

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES – SAN FRANCISCO, CALIFORNIA

David Saxe Productions, LLC

V Theater Group, LLC

and

International Alliance of Theatrical Stage  
Employees

Case No. 28-CA-157203

POST-HEARING BRIEF OF RESPONDENTS  
DAVID SAXE PRODUCTIONS, LLC AND  
V THEATER GROUP, LLC

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**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... iv

I. STATEMENT OF THE CASE..... 1

II. STATEMENT OF ISSUES .....6

III. PRODUCTION DEPARTMENT BACKGROUND.....8

    A. Prior Management Failed to Properly Discipline and Manage Employees Leading to Restructuring Three Weeks After Prior Manager’s Termination .....9

    B. DeStefano Assists with Restructuring and Begins Supervising the Production Department.....10

IV. SEQUESTRATION VIOLATIONS.....12

    A. Multiple Alleged Discriminatee Witnesses Violated the Sequestration Order and Thus Their Testimony Should Be Viewed with Strict Scrutiny .....12

    B. The Alleged Discriminatees Clearly Violated the Sequestration Order .....16

    C. Respondents Were Prejudiced by the Numerous Violations of the Sequestration Order .....18

    D. Saxe and DeStefano’s Alleged Violations Were at Most Technical in Nature .....19

V. PRODUCTION DEPARTMENT ALLEGATIONS .....22

    A. Legal Standard for Terminations .....22

    B. Arguments Applicable to All Production Employee Terminations.....23

        1. Knowledge .....23

            a. The Company Had No Knowledge of A Union Presence Until April 2018 .....23

            b. Surveillance Footage Did Not Reveal Union Campaign .....26

            c. Kostew and Estrada Did Not Inform Respondents of Union Organizing Campaign .....27

        2. General Counsel Cannot Link Timing of Terminations to Protected Activity .....29

a.	Timing Was Based on Change in Management.....	29
b.	The March 13, 2018 Work Call was Necessary to Avoid Injury to Performers and Was Not Used to Determine Employee Sympathies or Chill Section 7 Rights.....	30
3.	Evidence Fails to Demonstrate that Respondent’s Proffered Reasons for Termination are Pretextual .....	32
a.	Respondents Have A History of Terminating Employees Without Progressive Discipline .....	32
b.	Respondents Have Provided Additional Information – Not Inconsistent Information- Regarding the Employment Terminations .....	33
4.	There is No Evidence of Anti-Union Animus .....	35
C.	Facts and Arguments for Individual Employee Terminations.....	37
1.	Leigh Ann Hill .....	37
2.	Taylor Benevente Bohannon .....	41
3.	Nathaniel Franco .....	44
4.	Kevin Michaels .....	47
5.	Zachary Graham .....	51
6.	Alanzi Langstaff .....	55
7.	Jasmine Glick .....	59
8.	Chris Suapaia .....	62
9.	Michael Gasca .....	64
VI.	OTHER ALLEGED PRODUCTION DEPARTMENT EMPLOYEES .....	69
A.	Scott Tupy’s Discipline .....	69
B.	Schedule Changes For Tupy and Glenn .....	70
C.	Steven Urbanski’s Leave and Return to Work .....	72

VII.	AGENCY AND SUPERVISOR ISSUES .....	75
A.	General Counsel Did Not Prove Courtney Kostew Was Respondents’ Agent.....	75
1.	Chronological Facts Regarding Kostew .....	75
2.	Legal Analysis Regarding Kostew .....	79
B.	General Counsel Did Not Prove Sojak and/or Mecca Are Supervisors .....	91
VIII.	UNFAIR LABOR PRACTICE CHARGES PERTAINING TO PRODUCTION DEPARTMENT.....	94
A.	Respondents Did Not Promulgate Overly Board Rules.....	95
B.	Respondents Did Not Engage In or Create the Impression of Surveillance .....	99
C.	Respondents Did Not Make Threats or Promises .....	105
D.	Respondents Did Not Engage in Interrogation .....	107
E.	Respondents Did Not Unlawfully Grant Wage Increases.....	108
IX.	DAVID SAXE PRODUCTIONS WAREHOUSE ALLEGATIONS .....	110
A.	Scott Leigh Termination .....	110
X.	UNFAIR LABOR PRACTICES PERTAINING TO THE WAREHOUSE UNIT .....	115
A.	Saxe Did Not Engage in Unlawful Interrogation.....	115
B.	Saxe Did Not Engage in Surveillance or Create the Impression of Surveillance .....	116
C.	Respondents Did Not Refuse To Bargain in Violation of 8(a)(5) .....	118
XI.	GENERAL COUNSEL’S DEMAND FOR BARGAINING ORDER FAILS .....	122
A.	Procedural Background.....	123
B.	General Counsel Failed to Prove Majority Support in Appropriate Unit .....	126
1.	The Parties’ Stipulation Should Control Unit.....	127
2.	Proposed Warehouse Unit is Inappropriate .....	134

3. Lack of Majority Support – Denomination Issue .....147

- a. Because Respondents Acted in Good Faith, Additional Sanctions Are Not Appropriate .....150
- b. Judge Properly Denied General Counsel’s Motion to Amend ...157
- c. The Correct Denomination.....159
- d. Authorization Cards .....160

C. General Counsel Failed to Prove Bargaining Order Necessary .....165

XII. OBJECTIONS TO THE ELECTION .....171

XIII. CONCLUSION.....196

CERTIFICATE OF SERVICE .....197

## INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>A.S.V., Inc.</u> , 366 N.L.R.B. No. 162 (2018) .....	161
<u>Advance Prods. Corp.</u> , 304 N.L.R.B. 436 (1991) .....	84, 91
<u>Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Sys. &amp; Bricklayers &amp; Allied Craftworkers, Local 8 Se.</u> , 366 N.L.R.B. No. 57 (April 13, 2018) .....	43, 46, 58, 61, 67
<u>Airport 2000 Concessions, LLC &amp; Unite Here Local 7, Hotel &amp; Rest. Employees Union, Ckc.</u> , 346 N.L.R.B. 958 (2006) .....	107
<u>Alstate Maint. LLC &amp; Trevor Greenidge</u> , 2016 WL 3457642 (2016) .....	66, 70
<u>Am. League of Prof'l Baseball Clubs</u> , 189 N.L.R.B. 541 (1971) .....	25, 26
<u>Antioch Rock &amp; Ready Mix</u> , 327 N.L.R.B. 1091 (1999) .....	173
<u>Aqua Cool</u> , 332 N.L.R.B. 95 (2000) .....	171
<u>Arpro Co. n/v Arctic Producer</u> , 265 N.L.R.B. 318 (1982) .....	110
<u>Associated Milk Producers. Inc.</u> , 237 N.L.R.B. 879 (1978) .....	180, 189
<u>Avecor, Inc. v. NLRB</u> , 931 F.2d 924 (D.C. Cir. 1991) .....	123, 124, 171, 172
<u>Baja's Place, Inc.</u> , 268 N.L.R.B. 868 (1984) .....	173
<u>Bakers of Paris, Inc.</u> , 288 N.L.R.B. 991 (1988) .....	121
<u>Bannon Mills Inc.</u> , 146 N.L.R.B. 611 (1964) .....	155
<u>Beasley Energy, Inc. (Peaker Run Coal Co.)</u> , 228 N.L.R.B. 93 (1977) .....	157, 158
<u>Berenson Liquor Mart</u> , 223 N.L.R.B. 1115 (1976) .....	165
<u>Beverly Enters. v. N.L.R.B.</u> , 139 F.3d 135 (2d Cir. 1998) .....	110
<u>Bourne N. N.L.R.B.</u> , 332 F.2d 47 (2d Cir, 1964) .....	189
<u>Bridgestone Firestone South Carolina</u> , 350 N.L.R.B. 526 (2007) .....	116
<u>Brown Truck &amp; Trailer Mfg. Co., Inc.</u> , 106 N.L.R.B. 999(1953) .....	75

<u>Bruce Duncan Co.</u> , 233 N.L.R.B. 1243 (1977) .....	171
<u>Burlington Times, Inc.</u> , 328 N.L.R.B. 750 (1999).....	171
<u>Butler Asphalt, L.L.C.</u> , 352 N.L.R.B. 189 (2008) .....	130
<u>California Gas Transp., Inc.</u> , 347 N.L.R.B. 1314 (2006).....	89, 158, 168
<u>Calpine Containers</u> , 251 N.L.R.B. 1509, 1510 (1980) .....	145
<u>Cambridge Chemical Corp.</u> , 259 N.L.R.B. 1374.....	40, 50, 58, 61, 114
<u>Capital Coors Co.</u> , 309 N.L.R.B. 322, 325 (1992) .....	147
<u>Chevron Shipping Co.</u> , 317 N.L.R.B. 379 (1995) .....	92
<u>Coca Cola Bottling Co.</u> , 132 N.L.R.B. 481 (1961).....	110
<u>Color Tech Corp.</u> , 256 N.L.R.B. 476 (1987) .....	122
<u>Columbian Distribution Servs., Inc.</u> , 320 N.L.R.B. 1068 (1996).....	36
<u>Comet Elec., Inc.</u> , 314 N.L.R.B. 1215 (1994) .....	194
<u>Corella Elec., Inc.</u> , 317 N.L.R.B. 147 (1995) .....	170
<u>Cornell Forge Co.</u> , 339 N.L.R.B. 733 (2003) .....	80, 88
<u>Corner Furniture Disc. Ctr., Inc.</u> , 339 N.L.R.B. 1122 (2003).....	91
<u>Costco Wholesale Corp. &amp; Teamsters Local 592, Int’l Bhd. of Teamsters</u> , 366 N.L.R.B. No. 9 (February 2, 2018) .....	21
<u>Crown Bolt, Inc.</u> , 343 N.L.R.B. 776 (2004) .....	193, 196
<u>Cumberland Shoe Corp.</u> , 144 N.L.R.B. 1268 (1963) .....	162
<u>D &amp; W Food Centers, Inc. &amp; Debbie Vanderwall</u> , 305 N.L.R.B. 553 (1991).....	70
<u>Dadco Fashions, Inc.</u> , 243 N.L.R.B. 1193 (1979) .....	145
<u>Davis Supermarkets</u> , 306 N.L.R.B. 426 (1992).....	92
<u>Delta Brands, Inc.</u> , 344 N.L.R.B. 252 (2005) .....	173, 196

<u>Desert Aggregates</u> , 340 N.L.R.B. 289 (2003).....	172
<u>Dlubak Corp.</u> , 307 N.L.R.B. 1138 (1992) .....	164
<u>Douglas Foods, Corp.</u> , 330 N.L.R.B. 821 (2000).....	133, 134
<u>Dr. Phillip Megdal, D.D.S., Inc.</u> , 267 N.L.R.B. 82 (1983).....	28
<u>Dyncorp</u> , 343 N.L.R.B. 1197 (2004) .....	179, 189
<u>Eagle Material</u> , 558 F.2d 160 (3 <sup>rd</sup> Cir. 1977).....	119
<u>El Mundo Corp.</u> , 301 N.L.R.B. 351 (1991).....	18
<u>Electro-Wire Prods., Inc.</u> , 242 N.L.R.B. 960 (1979) .....	180, 189
<u>Emergency One, Inc.</u> , 2001 WL 1589694 (N.L.R.B. Div. of Judges, Aug. 16, 2001).....	183
<u>Exemplar, Inc.</u> , 363 N.L.R.B. No. 157, 2016 WL 1272893 (March 31, 2016).....	146
<u>Fed'n of Teachers Welfare Fund</u> , 322 N.L.R.B. 385 (1996) .....	22
<u>Feldcamp Enters., Inc.</u> , 323 N.L.R.B. 1193 (1997) .....	85
<u>Flav-O-Rich, Inc.</u> , 234 N.L.R.B. 1011 (1978).....	119, 121
<u>Fontaine Converting Works, Inc.</u> , 77 N.L.R.B. 1386 (1948) .....	194
<u>Foxwood Resorts Casino</u> , 352 N.L.R.B. 771 (2008).....	181
<u>Fresenius USA Mfg., Inc.</u> , 362 N.L.R.B. No. 130 (June 14, 2015).....	116
<u>Fresh &amp; Easy Neighborhood Market, Inc.</u> , 356 N.L.R.B. 546 (2011).....	54
<u>Gaylord Hsop. &amp; Jeanine Connelly</u> , 359 N.L.R.B. 1266 (2013).....	34
<u>Genesis Health Ventures of West Virginia, L.P. (Ansted Center)</u> , 326 N.L.R.B. 1208 (1998) ..	130
<u>Giddings &amp; Lewis, Inc.</u> , 240 N.L.R.B. 441 (1979) .....	34
<u>Grandee Beer Distributors, Inc.</u> , 247 N.L.R.B. 1280 (1980).....	122
<u>Greyhound Lines, Inc.</u> , 319 N.L.R.B. 554 (1995) .....	12
<u>Guard Publ'g Co.</u> , 344 N.L.R.B. 1142 (2005).....	109

<u>Hall Constr. V. N.L.R.B.</u> , 941 F.2d 684 (8 <sup>th</sup> Cir. 1991) .....	23
<u>Health Management, Inc.</u> , 356 N.L.R.B. 801 (2011).....	40, 50, 58, 61, 113
<u>Healthcare Servs. Grp., Inc.</u> , 2005 WL 3272354 (N.L.R.B. Div. of Judges, Nov. 25, 2005) .....	164
<u>Hopkins Nursing Care Ctr.</u> , 309 N.L.R.B. 958, (1992) .....	179
<u>Kialeah Hosp.</u> , 343 N.L.R.B. 391 (2004) .....	172
<u>Holly Farms Corp.</u> , 311 N.L.R.B. 273 (1993) .....	127, 157, 168
<u>Hudson Wire Co.</u> , 236 N.L.R.B. 1263 (1978) .....	189
<u>Ideal Elec. &amp; Mfg. Co.</u> , 134 N.L.R.B. 1275 (1961) .....	177
<u>Imperial Prods. Corp.</u> , 1996 WL 33321323 (NLRB Div, of Judges, Feb. 26, 1996).....	194
<u>In Re Orland Park Motor Cars, Inc.</u> , 333 N.L.R.B. 1017 (2001) .....	26
<u>In re Sealed Case</u> , 146 F.3d 881 (D.C. Cir. 1998) .....	33
<u>International Bedding Co.</u> , 356 N.L.R.B. 1336, 1337 (2011) .....	144
<u>Jennings and Webb, Inc.</u> , 288 N.L.R.B. 682 (1988).....	86
<u>John S. Barnes, Corp.</u> , 90 N.L.R.B. 1358 (1950) .....	185
<u>Joy Recovery Tech. Corp.</u> , 320 N.L.R.B. 356 (1995) .....	158
<u>Jules v. Lane</u> , 262 N.L.R.B. 118 (1982) .....	84
<u>Kalamzaoo Paper Box Corp.</u> , 136 N.L.R.B. 134, 136-37 (1962).....	144
<u>Kawa Sushi</u> , 359 N.L.R.B. 607 (2013) .....	80, 85, 86
<u>King Soopers, Inc. v. N.L.R.B.</u> , 859 F.3d 23 (D.C. Cir. 2017) .....	159
<u>Kmart Corp. v. N.L.R.B.</u> , 174 F.3d 834 (7 <sup>th</sup> Cir. 1999).....	144
<u>Knogo Corp.</u> , 265 N.L.R.B. 935 (1982) .....	82, 88
<u>Kokomo Tube Co</u> , 280 N.L.R.B. 357 (1986) .....	177
<u>Laborers Int'l Union of N. Am., Local 270</u> , 285 N.L.R.B. 1026 (1987).....	84, 86

