United States Bankruptcy Court for the Southern District of New York
Tops Holding II Corporation Claims Processing Center
c/o Epiq Bankruptcy Solutions, LLC
P.O. Box 4419
Beaverton, OR 97076-4419

To submit your form online please go to https://epiqworkflow.com/cases/TOP. Use your Mail ID for access.

Your Mail ID is as follows:
128075604

Name of Debtor: Tops Markets LLC
Case Number: 18-22279

Local 464A United Food and Commercial Workers Welfare Service Benefit Fund
245 Paterson Ave.
Little Falls, NJ 07424

For Court Use Only

RECEIVED
JUL 27 2018
LEGAL SERVICES

Filed: USBC - Southern District of New York
Tops Holding II Corporation, et al., (B10)
18-22279 (RDD)
TOP
0000000794

Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. With the exception of claims under 503(b)(9), do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503. Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?
Name of the current creditor (the person or entity to be paid for this claim): Local 464A United Food and Commercial Workers Welfare Service Benefit Fund

Other names the creditor used with the debtor: _____

2. Has this claim been acquired from someone else? ■ No ☐ Yes. From whom? _____

3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?
c/o John T. Niccollai
Name
245 Paterson Ave.
Number Street
Little Falls NJ 07424
City State ZIP Code
Country (if International): _____
Contact phone: 973-256-6790
Contact email: _____

Where should payments to the creditor be sent? (if different)
Name
Number Street
City State ZIP Code
Country (if International): _____
Contact phone: _____
Contact email: _____

4. Does this claim amend one already filed?
■ No
☐ Yes. Claim number on court claims register (if known) _____
Filed on _____ MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?
■ No
☐ Yes. Who made the earlier filing?

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?
■ No
☐ Yes.
Last 4 digits of the debtor's account or any number you use to identify the debtor:
___ ___ ___ ___

7. How much is the claim?
$ not less than $159,091.07

Does this amount include interest or other charges?
☐ No
■ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim?
Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information.

Benefit fund contribution delinquency; see addendum

9. Is all or part of the claim secured?

■ No

☐ Yes. The claim is secured by a lien on property.

Nature of property:

☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (official Form 410-A) with this *Proof of Claim*.

☐ Motor vehicle

☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____
(The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed) _____%

☐ Fixed ☐ Variable

10. Is this claim based on a lease?

■ No

☐ Yes. **Amount necessary to cure any default as of the date of petition.**

$_____

11. Is this claim subject to a right of setoff?

■ No

☐ Yes. Identify the property:

_____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No

■ Yes. *Check one:*

Amount entitled to priority

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). $_____

☐ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). $_____

☐ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). $_____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). $_____

■ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). $ not less than $80,204.30

☐ Other. Specify subsection of 11 U.S.C. § 507 (a)(__) that applies. $_____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

13. Does this claim qualify as an Administrative Expense under 11 U.S.C. § 503(b)(9)?

☐ No

■ Yes. **Amount that qualifies as an Administrative Expense under 11 U.S.C. § 503(b)(9):** $ Portion of claim owed prior to 8/21/17

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

■ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other co-debtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 7/25/18 _____
MM / DD / YYYY Signature

Print the name of the person who is completing and signing this claim:

Name Mark Hanna
First name Middle name Last name

Title Counsel for creditor

Company Murphy Anderson PLLC
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 1401 K St. NW, Suite 300
Number Street

Washington DC 20005
City State ZIP Code

Contact Phone 202-223-2620 Email mhanna@murphypllc.com

In re Tops Holding II Corporation, *et al.*
Chapter 11, Case No. 18-22279 (jointly administered)

ADDENDUM TO PROOF OF CLAIM

Debtor: Tops Holding II Corporation, *et al.*
Case No.: 18-22279-RDD

Claim of Local 464A United Food and Commercial Workers Welfare Service Benefit Fund (the "Fund" or the "Claimant")
245 Paterson Avenue
Little Falls, NJ 07424
Tel: (973) 256-6790

Claimant's claims arise under those certain documents, including without limitation (i) the Agreement, effective as of August 8, 2016, by and between Tops Markets, LLC, its successors and assigns, and the United Food and Commercial Workers Union, Local 464A, Chartered (UFCW) adopting the Collective Bargaining Agreement, effective as of June 19, 2016, by and between The Stop & Shop Supermarket Company its successors and assigns, and the UFCW, as amended, supplemented or modified from time to time (the "CBA"); (ii) Agreement and Declaration of Local 464A, United Food and Commercial Workers Union Pension Benefit Fund, effective as of September 9, 1992, as amended, supplemented or modified from time to time (the "Trust Agreement"); and (iii) Local 464A United Food and Commercial Workers Welfare Service Benefit Fund Summary Plan Description & Plan Document, amended as of January 1, 2015, and as amended, supplemented or modified from time to time (the "Plan Document"), as well as other related agreements and plan documents or documentation ("the Plan Documents"),[1] pursuant to the March 26, 2018 Order of the National Labor Relations Board in Case Nos. 03-CA-192010 and 03-CA-196668 (the "NLRB Order"), and pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1000 *et seq.* ("ERISA").

Claimant is an "employee welfare benefit plan" and "welfare plan" within the meaning of 29 U.S.C. § 1002(1) and is a "multiemployer plan" within the meaning of 29 U.S.C. §§ 1002(37)(A) and 1301(a)(3). Debtor is an employer within the meaning of 29 U.S.C. § 1002(5) and is directly obligated for all amounts due and owing to the Fund.

As of February 21, 2018 (the "Petition Date"), the Debtor was delinquent in contributions to the Claimant in an amount not less than **$107,921.50**, for contributions owed for hours worked from January 25, 2017 to February 20, 2018 by certain employees of the Tops Markets, LLC store in LaGrangeville, New York, pursuant to an Order of the National Labor Relations Board, attached hereto as Exhibit A.

[1] Due to their voluminous size and to certain confidential information contained therein, Claimant has not filed the Plan Documents herewith. Copies of the Plan Documents can be made available upon request and upon agreement among the parties as to confidentiality.

Pursuant to the Agreement, CBA, the Trust Agreement, the Plan Document, the Plan Documents and/or applicable law, including without limitation 29 U.S.C. § 1132(g), Debtor is liable for all interest, an amount equal to the greater of interest or liquidated damages, reasonable attorney's fees and costs incurred by Claimant and such other legal or equitable relief the applicable tribunal deems appropriate in connection with the enforcement of or other efforts by Claimant to protect its rights thereunder. Interest on delinquent contributions is due at the rate of 2% per month, and liquidated damages are due in the amount of 20% of the delinquent contributions or 2% per month, whichever is greater. The amounts owed are calculated as follows:

DELINQUENCIES CURRENTLY DUE TO CLAIMANT

Time Period	Contributions Due for Hours Worked	Interest Due to July 31, 2018	Liquidated Damages	Total
January 2017 to February 2018	$107,921.50	$26,349.21	$21,584.30	$135,171.65
March 2018 to May 2018	$18,796	$1,364.22	$3,759.20	$23,919.42
Total Due	**$126,717.50**	**$27,713.43**	**$25,343.50**	**$159,091.07**
Priority Claim August 2017 to February 2018	$58,151.50	$10,422.50	$11,630.30	$80,204.30

Accordingly, Claimant hereby files this Proof of Claim with respect to (i) all amounts currently due and owing to Claimant under the Agreement, CBA, the Trust Agreement, the Plan Document, the Plan Documents, the NLRB Order, and/or pursuant to ERISA, including without limitation any and all (A) delinquent contributions incurred to date, (B) interest, an amount equal to the greater of interest or liquidated damages, reasonable attorney's fees and costs incurred by Claimant and such other legal or equitable relief the applicable tribunal deems appropriate in connection with the enforcement of or other efforts by Claimant to protect its rights in connection with the foregoing and (ii) any and all contingent obligations currently owing, or which may become due and owing, to Claimant in connection with the Plan, the CBA, the Trust Agreement, the Plan Document, the Plan Documents and/or applicable law. Claimant asserts that this Proof of Claim is entitled to priority pursuant to Section 507(a)(5) of the Bankruptcy Code to the extent provided thereby.

