Discriminatees' geographical area. (Tr. 775:8-25, 776:1-6; R Exh. 47) Hagen further testified that between August 21, 2016 through September 12, 2016 (after the backpay period ended) she went online and looked for sales route driver job openings. (Tr. 781:10-25, 782:1-13; R Exh. 46) Based on the job openings for sales route drivers that she found online after the backpay period ended, Hagen called about eight employers who informed Hagen that during the backpay period, they had openings for sales drivers. (Tr. 781:10-25, 782:1-13, 799:22-25, 800:1-7; R Exh. 46)

A respondent arguing that a discriminatee failed to adequately search for interim employment must first come forward with evidence establishing that substantially equivalent jobs existed in the relevant geographic area. *St. George Warehouse*, 351 NLRB 961, 967 (2007). If the respondent does so, the burden then shifts to the General Counsel to “produce competent evidence of the reasonableness of the discriminatee’s job search.” *Id.* To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment. *Midwestern Pers. Servs.*, 346 NLRB 624, 625 (2006), *enfd.* 508 F.3d 418 (7th Cir. 2007) A respondent mitigates its backpay liability when it shows that a discriminatee “‘willfully incurred’ a ‘clearly unjustifiable’ refusal to take desirable new employment.” *St. George Warehouse*, at 963 (quoting *Hagar Mgmt. Corp.*, 323 NLRB 1005, 1006 (1997) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198–99 (1941))).

Under the *St. George Warehouse* framework, a respondent has the burden of putting forward evidence that demonstrates that substantially equivalent jobs existed in the relevant geographic area. 351 NLRB at 967. Further, “[s]uspicion and surmise are no more valid bases for decision in [a] backpay hearing than in an unfair labor practice proceeding.” *The Laidlaw Corp.*, 207 NLRB 591, 594 (1973), *enfd.* 507 F.2d 1381 (7th Cir. 1974), *cert. denied* 422 U.S.

1042 (1975). In addition, respondents in a compliance proceeding cannot merely rely upon cross-examination of the claimant and allegedly impeaching testimony to support its defenses. *J.J. Cassone Bakery*, 356 NLRB 951, fn. 2, 956 (2011). In fact, the Board affirmed an ALJ's conclusion that the respondent did not meet its burden of coming forward with evidence even where respondent presented expert testimony regarding available jobs. For instance, in *J.J. Cassone Bakery*, the respondent presented testimony from a labor economist who reviewed local newspapers and testified to jobs she believed the discriminatees could have filled. *Id.* at 951, 958. The Board affirmed the ALJ's conclusion that, given the lack of details in the expert testimony, the respondent failed to show that there were sources of actual or potential employment the claimant failed to explore, or where and when the discriminatee would have been hired had the discriminatees applied. *Id.* at 958.

In this case, Respondent's expert witness presented no credible evidence regarding the existence of any substantially equivalent jobs in the geographic area at any point during the backpay period. While the expert claimed that there were thousands of jobs in the Discriminatees' geographical area, the expert failed to show that those jobs were indeed comparable jobs. Other than providing a general job description for a "sales route driver" and salary range (some of which was substantially less than what the Discriminatees used to make), there was no information as to where these jobs were posted, the specific duties that these jobs required, the hours of work, location, or other benefits. *See Pennsylvania State Corrections Officers Assn.*, 364 NLRB No. 108, slip op. at 5 (2016) (in determining whether interim employment is substantially equivalent to a discriminatee's former employment, the Board compares various criteria, such as pay, working conditions, job duties, commutes, and working locations). Furthermore, because these jobs could have been anywhere in Los

Angeles, Orange or San Bernardino Counties, these jobs could have very well required substantial commute for the Discriminatees.

Similarly, while the expert witness claimed that after the backpay period ended some employers told her that they had had comparable jobs openings during the backpay period, her conclusions are unsubstantiated. For example, it is unknown precisely when in the backpay period these positions were allegedly available. (R Exh. 46).<sup>16</sup> Thus, there is absolutely no evidence as to when the Discriminatees would have been hired. Additionally, other than the expert witness saying that comparable positions were available during the backpay period, Respondent failed to present any direct evidence about those alleged comparable job openings. For example, presenting something as simple as the job-ad for the alleged job opening would allow a determination as to whether the job openings were indeed comparable or not.

Given Respondent's failure to present evidence of *any* substantially equivalent job in the relevant geographic area available during *any* point during the backpay period, Respondent has not satisfied its initial burden of production.

**b. Experts Witness Conclusions as to When the Discriminatees Should Have Found Work are Too Speculative**

Furthermore, based on Hagen's assessment of the labor market, the Discriminatees' qualifications and skills, Hagen determined that both Discriminatees should have found work within 4.75 months after their termination. (R Exhs. 50, 51) Under Hagen's conclusions, in order for the Discriminatees to meet a diligent search for work effort and find work within 4.75 months

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<sup>16</sup> See for example Hagen's summary of conversations with employers. Mission Linen Supply: "They typically hire for this job every 1-2 in Los Angeles County"; Frito-Lay: "They hire for this position throughout the year, sometime twice, depending on the area"; Parks Coffee: "They have hired for this job 'approximately four times' since 2010"; DeRosa Sales: "She estimated that they have hired four people for this job since 2010"; Giuliano Bakery: "They have hired for this job 'several times' since 2010"; Prudential Overall Supply: "They have hired for this job every year since 2010"; HD Supply: "They hire for this job each year and hired in 2010-2015." (R Exh. 46)

of their termination, Mares and Avila must have been looking for interim work on a full-time basis, applying to five jobs per day. (Tr. 806:24-25, 807:1-8, 808:10-17; R Exhs. 50, 51)

The Board considers the expert testimony as a factor in determining whether the discriminatees diligently searched for interim work. *See United Aircraft Corp.*, 204 NLRB 1068, 1078 (1973) (good-faith search for work depends on circumstances surrounding the search, including the economic climate in which the discriminatee operates). However, where an expert witness who gives an opinion that a discriminatee did not make a reasonable search for work based on data, such as newspaper ads reflecting available jobs, the Board has consistently found such testimony to be insufficient to establish that a discriminatee did not make a reasonable effort to find interim work. *St. George Warehouse II*, 355 NLRB 474, 503-04 (2010); *Parts Depot, Inc.* 348 NLRB 152, fn. 6 (2006); *Taylor Machine Prods.*, 338 NLRB 831, 831-32 (2003), *enfd.* 98 Fed. Appx. 424 (6th Cir. 2004).

In *Grosvenor Resort*, 350 NLRB 1197, 1200-01 (2007), the Board found the expert's testimony to be "too speculative to meet the Respondent's burden on establishing that the backpay of certain discriminatees should be reduced." In that case, the expert testified as to the labor market during the backpay period and concluded that if the discriminatees would have applied to 40 jobs per month, there was only a 12.9-percent chance of them not finding interim work. *Id.* at 1200. However, in rejecting the expert's conclusions, the Board noted that at no point did the expert meet with the discriminatees, consider their age, or language barriers in his analysis. *Id.*; *Parts Depot Inc.*, 348 NLRB 152, fn. 6 (2006) (Board refusing to rely on expert testimony where the expert is only 'referring to the probability of job opportunities, not to a given individual's situation' and he 'forms his opinions' about the claimant without having any personal knowledge of the latter's particular circumstances), *citing Food & Commercial Workers*

*Local 1357*, 301 NLRB 617, 621-22 (1991); *Continental Ins. Co.*, 289 NLRB 579, 583 (1988), citing *Flite Chief, Inc.*, 258 NLRB 1124 (1981).

In this case, Respondent's expert witness' conclusions are similarly too speculative to show that either of the Discriminatees' backpay claims should be reduced. First, Hagen's conclusions are premised on the Discriminatees looking for interim work on a full-time basis, thereby placing an unreasonably higher standard on the Discriminatees than required by Board law. *D.L. Baker, Inc.*, 351 NLRB 515, 535 (2007) (indicating that discriminatees are "not required to spend 8 hours a day, 5 days a week searching for work."). Furthermore, Hagen admitted that at no point during her determination did she meet Mares or Avila to assess their skills and experience. *Florida Tile Co.* 310 NLRB 609, 609 (1993) (ALJ noted that "In determining the reasonableness of the discriminatee's efforts at interim employment, the discriminatee's skills, qualifications, age, and labor conditions in the area are factors to be considered.") In the case of Mares, he speaks and understands limited English, yet Hagen assumed that he is bilingual. Additionally, Hagen provided no testimony that she considered the Discriminatees' age in her calculations. Furthermore, despite the fact that the backpay period experienced a high unemployment rate, contrary to Board law, Hagen dismissed the high unemployment rate as a relevant factor and completely omitted the unemployment rate from her determinations. *Vanguard Oil and Servs. Inc.*, 231 NLRB 146, 150 (1977) (ALJ finding that the discriminatee's limited interim earnings did not establish that the discriminatee did not diligently search for work given the high unemployment rate in the area during the backpay period).

As discussed below, contrary to Hagen's findings, in accordance with Board law, the Discriminatees engaged in a diligent search-for-work effort during the backpay period.

**c. The Discriminatees' Search for Work Efforts More Than Satisfies the Board's Standards**

Even assuming Respondent satisfied its burden of establishing that substantially equivalent jobs existed in the requisite geographic area during the backpay period—which it did not—the Discriminatees search for work was reasonable. The evidence shows that the Discriminatees search more than satisfies the Board's standards regarding the reasonableness of a discriminatee's job search. In seeking to mitigate losses, a backpay claimant is only required to make reasonable exertions, rather than the highest standard for diligence. *Minette Mills*, 316 NLRB 1009, 1010 (1995). The Board has repeatedly indicated that “a good faith effort requires conduct consistent with an inclination to work and be self-supporting, and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment.” *The Lorge Sch.*, 355 NLRB 558, 560 (2010). A discriminatee's search for work in a geographic area encompassing millions of people and scores of jobs is not unduly limited simply because the discriminatee did not expand the search to further areas or because the search for work was primarily completed online. *Id.* at 561–62.