<u>Lechmere, Inc. v. NLRB</u> , 502 U.S. 527 (1992).....	99
<u>Lutheran Heritage Village-Livonia</u> , 343 N.L.R.B. 646 (2004) .....	97
<u>Mack’s Supermarkets, Inc.</u> , 288 N.L.R.B. 1082 (1988) .....	88
<u>McAllister Towing &amp; Transp. Co.</u> , 341 N.L.R.B. 394 (2015) .....	155
<u>Medite of New Mexico, Inc.</u> , 314 N.L.R.B. 1145 (1995).....	16
<u>Merillat Industries</u> , 307 N.L.R.B. 1301 (1992) .....	50
<u>Millard Processing Services</u> , 304 N.L.R.B. 770 (1991) .....	80
<u>Miller Trucking Serv., Inc.</u> , 176 N.L.R.B. 556 (1969) .....	165
<u>Missouri Portland Cement Co. v. N.L.R.B.</u> , 965 F.2d 217 (1992).....	26
<u>Montgomery Ward &amp; Co.</u> , 259 N.L.R.B., 280,280-81 (1981) .....	144
<u>MPG Transp., Ltd.</u> , 315 N.L.R.B. 489 (1994).....	89
<u>Nash-Finch Co.</u> , 117 N.L.R.B. 808 (1957).....	183
<u>Naum Bros., Inc.</u> , 240 N.L.R.B. 311 (1979).....	121
<u>New Era Cap Co.</u> , 336 N.L.R.B. 526 (2001).....	186
<u>N.L.R.B. v. Adams Delivery Servs.</u> , 623 F.2d 96 (9 <sup>th</sup> Cir. 1980).....	66
<u>N.L.R.B. v. Bayliss Trucking Corp.</u> , 432 F.2d 1025 (2d Cir. 1970) .....	144
<u>N.L.R.B. v. Circo Resorts</u> , 646 F.2d 403 (9 <sup>th</sup> Cir. 1981).....	110
<u>N.L.R.B. v. Gissel Packing Co.</u> , 396 U.S. 575 (1969) .....	123, 168, 170
<u>N.L.R.B. v. International Medication Systems</u> , 640 F.2d 1110 (9 <sup>th</sup> Cir. 1981).....	156
<u>N.L.R.B. v. J.J. Collins’ Sons</u> , 332 F.2d 523 (7 <sup>th</sup> Cir. 1964).....	132
<u>N.L.R.B. v. Lundy Packing Co.</u> , 68 F.3d 1577 (4 <sup>th</sup> Cir. 1995).....	136, 137, 138
<u>N.L.R.B. v. Metropolitan Life Ins. Co.</u> , 380 U.S. 438 (1965).....	136
<u>N.L.R.B. v. Mike Yurosek &amp; Sons, Inc.</u> , 53 F.3d 261 (9 <sup>th</sup> Cir. 1995).....	22

<u>N.L.R.B. v. O’Daniel Trucking Co.</u> , 23 F.3d 1144 (7 <sup>th</sup> Cir. 1994).....	130, 132
<u>N.L.R.B. v. Sonoma Vineyards, Inc.</u> , 727 F.2d 860 (9 <sup>th</sup> Cir. 1984).....	130, 132
<u>N.L.R.B. v. Transportation Management</u> , 462 U.S. 393 (1983).....	22
<u>Noblit Bros., Inc.</u> , 305 N.L.R.B. 329 (1992) .....	155
<u>North Hills Office Servs., Inc.</u> , 346 N.L.R.B. 1099 (2006).....	102, 104, 117, 118
<u>Northshore Sheet Metal Inc.</u> , 2013 WL 3865066 (N.L.R.B. Div. of Judges, July 25, 2013).....	83
<u>N.Y. Univ. Med. Ctr.</u> , 324 N.L.R.B. 887 (1997).....	22, 23
<u>Operating Engineers Local Union No. 3 of Int’l Union of Operating Engineers, Afl-cio</u> , 324 N.L.R.B. 1183 (1997) .....	94
<u>Pac. Beach Corp.</u> , 344 N.L.R.B. 1160 (2005) .....	184
<u>Pacific Coast Sightseeing Tours &amp; Charters, Inc.</u> , 365 N.L.R.B. No. 131 (2017) .....	180
<u>Pan-Oston Co.</u> , 336 N.L.R.B. 305 (2001).....	80
<u>Paragon Sys., Inc.</u> , 2011 WL 6042790 (NLRB Dec. 5, 2011) .....	176
<u>PCC Structurala, Inc.</u> , 365 N.L.R.B. No. 160, 2017 WL 6507219 (2017).....	135, 137, 138
<u>Peavey Co.</u> , 648 F.2d 460 (7 <sup>th</sup> Cir. 1981) .....	22
<u>Peerless of America, Inc.</u> , 484 F.2d 1108 (7 <sup>th</sup> Cir. 1973).....	167
<u>Peerless Plywood, Co.</u> , 107 N.L.R.B. 427 (1953) .....	178, 180, 181
<u>People’s Transport Serv., Inc.</u> , 276 N.L.R.B. 169 (1985) .....	155, 156
<u>Pelton Casteel Inc., v. N.L.R.B.</u> , 627 F.2d 23 (7 <sup>th</sup> Cir. 1980).....	66
<u>Peters v. Lincoln Elec. Co.</u> , 285 F.3d 456 (6 <sup>th</sup> Cir. 2002) .....	29
<u>Pierce Corp.</u> , 288 N.L.R.B. 97 (1988) .....	80
<u>Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp.</u> , 258 N.L.R.B. 1081 (1981).....	121
<u>Port-A-Crib, Inc.</u> , 143 N.L.R.B. 483 (1963).....	28

<u>Production Plating Co.</u> , 233 N.L.R.B. 116 (1977).....	119, 121
<u>Red Coats, Inc.</u> , 328 N.L.R.B. 205 (1999) .....	131, 132
<u>Red Oaks Nursing Home v. NLRB</u> , 633 F.2d 503 (7 <sup>th</sup> Cir. 1980) .....	168
<u>Register Guard</u> , 344 N.L.R.B. 1142 (2005).....	103, 117
<u>Reinsdorf v. Skechers USA, Inc.</u> , 296 F.R.D. 604 (2013).....	156, 157
<u>Reno Hilton v. IATSE</u> , 282 N.L.R.B. 819 (1987) .....	20, 134
<u>Rescare of West Virginia</u> , 2002 WL 1883792 (N.L.R.B. Div. of Judges, Aug. 9, 2002) .....	87
<u>Rocky Mountain Planned Parenthood, Inc.</u> , 2017 WL 5665355, *4 (N.L.R.B. Nov. 13, 2017) .....	146
<u>Rojas v. Florida</u> , 285 F.3d 1339 (11 <sup>th</sup> Cir. 2002).....	29
<u>Rosewood Mfg., Co.</u> , 278 N.L.R.B. 722 (1986).....	183
<u>Rossmore House</u> , 269 N.L.R.B. 1176 (1984).....	189
<u>Ryder Transp. Servs.</u> , 341 N.L.R.B. 761 (2004) .....	107
<u>Saunders Leasing Sys.</u> , 204 N.L.R.B. 448 (1973) .....	190
<u>Schrementi Bros.</u> , 179 N.L.R.B. 853 (1969) .....	102, 117
<u>Scott v. Stephen Dunn &amp; Assoc.</u> , 241 F.3d 652 (9 <sup>th</sup> Cir. 2001).....	167
<u>Sears, Roebuck &amp; Co. v. N.L.R.B.</u> , 349 F.3d 493 (7 <sup>th</sup> Cir. 2003) .....	22, 93
<u>Seda Specialty Packaging Corp.</u> , 324 N.L.R.B. 350 (1997).....	189
<u>Serv. Employees Local 434-B</u> , 316 N.L.R.B. 1059 (1995).....	23
<u>Sewell Mfg. Co.</u> , 138 N.L.R.B. 66 (1962).....	177
<u>South Carolina Industries</u> , 181 N.L.R.B. 1031 (1970) .....	40, 50, 58, 114
<u>Specialty Health Care &amp; Rehabilitation Center of Mobile</u> , 357 N.L.R.B. 934 (2011).....	135, 137, 138
<u>Sprint Commc'ns d/b/a Cent. Tel. Co. of Texas &amp; Commc'ns Workers of Am., Local 6174, Alf-cio</u> , 343 N.L.R.B. 987 (2004) .....	33

<u>Stagehands Referral Serv.</u> , 347 N.L.R.B. 1167 (2006).....	159
<u>Starbucks Corp. d/b/a Starbucks Coffee Co. &amp; Local 660, Indus. Workers of the World</u> , 2008 WL 5351366 (2008).....	64
<u>Stop &amp; Shop Co. v. N.L.R.B.</u> , 548 F.2d 17 (1977).....	93
<u>Springfield Hosp.</u> , 281 N.L.R.B. 643 (1986).....	190
<u>Stormont-Vail Healthcare, Inc.</u> , 340 N.L.R.B. 1205, 1205, 1208 (2003).....	147
<u>Sturgis-Newport Bus. Forms, Inc.</u> , 227 N.L.R.B. 1426 (1977).....	171
<u>Suburban Trails</u> , 326 N.L.R.B. 1250 (1998) .....	16
<u>Sunnyvale Med. Clinic</u> , 277 N.L.R.B. 1217 (1985).....	189
<u>Swanson-Nunn Elec. Co.</u> , 256 N.L.R.B. 840 (1981).....	171
<u>Taylor Wharton Div.</u> , 336 N.L.R.B. 157 (2001).....	174, 196
<u>Television Signal Corp.</u> , 268 N.L.R.B. 633 (1984) .....	130
<u>Tidewater Oil Co. v. N.L.R.B.</u> , 358 F.2d 363 (2d Cir 1966).....	131
<u>The Boeing Co.</u> , 365 N.L.R.B. No. 154 (Dec. 14, 2017) .....	97, 99
<u>The New Otani Hotel and Garden</u> , 325 N.L.R.B. 928 (1998) .....	23
<u>The Tribune Co.</u> , 190 N.L.R.B. 398 (1971).....	131
<u>Tower Auto Operations USA</u> , 355 N.L.R.B. 1 (2010).....	36
<u>Traction Wholesale Ctr., Co.</u> , 328 N.L.R.B. 1058 (1999).....	170
<u>Tres Estrellas de Oro</u> , 329 N.L.R.B. 50 (1999) .....	191
<u>Trump Ruffin Commercial, LLC</u> , 2016 WL 3971037 (N.L.R.B. Div. of Judges, July 22, 2016) .....	84
<u>U.S. v. Adlman</u> , 134 F.3d 1194 (1998).....	33
<u>Unga Painting Corp.</u> , 237 N.L.R.B. 1306 (1978).....	18
<u>United Builders Supply Co.</u> , 287 N.L.R.B. 1364 (1988).....	82

<u>United Fed’n of Teachers Welfare Fund</u> , 322 N.L.R.B. 385 (1996) .....	23
<u>Valdivia v. Univ. of Kan. Med. Ctr.</u> , 24 F. Supp. 2d 1169 (1998) .....	29
<u>Virginia Mfg. Co.</u> , 310 N.L.R.B. 1261 (1993) .....	89
<u>Wal-Mart Stores, Inc.</u> , 349 N.L.R.B. 1095 (2007) .....	99
<u>Walmart Stores Inc.</u> , 2016 WL 275280 (Jan. 21, 2016) .....	116
<u>Walter Jack and Dixie A. Macy</u> , 257 N.L.R.B. 108 (1981) .....	170
<u>Washington Coca Cola Bottling Works, Inc.</u> , 117 N.L.R.B. 1163 (1957) .....	122
<u>Washington Fruit &amp; Produce Co.</u> , 343 N.L.R.B. 1215 (2004) .....	176
<u>White Cloud Prods., Inc.</u> , 214 N.L.R.B. 516 (1974) .....	131
<u>Women in Crisis Counseling</u> , 312 N.L.R.B. 589 (1993) .....	176
<u>Wright Line</u> , 251 N.L.R.B. 1083 (1980) .....	22, 39, 42, 45, 49, 65, 70, 74, 112

**Statutes**

29 USC §152 .....	92
29 USC §158(c) .....	103, 118
Restatement (Third) of Agency §1.01 .....	80
Restatement (Third) of Agency §1.03 .....	81
Restatement (Third) of Agency §3.01 .....	80
Restatement (Second) of Agency §284 .....	89

## **I. STATEMENT OF THE CASE.**

This case presents a complicated and complex set of facts involving ten (10) former employees, three (3) current employees, two union campaigns, one union election, and the correction of the mismanagement by Respondents' prior management. This case requires the Administrative Law Judge to determine the lawfulness of David Saxe Productions, LLC's and V Theater Group, LLC's ("Respondents") termination of ten employees discussed in detail *infra*, changing of hours of current employees, and the refusal to bargain with the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists, and Allied Crafts of the United States and Canada, Local 720, AFL-CIO ("the Union").

On or around April 24, 2018, the Union filed the initiating unfair labor practice charge in this case (28-CA-219225), alleging the unlawful termination of eleven employees: Scott Leigh, Chris Suapaia, Kevin Michaels, Jasmine Glick, Zachary Graham, Taylor Bohannon, Nathaniel Franco, Leigh-Ann Hill, Michael Gasca, Alanzi Langstaff, and Michael Koole<sup>1</sup> ("alleged discriminatees").

On or around April 26, 2018, the Union filed a Petition for Representation of all Production Department Employees, including stagehands, audio technicians, and lighting technicians (28-RC-219130). A stipulated election agreement was entered on May 9, 2018, scheduling the election for May 17, 2018. Ultimately, Respondents prevailed in the secret-ballot election with a vote of 19 in favor of the Union and 22 opposed to the Union. There were also seven challenged ballots cast by former employees (Glick, Graham, Bohannon, Franco, Hill, Langstaff, and Michaels) who alleged to be unlawfully terminated in Charge No. 28-CA-219225. Thereafter, a first amended charge in

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<sup>1</sup> The allegations pertaining to Michael Koole were not included in the Amended Complaint and, thus, were not pursued by the General Counsel at the hearing.

Case 28-CA-219225 was filed on or around June 29, 2018. Region 28 of the National Labor Relations Board (“Board”) issued a complaint based on the amended charge on July 9, 2018. Then, on July 10, 2018, the complaint was consolidated with the Hearing on Challenged Ballots and Election Objections from the Election in Case No. 28-RC-219130.