Claimant hereby reserves the right to further amend or supplement this Proof of Claim, or to file additional proofs of claim, including without limitation the right to assert claims for administrative expenses, against the Debtor to reflect other amounts that may be (or may become) due and owing. In executing and filing this Proof of Claim, Claimant does not submit itself to the jurisdiction of the Bankruptcy Court for any purpose other than with respect to the Proof of Claim and does not waive (i) any of its rights and remedies against any other person or entity who may be liable for all or part of the claims set forth herein, whether an affiliate, assignee, guarantor or otherwise, of the Debtor; or (ii) any other obligation owed to Claimant.

Should the National Labor Relations Board submit a proof of claim that seeks contributions to the Fund for the same hours worked, the Fund reserves the right to adjust its proof of claim to avoid duplicative claims.

Exhibit A

To Addendum of Proof of Claim

of

Local 464A United Food and Commercial Workers Welfare Service Benefit Fund

JD–20–18
LaGrangeville, NY

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

TOPS MARKETS, LLC

and

Cases 03–CA–192010
03–CA–196668

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 464A

Alexander J. Gancayco, Esq., for the General Counsel.
Raymond J. Pascucci, Esq. and ***(on brief) Mark A. Moldenhauer, Esq. (Bond, Schoeneck & King, PLLC),*** for the Respondent.

DECISION

STATEMENT OF THE CASE

ELIZABETH M. TAFE, Administrative Law Judge. This case was tried in Albany, New York, on August 7 and 8, 2017 pursuant to a consolidated complaint by the Regional Director for Region 3 issued on June 21, 2017, and amended at the hearing (the complaint) which alleged that Tops Markets, LLC (Respondent), violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the United Food and Commercial Workers Union, Local 464A (Union or Charging Party) as the exclusive representative of its employees and by failing and refusing to adhere to a collective-bargaining agreement following the Respondent's acquisition of a store located in LaGrangeville, New York. The complaint also alleges that the Respondent violated Section 8(a)(1) by engaging in unlawful interrogations and unlawful polling of employees. The complaint was based on an unfair labor practice charge (03–CA–196668) and an amended charge (03–CA–192010) filed by the Union. The Respondent timely answered the complaint admitting a substantial portion of the factual allegations, but denying all wrong doing.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, and to file posthearing briefs. On the entire record,[1] including my observations of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and the General Counsel,[2] I make the following

[1] Although I include citations to the record in this decision to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case.

[2] The Charging Party did not file a brief.

findings of fact,[3] conclusions of law, and recommended dispositions.

FINDINGS OF FACT

I. Jurisdiction

The Respondent is a corporation that operates retail supermarkets in New York and neighboring States, with a corporate headquarters and place of business in Williamsville, New York and a retail supermarket in LaGrangeville, New York (the LaGrangeville store). Annually, in conducting its operations, the Respondent derives gross revenues in excess of $500,000 and purchases and receives at its LaGrangeville store goods valued in excess $5,000 directly from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

1. The Respondent's operations

The Respondent operates approximately 170 retail supermarkets in at least four States, and employs at least 12,500 employees. The Respondent maintains collective-bargaining relationships and related agreements with several unions covering units of employees in many of its stores, some of which are longstanding relationships, which includes a longstanding relationship with the Charging Party. Some employees are not unionized in some of the Respondent's stores.

The Respondent admits and I find that at all material times the following individuals employed by the Respondent held the positions listed and were supervisors within the meaning of Section 2(11) and agents within the meaning of Section 2(13) of the Act: Jack Barrett, Vice President of Human Resources; Denise Rachow, Human Resources Manager; Kathy Liou, Human Resources Manager; Tammy Columbo, Store Relations/Payroll Manager; and Jennifer Veronesi, Assistant Store Manager. I further find that Joseph Topini, human resources manager, who testified at the hearing in that capacity and as keeper of the records, is an agent within the meaning of Section 2(13).

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[3] My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

2. The Union

The Union represents meat, seafood, deli, and fish department workers in upstate New York. Several union representatives testified at the hearing, including Secretary-Treasurer Richard Whalen, Business Agent John Finn, and Organizing Director Elizabeth Krayl. The Union has an office in Little Falls, New Jersey. Whalen participates in managing the Union, which involves corresponding on behalf of the Union with employers throughout the Northeast and negotiating collective-bargaining agreements. He also participates in organizing employees, negotiating "after-acquired stores" agreements, and representing current members in grievance procedures and arbitration according to their labor contract.

In about August 2016, Finn began overseeing the Union's communications with employees at the Lagrangeville store. Finn was the employees' contact during the period that union authorizations cards were collected, as discussed in detail below.

3. The bargaining unit

The Respondent admits, and I find, that the following employees of the Respondent (the unit) constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees in the meat, poultry, fish, appetizer and delicatessen departments in the present and future stores of the employer [Respondent] within the jurisdiction of the Union in Westchester, Putnam, and Dutchess counties of the State of New York, excluding guards and supervisors as defined in the Act.

The Respondent admits, and I find, that on about August 8, 2016, as described in detail below, the Respondent agreed to be bound by the collective-bargaining agreement (CBA) effective from June 19, 2016 to October 31, 2020, which was originally negotiated between Stop & Shop Stores and the Union, covering stores in Westchester, Putnam, and Dutchess Counties in New York. (GC Exhs. 5 and 6) The Respondent agreed to recognize the Union as the exclusive collective-bargaining representative of the unit, which includes employees in all stores that the Respondent purchased, converted and/or opened in Westchester, Putnam, and Dutchess Counties during the term of the CBA.

The LaGrangeville store is located in Dutchess County, New York, which is within the geographical coverage of the Union in the unit definition. In January 2017, there were a total of 30 employees performing the work described in the appropriate unit description above. (Tr. 37–34, 104–105; GC Exh. 4.)