The efforts a discriminatee is expected to make to get interim employment are those expected of reasonable persons in like circumstances. A variety of actions may demonstrate an effort to seek employment, including registering with state or private employment services, checking newspaper ads, visiting employers, utilizing online application resources, and asking friends and relatives. *Allied Mechanical, Inc.*, 352 NLRB 880, 880 (2008). Furthermore, a discriminatee's actions to seek employment may be influenced by age, health, education, employment history, and station in life, as well as by employment and unemployment trends in

the area. *Id.*; *United Aircraft Corp.*, 204 NLRB 1068, 1078 (1973). The presence or absence of any particular search activity does not determine mitigation. In seeking interim employment, however, a discriminatee need only follow their regular method of obtaining work. *See Gimrock Constr.*, 356 NLRB 529, 539 (2011), enforcement denied in part by *NLRB v. Gimrock Constr.*, (11th Cir. 2012).

It is well settled that “an employee discriminatorily laid off or discharged need not *instantly* seek new work; rather the test is whether, on the record as a whole, the employee has diligently sought other employment during the entire backpay period.” (emphasis added.) *Saginaw Aggregates*, 198 NLRB 598 (1972), *enfd.* 482 F.2d 946 (6th Cir. 1973) (backpay awarded even though employee did not seek interim work for initial two weeks). Notwithstanding the Board's focus on the totality of a discriminatee's mitigation efforts, a discriminatee's unreasonable delay in commencing an initial search for interim work will not be excused simply because he or she thereafter diligently seeks work. If the discriminatee unreasonably delays an initial search, the Board will toll backpay for that period, and will commence it if and when a reasonably diligent search begins. *See Marlene Industries Corp.*, 183 NLRB 50, 54-55, 59 (1970) (discriminatee's backpay tolled for initial six-week period, despite subsequent successfully diligent job search efforts). Here, neither Mares nor Avila waited an unreasonably long time before beginning their search for interim work. Despite the high unemployment rate in 2010, immediately upon being terminated by Respondent, both Mares and Avila began their search for work. In the case of Mares, since he had been employed by Respondent for a number of years, the first thing he did was to seek assistance to update his resume. Shortly thereafter, he began contacting employers and applying for interim work. In the

case of Avila, immediately after being terminated, he began submitting job applications to prospective employers.

Furthermore, despite Respondent's arguments, the evidence shows that both Mares and Avila made a reasonable search for work effort. In the case of Mares, from about July 2010 through December 2010, he received state unemployment benefits. On his part, Avila received unemployment benefits from about December 2010 through June 2012. The Board has stated that "registration with a state unemployment office is *prima facie* evidence of a reasonable search for employment." *Avery Heights*, 349 NLRB 829, 834 (2007); *Bauer Grp.*, 337 NLRB 395, 399 (2002); *Cassis Mgmt. Corp.*, 336 NLRB 961, 968 (2001); *Allegheny Graphics*, 320 NLRB 1141, 1145 (1996). Accordingly, Mares' and Avila's registration with the unemployment office without more establishes that while they were receiving unemployment benefits, they both engaged in a reasonable search-for-work during that time period.<sup>17</sup>

During the seven-month period that Mares was unemployed, he actively looked for interim employment. Despite the limitations posed by his age, his limited English and formal schooling, as well as the high unemployment rate, Mares did all that a reasonable employee in his position would have done to obtain interim employment. While unemployed, Mares first updated his resume, called and visited over twenty-six prospective employers looking for work. Then, after over six-months of looking for work, Mares secured interim employment with Pacific

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<sup>17</sup> Respondent argues that backpay should be cutoff (or offset) during the period that the Discriminatees received unemployment benefits. However, the Board considers unemployment benefits to be collateral benefits (rather than interim earnings) and are thus not used to offset the gross backpay. *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *Paint America Servs.*, 353 NLRB 973 (2009). See also Jt. Exh. 1 Section 10554 Earnings and Income not Deductible from Gross Backpay.

Foods.<sup>18</sup> Since taking that job in January of 2011, Mares has worked for the same interim employer during the remainder of the backpay period (about five and a half years).

The only job offer that Mares declined during the backpay period was an offer for a lower paying position with another employer. Mares had no obligation to resign his position with Pacific Foods to accept a lower paying job. In fact, accepting a lower paying job could have been perceived as willful loss of income. *See e.g., Delta Data Sys. Corp.*, 293 NLRB 736, 738 (1989) (a discriminatee accepting a lower paying job too soon may be held as having incurred a willful loss if earnings by accepting an unsuitable work). There is no doubt that Mares mitigated his losses by engaging in a reasonable search for work effort during the entirety of the backpay period.

Similarly, Avila too faced some challenges in finding interim work primarily due to his limited formal school and the high unemployment rate. Avila's failure to obtain interim employment for about a year and a half, despite his efforts, does not provide evidence of the inadequacy of his job search. *Midwestern Pers. Servs.*, 346 NLRB 624, 627 (2006) ("the fact that [the discriminatee] was unsuccessful in his initial search for interim employment does not establish that he failed to conduct that search with reasonable diligence"); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966) (respondent cannot meet its burden of proof merely by presenting evidence of lack of employee success in obtaining interim employment or of so-called "incredibly low earnings"). The Board has held that in determining

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<sup>18</sup> The fact that Mares accepted a lower paying position to work for interim employer Pacific Foods than what he was earning while working for Respondent should have no bearing on Mares' backpay claim. Acceptance of interim employment which pay less than a discriminatee's former employment, does not necessarily establish that a discriminatee incurred a willful loss. *Associated Grocers*, 295 NLRB 806 (1989). For example, the Board has recognized that a discriminatee who has been having difficulty finding comparable employment may at some point "lower his sights" and seek and accept a lower-paying job. *Delta Data Sys. Corp.*, 293 NLRB 736, 738-39 (1989); *United Aircraft Corp.*, 204 NLRB 1068, 1068-69 (1973).

whether an individual claimant has made a reasonable search for work, the test is whether the record as a whole establishes the employee diligently sought other employment during the entire backpay period. *Saginaw Aggregates*, 198 NLRB 598, 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395, 398 (1972); *Neely's Car Clinic*, 255 NLRB 1420, 1424-25 (1981).

Based on the evidence, Avila made reasonable search-for-work effort by diligently looking for work during the backpay period thereby mitigating damages. Furthermore, despite the fact that Avila worked for five interim employers during the backpay period, once he obtained the job with AT&T, there were no major unemployment gaps from one employer to the other.

**2. Discriminatee Avila Reasonably Quit Interim Employment; the Interim Jobs either Posed Onerous Working Conditions or Avila Quit Interim Jobs for Better Paying Jobs**

Respondent argues that the Discriminatees' backpay claims should be limited (or tolled) because they quit or were discharged from interim employment. Respondent presented no evidence showing that Mares quit his interim employment. In fact, since January 2011 to the present, Mares has worked for only one interim employer. As to Avila, the evidence shows that during the backpay period, he quit his position with four interim employers. In the case of his job with AT&T, based on the onerous working conditions of the job, Avila's decision to quit was reasonable. Similarly, Avila's decision to quit his jobs with Macy's, LA Corr and Helados La Tapatia for better paying jobs was justifiable.

When a discriminatee is shown to have voluntarily quit interim employment, the burden shifts from the respondent to the General Counsel to come forward with evidence that the action was reasonable. *Taylor Machine Prods.*, 338 NLRB 831, 835 (2003); *Minette Mills, Inc.*, 316 NLRB 1009, 1010 (1995); *Big Three Industrial Gas*, 263 NLRB 1189, 1199 (1982). A voluntary

resignation is not a willful loss of employment “if the interim job is substantially more onerous or is unsuitable or threatens to become so... [or] when it is prompted by unreasonable working conditions.” *Lundy Packing Co.*, 286 NLRB 141, 144 (1987), *enfd.* 856 F.2d 627 (4th Cir. 1988).

In *Minette Mills*, 316 NLRB 1009, 1016-18 (1995), the ALJ found that the discriminatee “fearing for her health” reasonably quit her interim job because of the stress created by the nature of the job and her supervisor's unprofessional method of supervision.<sup>19</sup> Similarly, Avila was justified in quitting his job with AT&T based on the stress caused by the nature of the job. While working for AT&T, Avila spent his entire work-day trying to reach his sales quotas—a failure to do so could result in him being disciplined. This is a significant difference from when he worked for Respondent where employees were motivated to increase sales, but Respondent presented no evidence that there was a requirement for perishable sales drivers to meet any type of sales quotas or were otherwise subject to discipline for failing to meet certain sales quotas. In the case of Avila, having to meet the sales quotas caused him a significant amount of stress, which forced him to take FMLA on two separate occasions in 2014. Around October 2014, the second time that Avila was on FMLA leave, Avila made the decision not to return to his interim job. Based on the additional stress caused by the job with AT&T, Avila had no duty to keep working for this employer.

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<sup>19</sup> Compare with *Grosvenor Resort*, 350 NLRB 1197, 1201 (2007) (the Board found that the discriminatee was not justified in quitting an interim job simply because she was embarrassed by the comment of a co-worker made in the presence of customers. As a result, respondent was permitted an offset of an amount equal to that which she would have earned had she not quit, until she found another job.)

Regarding Avila's decision to quit his employment with Macy's and LA Corr, Avila left these jobs for jobs where he would work more hours or would be paid more.<sup>20</sup> A voluntary quit does not toll the period when it is prompted by unreasonable working conditions or an earnest search for better paying employment. *Winn-Dixie Stores*, 170 NLRB 1734, 1744 (1968). A couple of months after working for Helados La Tapatia, Avila similarly left this job to go work for Mel-O-Dee where at times he was making more than what he would have earned working for Respondent. Thus, there is no question that in moving around various interm employers, looking for better paying jobs opportunities, Avila mitigated his losses.