The Union filed four additional unfair labor practice charges with Region 28. First, on or around July 9, 2018, the Union filed Charge No. 28-CA-223339, alleging that Respondents changed terms and conditions of employment by issuing a last-minute work call on March 13, 2018, and enforcing previously unenforced rules. Second, on or around July 10, 2018, the Union filed Charge No. 223362, alleging that Respondents refused to recognize and bargain in good faith with the Union and requesting a bargaining order for an unidentified unit. Third, on the same day, the Union filed Charge No. 223376, alleging that Respondents surveilled or created the impression of surveillance of employees’ union activities, interrogated employees about their union activities, threatened employees with job loss and closure, maintaining overly broad handbook rules, altering employee schedules around the time of an election, posting anti-union propaganda and failing to post NLRB election notices. Charge No. 223376 also alleged that Respondents reduced the hours of current employees Scott Tupy and Darnell Glenn and issued Tupy a discipline to discourage union activities. Finally, on or around July 20, 2018, the Union filed Charge No. 28-CA-224119 alleging that Respondents discriminated against then-current employee Steven Urbanski by delaying his return to work following a work-related injury and subjecting him to stricter work standards and discipline.

On or around August 20, 2018, the Union’s four additional charges were consolidated with the initial charge, complaint, and the Hearing on Challenged Ballots and Election Objections from the Election in Case No. 28-RC-219130. Subsequently, Region 28 scheduled a trial on the

consolidated matter before an administrative law judge to begin on August 27, 2018; however, Region 28 later unilaterally moved the trial to September 11, 2018.

A hearing was held before Administrative Law Judge Mara-Louise Anzalone in Las Vegas, Nevada, from September 11 through September 21, October 1 through October 5, October 22 through October 25, October 31 through November 2, and November 13, 2018. Transcripts containing the testimony presented during the hearing were prepared and transmitted to the parties throughout the hearing with the last volume being transmitted on November 18, 2018. The total number of transcripts was 23 volumes. The Consolidated Amended Complaint was amended during the hearing to exclude the request for a Gissel bargaining order as it relates to the production employees such as stagehands, audio technicians, lighting technicians, and wardrobe technicians employed at the V Theater (“Theater Unit”). An allegation of interrogation was also amended into the Complaint during the hearing.

At trial, Gregory J. Kamer, Esq. and Nicole A. Young, Esq. of the law firm of Kamer Zucker Abbott, represented David Saxe Productions, LLC and V Theater Group, LLC. Sara S. Demirok and Rudolfo Martinez, Esq. served as Counsel for the General Counsel of the National Labor Relations Board. During the hearing, the Board called the following individuals as witnesses: David Saxe, President/CEO of DSP and V Theater Group; Tiffany DeStefano, Production Coordinator for V Theater Group; Takeshia Carrigan, Human Resources Manager for DSP; Thomas Estrada, Stage Manager at V Theater Group; Courtney Kostew, Stagehand at V Theater Group; Tam Lam, Audio Technician at V Theater Group; Leigh Ann Hill, former Stagehand at V Theater Group; Michael Gasca, former Stagehand at V Theater Group; Taylor Bohannon, former Audio Technician at V Theater Group; Nathaniel Franco, former Audio Technician at V Theater Group; Jasmin Glick, former Spot Light Operator at V Theater Group;

Chris Su'apaia, former Stagehand at V Theater Group; Kevin Michaels, former Stagehand at V Theater Group; Scott Leigh, former Warehouse Technician at DSP; Zachary Graham, former Stagehand at V Theater Group; Raymond "Scott" Tupy, Lighting Technician for V Theater Group; Alanzi Langstaff, former Stagehand for V Theater Group; Darnell Glenn, Audio Technician at V Theater Group; Joshua Prieto, Stagehand at V Theater Group; Marielle "Apple" Thorne, Union Business Representative; Stephen Urbanski, Lighting Technician at V Theater Group;; and Dominic Antonelli, former Runner/Warehouse Technician at DSP. The Union called Bryce Petty, Audio Technician at V Theater Group and Courtney Kostew.

Respondent called the following witnesses: David Saxe; Tiffany DeStefano; Takeshia Carrigan; Thomas Estrada; Courtney Kostew; Anthony Ciulla, General Counsel for DSP; Gerard McCambridge, the Mentalist/Performer; Daniel Mecca, Stage Manager at V Theater Group; Stephen Sojak, Stage Manager at V Theater Group; David Montelongo, Warehouse Technician at DSP; Duwane Thomas, Runner/Warehouse Technician at DSP; Ivan Barrera, Stagehand at V Theater Group; Shannon Hardin, Theater Manager at V Theater Group; Jen Sarafina, Partner at Kamer Zucker Abbott; Mario Stumpf, former Warehouse Technician and Runner at DSP. References in the brief are to the party testifying, the date of the testimony, the page of testimony in the transcript, and the relevant transcript lines referenced (*e.g.*, Saxe Tr. 10/22/18 at 2530:1-3). There are also references to Respondent's Exhibits (**R. 1**), General Counsel's Exhibits (**GC. 1**), Joint Exhibits (**J. 1**), and ALJ Exhibits (**ALJ. 1**).

Respondent denies that any actions it took were in violation of the Act. Regarding the alleged unlawful terminations and as demonstrated during the trial, Respondent acted lawfully terminating those employees for poor job performance, attendance issues, policy violations, or job abandonment. The timing of the employment terminations was a result of a change in management

only a couple weeks prior to the majority of the terminations. Specifically, the former manager of the employees, Production Manager Jason Pendergraft, had a history of not enforcing policies and not disciplining employees for inappropriate behavior, attendance, or poor job performance. Once Mr. Pendergraft was terminated, the new supervisor and Mr. David Saxe, set out to restructure the Company by getting rid of poor performing employees and excess hours that were being assigned, but not needed to run the shows.

Regarding the allegations of changing current employees' schedules and reducing hours, the evidence presented clearly shows that under Respondents' prior management, Production Employees were being over-assigned hours to the financial detriment of the Company. Production employees were given two types of assignments: show calls and work calls. Show calls are assigned when production employees are scheduled to run a show. Work calls are scheduled when employees are scheduled at any time outside of show hours. Pendergraft was significantly over assigning work calls and paying employees to come to work even though those employees did not have any work to perform. The managing decisions made by the Company to address Pendergraft's mismanagement were both lawful and occurred prior to Respondents learning of its employees' protected, concerted activities.

One of the alleged discriminatees in this case, Mr. Scott Leigh, is unique in that he was employed at David Saxe Productions ("DSP") which is located on Oquendo Road in Las Vegas, Nevada. Leigh was employed as a Warehouse Technician/Welder who helped build custom pieces for the Oquendo office and had no involvement in the production of shows at the V Theater. Leigh also had a different manager, Jasmine Hunt and, as such, had different performance expectations. Only after his employment termination, did Respondents come to know that Leigh was attempting to organize the Warehouse Technicians at the DSP facility.

A Gissel bargaining order for the warehouse unit at DSP would be wholly inappropriate given the facts of this case. First, the General Counsel is unable to show that the Union enjoyed majority support of the warehouse unit on or around April 11, 2018. In fact, the parties were each unable to establish the number of warehouse employees employed on that date. As such, the Gissel elements cannot be met. Even assuming *arguendo* that the General Counsel has proven majority with the five cards submitted into evidence, two of those authorization cards were obtained under fraudulent circumstances. Namely, Duwane Thomas and David Montelongo both testified that they signed the cards under false pretenses and believed that they were signing up for free training. They had no knowledge of the Union's involvement in signing the cards. In fact, Thomas went so far as to call the Union and request his card back when he discovered the true purpose of the card. Montelongo admitted that he signed the card when he was told that it was for free training; however, he denied that any of the identifying information on the card belonged to him. Further evidence of the falsification of this card was demonstrated by the fact that the address on his ID differs from the address listed on his authorization card and his phone number listed on the authorization card has never belonged to him. Those two cards are fraudulent and should not be counted toward the majority. Further, the unit would be inappropriate as warehouse technicians do the same or similar work as runners and porters, thus the community of interest standard weighs in favor of including those additional classifications in the unit. A Gissel bargaining order simply cannot be justified under the facts presented in this case.

## **II. STATEMENT OF ISSUES.**

1. Whether the General Counsel established that the terminations of Leigh Ann Hill, Michael Gasca, Taylor Bohannon, Nathaniel Franco, Jasmine Glick, Chris Su'apaia, Kevin Michaels, Zachary Graham, Alanzi Langstaff, and Scott Leigh violated Section 8(a)(1) and 8(a)(3)

of the Act?

2. Whether the General Counsel established that by reducing work hours of employees Scott Tupy and Darnell Glenn Respondent violated Section 8(a)(1) and 8(a)(3) of the Act?

3. Whether General Counsel established that Tupy's June 20, 2018 discipline was in violation of 8(a)(3) of the Act?

4. Whether the General Counsel established that Respondent violated Section 8(a)(3) of the Act regarding offering Stephen Urbanski light duty and returning him to work?

5. Whether the General Counsel established that Respondent unlawfully interrogated employees regarding their union activities in violation of Sections 8(a)(1) of the Act?

6. Whether the General Counsel established that Respondent unlawfully engaged in surveillance or created the impression of surveillance of employees regarding their union activities in violation of Sections 8(a)(1) of the Act?

7. Whether the General Counsel established that Respondent unlawfully threatened employees regarding their union activities or promised benefits in exchange for employees not supporting the Union in violation of Sections 8(a)(1) of the Act?

8. Whether General Counsel established that Courtney Kostew is an agent within the meaning of the Act.

9. Whether General Counsel established that Dan Mecca and Steve Sojak are supervisors within the meaning of the Act.

10. Whether the maintenance of the identified provisions in Respondents' handbooks violate Section 8(a)(1) of the Act?

11. Whether Respondents violated the Act by increasing wages prior to the filing of the Petition for Representation?

12. Whether Respondents violated the Act by soliciting employees to participate in a work call scheduled for March 13, 2018?

13. Whether General Counsel established that the Union had majority support for the Warehouse Unit, that the Respondents have committed hallmark violations of the Act, and that a Gissel Bargaining Order is warranted?

### **III. PRODUCTION DEPARTMENT BACKGROUND.**

David Saxe Productions, LLC (“DSP”) is a consulting company that provides accounting, legal, HR and other support services to various entertainment related companies, including the V Theater Group, LLC. Saxe Tr. 9/11/18 at 53:23-25. The DSP facility is located on Oquendo Road in Las Vegas, Nevada and the complex includes offices and a warehouse space. Carrigan Tr. 10/23/18 at 2833:17-20. The V Theater Group, LLC is a company that leases and operates the V Theater and the Saxe Theater--live entertainment venues, which are located inside the Miracle Mile Shops at the Planet Hollywood Hotel and Casino in Las Vegas. Saxe Tr. 9/11/18 at 54:7-8; 55:8-14.<sup>2</sup> Saxe and V Theaters currently operate over a dozen shows including *Vegas! The Show*, *Popovich Comedy Pet Theater*, *Hitzville*, *Marc Savard Comedy Hypnosis*, *Las Vegas Comedy Live*, *All Shook Up*, *Aussie Heat*, *Nathan Burton*, *Zombie Burlesque*, *The Mentalist*, *V - The Ultimate Variety Show*, *Stripper 101*, and *Beatleshow*. Id. at 56:13-15; 3440:14-22.

The V Theater Group employs production employees, such as stagehands, audio technicians, and lighting technicians who assist in running the live performances in each theater. Front of house audio technicians prepare the audio mix that the audience hears through the main speakers. Saxe Tr. 9/11/18 at 59:1-5. Specifically, they control the volume levels between the singers, the band, and the microphone, as well as run audio tracks from the computer. Id. Deck

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<sup>2</sup> DSP and V Theater Group are collectively referred to as “Respondents” herein.

audio technicians control the in-ear monitors for the performers for playback. Id. at 58:15-17; 59:8-10. Lighting technicians run lights using a light board and spot lights for the shows. Id. at 59:22-25; 60:1-7. Stagehands set and strike scenes and perform a number of “tracks”--a list of cues or “action items” throughout the show. Id. at 61:11-25; 62:1-2. All of the production employees report to the Production Manager.

**A. Prior Management Failed to Properly Discipline and Manage Employees Leading to Restructuring Two Weeks After the Prior Manager’s Termination.**

Former Production Manager Jason Pendergraft supervised nine of the alleged discriminatees in this case. The V Theater hired Pendergraft on or around September 7, 2016. **R. 89** at 10. As Production Manager, Pendergraft supervised stagehands, audio technicians, lighting technicians, and wardrobe technicians; however, throughout his employment, Pendergraft failed to hold employees accountable, enforce company policies, or issue discipline for policy violations or job performance issues. Saxe Tr. 9/12/18 at 192: 13-22. While he was repeatedly admonished for his failure to enforce company policies and issue discipline, Pendergraft refused to comply with the directives of Respondents’ owner, David Saxe. **R. 88**. In fact, Saxe even resorted to emailing Pendergraft pictures of policy violations in an effort to encourage him to enforce company policies and properly supervise his employees. Id. Nevertheless, Pendergraft continually failed to properly manage his employees and did not consistently issue discipline during his tenure with the V Theater. Saxe Tr. 9/12/18 at 192:21-22; 259:10-15; DeStefano Tr. 10/22/18 at 2567:18-21. Instead, Pendergraft appeared to improperly and discriminatorily protect employees with whom he was friendly.

On January 31, 2018, it was reported that Pendergraft was assigning hours to production employees that were entirely unnecessary. **GC. 32** at 2. Shortly thereafter, Respondents noticed suspicious company account transactions and thereafter conducted an audit, which revealed

unauthorized transactions by Pendergraft. Upon further investigation, Respondents discovered forged invoices, missing equipment, and stolen cash.<sup>3</sup> Saxe Tr. 9/12/18 at 302:1-25; 303:1-7; Ciulla Tr. 10/26/18 at 3358:17-19. Consequently, upon confirmation of the theft, Respondents terminated Pendergraft’s employment on February 21, 2018. Saxe Tr. 9/12/18 at 305:1-2; **R. 89** at 10. While seeking an injunction in Federal court, the General Counsel referred to Pendergraft as a “scapegoat” in the briefing. However, General Counsel inexplicably failed to subpoena or call Pendergraft during this hearing making such a statement unsupported by any evidence or testimony in this proceeding and essentially erroneous.

**B. DeStefano Assists with Restructuring and Begins Supervising the Production Department.**

Production Coordinator Tiffany DeStefano assisted Pendergraft with scheduling and administrative work related to the Production Department during his employment. DeStefano Tr. 10/22/18 at 2565:20-24. However, they had a “difficult” working relationship and Pendergraft forbid DeStefano from enforcing any policies or disciplining any employees. See DeStefano Tr. 9/13/18 at 324:12 (“When Jason was here, I wasn’t allowed to do anything”); Id. at 2567:18-21 (“It was a fight every day... every time I suggested somebody needed to be disciplined or fired ... I’d get yelled at by him and told it’s not my job; my job is to sit there and do as he says”); See also **R. 28** (DeStefano explaining her working relationship with Pendergraft to Saxe) and **GC. 32** (same).<sup>4</sup>

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<sup>3</sup> Respondents filed a police report against Pendergraft on March 16, 2018 and are currently pressing charges for theft of property and embezzlement. **R. 86.**

<sup>4</sup> Importantly, DeStefano did issue discipline during Pendergraft’s tenure, but only discipline that Pendergraft had approved. DeStefano Tr. 10/23/18 at 2775:17-24.