4. The Respondent's acquisition of additional stores in August 2016.

The disputes in this case were precipitated by the Respondent's August 2016 acquisition

of six supermarkets from competitor companies, one being the LaGrangeville store. Four of the stores that the Respondent acquired had previously been operated by the Stop & Shop supermarket chain and had unionized work forces; two additional acquired stores, including the LaGrangeville store, had previously been operated by the Hannaford supermarket chain and had not been unionized.[4]

After learning of the upcoming acquisitions, union representatives, including Local President John Niccollai, Recorder Frank Hanley, and Secretary-Treasurer Whalen, spoke with the Respondent's representatives about the pending merger of the acquired stores with the Respondent. On about August 8, 2016, before the corporate acquisitions were finalized later in August, the Union and Respondent entered into an agreement setting forth the terms by which the Respondent would recognize the Union and apply terms of the existing CBA between the Union and Stop & Shop to employees in specified geographic areas (GC Exh. 5; see text below). Shortly after the acquisitions were finalized at the former Stop & Shop locations, the Respondent recognized the Union as the collective-bargaining representative of employees of the Meat, Seafood, Deli, and Prepared Foods departments in three New York stores and applied the existing CBA.[5] The Respondent did not immediately recognize the Union as representing employees at the former Hannaford locations, including the LaGrangeville store, who historically had not been unionized.[6]

B. Parties' Agreements

1. <u>After-acquired stores agreement</u>

On August 8, 2016, the Respondent by Vice President for Human Resources John P. "Jack" Barrett signed an agreement stating the following:

> With respect to the Collective Bargaining Agreements between Stop & Shop and the UFCW Local 464A covering stores in Westchester, Putnam, and Dutchess counties and the Stop & Shop Agreement between UFCW Local 464A covering stores in the New Jersey, Rockland, Orange, Ulster, and Sullivan countries in New York, effective June 19, 2016 and expiring on October 31, 2020, Tops Markets hereby agrees to the following:
>
> 1. Tops Markets hereby accepts all wages, hours, terms and conditions of employment of the aforementioned Stop & Shop agreements for all stores purchased, converted, and/or opened during the term of the Stop & Shop

[4] Neither Stop & Shop nor Hannaford are parties to this case.

[5] The Respondent recognized the Union as the representative of meat, seafood, deli and prepared foods departments at its acquired stores in New Paltz, Rhinebeck, and Wapping Falls, New York locations. The Respondent also recognized UFCW Local 1500 as the representative of nonsupervisory employees in the remaining departments in the New Paltz, Rhinebeck, and Wapping Falls stores. It recognized a different union at its location in Gardner, Massachusetts, which appears to be outside the Charging Party Union's geographic coverage.

[6] The other formerly Hannaford store acquired by the Respondent was in Carmel, New York.

agreements and hereby recognize [sic] UFCW Local 464A as the exclusive bargaining representative pursuant to the terms and conditions of the Stop & Shop agreements.

2. Tops Markets also agrees to recognize all the members' seniority both full- time and part-time for all purposes (wages, hours, terms and conditions of employments [sic], contribution of the various funds, and seniority, vacation, and sick leave, etc.).

Tops Markets hereby agrees to be bound by the terms and conditions of the aforementioned Stop & Shop agreements through the unexpired term of the agreements on October 31, 2020. (GC Exh. 5)

The agreement was signed by both Hanley and Whalen for the Union.

2. CBA Recognition Clause.

The CBA, which was negotiated originally between Stop & Shop the Union, and by its terms is effective from June 19, 2016 through October 31, 2020 states in relevant part:

Article 1.—Recognition

A. The Employer hereby recognizes the UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL #464A as the exclusive representative of its meat, poultry, fish, appetizer and delicatessen department employees, both full time and part time, in the present and future stores of the Employer located within the present and future jurisdictional area of the said local Union within the States of New Jersey and New York. (GC Exh. 6)

Although at the hearing the group of employees at the LaGrangeville store whose representation status is at issue was occasionally referred to as "a unit" or "the unit," it is clear from this recognition clause, from the CBA as a whole, as well as from the record as a whole, that the employees covered by the CBA constitute a single, multistore bargaining unit rather than separate single-store units.

C. Union Majority Status at LaGrangeville Store

1. Authorization card collection

Edward Strack is a journeyman meatcutter at the LaGrangeville store. He worked for Hannaford and then for the Respondent at the store for 14 years. In summer 2016, he approached a shop steward for the Union at a Stop & Shop location in Beekman, New York, to inquire about the Union. The steward gave him Union Business Agent John Finn's contact information, and Strack contacted Finn. Strack spoke to Finn by phone several times. He met Finn for the first time on December 28, 2016, when he and two other employees from the LaGrangeville store

(Greg Pecorella, assistant meat manager, and Greg Sheldon, meat manager)[7] met Finn at a coffee shop. They spoke with Finn about the Union. Finn gave them union authorization cards. Strack and Pecorella signed the cards there and gave them to Finn. Sheldon took the card and some pamphlets on the Union's benefits package to consider but did not sign the card at the meeting. Finn gave Strack blank authorization cards to bring to the workplace. In relevant part, the cards state the following:

> I hereby request membership in the United Food and Commercial Workers Union Local 464A of the United Food and Commercial Workers International Union, and desire to have the local union represent me as a collective bargaining agent on matters relating to hours, wages, and conditions of employment. The Constitution laws, rules, policies and regulations of the above union and its affiliates, and all amendments thereto shall be binding upon me.

On January 13, 2017, Strack spoke with coworkers about the Union and distributed some blank union authorization cards to them. That day, he collected five cards signed by coworkers directly from the individuals who signed them, including one from Sheldon. He continued to discuss the Union with coworkers, hand out cards, and hand out union pamphlets and Finn's business cards to accommodate coworkers' questions. Between January 14 and 23, he collected at least nine additional cards directly from the employees who signed them. Also in January, he received two cards from Pecorella that had been signed by other employees.[8] Strack handed the cards over to Finn periodically. Finn maintained them in a file secured in the glove compartment of his car, except when he brought them to the Union office on January 23 and 26 for meetings with other union representatives. During these meetings, the cards were copied. Organizing Director Krayl noted the employer on the cards before copying them and returning them to Finn, which was part of her regular practice. Krayl testified that she did not make any other marks on the cards. Finn eventually submitted the 18 cards (the 16 collected by Strack and Strack's and Pecorella's cards handed directly to Finn in their first meeting) to the Regional Office of the NLRB. (GC Exhs. 16 to 33).

Thus, by January 23, 2017, 18 of the 30 employees who performed the work described in the bargaining unit description had signed, dated, and submitted to the union authorization cards.

2. Union's demand for recognition and Respondent's response

After obtaining the 18 signed authorization cards, and determining that they represented a majority of the unit employees at the LaGrangeville store, the Union delivered by fax and mail a

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[7] No party argues that these individuals were not employees under the Act notwithstanding these job titles; Pecorella is listed as a "1st Cutter" in the employee list produced by the Respondent and Sheldon is included in the same list, which the parties stipulated referred to the 30 employees covered by the unit description (GC Exh 4).

[8] I granted the General Counsel's pretrial motion to permit authentication of one card by means of comparison with signatures from the employee's personnel file. My review of these documents satisfied me that GC Exh. 33 was a validly signed authorization card. See also GC Exhs. 1(o), 1(p), 8, and 9.

letter dated January 25, 2017, to the Respondent, which was addressed to Vice President Barrett (GC Exh. 10). The letter demanded recognition of the Union as the bargaining representative of employees at the store and the application of the CBA, consistent with the parties August 8, 2016 agreement and stated in relevant part:

> A majority of the non-supervisory employees in the Tops Markets store at 16 John J. Wagner Way, LaGrangeville, NY, have signed authorization cards designating UFCW Local 464A as their collective bargaining representative. We will submit those authorization cards for your verification upon request.
>
> Under the after-acquired store provisions of our August 8, 2016 Agreement and the 2016–2020 Stop & Shop Agreement that Tops Markets assumed, the Employer is now obligated to recognize UFCW Local 464A and apply the terms of our Collective Bargaining Agreement to the LaGrangeville store. Upon recognition, the LaGrangeville store shall become part of the multi-store bargaining unit operated by Tops covered by the 2016–2020 Agreement.
>
> Please contact me if you have any questions. (GC Exh. 10)

There is no dispute that the Respondent received General Counsel's Exhibit 10 on January 25, 2017 (Tr. 47; GC Exh. 1(1)). The Respondent did not contact the Union to respond to the demand for recognition and did not recognize the Union or apply the CBA (GC Exh. 1(1)). The Respondent did not request to review the cards that the Union offered to make available (Tr. 71, 91–92).