### **3. The Discriminatees did not Withdraw from the Labor Market**

In its defenses, Respondent argues that Avila is not eligible for backpay because he left the country for six months.

When a discriminatee becomes unavailable for employment or withdraws from the labor market, gross backpay is generally tolled for the period of unavailability. (Jt. Exh. 1, Section

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<sup>20</sup> With regards to his job at LA Corr, at the hearing, Respondent argued that Avila did not quit his job with LA Corr. (Tr. 621:10-25, 622:1-9; R Exh. 30) Rather, Respondent claimed that Avila was terminated from his warehouse position. Previously, at a deposition conducted by Respondent, Avila testified that while working at LA Corr, he was asked not to show-up anymore because he was sick and missed one-day of work (R Exh. 30, pg. 6). Where a discriminatee has been discharged by an interim employer, the Board will find a failure to mitigate if the discriminatee engaged in gross misconduct. *Ryder Sys.*, 302 NLRB 608, 610 (1991); *Atlantic Veal & Lamb Inc.*, 358 NLRB 616 (2012). The burden is on respondent to establish such deliberate or gross misconduct by the discriminatee which is has not done. *Gimrock Constr., Inc.*, 356 NLRB 529, 540 (2011). *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981), enfd. mem. 718 F.2d 1104 (7th Cir. 1983), cert. denied 469 U.S. 982 (1984).

In *Mid-America Machinery*, the employer attempted to establish that the discriminatee had incurred a willful loss of earnings by introducing a termination report which stated that he was discharged for "absenteeism, poor quality of work and bad attitude," and added in a handwritten notation, "drunk and disorderly." In the absence of evidence as to the precise circumstances surrounding the reference to "drunk and disorderly," however, the Board found that the employer had not established that the discriminatee had engaged in gross misconduct. *Id.* at 319. Thus, even assuming that Avila was asked to resign his position with LA Corr because he missed one-day of work, this in no way meets the Board's higher standard that Avila was terminated from LA Corr because he engaged in "gross misconduct."

10560 Unavailability for Employment or Withdrawal from Labor Market) When discriminatees take vacations, travel, attend to personal concerns or otherwise appear to be unavailable for employment, the circumstances of the case must be evaluated. *See, e.g., L'Ermitage Hotel*, 293 NLRB 924, fn. 2 (1989) (deducting one week's work of pay from the discriminatee's claim for the one week she travel outside the state as where she was did not submit any job applications that week and was not available to work).

Avila denied being out of the country for six months at any point during the backpay period. (Tr. 649:2-4) The only evidence that Respondent presented to show that Avila was unavailable for a significant amount of time were screenshots from Avila's online MySpace account. (R Exh. 19) These screenshots contained Avila's login comments and pictures Avila uploaded to his account. (R Exh. 19) Based on these comments and pictures, Respondent argues that Avila was outside the country for six months. (Tr. 649:5-8; R Exh. 19) However, there is nothing about Avila's login history or profile that supports Respondent's claims. On his MySpace account, referring to his login activity (not travels) Avila commented that he had not been on his MySpace account in a while. (Tr. 701:20-25; R Exh. 19(a), pg. 4). Furthermore, as to some of the pictures that Avila uploaded in 2011, Avila testified that those pictures were from a family trip taken in 2008. (Tr. 699:8-25) Avila specifically remembers that those pictures were taken in 2008 because they were taken during a family trip after his father recovered from a serious medical illness. (Tr. 699:8-25)

Contrary to Respondent's unsupported claims, during the backpay period, at most, Avila traveled outside the country on two separate occasions: one was a five-day trip around February or March of 2011 and the second was a two-week trip in 2014. (Tr. 700:1-13) The five-day trip in 2011 occurred while Avila was unemployed. As discussed above, when a discriminatee

receives unemployment, the Board treats that as *prima facie* evidence of reasonable search for employment. Here, simply leaving the country for a few days is insufficient to establish that Avila withdrew himself from the labor market and that backpay should be tolled. Furthermore, the two-week trip in 2014 took place while Avila was employed by AT&T. Given that at the time Avila was eligible for two-weeks of paid vacation, it is reasonable to assume that he used his paid vacation time to take a two-week trip.<sup>21</sup> Thus, there is no evidence that during the backpay period, either of the Discriminatees were unavailable for work.

#### 4. The Discriminatees Accurately Reported Interim Earnings

Throughout the hearing, Respondent claimed that the Discriminatees failed to report interim earnings and/or that they concealed interim earnings. At the hearing, Respondent questioned both Discriminatees as to monies deposited and/or transfers made to their respective bank accounts.

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<sup>21</sup> As to Mares, Respondent argues that his backpay should be cutoff (or tolled) during the period that Mares was incapacitated or limited to work due to an on-the-job injury or other medical condition as well as during the time that Mares received workers' compensation benefits. However, Respondent failed to submit any evidence in support of this defense. Contrary to Respondent's meritless claim, aside from the seven-month period that Mares was unemployed, Mares continuously worked for the same employer after his termination with no break in his employment. Further, there is no evidence that at any point during the backpay period, Mares received workers' compensation benefits. There is nothing to support a finding that the settlement executed with Respondent to settled alleged injuries that arose during Mares' employment with Respondent constitutes "workers' compensation benefits." In fact, the settlement itself states that "...this Compromise & Release includes an allocation of \$10,637 in consideration **for the applicant's Permanent Disability...**" (emphasis added). (R Exh. 14, pg. 12) Permanent disability benefits are not deemed interim earnings. *See* Jt. Exh. 1, Section 10554.1 Unearned Income and Collateral Benefits Not Deductible; Fringe Benefits Not Deductible: "To the extent the unemployment insurance benefits constitute permanent disability benefits, they are considered as reparations for the physical injury suffered, **and do not constitute interim earnings.**" (emphasis added)

Additionally, as to Respondent's claim that Mares started his own business company, Respondent similarly failed to support this claim and Mares flat out denied ever owning a trucking business at any point after being terminated by Respondent. (Tr. 471:1-25, 472:1-9)

**a. Mares Explained the Source of the Deposits/Transfers Reflected in His Bank Account Statements**

At the hearing, Respondent questioned Mares about a number of deposits/transfers made to his Chase bank account. Mares has a Chase bank account, which he owns jointly with his wife. (Tr. 1014:19-23; GC Exh. 31) Mares testified that certain deposits/transfers made to Chase account came from his mother-in-law's or his wife's own account with LBS Financial. (Tr. 1022:21-25, 1023:1-4, 1032:1-10) Mares does not have access to his mother-in-law's or wife's bank accounts. (Tr. 1027:15-17; GC Exhs. 30, 33) Regarding certain transfers/deposits that were made from his mother-in-law's bank account, before and after being terminated by Respondent, Mares' mother-in-law paid Mares and his wife about \$400.00 per month to live at their home and for other household expenses. (Tr. 1022:21-25, 1023:1-8, 1032:20-25, 1033:1-14) Not only do the monies that Mares received from his mother-in-law as rent payment not meet the definition of "interim earnings,"<sup>22</sup> the monies are rental income that Mares received even prior to his unlawful termination and should not be used to offset his backpay claim.<sup>23</sup>

Furthermore, while Respondent called into question a deposit made on about August 8, 2011 in the amount of \$14,553.47, Mares testified that those monies were to settle another matter with Respondent.<sup>24</sup> (Tr. 525:1-25, 526:1-10; R Exh. 25, pg. 3) Additionally, as to a deposit on about March 12, 2015, in the amount of \$3600.00, Mares, in looking at his federal income taxes

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<sup>22</sup> See generally Jt. Exh. 1, Section 10550 Interim Earnings Overview "All compensation earned by a discriminatee following the unlawful action (during the backpay period) must be considered as interim earnings."

<sup>23</sup> See Jt. Exh. 1, Section 10554 Supplemental Employment or Moonlighting. Stating that when a discriminatee holds a second job prior to his termination and continues that second job after the termination, the earnings from the second job are not used to offset against gross backpay.

<sup>24</sup> Respondent provided no evidence as to the terms of that settlement. (Tr. 402:6-9; R Exhs. 14, 17) The monies Avila or Mares received from any settlement executed with Respondent should not be used to offset their gross backpay, especially when the terms of the settlement are unknown.

for that year, testified that the deposit was his tax return. (Tr. 527:19-21, 1029:11-17; GC Exh. 32, 34; R Exh. 25, pg. 8) Similarly, regarding the source of a deposit on about February 7, 2011 for the amount of \$1090.58 and a deposit on about February 22, 2017 for about \$1071.18, upon realizing that his initial wage payments from Pacific Foods were paper checks, and that the deposit amounts were about what Pacific Foods paid him, Mares testified that those deposits represented interim earnings from Pacific Foods. (Tr. 528:17-20, 1015:12-24; 1046:1-8; R Exhs. 25 pg. 17, 56)

Mares credibly testified that during the backpay period he worked for only one interim employer—Pacific Foods. At no point during the backpay period did Mares work for any other employer nor did Mares receive cash payments for interim work performed. Mares was able to fully explain the cash deposits/transfers that appear on his (and his wife’s) bank account. Here, there is absolutely no evidence that Mares concealed any interim earnings.