Nevertheless, beginning in November 2017, DeStefano and Saxe began discussing ways to restructure the Production Department to get rid of extraneous and underperforming employees. DeStefano Tr. 10/22/18 at 2571:2-6; Saxe Tr. 9/12/18 at 193:4-12 (“So it was a very bad department infiltrated by a lot of people that probably shouldn't have been there. So we were going to get rid of the bad apples and put good people in and train them and hold them accountable and make it a good department”). DeStefano began actively looking into the department’s personnel needs and brainstorming ways to restructure in January 2018. See R. 29 (including a detailed listing of all employees, their tasks, and DeStefano’s recommendations for hours for each employee). Specifically, Saxe and DeStefano wanted to “build a good team” and “hire good people” who would follow company policies. Saxe Tr. 10/31/18 at 3469:13-25; Saxe Tr. 9/11/18 at 122:5-13; 15-17. Additionally, they wanted to reduce hours of employees that were not needed, but were nevertheless working and being paid for 40 hours a week. Id.; Saxe Tr. 9/12/18 at 283:22-25; 284:1 (“We were restructuring the department to reduce hours because Jason had way too may full timers... he was just giving hours for nothing); DeStefano Tr. 9/13/18 at 458:1-3; 7-11; 15-16 (“I could run it with less people... instead of having 70 people, I could do it with less”). After Pendergraft’s termination on February 21, 2018, DeStefano began enacting the plan to restructure when she was thrust into his supervisory role.<sup>5</sup>

Within days after Pendergraft’s termination, DeStefano made the decision to terminate Leigh Ann (“Laney”) Hill after Hill had told DeStefano that she had taken another job and would not be able to offer V Theater a consistent schedule. DeStefano Tr. 9/13/18 at 322:2, 14-17. On March 15, 2018, DeStefano reported to Saxe numerous cases of employee poor job performance

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<sup>5</sup> Notably, DeStefano had no prior management experience and did not receive any training on how to manage or discipline employees when she became the immediate supervisor of approximately 70 production employees. DeStefano Tr. dated 10/22/18 at 2566:20-25; 2567:3-7.

and misconduct that had occurred during Pendergraft's reign. DeStefano Tr. 9/13/18 at 475:13-19; 481:10-13; 10/23/18 at 2578:1-7, 10-12, 15-18. Specifically, DeStefano recommended that Jasmine Glick, Chris S'uapaia, Alanzi Langstaff, Kevin Michaels, Michael Gasca, and Nathaniel Franco be terminated and sent Saxe emails explaining her reasons for the same. Saxe Tr. 9/12/18 at 279:1-4; 17-18; **GC. 2; GC. 4, GC. 5, GC. 7-GC. 9, GC. 29**. Additionally, Saxe and DeStefano discussed the termination of Zachary Graham for job abandonment and Taylor Bohannon after Saxe received numerous complaints about her. The reason for the terminations were also memorialized via email from DeStefano. **GC. 6, GC. 11**. In an effort to remedy Pendergraft's failure to properly supervise his subordinates and to restructure in a way that allowed Respondents to remove underperforming employees, the employees at issue were subsequently separated from employment on or around March 19, 2018 due to the numerous performance, attitude, and attendance issues discussed in detail *infra*.<sup>6</sup> **GC. 34** at 2-7, 9.

#### **IV. SEQUESTRATION VIOLATIONS.**

##### **A. Multiple Alleged Discriminatee Witnesses Violated The Sequestration Order And Thus Their Testimony Should Be Viewed With Stricter Scrutiny.**

On the first day of the hearing, September 11, 2018, Administrative Law Judge Anzalone (the "Judge") issued a sequestration order (the "order") that applied throughout the case. Anzalone Tr. 9/11/18 at 7:7-9. The administrative law judge used the model sequestration order from the Greyhound case. Id.; See Greyhound Lines, Inc., 319 N.L.R.B. 554, 555 (1995). The order states:

"Counsel has invoked a rule requiring that the witnesses be sequestered. This means that all witnesses who are going to testify in this proceeding, with specific exceptions that I will tell you about, may only be present in the hearing room when they are themselves giving testimony. The exceptions are alleged discriminatees, natural persons who are parties, representatives of non-natural parties, and a person who is shown by a party to be essential to the presentation of the party's case. They may remain in the hearing room even if they are going to testify or have testified.

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<sup>6</sup> Kevin Michaels was not terminated until April 2, 2018. **GC. 34** at 9.

However, alleged discriminatees, including charging parties, may not remain in the hearing room when other witnesses on behalf of the General Counsel or the Charging Party are giving testimony as to events as to which the alleged discriminatees are expected to testify. The rule also means that from this point on until the hearing is finally closed, no witness may discuss with any other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid problems is to simply not discuss this case with any other potential witnesses until after the hearing is completed. Under the rule as applied by the Board with one exception, counsel for a party may not in any manner, including the showing of transcripts, inform a witness about the contents of testimony given by a preceding witness without my express permission. The exception is that counsel for a party may inform counsel's own witness of the content of such testimony, including the showing of transcripts, given by a witness for the opposing side in order to prepare for rebuttal of such testimony. I expect counsel to police the rule and to bring any violation of it to my attention immediately. That includes even interrupting witness testimony if it is absolutely necessary because somebody walks in and you recognize that they are also a witness. It is the obligation of counsel to inform potential witnesses who are not now present in the hearing room of their obligations under this rule. The best way to deal with this, because it's an open hearing, is to have a posting on the door that makes it clear that there is a sequestration order in effect. So I'll ask the parties to work together on something that has some wording that's acceptable to everybody." Anzalone 9/11/18 Tr. at 7:10-25; 8:1-25; 9:1-2.

After issuing the order, the Judge asked the parties to designate table representative(s) "who are not subject to the rule." Anzalone 9/11/18 Tr. at 9:3-6. Respondent designated David Saxe and the General Counsel for Respondent, Mr. Anthony Ciulla, as its representatives. Kamer 9/11/18 Tr. at 9:3-15. The Union designated Marielle "Apple" Thorne as its representative. Soto 9/11/18 Tr. at 10:24-25; 11:1-4. The Judge then went on to explain to the parties and the witnesses that compliance with the rule is of the utmost importance. Specifically, the Judge stated "[a]nd I want to make it very clear how serious this rule is. If I'm alerted to a violation of the sequestration order, if I find out that a witness talked to another witness, a very likely penalty will be I will strike that witness's testimony. It won't count. It will be as if you spent a day in court doing nothing for the case. So just keep that in mind." Anzalone 9/11/18 Tr. at 11:11-17.

Despite the Judge's warnings, several of the alleged discriminatees violated the sequestration order almost *immediately* after it was given. On September 17, 2018, the General Counsel reported a violation at the beginning of the hearing. Demirok 9/17/18 Tr. at 770:11-19. Specifically, the General Counsel reported that after the sequestration order was issued, the alleged discriminatees left to go have breakfast. Demirok 9/17/18 Tr. at 772:6-10. The individuals present were Leigh-Ann Hill, Michael Gasca, Kevin Michaels, Taylor Bohannon, Jasmine Glick, Nathaniel Franco, Chris S'uapaia, Alanzi Langstaff, Zach Graham, and Darnell Glenn. Demirok 9/17/18 Tr. at 771:9-16. The General Counsel explained that at some point either before or during breakfast, Leigh-Ann Hill, Michael Gasca, and others nearby discussed Courtney Kostew, her relationship with Leigh-Ann Hill, and their Facebook Group Chat (**J. 2**). Demirok 9/17/18 Tr. at 770:21-25; 771:1-25; 772:1-25; 773:1-25.

After cross examining the witnesses who were present, Respondents learned that there were in fact numerous conversations related to the hearing that occurred at a bar on Fremont Street ("Fremont Bar") *immediately* after the order was issued. Specifically, while many witnesses testified about the reported violative conversation between Hill and Gasca, the testimony revealed that in actuality at least six of the alleged discriminatees participated in the discussion. See Hill 9/18/18 Tr. at 1072:1-25; 1073:1-24 (Hill testifying that she told Gasca about her Facebook fight with Kostew); Gasca 9/19/18 Tr. at 1176:14-25; 1177:1-18 (Gasca testifying that Hill spoke to Glenn and Glick about the Facebook conversation between Hill and Kostew); Langstaff 10/2/18 Tr. at 1847:13-25; 1846:1-6; 1847:13-25; 1848:1-9; 1884:8-25; 1885:1-25 (Langstaff testifying that Hill was talking to Michaels and S'uapaia about how Kostew didn't like Hill); Michaels 9/21/18 Tr. at 1539:1-9; 1541:1-25; 1542:1-25; 1543:1-7 (Michaels testifying that he and Hill

discussed Kostew); Graham 10/1/18 Tr. at 1722:1-25; 1723:1-8. (Graham testifying that Hill was speaking with Gasca about how Kostew did not like her).

Further, in addition to the conversation pertaining to Hill and Kostew, it was discovered that Bohannon contacted *The Mentalist* Gerry McCambridge to discuss the reasons for her termination at around 10 a.m. and later that same day she also discussed her termination and communication with McCambridge with her boyfriend and current V Theater employee Bryce Petty. Bohannon Tr. 1249:3-25; 1250:1-25; 1251:23-25; 1252:1-6; 1254:14-25; 1255:1-8; 1256:1-25; 1257:15-25; 1258:1-8; 17-25; 1259:1-5. Glick admitted that Bohannon discussed her termination and a document she received that referenced reasons for her termination while at the Fremont Bar. Glick 9/20/18 Tr. at 1393:23-25; 1394:1-15; 1396:8-25; 1397:1-25; 1398:1-7. Franco also testified that Bohannon was talking to the group about McCambridge and that she showed the group a picture of a handwritten note from her phone that was part of a reprimand that she thought McCambridge might have written. Franco 9/20/18 Tr. at 1304:24-25; 1305:1-25; 1304:1-12; 18-21. Franco explained that Bohannon then texted McCambridge about the note. Id. Langstaff testified that Bohannon had a picture of a piece of paper that she was saying was from someone other than the proscribed author. Langstaff 10/2/18 Tr. at 1847:13-25; 1846:1-6; 1847:13-25; 1848:1-9; 1884:8-25; 1885:1-25. Multiple witnesses exposed Bohannon's violation through their testimony and established a clear violation of the sequestration order. This is particularly true since McCambridge was called to testify on October 25, 2018 and Petty testified on October 5, 2018 and October 22, 2018.

Notably, Langstaff also testified that he and Graham discussed the reasons for their terminations that were discussed at an earlier NLRB hearing, specifically what Saxe said about why they were terminated. Id. Langstaff reported that Saxe stated that he was terminated for getting

in a fistfight in the parking lot and told Graham that Saxe stated that he was a poor worker. Langstaff 10/2/2018 Tr. at 1885:1-8; 16-19. Notwithstanding the fact that there was no sequestration order applicable to testimony from the prior proceeding, the sequestration order that was issued just hours prior to this conversation should have been in effect to dissuade the conversation, especially since the reasons for their terminations are at issue in the present case.

As the Judge expressed, violating a sequestration order “may warrant striking the tainted testimony if it can be demonstrated that a party was prejudiced by the violation of the rule.” Suburban Trails, 326 N.L.R.B. 1250 n. 1 (1998). However, the Board’s preferred remedy for a violation of a sequestration order is for the tainted testimony to be viewed with “stricter scrutiny.” Medite of New Mexico, Inc., 314 N.L.R.B. 1145, 1149 (1994), *enfd.* 72 F.3d 780 (10th Cir. 1995); *See also* 2018 NLRB Bench Book, Ch. 10 SEQUESTRATION ORDER, 2001 WL 34773907, at \*4. The General Counsel acknowledged that treating tainted testimony with “stricter scrutiny” for a violation of the sequestration order is “the preferred course” and “the more appropriate course.” Demirok 9/17/18 Tr. at 772:19-24. Respondent agrees and requests that stricter scrutiny is not only applied to the conduct specifically reported by the General Counsel, but that it is also applied to the other violations by the alleged discriminatees that were discovered throughout the remainder of the hearing and discussed *supra*.

**B. The Discriminatees In Question Clearly Violated the Sequestration Order.**

The sequestration order states “[t]he rule also means that from this point on until the hearing is finally closed, no witness may discuss with any other potential witnesses either the testimony that they have given or that they intend to give.” Anzalone 9/11/18 Tr. at 8:1-4. Here, Hill blatantly violated the sequestration order during her conversation with other alleged discriminatees. Hill’s conversation about her negative relationship with Kostew, another witness

in this case, with Gasca, Glick, Glenn, and Michaels, witnesses who Hill knew would also be testifying, was prohibited by the order. Indeed, Hill admitted that she spoke about her testimony after she was ordered not to. Hill 9/18/2018 Tr. at 1072:4-6. Moreover, other witnesses testified that they overheard the conversation and that Hill was speaking directly to Glenn, Glick, Michaels, and S'uapaia. Hill 9/18/18 Tr. at 1072:1-25; 1073:1-24 (Hill testifying that she told Gasca about her Facebook fight with Kostew); Gasca 9/19/18 Tr. at 1176:14-25; 1177:1-18 (Gasca testifying that Hill spoke to Glenn and Glick about the Facebook conversation between Hill and Kostew); Langstaff 10/2/18 Tr. at 1847:13-25; 1846:1-6; 1847:13-25; 1848:1-9; 1884:8-25; 1885:1-25 (Langstaff testifying that Hill was talking to Michaels and S'uapaia about how Kostew didn't like Hill); Michaels 9/21/18 Tr. at 1539:1-9; 1541:1-25; 1542:1-25; 1543:1-7 (Michaels testifying that he and Hill discussed Kostew); Graham 10/1/18 Tr. at 1722:1-25; 1723:1-8. (Graham testifying that Hill was speaking with Gasca about how Kostew did not like her).

Bohannon also egregiously violated the sequestration order during conversations with Glick and others. Bohannon testified that she had conversations about her termination—which she clearly had knowledge would be discussed at the hearing—with two individuals who may have been called as witnesses at the hearing, her boyfriend, Petty, and an individual who starred in a show at V Theater, McCambridge. Bohannon Tr. 1249:3-25; 1250:1-25; 1251:23-25; 1252:1-6; 1254:14-25; 1255:1-8; 1256:1-25; 1257:15-25; 1258:1-8; 17-25; 1259:1-5. Further, other discriminatees testified that Bohannon showed the group of discriminatees present at the Fremont Street bar a picture of a handwritten note that discussed reasons for her termination. Glick 9/20/18 Tr. at 1393:23-25; 1394:1-15; 1396:8-25; 1397:1-25; 1398:1-7; Franco 9/20/18 Tr. at 1304:24-25; 1305:1-25; 1304:1-12; 18-21. This picture was later introduced into evidence as **R. 82**.

Langstaff and Graham also violated the sequestration order during their conversation about Saxe's prior testimony. Both Langstaff and Graham are alleged discriminatees, both were subpoenaed, and their required presence at the first day of hearing where the Judge issued the sequestration order would have made them both aware that they would likely be called to testify in this case. Additionally, although they discussed Saxe's testimony from a prior hearing, it was the same set of facts in issue as the instant case--the reasons for their employment terminations. Further, the content of their conversations—the reasons for their terminations—were at issue in the Complaint filed against Respondents.