Instead, the Respondent determined it would interview employees to investigate the Union's claim of majority status, and to uncover whether anything improper had occurred in the collection of the cards. There is no evidence that the Respondent had any reason to believe the collection of the cards was faulty or any reason to doubt the Union's claim of majority support before it embarked on the investigatory interviews. At the same time, the Respondent also began its own internal union-avoidance organizing plans (Tr. 70–72; GC Exhs. 12, 13, 14, 15). To prepare for both these efforts, human resources representatives and legal counsel met. They quickly developed an interview schedule and brought in human resource managers from outside the LaGrangeville store to help conduct structured interviews of employees. Part of this preparation included human resource manager Topini calculating whether each employee would receive a lower hourly wage under the CBA compared to their current wage. This calculation did not include the value of any other features of employees' compensation packages, such as health and welfare benefits or pensions. The preparation for the interviews also involved management evaluating the likelihood/extent of each employee's union support and assigning a score from 1 to 5 to each employee, which was recorded and provided in an email to those who were conducting the interviews (GC Exh.15). By January 26, a detailed schedule of interviews of 27 employees was prepared to be held on January 27 and 28, 2017 that contained the assigned scores reflecting management's perception of each employees' level of union support (Tr. 352–355, 471; GC Exh. 15). A list of questions was prepared for each interview that included for some employees a specific calculation of purported wage rate decrease the employee would

receive under the CBA (GC Exh. 7); the interview questions prepared did not include calculations for purported increases or other changes in employees' compensation packages under the CBA. The substance of these interviews is discussed in detail below.

By January 29, 2017 the Respondent determined, as explained in an email from Human Resources Manager Topini, that "many associates who signed cards were not informed of the effects of signing a Union card, specifically how it would result in a reduction of their hourly rate in many cases." (GC Exh. 11.) Topini explained, "It is very important that we increase our union avoidance activity and continue to communicate to associates the down side to unionizing." (GC Exh. 11.) He enclosed a posting described as an informational notice addressing the Respondent's perspective regarding the perils of card signing to "be posted by the time clock, in the employee break room and handed out to all associates." The email further advised the management team that talking points would be forthcoming. In subsequent emails, Topini sent managers a prepared form ". . . hopefully to be signed by those associates who now regret their decision" (GC Exh. 12; see also R. Exh. 29–34); talking points directing managers to be "proactive" in conversations with associates and to "get a better sense of associates concerns/fears and whether they are likely to support or resist unionization" (GC Exh. 13); and attaching a notice to employees setting out wage rates in the CBA, the purpose of which was "to address the pro-union employees' accusations that we are just trying to scare people with threats of a pay decrease" (GC Exh. 14).

Although the Respondent never availed itself of the opportunity to check the cards to determine majority status, Topini also advised managers that "The Company continues to investigate and confirm if [the Union's claim of majority status] is accurate." (GC Exh. 11). As noted above, the Respondent never responded to the Union regarding the demand for recognition, as it took the position it was not obligated to do so. (See GC Exh 1(1).)

3. Validity of cards collected

Although there was much evidence elicited and attorney colloquy at the hearing regarding the authentication and validity of the signed authorization cards, there is a lack of any evidence that the cards were signed under false pretenses or coercion. No witness was called to support any assertion that employees were promised anything other than what is set forth on the face of the cards. Notably, on brief, the Respondent neither argues that the cards were improperly obtained nor challenges the authenticity of the signatures on the cards.[9] As noted

[9] The Union's ministerial addition of the identity of the employer on the cards at the office was not shown to be inconsistent with the employees' clear intent upon signing the card. See, *Traction Wholesale Center*, 328 NLRB 1058, 1058 (1999) (markings of different colored ink and the inclusion of the employer's name by someone other than the signatory did not invalidate a properly signed and dated card; and *Parts Depot, Inc.*, 332 NLRB 670 (2000) (use of different colored ink on cards and union representative's inclusion of markings on card after receiving it did not invalidate the card where basic foundation of intent of signatory was uncontroverted.); see also *Zero Corp.*, 262 NLRB 495, 499 (1992), enfd. mem. 705 F.2d 439 (1st Cir. 1983) (In reversing the ALJ to find cards valid and admissible despite handwriting irregularities due to the respondent's failure to properly object to authenticity at trial, the Board further explained that the display of different handwriting on the cards, without more, is

above, the cards state clearly on their face that their purpose is to designate the Union as collective-bargaining representative. Based on the record evidence, and in light of a lack of any argument to the contrary raised in the briefs, I confirm my evidentiary rulings at the hearing and find that all 18 cards were validly signed by employees between January 13 and 23, 2017. I further find that, in the absence of any showing of coercion or misrepresentation, the 18 cards represent the individual signatories' intention on the dates they were signed. *Goodless Electric Co.*, 321 NLRB 64, 66 (1996); *Action Auto Stores*, 298 NLRB 875, 881 (1990).

The Respondent produced 6 typed forms entitled "Associate Statement" prepared by the Respondent and signed by employees in the week or so after their structured interviews with managers (on February 2, 3, and 10, 2017) indicating the individual employees wished to withdraw their support for the Union and that their true sentiments were not reflected in their signed authorization cards (R. Exhs. 29–34; see also GC Exh. 12). One of the individuals never submitted a Union authorization card, but still submitted the withdrawal form to the Respondent (R. Exh. 32). These requests for withdrawal of support for the Union were never delivered to the Union, but maintained by the Respondent (Tr. 505–506, 220–221, 278).[10] Employees were not provided copies of the forms. The statements on the forms do not claim that the collection of the cards was faulty or fraudulent in any manner or that employees were coerced or misled (R. Exhs. 29–34). I find that, at most, they represent that the five employees changed their minds about union representation after the Union demanded recognition; this does not have any effect on the Union's established majority status on the date it demanded recognition.[11] The critical date for determining majority status is the date on which the bargaining request was received by the employer. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). Whether a majority of authorization cards have been signed is assessed as of the time the Union made its recognition demand. *Alpha Beta Co.*, 294 NLRB 228, 230–231 (1989). Even when uncoerced, employees may not effectively revoke authorization cards in the absence of notification to the Union before the Union demands recognition. Id.