**b. Avila Explained the Source of the Deposits Reflected in his Bank Accounts’ Statements**

Although there are a number of cash deposits made to Avila’s bank accounts, the fact that Avila’s benefits and interim earnings from his employers after his unlawful termination were not always directly deposited to his bank account explains why there are numerous cash deposits throughout the backpay period. For example, while working for AT&T, Avila had a retirement savings account. (Tr. 1101:14-15; GC Exh. 38) Avila testified that during the backpay period, on at least one occasion, he withdrew money from his retirement savings account and deposited those monies onto his bank account. (Tr. 1101:14-25, 1102:1-15; GC Exh. 38; R Exh. 34, pg. 6). Furthermore, while working for AT&T, AT&T issued Avila a Citibank debit card where AT&T deposited monies from various awards Avila received during his employment. (Tr. 1084:5-25; GC Exh. 36). Similarly, at times, Avila would withdraw the money from his Citibank debit card

and deposit those monies onto his bank account. (1085:15-19, 1086:22-25, 1087:1-25, 1088:1-6; GC Exh. 36; R Exh. 34). Additionally, during the backpay period, Avila worked for a total of five different employers. Only AT&T paid him through direct deposit. (Tr. 1088:13-14). The other four employers paid Avila with paper check, which after cashing he sometimes deposited some of those monies to his bank account. (Tr. 1089:8-9, 1090:10-14, 1091:21-22, 1093:15-16, 1094:21-22). Thus, based on the fact that Avila's interim earnings and benefits were not always directly deposited to his bank account, it is not uncommon to see these cash deposits in his bank statements throughout the backpay period.<sup>25</sup>

Furthermore, even though there were some deposits that Avila could not recall what they were for, given the passage of time—in that some of these deposits go back a several years—Avila should not be blamed for not recalling specifically the source of every single deposit made onto his bank account. *Unitog Rental Servs.*, 318 NLRB 880, 885 (1995); *Cibao Meat Prod.*, 348 NLRB 47, 47-48 (2006) (backpay is not denied where a discriminatee, through inadvertence, fails to reports interim earnings or displays minors imperfections in recordkeeping over an extended period of time); *see also Teamsters Local 469 (Coastal Tank Lines)*, 323 NLRB 210, 220 (1997) (the Board is not required to place the consequences of its delay, even if inordinate, on the wronged employees, to the benefit of wrong doing employers) *citing NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1970). Moreover, the Board has found that poor record keeping, uncertain memory and even exaggeration do not necessarily disqualify an employee from receiving backpay. *G & T Terminal Packaging Co.*, 356 NLRB 181, 190 (2010); *Teamsters*

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<sup>25</sup> On his MySpace profile, on or before 2011, Avila wrote that he was a band promoter, making \$60-70,000. (R Exh. 19(a)) At the hearing, Avila denied ever being a band promoter or receiving any type of compensation for such work. (Tr. 697:14-22, 698:1-25, 699:1-6). The only reason Avila selected that figure was simply because that figure was an option available by the website. (Tr. 698:18-25, 699:1-6) Avila's social media comments, like everyone else's, should not be taken at face value, especially when nothing on the record supports a finding that at any point during the backpay period Avila was a band promoter or made the amount reported on his social media account.

*Local 509 (ABC Studios)*, 357 NLRB 1668, 1674 (2011).

For example, in *Midwestern Personnel Servs., Inc.*, 346 NLRB 624, 627 (2006), the Board found that even though a discriminatee could not remember with specificity the dates of his job application—which the Board attributed to the five year delay between his search for work and the hearing—that was insufficient to show that the discriminatee failed to mitigate damages. *See U.S. Can Co.*, 328 NLRB 334, 356 (1999), *enfd.* 254 F.3d 626 (7th Cir. 2001) (discriminatee not barred from receiving backpay where he claimed to have made three job contacts per week but was unable to recall the name of a single employer he contacted, after 5-year lapse between job search and testimony); *Allegheny Graphics Inc.*, 320 NLRB 1141, 1145 (1996) (discriminatee's testimony was sufficient to show that he made a reasonable effort to mitigate his loss of income over the backpay period as a whole, despite his poor memory and failure to keep adequate records of his job search efforts). Similarly, in this case, given the passage of time, it is reasonable that Avila would not recall the source of every single deposit made to his bank account. More importantly, Avila's failure to remember every single deposit made to his bank account in no way supports Respondent's claim that he concealed interim earnings.<sup>26</sup>

Based on these facts, as supported by case law, Respondent failed to show that during the backpay period either of the Discriminatees failed to report/concealed interim earnings.

## **5. Interim Expenses and Interest is Owed to the Discriminatees**

Respondent argues that the Discriminatees did not incur search-for-work expenses.

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<sup>26</sup> As to the fact that Avila at times helped with father with his business, given that he had engaged in this work prior to his termination, these earnings are not used to offset his gross backpay. (Jt. Exh. 1, Section 10554 Supplemental Employment or Moonlighting. Stating that when a discriminatee holds a second job prior to his termination and continues that second job after the termination, the earnings from the second job are not used to offset against gross backpay).

Respondent also argues that any search-for-work expenses must be limited to quarters in which Mares' and Avila's interim earnings equaled or exceeded their lost earnings and expenses. Thus, Respondent argues that it should not be liable for quarters where the Discriminatees incurred search-for-work expenses, but had no earnings for those quarters. Respondent further denies that any interest is owed to the Discriminatees and that if any interest is owed, it should be tolled for the General Counsel's excessive delay in initiating backpay proceedings.

First, under a make-whole-remedy approach, it is appropriate for discriminatees to receive full reimbursement for interim expenses incurred during the backpay period regardless of whether the discriminatees received interim earnings during the period. Here, the Compliance Officer testified (and that Discriminatees corroborated) that both of the Discriminatees incurred search-for-work expenses in the form of additional commuting mileage in searching-for and maintaining interim employment. *Interstate Bakeries*, 360 NLRB 112 (2014) (Board affirmed the ALJ's findings that discriminatee was entitled to additional mileage incurred interim while employed by the interim employer). As described in above (Section II, C, 2), the Compliance Officer explained the methods she used to calculate the additional mileage incurred by each Discriminatee. In essence, the Compliance Officer determined the additional mileage that the Discriminatees traveled from their homes to look for work or to work for their interim employers.

Despite Respondent's argument that interim expenses should only be owed for quarters in which the Discriminatees incurred interim expenses, the Board in *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 4-12 (2016), *enfd. in relevant part* 859 F.3d 23 (D.C. Cir. 2017) addressed this very issue and held that a respondent must compensate a discriminatee for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim

earnings. Thus, irrespective of whether Mares and Avila earned interim earnings for a particular quarter, if they incurred additional mileage in looking for or maintaining interim employment, Respondent must compensate them for those expenses.

Similarly, Respondent argues that no interest is owed to either of the Discriminatees. In the alternative, Respondent argues that if interest is owed, it must be tolled for the General Counsel's unreasonable and excessive delay in initiating backpay proceedings. Here, the Compliance Officer testified that interest is owed to both Discriminatees (which continues to accrue until payment is made to Discriminatees). It is settled law that delay in compliance matters by the Agency will not toll backpay owed to discriminatees under the principle that discriminatees should not be penalized for the Agency's acts or omissions. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1970); *Harding Glass Co.*, 337 NLRB 1116 (2002); *Unitog Rental Servs.* 318 NLRB 880 (1995); *Carrothers Constr. Co.*, 274 NLRB 762 (1985). In *Rutter-Rex Mfg. Co.*, the Court noted that "Wronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrong doing employer ... and the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *supra* at 264-265.

In line with this principle, the Board has rejected arguments that the doctrine of laches should be applied to penalize discriminatees for the conduct of Regional Offices in compliance matters. *Aroostock Cnty. Reg'l Opthamology Ctr.*, 332 NLRB 1616, 1618-19 (2001); *Carrothers Constr. Co Inc.*, 274 NLRB 762, 762-63 (1985); *Smyth Mfg. Co.*, 277 NLRB 680, 692 (1985). Here, the Discriminatees should likewise not be penalized for the Board's and the General Counsel's delay. The fact that the unfair labor practice hearing took place in 2011 and the backpay hearing did not commence until August 8, 2017 does not render a different result. In

fact, the Board in *Aroostock Ophthalmology Ctr.*, *supra* at 1618-19, and *Yorkaire, Inc.*, 328 NLRB 286, 287-288 (1999), rejected respondent's arguments that interest on backpay should be tolled where backpay specifications were not issued until more than three years after the circuit court orders. *See also Harding Glass Co., Inc.*, 337 NLRB 1116, 118 (2002) (Board rejected respondent's argument that the amended compliance specification should be dismissed because the amended compliance specification issued more than two years after the original compliance specification).

Thus, in accordance with Board law, the Discriminatees should be compensated for interim expenses incurred to search-for or maintain interim employment and awarded interest.<sup>27</sup>

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<sup>27</sup> In its affirmative defense, Respondent argues that it owes no backpay and the backpay period should be tolled because the Board lacked a proper quorum. In support of this assertion Respondent cites *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 137 S. Ct. 929, 933 (2017). *NLRB. V. SW General, Inc.*, did not have anything to do with the Board lacking a proper quorum. Rather, that case held that the Federal Vacancies Reform Act prohibits a person who has been nominated to fill a vacant Presidential appointment and Senate confirmation office from performing the duties of that office in an acting capacity. In that case, the Court found that in January 2011, when the President nominated then Acting General Counsel Lafe Solomon (Solomon) to serve as the NLRB's general counsel, Solomon was prohibited from serving in the capacity of "Acting General Counsel." As a result, the Court found that a complaint issued against a respondent-- when Solomon was prohibited from continuing to act as Acting General Counsel-- was invalid. Here, Respondent attempts to raise an argument that they could and should have raised during the unfair labor practice proceedings, which Respondent failed to do. The issue here pertains only to the Amended Compliance Specification that issued on May 31, 2017. There is no question that the Board was authorized to issue the Amended Compliance Specification and Respondent raises no valid arguments to the contrary. Respondent also argues that backpay should be tolled because of the Board's unreasonable and excessive delay in initiating backpay proceedings. On June 22, 2011, ALJ William Kocol found that Respondent unlawfully terminated Mares and Avila. Since then, Respondent has been exhausting the appeals process, causing a delay of time. It was not until May 19, 2016 that the United States Court of Appeals for the D.C. Circuit entered its Judgment enforcing the Board's Order. Once the D.C. Circuit entered its Judgment enforcing the Board's Order the Region was then able to issue a compliance specification. About a year later, once the Region obtained the information necessary, the Region issued the Amended Compliance Specification. Thus, any delay caused by the processing of the unfair labor practice case should not be used against the Discriminatees to reduce their backpay claims. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1970) (noting that employees are not to be penalized because there has been a delay). In its Answer, Respondent likewise fails to submit any case law in support of its argument that backpay should be tolled from January 25, 2013 through November 18, 2014, when the DC Circuit, upon consideration of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), placed the case in abeyance.