The foregoing conduct clearly violates the order. Although the Board allows alleged discriminatees a limited exemption to the order, the exemption from exclusion does not exist “during that portion of the hearing when another of the General Counsel's or the charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal.” Unga Painting Corp., 237 N.L.R.B. 1306 (1978). Given the allegations in the Complaint involving Kostew being an agent of the Respondent and the allegations of discriminatory terminations, the conversations involving Kostew, and the reasons behind multiple discriminatees terminations, are clearly matters that all discriminatees “may testify” to. Therefore, the exception to the sequestration order in Unga Painting does not apply and the alleged discriminatees discussed *supra* violated the sequestration order.

**C. Respondent Was Prejudiced by The Numerous Violations Of The Sequestration Order.**

It is undisputed that the purpose of a sequestration order is to “preclude communication among witnesses in order to enhance the probability that they will each tell their own recollection of events, uninfluenced by contemporaneous accounts [of] other persons.” See El Mundo Corp., 301 N.L.R.B. 351, 358 (1991). While certain violations of sequestration orders do not lead to the

problems that the sequestration order was issued to protect (*e.g.*, witnesses remain uninfluenced and tell their own recollection of events) violations that prejudice a non-violating party necessitate a remedy. Here, alleged discriminatee witnesses were clearly influenced by Hill's and others negative accounts of Kostew. This is evidenced by the testimony of Gasca who was a part of the group gathered at the Fremont Street bar after the issuing of the order. Gasca testified that upon hearing a story about Kostew, Glenn and Glick were in "shock." Gasca 9/18/2018 Tr. at 1177:9-15. Further, the conversations divulging reasons why certain alleged discriminatees were terminated by Respondents may have led to tainted testimony or fabricated defenses, instead of witnesses testifying as to their own recollection of events. Moreover, because we cannot be certain as to what extent Hill or Bohannon tainted the testimony of other witnesses, Respondent is entitled to stricter scrutiny as a remedy. Due to the prejudice and because of the widespread dialogue, any testimony by the discriminatees who were present at the Fremont Street bar on September 11, 2018 regarding Kostew, Hill's termination, or Bohannon's termination should be viewed with stricter scrutiny. Additionally, Respondents request that any testimony by Langstaff or Graham regarding either of their terminations also be viewed with stricter scrutiny since they had knowledge of Saxe's testimony and were able to rebut such allegations that they normally would not have had knowledge of without the violation.

**D. Mr. David Saxe And Ms. Tiffany DeStefano's Alleged Violation Of The Sequestration Order Was At Most Technical In Nature.**

The General Counsel will argue that Saxe and DeStefano also violated the sequestration order and that their testimony should either be stricken or viewed with "stricter scrutiny." However, this argument fails as discussed *infra*. The evidence shows that upon learning of the technical violation of the sequestration order, Respondent reported this information to the court. Kamer Tr. 10/22/2018 at 2527:6-24. Respondent explained that as a company representative, Saxe

was given access to transcripts when he was unable to attend the hearing in person. Id. Saxe was under the impression that—as he has done in prior litigation—he and others were supposed to review the transcripts for accuracy. Saxe Tr. 10/22/2018 at 2530:6-11. Delegating this task, Saxe directed DeStefano to review the transcripts for accuracy at what she was told was at the request of the company’s lawyers. Saxe Tr. 10/22/2018 at 2540:8-20.

DeStefano spent at most a couple of hours skimming the transcripts provided by Saxe. DeStefano Tr. 10/22/2018 at 2540:24-25; 2541:1-2; 2542:2-5. She could only recall seeing testimony given by Prieto, Petty, Gasca, and herself regarding a limited set of events. Id. at 2542:15-25; 2543:1-8; 2551:13-25; 2552:1. Specifically, Ms. DeStefano recalled reading about a leave of absence involving Gasca and who Gasca reported to, the posting of notices by time clocks, and which track an employee ran. Id. at 2551:13-25; 2552:1. Indeed, when the portions of the transcript that Ms. DeStefano reviewed were later produced pursuant to the General Counsel’s subpoena, the portions were limited to a small section.

As an initial matter, Saxe, as a designated company representative, is excepted from the sequestration order issued on September 11, 2018. See Anzalone 9/11/18 Tr. at 9:3-6 (stating “[o]kay, at this time I’ll ask for counsel, first of all, to identify any table representatives who are not subject to the rule. . .”); Anzalone 9/11/18 Tr. at 7:10-18 (explaining “Counsel has invoked a rule requiring that the witnesses be sequestered. This means that all witnesses who are going to testify in this proceeding, with specific exceptions that I will tell you about, may only be present in the hearing room when they are themselves giving testimony. The exceptions are alleged discriminatees, natural persons who are parties, representatives of non-natural parties, and a person who is shown by a party to be essential to the presentation of the party’s case.”); See also Reno Hilton, 282 N.L.R.B. 819, 849 (1987) (stating that “trial representative” is “an exception to the

general witness-sequestration order.”). Any argument by General Counsel that Saxe’s testimony was tainted by a violation of the rule must fail. Indeed, as a company representative who is excepted from the sequestration order, it was appropriate for Saxe to have access to the transcript. In the alternative, even if it is determined that Saxe should not have had access to any portion of the transcript, because Saxe as a company representative would have been permitted to remain throughout the entire trial, no material harm could be caused by his review. See Costco Wholesale Corp. & Teamsters Local 592, Int’l Bhd. of Teamsters, 366 N.L.R.B. No. 9 (Feb. 2, 2018) (holding that no material harm was caused where Respondent’s counsel agreed to exclude the party representative from the hearing room and later reviewed a board affidavit with the company representative outside of the hearing room because the party rep would have likely been permitted to remain throughout the entire trial). Moreover, Saxe testified that the only portion of the transcript he reviewed was related to his own testimony and included the first 20 pages thereby limiting any prejudice to the alleged discriminatees. Saxe 10/25/18 Tr. at 3070:9-16; 3076: 15-20.

DeStefano’s skimming of portions of the transcript also did not prejudice the General Counsel or the Union. Notably, DeStefano testified that her recollection of the transcript was limited to three minor topics: the leave of absence involving Gasca and who he reported to, the posting of notices by the time clocks, and which track an employee ran, and four individuals: Prieto, Petty, Gasca, and herself. DeStefano Tr. 10/22/2018 at 2542:15-25; 2543:1-8; 2551:13-25; 2552:1. In the alternative, even if it was determined that DeStefano’s skimming of portions of the transcript prejudiced the General Counsel (which Respondent vehemently denies), the tainted testimony should be limited in scope to only testimony that she gave after skimming the transcripts that was also inconsistent with prior testimony and that specifically involved one of the three events she testified to reading in the transcript.

For the reasons stated above, the testimony surrounding the violations of the sequestration order involving a number of the alleged discriminatees should be viewed with stricter scrutiny. Specifically, because of the widespread dialogue on multiple topics, any testimony by the discriminatees who were present at the Fremont bar on September 11, 2018 regarding Kostew or Bohannon's termination should be viewed with stricter scrutiny. Further, any testimony by Langstaff or Graham regarding either of their termination should also be viewed with stricter scrutiny. However, since neither the General Counsel nor the Union were prejudiced by the technical violation involving Saxe or DeStefano's review of the transcript no remedy is necessary.

## **V. PRODUCTION DEPARTMENT ALLEGATIONS.**

### **A. Legal Standard for Terminations.**

In determining whether a discipline or termination is lawful under the Act, it is well-established that the Board applies the burden-shifting framework first adopted in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1<sup>st</sup> Cir. 1981), and later endorsed by the Supreme Court in N.L.R.B. v. Transportation Management, 462 U.S. 393, 401-03 (1983). See NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 267 (9<sup>th</sup> Cir. 1995). According to the Wright Line burden-shifting framework, to sustain an unfair labor practice charge, the Charging Party has the burden of proving a *prima facie* case by showing that his or her alleged protected activity was a substantial or motivating factor in the decision to discipline or terminate the employee. Peavey Co., 648 F.2d at 461; N.Y. Univ. Med. Ctr., 324 N.L.R.B. 887, 900 (1997). The elements required to support a showing of discriminatory motivation are: (1) protected concerted activity by the employee; (2) employer knowledge of the protected activity; (3) timing; and (4) adverse action by the employer *because of* anti-union animus. Sears, Roebuck & Co. v. N.L.R.B., 349 F.3d 493, 503 (7<sup>th</sup> Cir. 2003); Fed'n of Teachers Welfare Fund, 322 N.L.R.B. 385, 392 (1996). The

employee must prove not only that the employer knew of his or her protected concerted activities, but also that there was animus to link the factors of timing and knowledge to the improper motivation. See N.Y. Univ. Med. Ctr., 324 N.L.R.B. at 900 (citing Hall Constr. v. N.L.R.B., 941 F.2d 684 (8<sup>th</sup> Cir. 1991) and Serv. Employees Local 434-B, 316 N.L.R.B. 1059 (1995)); see also United Fed'n of Teachers Welfare Fund, 322 N.L.R.B. at 392 (stating that General Counsel is required to prove the timing of the alleged reprisal was proximate to protected activities). If such unlawful motivation is shown, the burden of persuasion shifts to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Sears, Roebuck & Co., 349 F.3d at 503; Excel Corp., 324 N.L.R.B. 416, 420 (1997); N.Y. Univ. Med. Ctr., 324 N.L.R.B. at 900. Nevertheless, the ultimate burden of proof always remains with the General Counsel throughout the proceedings and does not shift to the respondent. The New Otani Hotel and Garden, 325 N.L.R.B. 928, 938 (1998).

**B. Arguments Applicable to All Production Employee Terminations.**

***1. Knowledge.***

***a. The Company Had No Knowledge of A Union Presence Until April 2018.***

The General Counsel presented no direct evidence that supports the theory that Respondents knew of any union activity at the time of the employment terminations. In fact, all evidence of knowledge and the lack thereof was provided by Respondent's employees. Respondents' testimony and evidence established that it was not until April 9, 2018 that Respondents became aware that there may be a potential union presence. Specifically, Respondents first became aware of union activity only after V Theater received Glick's Department of Employment, Training, and Rehabilitation ("DETR") paperwork in which she claimed that she was terminated for engaging in protected activity. Saxe Tr. 10/31/18 at 3472:24-25; 3473:1-2. Thereafter, the union activity was confirmed to management on April 10, 2018 when Graham was on property in the V Theater parking lot passing out union cards or other union

information. DeStefano Tr. 10/23/18 at 2614:5-17; Saxe Tr. 10/31/18 at 3473: 18-23; Estrada Tr. 10/25/18 at 3101:20-23.<sup>7</sup> Notably, however, all the employee terminations in question occurred prior to April 9, 2018. **GC. 34.** Further, the managers involved in the termination of the Production Department employees had no knowledge or understanding of any union organizing efforts at the time of the terminations. See DeStefano Tr. 9/13/18 at 510:15-20 (“I was confused to be honest with you. It took about a week to even understand how that could happen, because... I didn’t know that union could come into a non-union house”); Estrada Tr. 10/25/18 at 3105:25; 3106:1-3 (“I have no idea what it means or what it is at all” for an employee to pass out Union cards); Carrigan Tr. 10/23/18 at 2835:3-10 (never involved in a Union campaign or election).

While the General Counsel’s theory entirely relies on Respondents acquiring knowledge of the campaign at some point prior to March 19, 2018, the evidence presented at trial does not support an inference of knowledge. In fact, the General Counsel has presented no evidence that shows that any decisionmaker had knowledge of the organizing at any point prior to March 19, 2018. While the Court can make an inference of knowledge based on various factors, a concocted legal theory and unfortunate timing cannot alone warrant such an inference. Am. League of Prof’l

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<sup>7</sup>Estrada mistakenly identified early February as the date that Graham was passing out union cards, however, the evidence shows that the campaign did not even start until late February and Graham testified that he would come to the theater to campaign after he broke his arm on February 21, 2018. Graham Tr. at 1679:16-18. In fact, Graham admitted that he was at the Theater on or around April 6, 2018 to solicit employees to sign cards. Id. at 1718:25; 1719:1-4. On or around April 10, 2018 was the date identified by both DeStefano and Saxe for when Graham was reported to have been in the parking lot passing out union information. DeStefano Tr. at 697:19-24 (stating she received a call on April 10, 2018 notifying her of the union activity). Further, the testimony overwhelmingly shows that Estrada had no concept of the timeline when asked about any facts of this case. See Estrada Tr. 9/17/18 at 815:7-9 (doesn’t know if stage work call was the same day as a production meeting he); id. at 818:18-21 (doesn’t know when Divito stopped working for the Company); id. at 826 (when asked about working with Gasca states “I don’t know how long I worked with him before. I don’t know. I don’t recall this at all”); id. at 829:21-23 (doesn’t remember Gasca taking a leave of absence). As such, the record as a whole shows that Graham was passing out union cards at the theater between April 6 and April 10 and Estrada reported that activity to upper management.

Baseball Clubs, 189 NLRB 541, 551–52 (1971) (finding that evidence of animus, suspicious timing, and pretext are not adequate substitutes for independent evidence from which an inference of knowledge may be drawn). In American League, the Board adopted the ALJ’s holding stating that the employer *could have* learned of the employees’ protected activities before they were discharged and it may even leave strong suspicion that they did. But even assuming the Judge rejected the denials of the Employer in this regard, the affirmative evidence was not sufficient to permit the inference that the Employer knew of the organizational activities of the employees before their contracts were terminated. Thus, the ALJ concluded that the General Counsel failed by affirmative evidence to establish that Respondent had knowledge of the union activities of the alleged discriminatees beyond mere suspicion or surmise and that the complaint must be dismissed for failure to establish an essential prerequisite to a finding that the discharges were caused by union activities. Id.

Notably, General Counsel’s case is based on exactly this “mere suspicion or surmise.” Based on questions at trial, the General Counsel may try to infer that a March 15, 2018 text message between Saxe and DeStefano was proof of Respondents’ knowledge. See GC. 3, at 2 10:52 pm (“I hope deciding not to bother you earlier didn’t cost me your trust in me. I thought it meant nothing. I promise you I have no clue or involvement”). However, DeStefano, the author of the message and the only person with definitive knowledge of the meaning, explained that the message was actually in reference to a report that technicians were working on third party shows without those shows being charged for the staff – thus Respondents were not being compensated accordingly. DeStefano Tr. 10/22/18 at 2575:7-18. No evidence has been presented to contradict this explanation. While it need not be blindly credited, neither can uncontradicted testimony simply be evaluated on the same plane as testimony which is contradicted. In Re Orland Park Motor Cars,

Inc., 333 NLRB 1017, 1026 (2001) (citing Missouri Portland Cement Co. v. NLRB, 965 F.2d 217, 222 (7th Cir. 1992) (“Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation,’ presumably based upon valid factors considered in light of the other party’s failure to put such testimony in issue by offering testimony, or other evidence, to dispute it.”)).