General Counsel's Exhibit 7 contains 27 two-page documents with handwritten notes taken by Respondent's representatives in the interviews on a list or script of interview questions. The Respondent's witnesses inconsistently testified that they always stuck to the script and wrote down what the employees reported to them, but the notes often appear to be shorthand or have no answers at all. I received these records, but I find them generally to be unreliable hearsay. I do note, however, that not one of these sets of handwritten notes contains a record that any employee told the interviewer that he or she was coerced to sign a card, given any promises to sign a card, or misled to sign a card. Thus, I rely on these notes in General Counsel's Exhibit 7 to establish, as admissions against interest, that even after the one-on-one interviews that were purportedly to determine the validity of the Union's claim of majority support, the Respondent

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insufficient to overcome the presumption that the cards were signed on the date appearing on them.)

[10] In its brief, the Respondent asserts that "upon information and belief, all but one of the six employees requested his/her card back from the Union." R. Br. at 11. There is no evidence in the record to support this assertion, and the brief fails to refer to any such evidence.

[11] Moreover, as discussed below, my finding that the one-on-one interviews were unlawful establishes that these forms were not signed in the absence of Respondent's unlawful coercive conduct, and therefore are unreliable as representations of the employees' actual, uncoerced intent.

had no reason to suspect that the cards were coerced or based on misrepresentations. The Respondent asserts only that some employees were not specifically advised what their wages would be under the established CBA. And, as discussed above, a handful of employees' support for the Union may have changed after the Respondent interviewed them and advised them of its perspective on their wage difference under the CBA.

D. Respondent's One-on-One Interviews with Employees

As noted above, the Respondent held individual meetings with employees following the Union's demand for recognition. Its stated purpose of the meetings was to investigate the claim of majority status by the Union. (See Respondent's answer to consolidated complaint, GC Exh. 1(1); see also Respondent's Br. at 8). The meetings were structured as interviews with employees (See GC Exh. 7) and were conducted by managers of the Respondent from within and outside the LaGrangeville store, including by Human Resource Managers Kathy Liou and Denise Rachow, Assistant Store Manager Jennifer Veronesi, and Associate Relations Manager Tammy Columbo. The meetings were held during work in one-on-one meetings on Friday, January 27 and Saturday, January 28. One was also held by phone. As noted above, before the meetings, calculations had been added to some of the interview scripts to reflect the Respondent's perspective that certain employees would lose wages under the CBA. Nineteen of the 27 sets of notes in General Counsel's 7 contain notations reflecting the perspective that the individual employees would see decreased wage rates varying from 33 cents per hour to $3.65 per hour.[12] The interviews were expected to follow the questions set forth in the interview forms, including the following questions and interviewer instructions:

- If you were asked to sign a union authorization card, was the significance of the card explained to you?
- Did you understand that by signing you were making a legal declaration that you want to be represented by United Food & Commercial Workers, Local 464A? [If the card was not explained or the employee did not understand, ask follow up questions to elicit as many details as possible about who said what, who else was present if anyone, when and where the conversation(s) took place, and the specifics statements or claims made by the person(s) who presented the employee with the card.]
- Were you given any promises or assurances in order to encourage you to sign a union authorization card?
- For example, were you told that you will not need to pay initiation fees or union dues for a certain period of time if you signed an authorization card? [If yes to either question, follow up to elicit all details.]
- Were you given any false or misleading information to entice you to sign a union authorization card? [If yes follow up to elicit all details.]
- [Only for employees whose hourly rate will decrease under the union contract] For example, did you understand that your hourly rate will

[12] The record does not establish whether these calculations were factually accurate.

decrease by $____ per hour under the union scale, as compared to the current wage scale for the store? [If the employee did not know this, ask what their understanding is concerning the pay rate if employees become covered by the union, ask them to explain the basis for that understanding (what was said, who said, when), and follow up to elicit other details.] [Tell the employee that if the information concerning pay rates changes their opinion, they have the right to ask the union for the card back. (As is their right if they change their mind for some other reason.)]

- Did you feel pressured, harassed or coerced in any way with respect to signing a union authorization card?
- In other words, did anyone force you to sign, or say you had to sign, or threaten you in any way unless you signed? [If yes to either question, elicit details.]
- Did you have any discussions with Greg Sheldon or William Novoa about signing a union authorization card? [If yes, elicit all details.]
- Did you witness or hear about anyone else being threatened, coerced or tricked into signing a union authorization card? [If yes, elicit details.]
- Is there anything else that you would like to add?
  [End interview by thanking the employee for his/her input.]
  (GC Exh. 7)

Despite the Respondent's detailed inquiries, there is no evidence, either from the notes on General Counsel's Exhibit 7 or from testimony at the hearing, that any employee reported to the Respondent that he or she was given assurances or promises to sign a card, given false or misleading information to sign a card, felt pressured, threatened, or coerced to sign a card, or knew of another employee feeling pressured, threatened, or coerced to sign a card. Upon hearing from the Respondent interviewer of the prospect of a lowered wage rate, some employees reportedly seemed surprised, fearful or upset (Tr. 432, 468).

The hearing testimony is inconsistent regarding whether the interviewers stuck strictly to these questions. The Respondent's witnesses asserted that they asked all the questions and tried to record all the information verbatim, but the notes on the pages do not fully corroborate those assertions, as they often appear to be shorthand or reveal an absence of any notes despite that the questions were asked. Moreover, the witnesses were not able to independently recall the specific interviews without referring to the notes in General Counsel's Exhibit 7. I find, based on the record as a whole, that the interviewers followed the questions in General Counsel's Exhibit 7 as guidelines, but did not necessarily read them verbatim, did not necessarily read all of them, and did not necessarily record everything that was said in the meetings.

Employees Thomas Schembri and George Collins testified that Assistant Store Manager Veronesi asked them directly if they signed a union card in the interviews. (Tr. 112–114, 138, 147–149). Veronesi denied doing so, but testified that she followed the questions in the interview script. (Tr. 382-383, 395, 407, They also testified that she asked them what issues or problems they were having at work that motivated them to support the Union, which she also

denied. I credit Schembri and Collins over Veronesi. Schembri and Collins testified in a straight forward and sincere manner and appeared to give equal effort to responding to questions on direct- and cross-examination. It is apparent from the structure of the interview form, the emails setting forth the Respondent's union-avoidance efforts, and the pre-interview ratings prepared indicating the likelihood of union support, which was included in the schedule of interviews sent to management representatives, that a purpose of the interviews was to collect information about employees' union sentiments and about who had been involved in collecting cards. Although ultimately Veronesi admitted that she reported back to Topini that at least one individual did not sign a card was initially evasive in her response to questioning about reporting back to Topini. She further admitted that she understood she was not supposed to directly ask if someone signed a card. She performed 11 interviews and her memory was not specific regarding the details of distinct interviews and she relied on referring to her notes in General Counsel's Exhibit 7 rather than her independent memory, making her testimony less reliable than that of Schembri and Collins. Moreover, as I discuss below, several of the interview questions, whether by design or due to poor grammatical structure, are difficult for anyone to answer without revealing whether one signed a card. Likewise, I find it would be difficult for an interviewer to paraphrase such questions without at least on some occasions asking the intended question—the question admittedly she understood she was not supposed to ask.

Before conducting the interviews, employees were given a form entitled "Pre-Interview Statement and Employee Acknowledgment." (R. Exhs. 1–28). Employees were given the form to review, and some interviewers explained the form to the employee. The form states that the Respondent is investigating the Union's claim of majority status and that the purpose of the interview is to ask questions about that. It also states that the meetings are voluntary and can be concluded at any time by the employee, and that there will be not retaliation based on the answers, lack of answers, or choice not to participate. All the employees proceeded with the interviews; all the in-person interviewees signed the statement and acknowledgement form.