**6. The Settlements the Discriminatees Signed with Respondent do not Meet the “Reasonableness” Standard and in no Way Bar or Limit the Discriminatees’ Backpay Claims**

In its affirmative defenses, Respondent also argues that backpay must be tolled on the date that Mares agreed to a no-hire provision with the Respondent in a private settlement agreement. (R Exh. 14) Similarly, Respondent argues that Avila signed a general release with Respondent, which in turn released his backpay claim. (R Exh. 17) Furthermore, based on the settlement that Avila entered into with Respondent, Respondent argues that backpay should be cutoff (or offset) by the amount of monies that Mares and Avila received as class members from that settlement. (R Exhs. 18, 23)

**a. Settlements Signed by the Discriminatees**

During the backpay investigation and at the hearing, Respondent submitted two settlement agreements that Respondent signed with the Discriminatees. (Tr. 389:17-13, 402:7-9; R Exhs. 14, 17) Respondent claims that these two settlements preclude Mares and Avila from receiving any monies in this proceeding.

On about August 15, 2012, Mares settled a workers’ compensation claim with Respondent for alleged injuries he had sustained while working for Respondent before being unlawfully terminated. (Tr. 388:1-9; R Exh. 14) In exchange, Mares received about \$25,000.00. (R Exh. 14) The settlement agreement includes the following clause: ONLY ISSUES INITIALED BY THE APPLICANT AND HIS/HER REPRESENTATIVE AND DEFENDANTS OR THEIR REPRESENTATIVES ARE INCLUDED WITHIN THIS SETTLEMENT. (R Exh. 14, pg. 8) Mares and Respondent both initialed the “employment” section. (Tr. 513:21-25, 514:22-25, 515:4; R Exh. 14, pg. 8) Based on both parties having initialed the employment section, Respondent argues that Mares’ backpay claim is tolled because

in settling his workers' compensation claim Mares agreed to a no re-hire provision and Mares had no intention of returning to work for Respondent.

Regarding Avila, on about July 29, 2016, Avila, as part of a class settlement, settled a wage-and-hour claim against Respondent. (Tr. 395:7-11; R. Exh. 17) The settlement, among other things, was for alleged meal and rest-break violations that occurred while Avila was employed by Respondent. (R Exh. 17) In exchange for the settlement, Avila received about \$5,000.00. (R Exh. 17, 18) Since this was a class action settlement, Mares, who was part of the class, received a check for about \$182.52.<sup>28</sup> (R Exh. 23) The settlement includes the following General Release of Claims:

Plaintiff, individually and on behalf of Plaintiffs heirs, executors, administrators, representatives, attorneys, successors and assigns knowingly and voluntarily releases and forever discharges Defendant, including its parent corporation, affiliates, subsidiaries, divisions, predecessors, insurers, successors and assigns, and their current and former employees, attorneys, officers, directors and agents thereof, both individually and in their business capacities, and their employee benefit plans and programs and the trustees, administrators, fiduciaries and insurers of such plans and programs (collectively, the "Released Parties"), to the full extent permitted by law, of and from any and all claims, known and unknown, asserted and unasserted, which Plaintiff has or may have against the Released Parties as of the date of execution of this Settlement Agreement including, but not limited to, any alleged violation of.

The settlement then lists various federal laws that Respondent argues Avila released the Respondent from further legal action. (R Exh. 17 pgs. 3, 4) Based on this, Respondent argues that Avila is not eligible for backpay because he signed the above general lease, which in turn released his backpay claim before the NLRB.

**b. The Settlements Signed by the Discriminatees Do Not Meet *Independent Stave's* "Reasonableness" Standard**

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<sup>28</sup> Mares did not sign this settlement.

Non-Board settlements, such as the ones signed by Mares and Avila with Respondent, are governed by the standards of *Independent Stave Co.*, 287 NLRB 740 (1987); *see also UPMC*, 365 NLRB No. 153 (2017) (in determining whether an ALJ is permitted to approve a consent settlement agreement over the General Counsel’s objections, the Board held that it would apply the “reasonableness” standard set forth in *Independent Stave*). In evaluating whether to approve a non-board settlement, the Board will consider the position of the General Counsel, as well as the following factors: 1) whether the terms are reasonable in light of the violations, the uncertainty inherent in litigation, and the current stage of litigation, 2) whether all parties, including the respondent, the charging party, and all affected employees agree to be bound by the settlement, 3) whether there is any indication that the agreement was reached through coercion, fraud, or duress, 4) whether there is any respondent history of violations or breach of previous unfair labor practice settlement agreements.

The non-Board settlements signed by Mares and Avila do not meet the “reasonableness” standard set forth in *Independent Stave* and should not be used to toll or otherwise limit the Discriminatees’ backpay claims against Respondent. For example, in *Weldun Int’l, Inc.*, 321 NLRB 733 (1996), the Board affirmed the ALJ’s rejection of respondent’s argument that private non-Board settlements entered into with five discriminatees barred further litigation involving those individuals. In *Weldun*, the ALJ rejected respondent’s argument on the grounds that the settlements were not presented or approved by the General Counsel. *Id.* at 754. The ALJ also noted that the private settlements did not “include a provision for reinstatement.” *Id.* Similarly, in *Webco Indus.*, 334 NLRB 608 (2001), the Board upheld the ALJ’s rejection of a similar settlement. In *Webco*, the Board found that “[the discriminatee] did not waive his right to obtain relief under the Act by signing a severance agreement in which he purported to release the

Respondent from all legal claims arising from his employment with respondent, including those arising under the Act.” *Id.* at 610. Based on this, as well as the charging party union’s objections and the respondent’s history of committing serious violations of the Act, the Board concluded that the private settlement did not meet the *Independent Stave* standard.

Likewise, here, the General Counsel objects to either of these two settlements from precluding the Discriminatees’ backpay claims. At no point prior to the signing of the settlements was the General Counsel made aware of or consulted with. In fact, the General Counsel did not know of the existence of such settlements until after they were executed by the parties. In the case of Mares, although the settlement was executed in 2012, Respondent did not make the General Counsel aware of the existence of such settlement until early 2017.<sup>29</sup> Furthermore, neither of the Discriminatees intended to release their NLRB claims as a result of these settlements for different matters completely unrelated to their NLRB claims. In the case of the settlement entered into with Mares, Respondent argues that by checking-off the employment section, Mares agreed to a no re-hire clause. However, there is nothing in the settlement that addresses his NLRB claim against Respondent. Similarly, regarding the private settlement entered into with Avila on July 29, 2016, where the Respondent argues that the general release signed by Avila released his backpay claim, despite the fact that on May 19, 2016, the United States Court of Appeals for the D.C. Circuit entered its Judgment enforcing the Board’s Order, two months later, Respondent and Avila entered into a private settlement agreement which makes absolutely no reference to Avila’s NLRB case. In settling the wage and hour claim, the parties could have unequivocally included language to similarly settle their NLRB case, but the parties chose not to do so. In the absence of such language, it is reasonable to conclude that the

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<sup>29</sup> Likewise, at no point prior to making the Discriminatees offers of reinstatement did the Employer raise the settlements as an affirmative defense.

parties had no desire to also settle their NLRB case.<sup>30</sup>

Applying the reasonableness standard, in *Beverly California Corp.*, 329 NLRB 977 (1990), the Board affirmed the ALJ's findings that the private settlement executed between the discriminatees and the respondent did not comport with *Independent Stave*. In doing so, among other things, the ALJ similarly noted the General Counsel's opposition (as well as the fact that the General Counsel was not consulted) and the unreasonableness of the terms. *Id.* at 986. As to the unreasonableness of the terms, the ALJ noted that when the settlement agreements were signed, an ALJ had already determined that respondent had unlawfully discharged the discriminatees. Thus, the litigation risks had been significantly reduced. *Id.* Having prevailed at the hearing, the discriminatees were in better negotiation positions. *Id.* Secondly, in finding that the terms of the settlement were unreasonable, the ALJ focused on the method used to calculate the discriminatees' backpay claims—which were not in accordance with the NLRB's backpay computation methods. *Id.* By failing to follow the NLRB's backpay guidelines, the parties wrongly determined that the discriminatees' backpay claims were about 15-17 percent of their actual backpay claim. *Id.* Based on this, the ALJ determined that the “amounts were not reasonable given the state of the litigation.” *Id.*

As in *Beverly California Corp.*, the ALJ should find that settlement agreements executed by the Discriminatees do not meet the reasonableness standard, because, among other things, the terms of the settlements (including monies paid to the Discriminatees) are beyond absurd. Given that the NLRB was not informed of or consulted before either of the two settlements was

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<sup>30</sup> Additionally, with regards to both settlements, at no point prior to the execution of the settlements did Respondent make either Discriminatee an offer of reinstatement. *See Federal Screw Works*, 310 NLRB 1131, 1139 (1993) (finding that “A payment of severance pay cannot be considered to be a substantial remedy in circumstances involving illegal termination where the normal remedy includes reinstatement and backpay.”) Thus, neither Mares nor Avila could have waived reinstatement when Respondent had yet to make them both offers of reinstatement.

executed by the Discriminatees, and that the NLRB did not provide settlement figures for the parties to consider when executing the settlements, the settlements do not release Respondent from its obligations to pay the Discriminatees for their unlawful terminations. When the Amended Compliance issued, the backpay claim for Mares totaled about \$151,014.00 (plus taxes and interest) and for Avila it totaled about \$162,528.00 (plus taxes and interest). Here, Respondent settled a workers' compensation claim with Mares for about \$25,000.00 and a wage and hour claim with Avila for a mere \$5,000.00, both settlement amounts clearly fall far below the NLRB's calculations and are beyond unreasonable to conclude they substitute for backpay owed to the Discriminatees. Furthermore, Respondent introduced no evidence to show that the settlement figures were calculated in accordance with the NLRB's backpay guidelines and procedures.