*b. Surveillance Footage Did Not Reveal a Union Campaign to Respondent.*

General Counsel will likely also argue that Respondents acquired knowledge earlier through surveillance cameras; however, again, there is no evidence of such. General Counsel has only established the existence of cameras and the fact that some of those cameras have audio capabilities. Notably, none of this was ever in dispute and just the fact that Respondents “could have” discovered protected activity, does not establish an inference of knowledge. See Am. League of Prof'l Baseball Clubs, 189 N.L.R.B. 541, 551–52 (1971); **GC. 105**. There has been no direct evidence establishing: (1) that any of the alleged discriminatees were captured campaigning on surveillance footage, (2) that footage was reviewed by management, or (3) that any member of management discerned that a campaign was occurring as a result of a review of surveillance footage. Rather, Respondents clearly demonstrated that the footage is *not* routinely reviewed. Saxe Tr. 9/11/18 at 81:16-20 (Saxe does not regularly review the footage because it is behind him at his desk); DeStefano Tr. 9/14/18 at 606:2-8 (Saxe is not sitting in his office watching the cameras). In fact, Saxe could not recall a single occasion in which he reviewed the audio recording from any surveillance footage in the six (6) months prior to the hearing. Saxe Tr. 10/31/18 at 3501:6-8. Further, the testimony established that when footage has been reviewed for specific reasons, such as admissions of theft by employees, the audio recordings have for the most part been indecipherable. Id. at 3500:12-25; 1-5; Ciulla Tr. 10/26/18 at 3357:15-22; 3358:6-25; 3359:1-9

(describing the audio from footage he has reviewed as sounding like the adult from Charlie Brown and it has become a joke to review the audio footage). None of the General Counsel’s witnesses testified that they have heard audio recordings, only that they have been told there is audio and that they saw what appeared to be a sound bar on the surveillance footage. See Franco Tr. at 1314:24-25; 1315:1-4 (Franco was told there is audio, but he has never heard it); Petty Tr. at 2468:9-25; 2469:1-14 (Petty saw what appears to be audio meters but he does not know how high the signal was or if any sound was understandable). Without contradicting evidence, Respondents’ testimony should be credited and this claim dismissed.

c. *Courtney Kostew and Thomas Estrada, Sr. Did Not Inform Respondent of Union Organizing.*

General Counsel’s theory, as argued in its Federal 10(j) injunction proceeding, relies on the fact that Courtney Kostew had knowledge of the organizing as early as February 21, 2018. See J. 2. Moreover, General Counsel’s theory also presumes that Estrada was notified of the activity around that time. Both Estrada and Kostew testified, however, that that did not speak about the union organizing until around the time of the election. Estrada Tr. 9/17/18 at 820:3-11; Estrada Tr. 10/25/18 at 3106:4-12; Kostew Tr. 10/24/18 at 2960:4-14 (when asked why she did not tell Estrada about the union organizing, Kostew stated “Because I was told not to. And I was under the impression that everyone involved... was my friend and I didn't really want to throw them under the bus because they were saying not to let management know.”)

The General Counsel may point to purported evidence indicating that the employees spoke about the general topic of unions sometime prior to March 11, 2018 on Facebook. **GC. 58** (Facebook chat with Prieto stating “Tommy [Estrada] said the other few times there have been Union possibilities everyone involved was fired). Notably, however, Kostew testified that she did not talk to Estrada about union organizing but rather, she remembers “Dan in lighting” saying

something to that effect. Kostew Tr. 10/24/18 at 2962:8-12. Kostew further testified that she did not remember Estrada saying anything similar to the statement in her message to Prieto. Id. at 2962:14-16. In addition, Estrada testified that he had no knowledge of any union campaigns at David Saxe Productions. Estrada Tr. at 3107:23-25; 3108:1. The theory that Kostew reported the organizing to Estrada is also undercut by Kostew's past statements, which were consistent with her testimony. Specifically, Kostew told the employees in the Facebook chat that she was concerned to talk to certain employees because *they* might tell Estrada, indicating that she too was trying to hide the organizing activity from Estrada. **J. 2** at 6. There is no conclusive evidence that Kostew reported the campaign to Estrada.

While Graham alleged that he had spoken to Estrada about coming to the union meetings, Estrada denied knowing of any union campaign until the day Graham was passing out union cards. Estrada at 820:18-24 (never spoke to Graham about the Union); Graham Tr. at 822:18-21; 1656:2-3; 9-12 (never heard about union meetings). Moreover, even if Estrada did have knowledge of the union campaign, there is no evidence that he reported this to anyone in upper management prior to April 2018. See Dr. Phillip Megdal, D.D.S., Inc., 267 N.L.R.B. 82 (1983) (holding that there is no imputation of knowledge as a matter of law where the employer affirmatively establishes that the supervisor did not pass on knowledge of union activities to others); Port-A-Crib, Inc., 143 N.L.R.B. 483, 484 (1963) (finding the employer's incomplete or nonexistent knowledge of the discriminatees' union activities was a compelling factor in rejecting retaliation claim). The record is devoid of any link between Kostew or Estrada's knowledge and any reports to a decisionmaker prior to April 2018.

**2. The General Counsel Cannot Link the Timing of the Terminations to Protected Activity.**

*a. The Timing was Based on the Change in Management.*

As discussed *supra*, the employment terminations occurred within weeks of the termination of former Production Manager Pendergraft. Once DeStefano assumed the role of supervising the Production Department employees, she took action to terminate the previously identified poor performing employees, began enforcing pre-existing policies that Pendergraft did not enforce, and enacted the plan to restructure that had been in the works since January. As the “new sheriff in town,” DeStefano acted lawfully when she enforced existing policies and rated employees’ performances under her own standards that differed from prior management. See Rojas v. Florida, 285 F.3d 1339, 1343 (11<sup>th</sup> Cir. 2002) (In response to Plaintiff’s argument that her prior supervisor praised her performance at work, the court held that such evidence did not raise a genuine issue of pretext, asserting: “Different supervisors may impose different standards of behavior and a new supervisor may decide to enforce policies that a previous supervisor did not consider important.”); Peters v. Lincoln Elec. Co., 285 F.3d 456, 474 (6<sup>th</sup> Cir. 2002) (“It is simply stating the obvious to observe that what may have satisfied one management regime does not necessarily satisfy its successor); Valdivia v. Univ. of Kan. Med. Ctr., 24 F. Supp. 2d 1169, 1174 (court noting that “a change in managements evaluation of an employee’s performance does not by itself raise inference of pretext” and that “such inference is even less permissible when a new supervisor is appointed, who is entitled to set [her] own standards and agenda”).

General Counsel previously argued that there was an unnecessary delay in DeStefano’s termination of the employees after Pendergraft’s termination. However, this delay is explained by DeStefano’s testimony in which she stated that she was unsure of her role after Pendergraft’s termination. DeStefano Tr. 10/22/18 at 2578:1-7. At that time, she did not know if Respondents

were going to hire someone else to fulfill that supervisor role or if someone from the Company would be stepping in to fill the role. Id. It is anticipated General Counsel may claim that Saxe himself could have terminated underperforming employees at any time if he thought that was the appropriate course of action. That argument, however, ignores the fact that Saxe is the owner of multiple companies and he does not regularly handle the day-to-day operations of line level employees on a regular basis. When there is an additional layer of management in place, Saxe will rely on that management team to discipline employees and follow his directives. Saxe Tr. 9/12/18 at 259:10-15 (Saxe stating “Jason Pendergraft was ... told to do certain things. And he lied and said he was handling things, but he wasn’t”) 192:21-22 (“Jason Pendergraft ‘yessed’ me and said he was doing but wasn't doing”). Pendergraft ignored all such direction from Saxe. Id.; **R. 88.** Once these failures of management were fully uncovered, Saxe and DeStefano remedied the situation as timely as practicable and did so in a lawful manner.

b. *The March 13, 2018 Work Call Was Necessary to Avoid Injury to Performers and Was Not Used to Determine Employee Sympathies or Chill Section 7 Rights.*

In February and March 2018, Respondents experienced some safety issues with the stage in the Saxe Theater. At some unidentified point prior to his termination on February 21, 2018, Pendergraft ordered the stagehands to “flip the stage,” essentially taking up all of the floorboards on the stage and turning them over. DeStefano Tr. 9/13/18 at 485:9-13. This was done in an effort to even out the stage as it was damaged from wear and tear from prior shows. Id. at 485:18-22. However, flipping the stage only made the problems worse. After the stage was flipped there were grooves between the tiles, bumps, jagged corners, and even screws sticking up. Saxe Tr. 9/12/18 at 200:16-24; DeStefano Tr. 9/13/18 at 491:1-9 (“nothing was filled, so there were all spaces, and their shoes were catching, and their nails on their toes were catching”). There were several work

calls scheduled to fix the stage as a result. Saxe Tr. 9/12/18 at 199:11. In order to fix the stage, the stagehands had to sandpaper, sweep and mop, bondo, and then paint the stage. DeStefano Tr. 9/13/18 at 489:6-8, 13-17.

In the time before the stage was fixed, several dancers were injured as a result of the faulty stage, including toes nails being ripped off. Michaels Tr. at 1546:23-25 (“[O]nce we flipped the stage, it had become unsafe, and at least three of the performers had injured themselves.”) Once Saxe learned of that safety issue, he ordered that the stage be fixed immediately. Saxe Tr. 9/11/18 at 103:10-12; 204:15-17. As a result, Respondents ordered a same-day work call for all stagehands on March 13, 2018 to fix the stage. Id. Notably, this work call was entirely voluntary, and no stagehand was disciplined for not attending. DeStefano Tr. 10/23/18 at 2750:20-22. Importantly, the work call was only for stagehands in the Saxe Theater and could not have identified pro-Union employees who were Stagehands in V Theater, or any audio technicians or any lighting technicians.<sup>8</sup> Glick Tr. at 1419:16-18. This fact alone belies General Counsel’s theory in regard to the work call. Respondents have established a legitimate, business reason for ordering the emergency work call--the safety of performers and the avoidance of potential liability. Further, the work call is consistent with Respondents’ past practice of ordering last minute work calls. DeStefano Tr. at 2748:9-13; 2750:23-25; 2751:1-9; Graham Tr. at 1720:22 (admitting “Surprise work calls happen from time to time”). The March 13, 2018 work call simply does not support an

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<sup>8</sup>The only Saxe Theater stagehands implicated in this matter are Graham, Michaels, Langstaff and Suapaia. Notably, Graham was not scheduled for the work call as he was out due to his injury. Langstaff did not even attend the March 13, 2018 Union meeting. Glick Tr. at 1379:6-8, 13. Suapaia was not scheduled to work that night. Suapaia Tr. at 1459:14-16. Michaels was the only stagehand scheduled to work who left the work call to attend the meeting further weakening any link between this work call and the identification of pro-union employees.

inference of knowledge for the General Counsel's case. Further, the act of holding the work call, is not discriminatory or violative of the Act in and of itself.

**3. The Evidence Fails to Demonstrate that the Respondent's Proffered Reasons for Termination are Pretextual.**

*a. Respondents Have a History of Terminating Employees Without Progressive Discipline.*

To the extent General Counsel argues that the lack of progressive discipline evidences pretext, the evidence shows that Respondents had a history and reputation of terminating employees without progressive discipline or for insignificant reasons as even admitted by the alleged discriminatees. See Bohannon Tr. 9/19/18 at 1234:18-25 (Bohannon stating she believed there was a high turnover even before the union campaign because the door codes were changed frequently); Id. at 1235:1-9; 16-18 (Bohannon admitting that people were fired for the "smallest things" even without having engaged in union activities); Franco Tr. 9/20/18 at 1322:12-14; 1323:11-13 (Franco admitting that it didn't seem like anybody had any job security and people were concerned about being terminated for ridiculous reasons); Michaels Tr. 9/21/18 at 1553:16-24 (Michaels stating that before the union campaign Saxe had fired people on a "whim" and one of the reasons he wanted a union was because he wanted to stop Saxe from firing people on a whim without warning or progressive discipline). In fact, approximately 204 people have cycled through 60 production positions in just two years. DeStefano Tr. 10/22/18 at 2585:9-17. As such, Respondents' actions of terminating these employees for various reasons, and in some cases without prior discipline, are consistent with its past practices and do not support the General Counsel's attenuated and circumstantial legal theory in this case.

b. Respondents Have Provided Additional Information--Not Inconsistent Information—Regarding the Employment Terminations.

In the General Counsel’s Reply to its request for a 10(j) injunction in federal court, General Counsel argued that Respondents provided multiple reasons or shifting explanations for the terminations of the alleged discriminatees. However, the only actual evidence that General Counsel relies on is a stray action form with handwriting that was written in order to assist Respondents’ counsel during the production of documents. See GC. 78 (Hill’s termination form with “+ secondary employment” written in handwriting). Such a piece of evidence should be privileged and should not be considered.<sup>9</sup> Sprint Commc'ns d/b/a/ Cent. Tel. Co. of Texas & Commc'ns Workers of Am., Local 6174, Afl-Cio, 343 N.L.R.B. 987, 988–89 (2004) (noting document prepared by Human Resources specialist at the request of in-house counsel was created in anticipation of litigation, was not a business record, and was privileged).

The General Counsel will apparently also attempt to argue that the information presented at trial was inconsistent with the position that Respondents took in their position statement. This argument is also not persuasive as Respondents were only provided two weeks to investigate, collect documents, draft, edit, and submit their position statement, which ended up being over 175 pages with exhibits. GC. 105. Given that short period of time, Respondents underwent their best efforts to provide complete and accurate information; however, additional information was discovered in preparation for the trial that supported and supplemented Respondents’ initial

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<sup>9</sup> Work product protection will be accorded where a “document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation.” Adlman, 134 F.3d at 1195. In order to meet this standard, the party representative “must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.” In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998). Here, this document was prepared as part of the subpoenaed production for the current hearing and thus was clearly in anticipation of litigation.

arguments. Id. While Respondents may have discovered additional evidentiary support and clarified initial arguments, they certainly did not provide inconsistent evidence or arguments at the hearing as would be required to infer pretext. Giddings & Lewis, Inc., 240 N.L.R.B. 441, 450 (1979) (holding that although a Respondent’s statement of the position may evidence a shifting of reasons for discharge, Judge did not find that failure of Respondent to advance *all its evidence* of misconduct at one time to constitute a “shifting” of reasons for the discharge, where its position is not inconsistent.).<sup>10</sup> Further, Respondents noted in their position statement that the information it provided was to the best of its belief at the time and the information contained therein may be modified. **GC. 105** at 1.

In the General Counsel’s Reply to its request for a 10(j) injunction in federal court, General Counsel relied on the information contained in the Personnel Action Forms terminating the alleged discriminates. Respondents have explained that these action forms were drafted by DeStefano in her first weeks as a supervisor, for which she was not trained. DeStefano Tr. dated 10/22/18 at 2566:20-25; 2567:3-7. Additional testimony has been provided explaining that DeStefano was unsure of how to terminate an employee, did not know how to word personnel action forms, and overall was uneducated on legal implications related to terminations. Saxe Tr. 9/12/18 at 268:16-21 (“I know Tiffany, she just needs to know how to do it. And this was her documenting everything, because I always say, you can’t term somebody for no reason. You have to have good reason. You have to have write-ups or things in writing. I’m just trying to let them

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<sup>10</sup> Further, any reasons given in addition to DeStefano’s stated reasons are not “shifting” because DeStefano was the ultimate decisionmaker and additional reasons from non-decisionmakers are not evidence of pretext. Gaylord Hosp. & Jeanine Connelly, 359 N.L.R.B. 1266, 1282 (2013) (the fact that non-decisionmaker had additional concerns of misconduct does not constitute a shifting defense.); see also DeStefano Tr. 9/14/18 at 682:13-24 (Saxe did not order Tiffany to fire people; she suggested the terminations and sought Saxe’s blessing).

understand how to do it”). Indeed, DeStefano’s instinct in terminating employees was to give blanket, impersonal reasons for termination to avoid conflict. Id. at 503:3-9, 23-25 (DeStefano stating “I tried to do it in the nicest way possible... so I tried to blanket... I’m restructuring... So I used that in my - - in my reasoning of okay, here, here, just to again avoid confrontation, just try and make it smooth). Another example of this apprehensive termination style is DeStefano verbally informing alleged discriminatees that the reasons for their discharges were due to “restructuring” and “bringing in a third party.”