ANALYSIS

I. Alleged Failure to Recognize and Bargain in Violation of Section 8(a)(5) and (1)

A. Legal Framework

The Board balances the statutory interests of promoting stable labor relations and protecting individual employee choice in many of its established legal doctrines. In *Houston Division of the Kroger Co.*, 219 NLRB 388, 388–389 (1975), and in subsequent cases, the Board established a framework for unions and employers to lawfully enter into valid, enforceable "after-acquired stores" agreements, by which the parties agree that the employer will recognize the union and apply an existing collective-bargaining agreement to a new group of employees upon acquiring a new facility or operation. Breaching such agreements may violate of Section 8(a)(5) and (1) of the Act. Id. In establishing this legal doctrine, the Board accommodated the need for individual employee choice with the rights of the parties to agree to include employees in a newly acquired facility within an established bargaining unit by holding that "after-acquired stores" agreements constitute a waiver of the employer's right to a Board election, as long as the

union has a valid card majority among the new group of employees (or otherwise objectively demonstrates majority support). Id. Comparable to an accretion situation, the Board requires that the Union demonstrate majority support within the new group of employees to be merged into a preexisting unit. Id. Thus, in *Kroger*, and subsequent cases applying *Kroger*, the Board has found that the employer violated Section 8(a)(5) by refusing to honor a contract clause requiring newly-acquired stores be covered by the existing contract, where the union had proof of card majorities in those stores. *Alpha Beta Co.*, above at 228, 229–230 (1989); see also, *Raley's*, 336 NLRB 374, 375–378 (2001) (affirming the *Kroger* doctrine, and remanding for further proceedings to determine whether the union had majority support). The Board has confirmed that when, like here, the employees of newly organized or acquired store are to be merged into a multistore contractual bargaining unit, after-acquired store agreements are mandatory subjects of bargaining and failing to honor the agreements is a repudiation of contract that violates Section 8(a)(5) of the Act. See *Supervalu, Inc.*, 351 NLRB 948, 950 (2007) (Although the Board found the parties agreements in this case did not establish that breach of the after-acquired clause was an 8(a)(5) violation, it confirmed that when there exists a multistore unit, breach of the after-acquired stores clause may violate Sec. 8(a)(5)). Compare *Shaw's Supermarkets*, 343 NLRB 963 (2004), in which the Board considered the dismissal of an RM petition pursuant to an after-acquired stores agreement, and remanded the issues to the Regional Director for further processing, reasoning that the terms of the parties' agreement did not establish clearly the definition of the bargaining unit, and particularly, whether there were multiple store-specific units or one, multistore unit, and that there was an absence of information in the record regarding the appropriateness of the proposed unit.[13]

B. Application to the Parties' Agreements and the LaGrangeville Store Employees

Consistent with the General Counsel's arguments, I find that the wording of the after-acquired stores agreement in this case is clear. The period of time covered under the agreement is clear: June 19, 2016 through October 31, 2020. (GC Exh. 5.) The definition of the bargaining unit and its geographical scope are clearly set forth in both the agreement and the existing CBA (GC Exhs. 5 and 6). The employees at issue in this dispute clearly fall within this unit definition. The agreement clearly sets forth that the Respondent must apply the terms of the existing CBA to employees who otherwise belong in the bargaining unit.

Although the parties' after-acquired stores agreement clearly anticipates that the Respondent will recognize the Union as the exclusive representative for collective bargaining of employees in its new stores, the Respondent correctly points out that the agreement lacks an explicit designation of an agreed-upon method for the Union to demonstrate its majority support among employees in a newly acquired store. Demonstration of union majority status by card check of authentic union authorization cards is an acceptable method consistently recognized by

[13] In *Shaws*, the Board panel discussed that whether a contract provision is clear and unequivocal is a fact-specific analysis, and further suggested an intention to reconsider whether public policy considerations might outweigh an employer's private agreement not to hold an election pursuant to the *Kroger* doctrine. As the case was remanded to the Regional Director and the Board did not specifically revisit this policy question in subsequent review of this or other cases, the questions raised by the Board in *Shaws* are not precedential and do not disturb the Board's holding either in *Kroger* or cases relying on *Kroger*.

the Board as an appropriate method to trigger recognition obligations pursuant to an after-acquired store clause. *Kroger*, above at 388; *Raley's*, above at 378; *Alpha Beta Co.*, above. The absence of specificity in the agreement regarding the method of demonstration of majority support does not render an otherwise clear after-acquired stores agreement fatally ambiguous. *Kroger*, above. The agreement also does not explicitly waive the Respondent's right to file a representation petition. However, the Board has consistently held that after-acquired stores agreements implicitly contain a waiver of the employer's right to a Board election, because without such a waiver they would have no meaning. *Kroger*, above at 388-389; *Alpha Beta Co.*, above at 229. Therefore, it is of no consequence on the facts of this case that there is no explicit waiver of the right for the Respondent to demand an election.[14] Id.

The record establishes that the Union obtained evidence of majority support by collecting 18 signed authorization cards from a majority of the 30 unit employees at the LaGrangeville store by January 23, 2017. The Union in its demand for recognition and bargaining on January 25, 2017, asserted it had proof of majority status in the form of signed cards and that it would make that evidence available to the Respondent upon request (GC Exh. 10). Rather than investigate whether majority status existed by examining the cards, or contacting the Union at all, however, the Respondent failed to review the Union's evidence and embarked on an "investigation" of the card-collecting process by interviewing all employees individually. At the same time, it planned and engaged in a union-avoidance campaign. In this context, the Respondent did not alleviate itself of its contractual obligation to recognize the Union and apply the terms of the collective bargaining agreement by failing to review the cards. I find that its decision to interview employees individually about their experiences with card collecting in an absence of any suggestion of wrong-doing, coercion, or misrepresentations by the Union, and in an absence of having reviewed the objective evidence of majority support is inconsistent with its obligation to engage in good faith consultations with the Union pursuant to its after-acquired stores Agreement and its established CBA. Even though the representation of employees at the LaGrangeville store may have been in dispute, the Respondent was obliged to deal with the Union in good faith based on its established collective-bargaining relationship. Asserting that it was "investigating" the validity of the Union's claim of majority support was disingenuous in a context where the Respondent had not bothered to review the evidence of majority support. What was it investigating if it did not begin with consideration of the Union's evidence of majority support? I find that the Respondent cannot assert that it lacked knowledge of the Union's majority support by purposefully refusing to review the signed authorization cards and evaluate their significance. See *Alpha Beta Co.*, above at 229 (reasoning that without any evidence of impropriety or misconduct in solicitation of the authorization cards, the respondent clearly

[14] There is no evidence on this record that any representation petition was filed or is pending regarding the unit employees at the LaGrangeville store and so none is before me. The Respondent freely and explicitly entered into the after-acquired stores agreement on August 8, 2016 just before acquiring the store. Therefore, the Respondent's argument the Union's majority status among this group of employees should be determined by a Board-conducted election is unfounded. The Respondent's policy argument that election waiver agreements in general should be found invalid by the Board is misplaced here and strikes me as insincere where the Respondent freely and consciously entered into the agreement it is asking the Board to find invalid. Moreover, the Respondent's simple assertion that these agreements are fundamentally unfair presents no arguments not already considered by the Board in the *Kroger* line of cases.

breached its obligations to recognize the union pursuant to the after-acquired stores clause by flatly refusing to review the proffered evidence of majority support); see also *J. T. Thorpe & Son, Inc.*, 356 NLRB 822 (2011) (union's offer to show signed authorization cards to employer's bargaining representative adequate despite employer's decision not to inspect them in the context of union's conversion from Section 8(f) to Section 9(a) representative based on majority support for the union); cf. *Supervalu, Inc.*, above (respondent's refusal to review cards did not violate Sec. 8(a)(5) even though it may have breached the parties agreement, where separate, additional stores bargaining units were not shown to vitally effect the interests of the employees in the unit covered by the existing agreement.) Therefore, I attribute knowledge of the Union's majority status as of the Union's offer to share its evidence of support with the Respondent received on January 25, 2017. *Alpha Beta Co.*, above.