In some instances—which are not present here—the Board has found certain private settlements to meet the reasonableness standard. For example, in *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007),<sup>31</sup> the Board found the settlement agreements to be reasonable “...in light of the violations alleged and the litigation risk presented.” *Id.* at 615. In that case, when the settlement agreements were executed, no charges had been filed, and thus the litigation risk was unknown. *Id.* The Board further noted that respondent did not have a history of violating the Act. *Id.* at 616. Two of the factors that the Board relied on in finding that the private settlements were reasonable are not present in this case. First, the backpay hearing is simply to

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<sup>31</sup> See also *Hughes Christensen Co.*, 317 NLRB 633,634 (1995) (finding that the release agreements met the *Independent Stave* standards because “...Respondent's agreement to pay enhanced severance benefits in exchange for the employees' agreement to waive and release any preexisting employment-related claims that they may have had against the Respondent was a reasonable adjustment in light of the potential costs and risks inherent in any litigation. At the time the agreements were signed, the charges filed on behalf of the alleged discriminatees had been dismissed by the Regional Director and had not yet been reinstated by the General Counsel... Further, the Respondent does not have a history of violating the Act, and there is no evidence that it has breached settlement agreements in the past.”)

determine the amount that is owed to each of the Discriminatees. Way before the settlements were signed, on June 22, 2011, an ALJ determined that Respondent had unlawfully terminated the Discriminatees. Thus, unlike in *BP Amoco*, the litigation risk is extremely low. Second, unlike the respondent in *BP Amoco*, an ALJ, and the Board, found that this Respondent committed serious violations of the Act by unlawfully terminating the employees. Thus, based on these two facts alone, the settlement agreements signed by the Discriminatees clearly do not meet the reasonableness standard set forth in *Independent State*.

In conclusion, based on the General Counsel's opposition to these settlements, the unreasonableness of the settlement terms (both, the monies received by the Discriminatees and that they were executed when the litigation risk was relatively low), and Respondent's history of violating the Act, the ALJ should find that the settlement agreements signed by the Discriminatees do not bar their backpay claims. Additionally, given that these settlement agreements were entered to settle allege claims that arose during the Discriminatees' employment with Respondent, the settlement monies should not be used to offset the Discriminatees' backpay claims. Here, the backpay claims are to make the Discriminatees whole for Respondent's unlawful termination and monies they lost after they were terminated. Thus, these settlement monies in no way represent interim earnings that the Discriminatees earned during the backpay period and thus should have no bearing on their backpay claims.

### **III. ADVERSE INFERENCES ARE UNWARRANTED IN THIS CASE**

Discriminatees Mares and Avila were unlawfully terminated by Respondent in 2010. For the past eight years, Respondent has failed to make Mares and Avila whole for the losses they sustained as a result of Respondent's unlawful conduct. At the hearing, in an attempt to distract the focus from Respondent's unlawful actions against the Discriminatees, Respondent wrongly

accused the Discriminatees of failing to produce subpoena documents or failing to produce them in a timely manner.

On February 28, 2018, on the last day of the hearing, the ALJ asked the parties to address the issue of whether the Discriminatees' subpoena production or delay thereof was egregious, intentional, and/or willful and whether an adverse inference could be inferred based on the Discriminatees' conduct. (Tr. 1143:7-20)

As supported by the record, Mares and Avila diligently produced all responsive documents in their possession to Respondent and Respondent also had an opportunity to question the Discriminatees at the hearing. Therefore, adverse inferences are unwarranted. More importantly, the purpose of this compliance matter should be on how much Respondent owes to each of the Discriminatees for unlawfully terminating them more than eight years ago.

## **A. Statement of Facts**

### **1. Subpoenas Issued to Discriminatees**

Prior to the Compliance hearing that commenced on August 8, 2017, Respondent served subpoenas duces tecum on each of the Discriminatees requesting numerous documents. (Tr. 10:19-25, 11:16-25, 12:1-8; R Exhs. 1-5) Respondent served two subpoenas on Mares and one on Avila. (R Exhs. 1-5) In Subpoena B-1-WJPXPR issued to Mares and Subpoena B-1-WJQ1M1 issued to Avila, Respondent, among other things, requested voluminous records from the Discriminatees, including all records of payments received by Mares and Avila, including income tax returns, W-2 Wage and Tax Statements, 1099s, and bank statements covering the entirety of the backpay period. (R Exhs. 1, 3-5) As to Subpoena B-1-VTSNU5 (and duplicative Subpoena B-1-VTWTK5), Respondent requested documents from Mares' non-existent trucking company. (Tr. 472:1-9; R Exhs. 1, 2, 57)

## 2. Discriminatees Produced Documents in Their Possession

Throughout this proceeding, both Discriminatees have been unrepresented by counsel and have done their best to comply with Respondent's subpoenas requests.<sup>32</sup> They are regular people who work full-time jobs and attempted to provide documents in response to a very lengthy and legally complex subpoenas. There is not one shred of evidence that their document production over the course of the hearing pursuant to the subpoena was intentional, willful or egregious. Rather, the Discriminatees tried to the best of their ability to produce documents that they were able to obtain or had in their possession.

On the first day of the Compliance hearing, Mares turned over to Respondent most of his W-2 Wage and Tax Statements from 2010 through 2016 as requested by Respondent and Avila none pursuant to the subpoenas. (ALJ Exh. 1(d), pgs. 8, 14) At the time, ALJ Thompson ordered Mares and Avila to make a better due diligence search for the documents requested by Respondent and instructed Mares and Avila to bring the documents the following day.

The next day, on August 9, 2017, before going on the record, both Mares and Avila, after a diligent search effort, brought a substantial amount of documents in response to the subpoenas and provided those documents to Respondent. Mares, among other things, provided Respondent with a copy of all his income tax returns from 2010 through 2016; all of his W-2 Wage and Tax Statements from 2011 through 2016; earnings statements from his one interim employer; Employment Development Department (EDD) forms related to his unemployment claim; and all of his bank statements from 2011 through 2016. (Tr. 262:14-19; 1048:15-21, 1064:10-19; R

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<sup>32</sup> At various points throughout this hearing, Respondent made statements about the Discriminatees being represented by counsel in other non NLRB matters. (Tr. 263:3-7, 264:1-3, 264:24-25, 265:1-13) Not only is this irrelevant, but it is also highly prejudicial for the ALJ to consider the Discriminatees' representation in other non-NLRB matters. Similarly, the ALJ's comment insinuating that the Discriminatees are experienced with subpoenas is unsupported by the record, as there is nothing in the record that demonstrates that in the past these Discriminatees have been served with subpoenas. (Tr. 912:2-12)

Exhs. 24, 25, 56, 57, 58). In the case of Avila, he provided Respondent with five handouts regarding job openings obtained from two job fairs he attended; W-2 Wage and Tax Statements for tax year 2014; federal income tax return forms for tax year 2014; complete payroll documents for one of his interim employers; some payroll documents from another interim employer; EDD documents related to unemployment benefits Avila received during the backpay period, among other things. (ALJ Exh. 1(d), pg. 13; R Exhs. 16, 60).

Furthermore, on August 10, 2017, the third day of the hearing, after hearing that Respondent was claiming that Mares owed a trucking company—which Mares categorically denied—Mares provided Respondent with a photograph of a truck he had owned before being terminated by Respondent and a copy of his resume. (Tr. 471:18-25, 472:1-9; ALJ Exh. 1(d) pg. 14; GC Exh. 21; R Exh. 10). On his part, on the third day of the hearing, Avila produced bank statements from the bank accounts he maintained during the backpay period. (ALJ Exh. 1(d) pg. 13; R Exh. 34).<sup>33</sup>

### **3. Discriminatees Continue to Produce Documents in Their Possession, the ALJ Issues Evidentiary Sanctions Against the General Counsel and the General Counsel Files a Special Appeal**

Despite the Discriminatees' diligent efforts to comply Respondent's subpoena requests, Respondent expressed that neither Mares nor Avila had fully complied with the subpoenas. (Tr. 110:14-25) Before issuing evidentiary sanctions, neither Mares nor Avila were afforded an opportunity to explain on the record that they had produced all responsive documents in their possession. (Tr. 412:5-11) On August 10, 2017, as a result of what the ALJ deemed to be an

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<sup>33</sup> Mares was called by Counsel for the General Counsel to testify on August 10, 11, 2017 (Tr. 249:2-4, 439:2-4). Avila was called to testify on August 11, and 15, 2017 (Tr. 439:2-4, 670:2-3). Mares also testified on rebuttal on September 6, 2017 (Tr. 881:2-4). Both Mares and Avila testified on February 28, 2018. (Tr. 994:3-5) At all times, Mares and Avila were questioned by Respondent during cross-examination.

incomplete production of documents, the ALJ issued a ruling prohibiting Counsel for the General Counsel from examining witnesses (with the exception of the Compliance Officer) with regards to the Discriminatees' interim earnings. (Tr. 258:5-25, 259:1-13) As a result of the ALJ's sanctions against Counsel for the General Counsel, on August 11, 2017, Counsel for the General Counsel filed a Special Appeal to the ALJ's ruling prohibiting Counsel for the General Counsel from questioning witnesses about interim earning. (GC Exh. 24)

#### **4. ALJ Issues Expanded Evidentiary Sanctions Against Avila and the General Counsel, but not Mares**

On August 14 and 15, 2017, Discriminatee Avila testified and was subject to cross examination. While testifying, Avila became aware that he had not produced a copy of his resume to the Respondent. (Tr. 596:19-24) The next day, before going on the record, Avila provided a copy of his resume to Respondent. (Tr. 676:10-19; R Exh. 35) When Respondent questioned Avila about his resume, Avila acknowledged that there was an updated version of his resume on the website Indeed.com. (Tr. 710:4-21) Although Avila had provided a resume to Respondent, Avila failed to realize that Respondent wanted an updated copy of his resume. (Tr. 710:9-14) On August 29, 2017, citing Avila's failure to timely produce his Indeed resume, Respondent filed a Motion for Expanded Evidentiary Sanctions against Discriminatee Avila and on September 5, 2017, Respondent filed a Motion for Expanded Evidentiary Sanctions against Discriminatee Mares. (R Exhs. 54, 55)

On August 29, 2017, once Avila became aware that Respondent was waiting for a copy of his Indeed resume, Avila promptly provided a copy of said resume to Respondent. On September 6, 2017—relaying Avila's failure to timely produce his Indeed resume—ALJ Thompson granted Respondent's Motion for Expanded Evidentiary Sanctions against Discriminatee Avila, noting that Avila had willfully failed to produce the subpoenaed documents

that were readily available to him or that he could have reasonably obtained. (Tr. 962:3-25, 963:1-25, 964:1-25, 965:1-8, 13-25, 966:1) The ALJ also prohibited Counsel for the General Counsel for questioning Avila regarding his search-for work efforts on rebuttal.<sup>34</sup> (Tr. 965:10-11) On September 6, 2017, the record closed for the first time.