The facts in this case show that Respondents had a brand-new manager with no experience disciplining or terminating employees and who was hesitant to hurt employees’ feelings and afraid of confrontation. DeStefano Tr. dated 10/22/18 at 2566:20-25; 2567:3-7; DeStefano Tr. 9/13/18:502:2-7, 13-15, 21 (DeStefano admitting that she cried after terminating the first three alleged discriminatees and stating “that confrontation was a lot for me...having to talk about their reasons”). As a result, DeStefano tried to passively terminate employees or give them blanket reasons in an attempt to soften the blow. Id. at 503:3-9, 23-25. This sensitivity by DeStefano, is not evidence of unlawful conduct or pretext by Respondents. In fact, Saxe explicitly trained DeStefano to “tell the truth” in why she was terminating people and “always state on the paperwork the exact reason why we termed someone.” **GC. 10** at 3. Further, DeStefano’s explanations in the termination forms exemplify a vague, passive termination with no explicit details, which are not inconsistent with the testimony at trial and are not unlawful.

**4. There is No Evidence of Anti-Union Animus.**

General Counsel provides no evidence that Respondents harbored or acted with any illegal union animus toward the employees. Instead, the evidence demonstrates that Respondents’ employees are free to choose for themselves whether to seek representation by a union. This

evidence includes Saxe stating to employees that he had no problem with them being union. Saxe Tr. 10/31/18 at 3537:21-25 (“I just wanted [Prieto] to know that I heard he’s a good employee and he has nothing to worry about, that he’s not being fired and all is good, he can be pro-union and it’s okay”); *id.* at 3541:2-9 (After Tupy told him that he is pre-Union, “I said, great, I joined the Union 30 years ago, like I was in the Union, too... I understand. You’re right, I’m not mad at you, it’s fine. There’s no problem with you being in the Union. I’m not mad. I don’t care.”). Further, Respondents offered transportation to all employees to the election site, including the alleged discriminatees in this case. **GC. 40**; **GC. 41**. This shows that Respondents assured employees that they would not suffer adverse action for their union sympathies and all employees were offered transportation to the election site.<sup>11</sup>

Further, the evidence demonstrates that Respondents acted solely with the legitimate business interest of maintaining proper operations by ensuring that employees perform their job duties with the requisite skill. Absent evidence of illegal animus, General Counsel’s assertions fall flat, and General Counsel fails to sustain its burden of proof on the 8(a)(3) allegations. Columbian Distribution Servs., Inc., 320 N.L.R.B. 1068, 1071 (1996). Further, when determining whether antiunion animus motivated an adverse employment action, all the relevant circumstances must be considered. Tower Auto. Operations Usa, 355 N.L.R.B. 1, 3 (2010). The relevant circumstances in this case include the impropriety of former management, DeStefano as the “new sheriff in town,” the lack of consistent progressive discipline, the history of the Respondents terminating employees for small things, and all of the facts specific to each of the alleged discriminatees

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<sup>11</sup>Respondents’ former counsel entered into a stipulated election agreement agreeing to hold the election at the NLRB’s offices. When Respondents retained current counsel, Respondents attempted to move the election site to a more convenient location for the employees, but this request was denied.

discussed *infra*.

In contrast to the dearth of evidence of union animus by Respondents, the record is replete with evidence of animus by the former employees, including evidence that the entire union organizing campaign was started by a disgruntled former supervisor David Divito, who wildly claims that he was “drugged” and “fired for soliciting drugs and prostitutes.” See J. 2 at 1, 27. In a single Facebook group chat, Divito referred to Saxe as a “fucking maniac”, J. 2 at 1, a “lunatic”, id. at 11; “Fuck Saxe”, id. at 27, and a “crazy maniac” id. at 27. Unidentified employees also displayed animosity, particularly toward DeStefano and Saxe. See J. 2 at 35 (calling Tiffany a “cunt”, stating Tiffany “should have been fired first”, Tiffany is “like a rat lost in a maze”, threatening to shove a baseball bat up Saxe’s “arse”, talking about burning the theater down) id. at 30.) The alleged discriminatees also had made choice comments about Saxe management, including Glick calling Saxe a “dictator,” id. at 27, and DeStefano “head bitch” J. 4 at 37; Hill calling DeStefano the “shadiest mofo there” and stating that the Respondents are “fucking ass holes” J. 2 at 32, and Franco talking about “shitting in Saxe’s mouth” and Saxe dying of a “shit induced lung infection” id. at 40. These appalling comments and the clear personal disdain for Respondents and management should be considered when assessing the credibility of the alleged discriminatees as they show a group of disgruntled former employees who want to “stick it” to their former employer for reasons unrelated to their union activities.

**C. Facts and Arguments for Individual Employee Terminations.**

***a. Leigh-Ann Hill.***

Respondents hired Leigh-Ann Hill on August 14, 2017 as part of the day crew. R. 32. On or around February 26, 2018, Hill informed DeStefano that she had accepted another job with conflicting hours and explained that the new job took priority over her job with Respondents.

DeStefano 10/22/18 Tr. at 2587:5-8; 18-20; 24. In fact, Hill essentially stated that she would only be coming in for shows and would not be fulfilling her day crew schedule to which she was assigned full time. See GC. 18 at 2. Upon learning this, DeStefano became concerned that Hill might call in last minute and she would not have any one available to cover her shift. As a result and in order to prevent a predicament in which a show might have to be cancelled due to Hill's absence, DeStefano began training another employee on Hill's duties based on Hill's representation that she would not be coming to work if her new job needed her. DeStefano 10/22/18 Tr. at 2587:5-8; 18-20; 24; 2589: 3-4; 10-13; 19-20.

After hearing that she was being terminated, Hill subsequently confronted DeStefano in her office on March 1, 2018. Id. at 2588:9; 18-24. Hill screamed at DeStefano demanding to know if she was being fired. Id. at 2590:15-17. Hill also cursed at DeStefano admittedly using language such as "fuck," "shit" and "bullshit." Hill Tr. at 1084:24. Hill's abrasive and hostile demeanor caused DeStefano to become uncomfortable and to inconspicuously call Theater Manager Michael Moore to come to her office to assist in deescalating the situation. DeStefano Tr. dated 9/14/18 at 675:6-12 ("About halfway at her screaming at me, I dialed my director of operations. So he did come up toward the end of that conversation because I felt very cornered and I didn't want to be in there alone with her.") DeStefano and Moore informed Hill that Respondents cannot maintain a full-time employee who is not able to commit to a consistent schedule. DeStefano 10/22/18 Tr. at 2591:4-12. Since Hill had already heard that she was being terminated, the following day, Human Resources Manager Takeshia Carrigan called Hill and officially informed her of her employment termination.<sup>12</sup> Carrigan 9/14/18 Tr. at 721:17-19. Significantly, other employees have

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<sup>12</sup> The decision to terminate was discussed with Saxe who agreed with the termination also based on his knowledge of Hill's work performance. DeStefano Tr. dated 9/14/18 at 675:6-12; Saxe Tr. dated 9/11/18 at 98:10-17 ("She'd been a problem for quite some time....Just not a good worker...")

been terminated by Respondents for similar scheduling issues. See R. 34 (Durand not able to work his scheduled shift; Tannenbaum given option to resign after her position was restructured and she was unable to work the scheduled days; Hojnacki could not provide a consistent schedule due to another job).

Here, under the Wright Line analysis discussed *supra*, and in addition to the arguments presented in section V(B)(1)-(4), Hill cannot prove timing or causation because her termination occurred on March 2, 2018 – over a month before the Employer first became aware of any potential union campaign and prior to the filing of the RC Petition. **GC. 1(c); GC. 34** at 1. Further, Hill was not terminated *because* of any union activity; she was terminated because she could no longer fulfill her obligations as a full-time employee and was unable to offer a consistent schedule. DeStefano Tr. dated 9/13/18 at 327:9-13) (“Her main reason [for termination] was her schedule and the fact that she took her other job and was unable to give me consistency”). The facts pertaining to this employee do not establish a *prima facie* case.

Were General Counsel able to establish a *prima facie* case, given Hill’s inability to effectuate a consistent schedule and her admission that she would take another job over her job at V Theater, Respondents acted for legitimate business purposes when it terminated her. Hill was a full-time employee with set hours who informed the Respondent that she would call out last minute without any regard to Respondents’ show schedule or staffing. Employees are scheduled according to business needs and are expected to be present for their entire assigned shift. An employee who is unreliable regularly unavailable interferes with Respondents’ business and will

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Lazy Laney, doesn’t work and likes to talk, almost never working, just wants to hang out... dance.”); **R. 90**. Hill further admitted to goofing off while at work. See Hill Tr. at 1091:20-22 (“If you’re talking about making jokes and laughing with each other, then yes, we were goofing around.”)

be terminated. Attendance issues are a legitimate business reason for termination. See Health Management, Inc., 326 N.L.R.B. 801 (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (same); South Carolina Industries, 181 N.L.R.B. 1031 (same). Significantly, other employees have been terminated for similar scheduling conflicts and attendance issues. **R. 34.** Accordingly, the employment termination of Hill was lawful.

The General Counsel may claim that the Respondent's reason for termination is pretextual and that Hill had only asked for a couple of days off to do a short gig. However, such a claim seems incredible given Hill's own testimony. Hill admittedly worked three other jobs while she was employed at V Theater, including two new jobs that she was hired for just a week before her termination. Hill Tr. at 1076:16-24; 1077:8-10; 1079:4-7 (Hill was also employed at PRG during her employment at V Theater and was hired at Production Theory and Signature Theater in late February 2018). Hill also testified that these other jobs paid higher wages than the Respondents. Id. at 1078:17 (Production Theory paid a flat rate of \$1000 for four days); id. at 1079:1, 5-12 (PRG paid \$25 an hour); id. at 1079:20 (Signature Theater paid approximately \$2000 for a month's worth of work). Hill even admitted to telling DeStefano that if she got other jobs that paid me, she would take them over working for Respondents. Id. at 1083:19-25 (When asked whether she told DeStefano that she would work for other employers over Respondents if she made more money, Hill responded "I was speaking in a general sense"). Hill further stated to her coworkers on March 1, 2018 that she was a week away from quitting, further evidencing that Hill's claims that she did not have another job are false. See **J. 4** at 26, 2018-03-01 11:01 PM ("I'm just not about drama. I'm literally a week from quitting because I can't stand this anymore.") All of the evidence,

including Hill's own testimony support Respondents' position and thus Respondents' testimony should be found credible to the extent it conflicts with Hill's testimony.

***b. Taylor Benavente Bohannon.***

Bohannon was hired by the V Theater as an audio technician on November 4, 2017. **R. 35.** Shortly after her hire, she received written discipline for poor job performance when she did not adhere to her schedule and took an unauthorized break rather than complete her assigned work call. **R. 36; GC. 102** (email from Saxe leading to discipline). There were no additional issues of poor job performance reported until the beginning of March 2018, when within an approximate two-week period, Saxe received complaints from three performers, all of whom complained about Bohannon's job performance and lack of experience. Saxe 9/11/18 Tr. at 111:12;16-17. Specifically, Gerry McCambridge, the star of *The Mentalist*, complained that when Bohannon was working, he ran his own audio to ensure that his show would not be messed up and claimed that Bohannon "was ruining his show" and she "was very unprofessional." Id. at 111:12-20; **R. 82.** In fact, McCambridge even pled that Bohannon be terminated. Id. Indeed, during the hearing McCambridge described Bohannon as a "knob turner," and indicated that she was unable to correct errors on her own without the help of a manager. McCambridge Tr. at 3145:5-16.

Around the same time, Saxe received a complaint from the star of *Zombie Burlesque*, Enoch Scott, claiming that Bohannon did not have what it took to be an audio technician. Saxe 9/11/18 Tr. at 112:3-6. Saxe also received a complaint from the host of *V the Ultimate Variety Show*, Wally Eastwood, also expressing that Bohannon was not qualified. Id. at 3474:16-17; 23-24. Bohannon's subpar work performance was investigated and confirmed by DeStefano on or around March 15, 2018. DeStefano Tr. dated 10/22/18 at 2607:2-6; 2608:6-25; 2609:1-2. Bohannon was terminated from employment on March 19, 2018 for her inability to execute the

shows. **GC. 34** at 4; DeStefano 10/22/18 Tr. at 2608:6-25; 2609:1-2. Importantly, Bohannon does not dispute that she missed cues and would be on her cell phone during shows. Bohannon Tr. at 1238:22-23; 1239:7-12. Bohannon also agreed with McCambridge's complaints admitting that she understood why McCambridge did not think she should be running a show by herself because it was her first audio job outside of high school. *Id.* at 1247:17-20; 1259:18-23.

Here, under the Wright Line analysis discussed *supra* and in addition to the arguments presented in section V(B)(1)-(4), Bohannon cannot prove timing or causation because her poor job performance was being discussed as early as February 6, 2018, **R. 30**, and she was in fact terminated on March 19, 2018 – several weeks prior to when the Employer first became aware of any potential union campaign and over a month prior to the filing of the RC Petition. **GC. 1(e); GC. 34; R. 30** (ranking Bohannon' job performance second worst of the audio technicians). Further, Bohannon was not terminated *because* of any union activity; she was terminated for poor job performance after the Company received complaints from *The Mentalist* star that Ms. Bohannon “ruined his show”, as well as similar complaints from Wally Eastwood and Enoch Scott. DeStefano Tr. dated 10/22/18 at 2608:6-25; 2609:1-2. The facts pertaining to this employee do not establish a *prima facie* case of discrimination.

Assuming, *arguendo*, Bohannon could demonstrate a *prima facie* case, the Company acted for legitimate, business purposes compelling termination regardless of any protected activity. The Company is in the business of providing quality shows for paying guests. Reputation is of the utmost importance in the competitive entertainment industry so there is no room for error when an employee who has been trained and is being compensated to run audio messes up cues to the point that they not only result in complaints from performers, but likely are also noticed by the audience. Poor job performance that disrupts the show experience and causes a star to claim that an employee

“ruined his show” will simply not be tolerated and is a legitimate, business reason for termination. See Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se., 366 N.L.R.B. No. 57 (Apr. 13, 2018) (poor work performance is a legitimate business reason for termination). Further, Respondents have terminated other employees for similar performance issues. See **R. 37** (Wright terminated for poor performance and skill set; Ward unable to execute shows; Holl terminated for being unable to execute a show after two weeks of training Hewitt terminated for performance; Miller terminated for multiple mistakes after six weeks of training; Birdsall terminated for poor job performance when his actions caused shows to start late or be cancelled). Accordingly, Bohannon cannot establish a case of discrimination because the Company would have terminated her regardless of any protected concerted activity. The termination of Bohannon was lawful.