Based on the above, and my finding that the the18 cards were authentic and constituted a valid demonstration of majority support for the Union as of the January 25, 2017, the day the Respondent received the Union's demand for recognition and bargaining, I conclude that the Union was the exclusive collective-bargaining representative of the employees at the LaGrangeville store included in the multistore bargaining unit of meat, poultry, fish, appetizer and delicatessen departments, as defined in the CBA pursuant to Section 9(a) of the Act as of January 25, 2017. By failing to recognize the Union as the exclusive collective-bargaining agent of the unit employees at the LaGrangeville store, and by failing to apply the existing terms and conditions of employment agreed to in the existing CBA, the Respondent violated Section 8(a)(5) and (1) of the Act.

II. Alleged Unlawful Interrogations and Polling in Violation of Section 8(a)(1)

The General Counsel argues that the Respondents' one-on-one interviews with employees in late January 2017 were unlawful under two legal theories: (1) that they constituted coercive interrogations and (2) that they involved unlawful polling. I find the Respondent violated Section 8(a)(1) pursuant to both legal theories.

As a threshold issue, I find that the Respondent's reliance on having initially explained the purpose of the interviews, assured employees that their participation in the interviews was voluntary and that there would be no retaliation for participation is misplaced. The Respondent argues that it was entitled to conduct the interviews pursuant to the protections outlined in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). However, this holding in *Johnnie's Poultry* applies to situations in which the Respondent, or most often its legal counsel, is faced with the need to ask employees about protected or union activity to prepare for litigation. Here, no litigation was pending until the Union filed a charge *after* the Respondent conducted the interviews. The Respondent cannot retroactively reframe the interviews as preparation for litigation, when, in fact the interviews themselves were part of the reason litigation ensued. The question pending regarding whether the Union enjoyed majority support sufficient to trigger a bargaining obligation pursuant to the parties' contracts was a factual one, one which the Respondent avoided even addressing by failing to review the Union's evidence of support. Moreover, the purpose of the interview meetings was not fully explained to the employees in the Pre-Interview Statement and Employee Acknowledgment that employees signed before the interviews were commenced (R. Exhs. 1–28). I have found above that in addition to any

purported purpose in investigating the Union's claim of majority support for the Union, the Respondent clearly intended to use, and indeed did use, the meetings to solicit information from employees regarding who supported the Union and why, and to further its union-avoidance efforts by persuading employees that they were better off without the union contract. Therefore, even if it were to appropriately apply in this case, the signed statements fall short of the requirement of *Johnnies's Poultry* to advise employees of the actual purpose(s) of the investigatory meetings in order to lessen the coercive effect of the meetings.

The Board determines whether an employer's questioning of an employee about union activity violates 8(a)(1) by considering whether, under all the circumstances, the interrogation would reasonably tend to restrain, coerce, or interfere with Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among factors considered are: (1) the questioner's identity, including their position of authority; (2) the place and method of interrogation; (3) the background of the questioning, including the context of unfair labor practices; (4) and the nature of the information sought; and (5) whether the employee is an open union supporter. *Scheid Electric*, 355 NLRB 160 (2010); see also *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (above factors described). The Board also considers whether the employees responded truthfully, as evasive or inaccurate responses may tend to indicate a tendency of the questioning to intimidate or coerce. *Westwood Health Care Center, a Division of Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000). These factors are not to be mechanically applied, and are not the only factors the Board considers in evaluating the totality of circumstances. *Rossmore House*, supra, fn. 20.

Based on the above, I find that under all the circumstances the Respondent's interviews were unlawfully coercive in violation of Section 8(a)(1). The interviews took place in direct response to collection of union authorization cards while recognition of the Union was pending, and it involved asking employees about the signing of union authorization cards by the employees and their coworkers, and about their communications with the Union. The Respondent simultaneously engaged in "union-avoidance" efforts, confirming the context of the interviews taking place during an organizing drive. Significantly, the content of the interviews was directly related to the protected activity of conversations with the Union, signing union authorization cards, and talking to other employees soliciting union authorization cards. During the interviews, the Respondent solicited employees' views regarding the Union by asking them to respond to the Respondent's calculations about their purported pay cuts. Significantly, they did not either reveal to employees or solicit opinions from employees about calculations that may have revealed pay increases (Tr. 328). See, e.g., *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001) (Interrogations that constitute "a pointed attempt to ascertain the extent of the employees' union activities" are unlawful.) Moreover, the questioning contained leading and, at times, loaded questions that would cause an employee to reveal his or her union sentiments (GC Exh. 7). Take the very first question: "If you were asked to sign a union authorization card, was the significance of the card explained to you?" This is clearly a loaded question. It calls for a "yes" or "no" answer; yet, by answering either way the employee reveals that he or she was asked to sign a card. In order to not admit to having been asked to sign a card, the employee must challenge the conditional premise of the question, itself difficult to do with a senior management representative in a formal setting, and might say something like, I wasn't asked to sign a card, which is an awkward answer because, as I noted, the question calls for a "yes" or "no" answer. And of course,

even answering in that way reveals whether the employee was asked to sign a card. The hearing testimony as well as the notes on General Counsel's 7 indicate that this question also elicited revelations that employees either had or had not *signed* a card from some employees. Whether this was intended or a consequence poor draftsmanship is not determinative in an 8(a)(1) allegation, where the assessment is whether the questioning had a tendency to coerce employees.

The interviews were conducted by store managers and upper-level managers from outside the store and not known to employees. The interviews took place during work time in the human resources office with the door closed. Employees were called individually to the meetings from the work floor, often over the intercom, which was an unusual experience. Some employees exhibited emotional reactions to the interviews, lending credence to the intimidation and coercion of the experiences. (Tr. 432, 468.) As previously mentioned, despite never signing a card or communicating with the Union, one employee acknowledged signing a union card during his interview and followed up by lying and signing a form given to him by Respondent revoking his nonexistent card. (R. Exh. 32; GC. Exh. 16–33.

Moreover, the managers doing the interviews took notes, reflecting that they were inquiring and collecting information from employees about their union activity. The Respondent specifically kept track when they learned that an employee signed a card (Tr. 70). In the following week, the employer's union-avoidance campaign literature then reflected some of the answers to the interview questions, revealing the Respondent's use of the so-called investigation for its union-avoidance campaign. The element of implied surveillance and encouragement to oppose the union in the interviews supports my finding that the interviews were unlawful interrogations. See *Hercules Automotive, Inc.*, 285 NLRB 944, 949 (1987) (an employer violates 8(a)(1) by interrogating an employee about his union sympathies in the context where, "[i]ts purpose was to induce and convince the employees" to oppose the union.)