**5. The Board Grants the General Counsel's Special Appeals and ALJ Agrees to Re-Open the Record and Rescinds Her Expanded Evidentiary Sanctions Against Discriminatee Avila and the General Counsel**

The day after the hearing record closed, on September 7, 2017, the Board issued an Order granting Counsel for the General Counsel's Special Appeal, finding that the ALJ abused her discretion by ordering an unduly harsh evidentiary sanction against Counsel for the General Counsel based on the Discriminatees' failure to fully produce responsive documents. (ALJ Exh. 1(a))

In light of the Board's Order, on February 1, 2018, the ALJ ordered the record to re-open to afford the General Counsel an opportunity to question the Discriminatees about their interim earnings. (ALJ Exh. 1(j)) The ALJ also rescinded her expanded evidentiary sanctions against Avila and the General Counsel. (ALJ Exh. 1(j))

**6. Discriminatees Produced Additional Documents to Respondent Prior to the Last Day of the Hearing and Testified as to their Efforts to Comply with Respondent's Subpoena Requests**

More than two weeks before going back on the record, on about mid-February 2018, Mares and Avila provided additional documents to Respondent that they had secured since the

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<sup>34</sup> As to Mares, ALJ Thompson denied Respondent's request for expanded evidentiary sanctions. (Tr. 966:2-16)

last day of the hearing on September 6, 2017.<sup>35</sup> In the case of Mares, he provided three additional pieces of documents to Respondent: 1) a copy of his Work Source card, which Respondent had previously obtained during the hearing (GC Exh. 18); 2) a copy of his mother-in-law's bank account statement; and 3) a copy of his wife's bank account statement.<sup>36</sup> (R Exh. 57) Similarly, Avila provided Respondent with the following documents: 1) a copy of his IRS Account Transcript from 2010-2015; 2) EDD earning debit card record; 3) Fidelity 1099 for 2015 and 2016; and 4) his AT&T Orange Reward debit card statement. (GC Exhs. 36-38; R Exhs. 59, 62) At the time, Avila notified Respondent that he was waiting for his Fidelity retirement account statements, which Avila provided shortly thereafter to Respondent. (GC Exh. 38; R Exh. 59)

On February 28, 2018, the last day of the hearing, Respondent and the ALJ questioned Mares and Avila about their subpoena compliance.

For example, during the hearing, the ALJ questioned Mares as to the documents he had turned over to Respondent in response to the subpoenas. (Tr. 1059:20-25, 1060:1-3, 1064:4-25, 1065:1-25, 1067:1-25, 1068:1-25, 1069:1-25, 1071:1-25, 1072:1-25). Prior to the hearing, Mares, with his wife's assistance, prepared a letter for Respondent summarizing the documents he had produced to Respondent and noted where there were no responsive documents to the subpoena. (R. Exh. 57) When asked by the ALJ as to whether he has produced documents in response to the subpoena request, for a few paragraphs, Mares responded that he had although the letter he sent to Respondent stated that there were no responsive documents for those particular subpoena requests. (Tr. 1059:20-25, 1060:1-3, 1064:4-25, 1065:1-25, 1067:1-25, 1068:1-25, 1069:1-25,

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<sup>35</sup> During the period September 6, 2017 and February 28, 2018, when the record was effectively closed, the Discriminatees had no obligation to produce any documents to Respondent.

<sup>36</sup> Although not covered by the subpoena request, Mares nonetheless produced documents 2 and 3 to Respondent. (R Exhs. 1-3, 57)

1071:1-25, 1072:1-25; R Exh. 57)

Despite his ambitious testimony, Mares was not intentionally misleading the ALJ or Respondent about the documents he had produced to Respondent. On the contrary, all along Mares has diligently made every effort to produce whatever documents Respondent was requesting. Any discrepancy between what Mares testified to at the hearing and his letter to Respondent as to what he had produced is due to the fact that this is an ordinary person trying his best to comply with legal matters that are far-above his full understanding. (Tr. 1073:1-13, 1075:1-17) Additionally, Mares speaks and understands limited English, thus, he has had to rely on his wife's assistance in trying to fully cooperate with Respondent's subpoenas.<sup>37</sup> (Tr. 1073:1-13, 1073:17-25, 1074:1-25)

As to Respondent, his questions towards Mares on the last day of the hearing were focused on his alleged failure to produce bank statements from June 2010 through December 2010; Mares' alleged failure to produce communications he had with the NLRB; and records of payment Mares may have received from settlements during the backpay period. (Tr. 1077:2-10, 1055:6-10, 1056:3-6, 1076:3-25, 1077:1). Mares' testimony further confirmed that he has produced all responsive documents in his possession. (R Exh. 57) First, as to the bank statements from 2010, Mares testified that because the records date back to 2010, the bank had been unable to produce those documents. (Tr. 1077:2-10) Furthermore, as to records of settlements Mares entered into, while Mares appeared to be confused as to what specifically Respondent was requesting, aside from the settlements that Mares entered into with Respondent, Mares testified that he did not enter into any other settlement with any other employer during the backpay period. (Tr. 1076:3-25, 1077:1, 22-25, 1078:1) Thus, any settlement Mares signed with

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<sup>37</sup> It is worth noting that despite the fact that Respondent is well aware that Mares does not read English, Respondent made no effort to translate the subpoenas for Mares. (Tr. 418:1-6; R Exhs. 1-2)

Respondent, Respondent has had all along.

Regarding the documents that Mares received from the NLRB, while Mares acknowledged that there were certain letters he had received from the NLRB that were not produced to Respondent, asking Mares about “documents, emails, correspondence, letters that [he] received from the NLRB or communications that [he] received **from the NLRB**,” was overly broad given that aside from any communications Mares may have received from the compliance officer regarding his backpay claim, throughout these proceedings, as a party to the case, Mares has also received copies of various orders, motions, etc. from the Region and the Board that are unrelated to his backpay claim calculation. (Tr. 1056:3-6, 1057:17-25, 1058:1-2, 1059:7-12; ALJ Exh. 1) Additionally, what documents, if any, Mares may have received from the NLRB, are irrelevant as to whether Mares mitigated damages or concealed interim earnings during the backpay period.

In the case of Avila, Respondent questioned Avila as to his delay in producing the subpoenaed documents the first day of the hearing. (Tr. 1025:1-6) In response, Avila candidly testified that he had received the subpoena about a week before the hearing and that because of his work commitments, he had been unable to look for the documents Respondent requested. (Tr. 1025:6-25, 1026:1-14) At the hearing, Respondent did not deny receiving the additional documents that Avila handed over around mid-February 2018. (Tr. 1129:1-16, 1130:1-18). When Respondent asked specifically as to why certain documents were not produced earlier, Avila’s answers revealed that he complied with the subpoena request and produced the documents that he was able to secure. For example, as to his income taxes, aside for tax year 2014, while Avila testified that he did not have those records, Avila produced a copy of his IRS Account Transcripts from 2010 through 2016 to Respondent. (Tr. 1130:15-25, 1131:1-2; R Exh. 59)

Similarly, despite the fact that on the third day of the hearing Avila had produced the bank statements he was able to secure, at the hearing Respondent questioned Avila as to why he had not produced all of his bank statements, to which Avila responded that he did not have them. (Tr. 1131:3-20; R Exh. 59) When asked about his communications with the Compliance Officer, Avila testified that he had already produced whatever documents he had. (Tr. 1132:3-9, 1133:21-24, 1134:24-25). Lastly, when questioned about any additional payroll records, Avila testified he had no other responsive documents. (Tr. 1135:24-25, 1136:1)

**B. Evidentiary Sanctions are Unwarranted as the Discriminatees Produced all Responsive Documents in their Possession and there is no Evidence that Respondent has been Prejudiced**

The Discriminatees' actions in diligently making every effort to comply with Respondent's subpoenas are insufficient to show that the Discriminatees' subpoena production or delay thereof was egregious, intentional, and/or willful. Furthermore, there is no evidence that Respondent has been prejudiced by the Discriminatees' actions of producing documents as they have become available. Thus, adverse inferences against the Discriminatees are not only unwarranted but would be unjust in this case where not only did Respondent receive all responsive documents from the Discriminatees, but Respondent also had the opportunity to question the Discriminatees about their search-for-work efforts and interim earnings.

The Board may impose a range of sanctions for subpoena noncompliance, "including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing & Transp. Co.*, 341 NLRB 394, 396 (2004), *enfd.* 156 Fed.Appx. 386 (2d Cir. 2005). However, the Board must balance the need to protect its processes against its Section 10(c) mandate to remedy unfair labor practices. *See*

*Toll Mfg. Co.*, 341 NLRB 832, 836 (2004). The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance. *See, e.g., Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with subpoena, due to its harshness and "perhaps unprecedented" nature and the availability of lesser sanctions). The burden of establishing noncompliance lies with the party that directed issuance of the subpoena. *See R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994), *affd. mem.* 74 F.3d 1240 (6th Cir. 1996).

In *McAllister*, *supra*, the Board upheld the ALJ's issuance of limited sanctions against respondent, allowing the General Counsel to prove by secondary evidence matters that were covered by subpoena and prohibited respondent from rebutting the evidence. *Id.* at 396. However, in that case, the ALJ specifically declined to issue the harsher sanctions requested by the General Counsel, including refusing to limit the respondent's right of cross-examination and the request to automatically draw adverse inferences against the respondent. *Id.* In reviewing whether the ALJ abused his discretion by imposing sanctions against a party, the Board noted the respondent's ongoing refusal to comply with the subpoena. *Id.* at 397.

The facts in *McAllister* warranting limited sanctions are not present in this case. Unlike *McAllister*, here, the Discriminatees complied with the subpoena requests. At no point did either of the Discriminatees refuse to comply with the subpoenas. Furthermore, there is no merit to Respondent's claim that it has been prejudiced as it received the majority of the documents from the Discriminatees before the Discriminatees testified. While Respondent argues that it has been prejudiced by the Discriminatees' trickling of document production, the Discriminatees were simply complying with their obligations by producing responsive documents as they became available. It is also worth noting that in *McAllister*, while the General Counsel's request for

limited sanctions were granted, aside from a few pieces of documents, the General Counsel did not also receive the subpoena documents. *Id.* at 396. Here, Respondent has had the privilege of questioning and introducing numerous pieces of documents that the Discriminatees provided to Respondent. Thus, at this point, it would be unjust to also sanction the Discriminatees.

At the hearing, Respondent also argued that it was prejudiced because the Discriminatees produced certain documents that were responsive to the subpoena request to the General Counsel, but not Respondent. However, there is nothing on the record to support a finding that the Discriminatees' actions of providing a few documents to the General Counsel before they were provided to Respondent were intentional or willful. For example, in *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 8-9 (2015), respondent argued that the discriminatee's failure to comply with a subpoena precluded the discriminatee's remedy. While testifying, the discriminatee acknowledged that it had forwarded certain emails to the General Counsel, but had not produced those emails to respondent. *Id.* at 11. The Board, noting that the scope of the subpoena was not altogether clear, found that it was not unreasonable for the discriminatee to conclude that the subpoena was not seeking emails the discriminatee sent to the General Counsel. *Id.*

Here, while Mares produced a copy of his Work Source Card (which is a basic form of identification issued to Mares) to the General Counsel before the hearing but not to Respondent, in looking at the subpoena request, there is no reason for Mares—an unrepresented party throughout these proceedings—to know that Respondent was seeking a copy of his Work Source Card. (GC Exh. 18; R Exhs. 1-3)<sup>38</sup> Similarly, during the hearing, upon realizing that a Google

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<sup>38</sup> Regarding GC Exh. 18, Respondent objected, and the ALJ sustained, to the admission of the document on the basis that it was a responsive document to the subpoena issued to Mares and Respondent did not receive a copy of the document before the hearing. (Tr. 421:8-25, 422:1-25, 423:1-2). Thus, the General

search showed that Mares supposedly owed a trucking company during the backpay period—which Mares flat out denied—Mares, believing someone was using his identity, immediately went to the police to file a report as he also went to the Social Security Administration (SSA) to report the issue. (Tr. 458:5-25, 459:1, 460:1, 461:4-25, 462:1-7; R Exh. 20)<sup>39</sup> When Mares produced the records he obtained from the police department and SSA to the General Counsel, but not Respondent, Respondent again objected. Again, from the plain reading of the subpoena, there is absolutely no reason for Mares—an unsophisticated party with limited English—to think that such documents were covered by Respondent’s subpoena, especially when the documents were created after the subpoena issued. (Tr. 475:13-16, 478:5-10; R Exhs. 1-3) Mares’ actions throughout the hearing are not that of a discriminatee seeking to withhold responsive documents from Respondent. On the contrary, Mares produced a substantial amount of documents to Respondent, most of which were produced before Mares testified. More importantly, Respondent fails to show how Mares’ actions have prejudiced Respondent when Respondent has obtained the documents from Mares and has also had an opportunity to question Mares about the content of such documents.

Regarding Avila’s delay in producing his two resumes, Respondent argued that it was prejudiced by Avila’s late production because his resumes, in particular his Indeed resume, were directly tied to Avila’s search-for-work effort. (Tr. 915:20-25, 916:1-8; R Exh. 53) Respondent argued that Avila’s Indeed resume went to the very heart of the issues in this hearing—Avila’s

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Counsel did not rely on this document. Later on, Respondent offered it into the record to rely on it as proof of Mares’ alleged subpoena non-compliance. (Tr. 475:13-16, 476:2-125, 478:5-10)

<sup>39</sup> The General Counsel initially offered this exhibit into the record, but after Respondent’s objections withdrew the exhibit. (Tr. 464:1-25, 465:1-25, 466:1-25, 467:1-25, 468:1-16; R Exh. 20) As stated by the General Counsel and acknowledged by the ALJ, Counsel for the General Counsel did not receive the document until shortly before the hearing commenced that morning. (Tr. 468:17-25, 469:1-25, 470:1-8)

job duties with Respondent. (Tr. 915:20-25, 916:1-8) Irrespective of Avila's resume, Respondent offered substantial evidence regarding Avila's job duties while employed by Respondent. Thus, the Indeed resume was not the only source Respondent could rely on to address Avila's work duties. First, Respondent had an opportunity to question Avila about his job duties and in fact questioned Avila at length about his duties and responsibilities while employed by Respondent. (Tr. 576:13-25, 577:1-25, 578:1-25, 578:1-20) Second, Respondent through documents and other witnesses provided evidence as to Avila's job duties with Respondent. (Tr. 832:22-25, 833:1-10, 835:7-25, 836:1-25, 837:1-25, 838:1-6; R Exh. 21) Third, the Indeed resume itself, while it lists Avila's position with Respondent as a "Salesman," the duties listed on the resume are consistent with Avila's testimony at the hearing. (Tr. 545:24-25, 546:1-16; R Exh. 53) Thus, for Respondent to make the argument that somehow Avila was intentionally concealing his Indeed resume because it hurt his case is beyond absurd.

As proven by the ALJ's and Respondent's questioning of the Discriminatees the last day of the hearing, at this point, both of the Discriminatees had turned over all responsive documents in their possession and Respondent had the opportunity to question both Mares and Avila about those documents.<sup>40</sup> In fact, the only records that Mares and Avila did not produce are documents that do not exist or they did not have in their possession. (R Exhs. 57, 59) *Hansen Bros. Enterprises*, 313 NLRB 599, 609 (1993) (rejected the contention that an employee had failed to comply with his subpoena, finding that the record contained no intimation that the employee had withheld existing subpoenaed materials, or that he had failed to make a reasonable effort to locate such materials, and concluded that a claimant's entitlement is not compromised because of

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<sup>40</sup> Respondent also received various documents from the General Counsel and interim employers regarding the Discriminatees' search-for-work efforts and interim earnings. (GC Exhs. 6, 7, 8, 14, 13, 15, 16; R Exhs. 11, 12, 15,)

his failure to produce that which does not exist or cannot be found).

Based on the facts of this case in regards to the Discriminatees and subpoena compliance, no adverse inference is warranted. The Board's Order, in this case, in finding that the ALJ's sanctions against the General Counsel were unduly harsh, relying on *Sisters' Camelot*, noted that '[t]he Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance.' See, e.g., *Selwyn Shoe Mfg. Corp.*, 172 NLRB 674-674-75 (1967) (holding evidentiary sanctions ought to be narrowly tailored to the subject of non-compliance).<sup>41</sup> Furthermore, the Board, in reversing the ALJ's sanctions, specifically noted that 'a backpay remedy is not a private right but is a right granted to vindicate the policies of the Act.' Flat out denying the Discriminatees' backpay claims far exceeds any penalty that may be warranted in this case and would severely undermine the Agency's duties to enforce the Act. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with subpoena, due to its harshness and 'perhaps unprecedented' nature and the availability of lesser sanctions)." See also *Toll Mfg. Co.*, 341 NLRB 832, 836 (2005).

Thus, because both Mares and Avila produced all responsive documents to Respondent and there is no evidence that Respondent has been prejudiced when Respondent had an opportunity to question the Discriminatees' about all the documents they produced, no adverse inference is warranted in this case.

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<sup>41</sup> In situations where it is determined that a discriminatee has concealed interim earnings, it is "...Board policy to deny backpay for the period of concealment." See *American Navigation Co.*, 268 NLRB 426 (1983) (denying backpay for the quarters in which the discriminatee concealed interim earnings). But see *Atlantic Veal & Lamb, Inc.*, 358 NLRB 616, fn. 8 (2012) (a discriminatee's interim earnings discrepancy is insufficient to establish a willful concealment of interim earnings).

#### IV. CONCLUSION

For the reasons set forth in this Brief, Counsel for the General Counsel respectfully requests that the Honorable Administrative Law Judge find and recommend to the Board that Respondent be ordered to pay the Discriminatees the amount of backpay as stated in the Amended Compliance Specification (with the additional deductions to Avila's claim as noted in this brief), plus interest.

Dated at Los Angeles, California, on May 2, 2018 and respectfully submitted by:

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## STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge** has been submitted by e-filing to the Division of Judges of the National Labor Relations Board on May 2, 2018, and that each party was served with a copy of the same document by e-mail.

I hereby certify that a copy of **Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge** was served by e-mail, on May 2, 2018, on the following parties:

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Respectfully submitted,

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