Turning to the unlawful polling allegation, the Respondent argues that the questioning was simply not polling. I disagree. As I have already found, the questioning was part of the Respondent's union-avoidance campaign. Any assertion that the Respondent was entitled to investigate the validity of the Union's claim of majority support by this method in this context is unsupported by Board precedent. Regardless, I have credited the testimony of two employees (Schembri and Collins) testimony that they were directly asked whether they signed union cards. (See Tr. 113, 138.) The Board has long-held that polling employees about their union support is inherently coercive, and the Board allows it only under very limited circumstances and in a very limited manner. For polling to be lawful, all of the safeguards under *Struknes Construction Co.*, 165 NLRB 1062 (1967) must be met. See *Vista Del Sol Health Services*, 363 NLRB No. 135, slip op. at 21 (2016):

> Absent unusual circumstances, the polling of employees by an employer will violate Section 8(a)(1) of the Act unless all of the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struksnes Construction Co.,* 165 NLRB 1062, 1063 (1967); see also

> *Johnnies Poultry* 146 NLRB 770, 775 (1964); *HTH Corp.*, 356 NLRB 1397, 1404 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012). "[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." *Struksnes Construction. Co.*, supra at 1062.

Thus, pursuant to *Struksnes*, polling employees about their union sympathies violates Section 8(a)(1) of the Act if the polling is performed without a secret ballot or in a context of unfair labor practices or a coercive atmosphere. Clearly, one purpose of the interviews was to assess the level of union support of each employee, as the Respondent assigned its representatives collective judgment of the level of support on a scale of 1 to 5 and interviewers evaluated and reported their assessments to upper management regarding each employees' union support to the extent they had d(Tr. 482). Here, the polling of employees' sympathies was neither by secret ballot nor in a context free of unfair labor practices, and it constituted unlawful polling in violation of Section 8(a)(1).

Therefore, I find the Respondent violated Section 8(a)(1) by its investigatory interviews of employees regarding the union authorization card collection under both legal theories argued by the General Counsel.

CONCLUSIONS OF LAW

1. The Respondent, Tops Markets, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers Union, Local 464A, is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about their union activities, their communications with the Union, their support of the Union, and the union activities of their coworkers, the Respondent violates Section 8(a)(1) of the Act.

4. By coercively polling employees about their support of the Union and their signing of authorization cards, the Respondent violated Section 8(a)(1) of the Act.

5. The Union has been the exclusive representative for the purposes of collective bargaining of the employees in the following bargaining unit pursuant to 9(a) of the Act:

> All full-time and regular part-time employees in the meat, poultry, fish, appetizer and delicatessen departments in the present and future stores of the Respondent within the jurisdiction of the Union in Westchester, Putnam, and Dutchess counties of the State of New York, excluding guards and supervisors as defined in the Act.

6. By failing and refusing to recognize the Union as the exclusive collective-bargaining representative of unit employees, and by failing to apply the existing collective-

bargaining agreement at the LaGrangeville store upon the Union's demand, the Respondent has been violating Section 8(a)(5) and (1) of the Act since January 25, 2017.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, the Respondent shall be ordered to cease and desist from engaging in such conduct and take certain affirmative action designed to effectuate the policies of the Act. The Respondent is ordered to apply the terms of the existing collective-bargaining agreement with the Union covering the bargaining unit that includes employees at the LaGrangeville store.

The Respondent must apply the terms of the collective-bargaining agreement retroactively to January 25, 2017. The Respondent must make employees whole for any loss of earnings and other benefits they may have suffered due to the Respondent's unlawful refusal to apply the terms and conditions of employment set forth in the parties' existing collective-bargaining agreement as agreed to on August 8, 2017. The make-whole remedy shall be computed in accordance with *Ogle Protective Services,* 183 NLRB 682 (1970), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). The Respondent will also be ordered to preserve records necessary to determine the make-whole remedies. The remedial order shall not be interpreted to require or authorize the Respondent to recoup any overpayments from employees for any wages and benefits already paid to employees that may be inconsistent with the existing collective-bargaining agreement, absent the Union's consent.

The Respondent must bargain on request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement. The Respondent is required to meet to negotiate with the Union at reasonable times and reasonable places. An affirmative bargaining order is appropriate in this case, as it is consistent with the parties' agreements and consistent with the demonstrated uncoerced desire of a majority of employees in the unit at the Respondent's LaGrangeville store to be represented by the Union. Any evidence of loss of support in this record occurred directly after the unlawfully coercive actions of the Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[15]

ORDER

Respondent, Tops Markets, LLC, LaGrangeville, New York, its officers, agents, successors, and

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities, their communications with the Union, their support of the Union, and the union activities of their coworkers.

(b) Coercively polling employees about their support of the Union and their signing of authorization cards.

(c) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit set forth below:

All full-time and regular part-time employees in the meat, poultry, fish, appetizer and delicatessen departments in the present and future stores of Respondent within the jurisdiction of the Union in Westchester, Putnam, and Dutchess counties in the State of New York, excluding guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit described above.

(b) Upon request, apply and extend to the unit employees in its LaGrangeville, New York store, as part of the appropriate unit, the existing collective-bargaining agreement it has with the Union, with retroactive effect from January 25, 2017, the date of the Union's demand for recognition.

(c) Make employees whole for any losses in wages and benefits suffered since January 25, 2017 as a result of the unlawful failure to apply the existing collective-bargaining agreement. This Order does not require or authorize the Respondent to recoup any overpayments from employees due to the retroactive effect of the existing collective-bargaining agreement, absent the Union's consent.

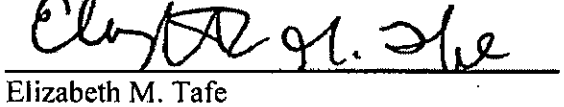
(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to

analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in LaGrangeville, New York, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since January 25, 2017.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 3 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provision of this Order.

Dated at Washington, D.C., March 26, 2018



Elizabeth M. Tafe
Administrative Law Judge

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to recognize and bargain collectively with the United Food and Commercial Workers' Union, Local 464A (the Union), as the exclusive representative of our employees at our LaGrangeville, New York store as part of the bargaining unit noted below with respect to wages, hours, or other terms and conditions of employment:

> All full-time and regular part-time employees in the meat, poultry, fish, appetizer and delicatessen departments in the present and future stores of the Employer within the jurisdiction of the Union in Westchester, Putnam, and Dutchess County excluding guards and supervisors as defined in the Act.

WE WILL NOT unlawfully question you about your Union activities and sympathies or about the Union activities or sympathies of your coworkers.

WE WILL NOT unlawfully conduct a poll of employees regarding the level of support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, upon request, bargain, with the Union and also, upon request, apply our 2016-2020 collective-bargaining agreement with the Union to the employees in our LaGrangeville, New York store as part of the multistore appropriate unit described above.

WE WILL make our employees whole for any losses suffered as a result of our refusal to recognize the Union.

TOPS MARKETS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-192010 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
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