Notably, Bohannon testified that she missed cues, was on her phone during work hours, and she understood why McCambridge complained about her. Given these admissions, Respondents believe there is no factual dispute regarding the reason for her termination. However, to the extent Bohannon’s testimony conflicts with Respondents’ evidence, Bohannon’s testimony should not be found credible. Specifically, Bohannon repeatedly claimed that she only messaged McCambridge because she had just noticed that he requested to follow her on Instagram. Bohannon Tr. at 1252:11-12; 1253:19-24. McCambridge, on the other hand, testified that he had never followed Bohannon, but she had followed him. McCambridge Tr. at 3147:11-13. Bohannon also testified that she did not speak to anyone at the Fremont Street bar about McCambridge, Bohannon Tr. at 1255:9-22; however, multiple other alleged discriminatees confirmed that she was showing them the note discussing the complaint from McCambridge. Franco 9/20/18 Tr. at 1304:24-25; 1305:1-25; 1304:1-12; 18-21; Langstaff 10/2/18 Tr. at 1847:13-25; 1846:1-6;

1847:13-25; 1848:1-9; 1884:8-25; 1885:1-25; Glick 9/20/18 Tr. at 1393:23-25; 1394:1-15; 1396:8-25; 1397:1-25; 1398:1-7. Further, Bohannon claimed that she was unaware that her boyfriend, Petty, was a potential witness in this case. Bohannon Tr. at 1256:1-8. Nevertheless, Petty was called to testify the following week of trial. See 10/5/18 Tr. at 2404. This lack of candor by Bohannon should be given heavy weight by the Court when assessing her credibility.

*c. Nathaniel Franco.*

The V Theater hired Nathaniel Franco on December 4, 2017 as an audio technician. However, Franco was unable to effectively perform his job through his entire employment. Specifically, Respondents originally assigned Franco to shows at the V Theater, but he was unable to execute a single show. DeStefano Tr. dated 9/13/18 at 345:8-19. As a result, Franco was transferred to the Saxe Theater where he was given more training, but he continued to make the same mistakes. Id.; Hardin Tr. at 3414:18-149 (Hardin describing Franco as a poor performing audio technician). Respondents moved Franco through *nine* different shows to find a good fit for him. DeStefano Tr. 10/23/18 Tr. at 2652:6-16. Despite Respondent's efforts, Franco was unable to execute any show and continuously made significant mistakes despite receiving twice the amount of training of other employees. Id. at 2653:24-25; 2654:1-2; **GC. 29**; DeStefano Tr. dated 9/13/18 at 345:8-19.

While in Saxe Theater, Franco regularly missed the band's volume and, while working on *Vegas! The Show*, even played the wrong specialty act music and announcement for the wrong act on at least two occasions essentially "stopping" the show. Hardin Tr. at 3414:22-25; 3415:1-18. That kind of mistake not only causes chaos backstage as the performers become confused and scramble to set up the correct act, it is also a mistake that even Franco admits is very apparent to the audience. DeStefano 10/23/18 Tr. at 2654:14-19; 23-25; 2655:6-8; 23-25; 2656:1-2; 2658:3-

9; Franco Tr. at 1308:12-21 (admitting he played the wrong music “at least a couple” times and that such a mistake “disrupt[s] the performance and make[s] the performers not very happy”); Id. at 1309:1-12 (Franco explaining that when he played the wrong music it was a “major disruption” noticed by the audience who turned around and looked at him “wondering what the heck is going on”). This “major disruption” was reported directly to Saxe by the Company Manager Shannon Hardin and the Dance Captain Alejandro Domingo who also wrote written complaints about Franco’s performance. Saxe Tr. dated 9/11/18 at 114:5-16; **GC. 20.** After that “disaster” which occurred in mid-March, Franco was terminated on March 19, 2018. Franco Tr. at 1321:2-4; Saxe Tr. dated 9/11/18 at 114:5-16 (“The general consensus was this guy is definitely not fit to be running shows); Id. at 113:17-25 (“He was really bad at audio”); Id. 115:23-25 (“He can’t run audio... there’s certain people that can run live shows and certain people who just don’t have it”); Hardin Tr. at 3414:18-149 (Hardin describing Franco as a poor performing audio technician); **GC. 34.** Notably, even Franco acknowledged the he had no real experience in audio and he knew that there were problems with his job performance. Id. at 1307:17-25; 1308:1; 1319:23-25; 1320:1-2.

Here, General Counsel is unable to demonstrate a *prima facie* case under the Wright Line analysis discussed *supra*. In addition to the arguments presented in section V(B)(1)-(4), General Counsel cannot prove timing or causation because Franco was identified as *the poorest* performing audio technician as early as February 6, 2018. **R. 30.** Franco was in fact terminated on March 19, 2018—several weeks prior to when Respondents first became aware of any potential union campaign and over a month prior to the filing of the Petition for a Representation Election on April 26, 2018. **GC. 34** at 3; **GC. 1(c).**

Furthermore, Franco was not terminated *because* of any union activity. Respondents terminated Franco because of his poor job performance and failure to grasp the essential functions

of his position despite being trained twice as much as any other audio technician. **GC. 34; GC. 29.** Importantly, Franco admitted during his testimony that he had made serious errors labeling his mistake as a “disaster” and a “major disruption” during his employment and admitted that his job performance was subpar. Given those admissions, Respondents clearly acted for legitimate business purposes that would have compelled termination regardless of any alleged protected activity. Respondents are in the business of providing high quality shows and positive guest experiences. In doing so, Respondents must employ skilled, professional employees that can efficiently complete their job tasks. Poor job performance that disrupts the show experience and causes management to claim that an employee “stopped the show” will not be tolerated and is a legitimate business reason for termination. See Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se., 366 N.L.R.B. No. 57 (Apr. 13, 2018) (poor work performance is a legitimate business reason for termination). Moreover, other employees have been terminated for similar performance issues. See R. 37 (Wright terminated for poor performance and skill set; Ward unable to execute shows; Holl terminated for being unable to execute a show after two weeks of training; Hewitt terminated for performance; Miller terminated for multiple mistakes after six weeks of training; Birdsall terminated for poor job performance when his actions caused shows to start late or be cancelled). Accordingly, the employment termination of Franco was lawful.

Franco admitted that his job performance was subpar and that he made several mistakes that resulted in the show being a “disaster” and made performers “not happy.” Franco Tr. at 1308:12-21; 1321:2-4. Given those admissions, Respondents assert that there can be no factual dispute regarding the reason for Franco’s termination. Nevertheless, to the extent Franco’s testimony differs from the evidence presented by the Respondent, Franco’s testimony should be

discredited. The most blatant reason for discrediting Franco's testimony is that Franco claimed that he was shown information by the NLRB Board Agent that revealed that there were hidden cameras in the Saxe Theaters. Franco Tr. at 1310:18-22 ("I saw documentation saying that there was, that there was hidden cameras... When I first came in and talked to the NLRB, they advised me that there was hidden cameras.") However, the parties have stipulated that during the investigation of this matter, the Agent did not show Franco any documents related to cameras located inside Respondents' facility. **J. 3.** This discrepancy shows either a faulty memory or a disingenuous motive. Further, Franco has exuded an extreme disdain for Saxe personally that evidences animosity toward the Respondents that could have either intentionally or unintentionally altered Franco's testimony. See J. 2 at 39-40.

*d. Kevin Michaels.*

The V Theater hired Kevin Michaels as a stagehand on August 26, 2015. **R. 38.** Michaels' employment tenure exhibited consistent poor attendance, as well as substandard job performance and insubordination. DeStefano 9/13/18 Tr. at 358:2-7; 17-19, 24-25; 359:8-10; 17-18; 25. Michaels refused to be a team player and refused to perform any tasks outside his designated track to help Respondents. Estrada Tr. at 790:4-5, 7-13 ("When I asked him to do something, he wouldn't do it... Part of his track was to roll up the cord, the cord that comes down the center of the curtains. And I'd asked him several times can you do that, and he kept saying it's not my track. But it is your track, I know it is. It's in black and white right there. And he just didn't, just didn't want to do it...didn't want to step up when we were short"). Michaels also only knew one track and refused to learn any additional tracks to assist if other stagehands were out. Id. at 836:8-12 (But he only knew one track... he was on the same thing every night. Every time I tried - - I think I tried to train him on something, and he just, no, no, no, no, I don't want to do that."). Estrada

reported Michaels' performance issues to DeStefano suggesting that he be terminated. Estrada Tr. dated 9/17/18 at 789:13-17 ("he was not helping"); id. at 791:1-3; 20-23.

The final straw, which ultimately led to Michaels' termination, revolved around scheduling and his insubordination in refusing to comply with his assigned schedule despite numerous conversations with DeStefano asking him to do so. DeStefano Tr. dated 9/13/18 at 360:3-4; 14-16. It became apparent in late February and early March that Michaels refused to abide by any assigned schedule. Instead, he would arrive at work anywhere between sixteen minutes early to two hours late and would leave anywhere between one hour and 31 minutes early to one hour and eight minutes late. See **R. 39**. Importantly, Michaels does not deny this poor attendance pattern. See Michaels Tr. at 1563:20-25; 1564:1-25; 1565:1-15 (Michaels cannot deny clocking in: two hours and 41 minutes outside of his assigned schedule on February 27, 2018; one hour and 43 minutes outside his assigned schedule on February 28, 2018; 42 minutes outside his assigned schedule on March 1, 2018; one hour and 14 minutes outside his assigned schedule on March 3, 2018; one hour and 46 minutes outside his assigned schedule on March 4, 2018; one hour and 30 minutes outside assigned schedule on March 6, 2018; 16 minutes outside his assigned schedule on March 7, 2018; one hour outside his assigned schedule on March 9, 2018; 34 minutes outside his assigned schedule on March 10, 2018; and one hour and 36 minutes outside his assigned schedule on March 11, 2018). Michaels' behavior directly violated the applicable Timekeeping Policy requiring that employees clock in no earlier than five minutes prior to their shift and clock out no later than five minutes after their shift, which Michaels received upon hire. **GC. 52; R. 14; R. 15**. Additionally, Michaels attended a meeting on February 12, 2018 where he was again reminded of the importance of scheduling by Pendergraft and DeStefano. **R. 16**. DeStefano also spoke to him individually about his attendance issues, but he refused to conform to the schedule. **GC. 8**,

DeStefano Tr. dated 9/13/18 at 358:17-19; 24-25; 365:2-7 (“I talked to Kevin countless times. I can’t even tell you how many times; that’s how many times I actually spoke to him...He’s somebody that doesn’t necessarily like to be managed). As a result of the repeated policy violation and his disregard of his supervisor’s directives, Michaels was terminated on April 2, 2018. **GC. 34**; DeStefano Tr. dated 9/13/18 at 360:14-16 (“his main reason was his timeliness and his attendance and his disregard to my direction and what I had asked of him”).

Here, under the Wright Line analysis discussed *supra*, and in addition to the arguments presented in section V(B)(1)-(4), Michaels is unable to establish a *prima facie* case because he is unable to show protected activity, that the employer had knowledge of any alleged protected activity, timing, or that his termination was the result of any alleged protected activity. Notably, the only protected activity alleged by Michaels is that he attended one union meeting on March 13, 2018; however, he does not offer any evidence of employer knowledge or animus other than a “look” Estrada allegedly gave him when he left the work call around midnight. Michaels Tr. at 1521:18-19; 24-25. Michaels also cannot prove timing or causation because his termination was decided on March 16 and occurred on April 2, 2018 – before Respondents first became aware of any potential union campaign and several weeks prior to the filing of the RC Petition. **GC. 1(c); GC. 34; GC. 8**. Further, Michaels was not terminated *because* of any union activity; he was terminated for his repeated violations of the Company’s Timekeeping Policy, his insubordination in continuing to violate the policy when directed otherwise by management, and his attitude when spoken to by management. DeStefano Tr. dated 9/13/18 at 358:2-7; 17-19, 24-25; 359: 8-10; 17-18; 25; 360: 3-4; 14-16; **GC. 52**. Michaels knowingly violated the Timekeeping Policy as he had acknowledged that he received the policy and knew of Respondents’ expectation that he abide by

all policies in the Employee Handbook. **GC. 52; R. 14.** The facts pertaining to this employee do not establish a *prima facie* case.

Assuming, *arguendo*, Michaels could demonstrate a *prima facie* case, Respondents acted for legitimate, business purposes that would have compelled termination regardless of any protected activity. Respondents maintain a Timekeeping and Attendance Policy because it puts on shows at specific times each day and employees are scheduled according to business needs and are expected to be present for their entire assigned shift. Production employees do not have the liberty of designating their own schedules as Michaels did. An employee's refusal to comply with schedules and refusal to comply with management's request cannot be tolerated and is a legitimate, business reason for termination. Health Management, Inc., 326 N.L.R.B. 801 (1998) (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (1981) (same); South Carolina Industries, 181 N.L.R.B. 1031 (1970) (same). Moreover, Respondents have terminated employees for attendance issues in the past, however, there are no comparators similar to Michaels' complete disregard of the schedule. **R. 40** (Soares no called/no showed; Fleig had 7 call outs/tardies in his first 90 days); see also Merillat Industries, 307 N.L.R.B. 1301 (1992) (Board noted that an 8(a)(3) respondent will rarely be able to present evidence of past employees who were discharged under identical circumstances to those of the discriminate). Furthermore, to the extent Michaels' claims that his attendance practice was accepted by prior management, such a claim is unavailing as DeStefano had the right to enforce policies and hold employees to her own standards as discussed *supra*. Accordingly, Michaels cannot establish a *prima facie* case of discrimination and Respondents would have terminated him regardless of any protected concerted activity. The termination of Michaels was lawful.

Notably, Michaels offered contradictory testimony between his affidavit, his direct examination, and his cross-examination. Specifically, Michaels' memory appeared faulty as it pertained to the allegation that Estrada said something to the effect of "I have 15 people lined up outside to replace you." Although he testified to the comment, he was unable to pinpoint a day or specific timeframe in which the comment was said. Furthermore, when asked on cross-examination if any of the alleged discriminatees had been complained about for not carrying their weight, he said "no." Michaels Tr. at 1562:5-8. Nevertheless, just minutes later on his redirect examination when asked who was complained about, Michaels identified alleged discriminatee Langstaff. Id. 1580:1-2. Michaels also claimed that he never refused to learn additional tracks. Id. at 1570:18-20. However, the testimony of Estrada, as well as documentation during Michaels' employment all indicate otherwise. Estrada Tr. 9/17/18 at 836:8; **GC. 8.** Michaels' faulty memory should not be relied upon to the extent that it contradicts other evidence.

*e. Zachary Graham.*

The V Theater hired Zachary Graham as a stagehand on August 25, 2014. **R. 41.** During the last few months of his employment, Graham ran the cues track on *Vegas! The Show*. Graham Tr. at 1699:11-13; 1702:14-15. On February 21, 2018, Graham sustained a non-work-related injury which resulted in him seriously injuring his arm. DeStefano 10/23/18 Tr. at 2646:7-17; 2647:1-6. On or around February 22, 2018, Graham visited the V Theater and informed DeStefano that he was unable to work due to his arm injury. Id. When DeStefano asked Graham for a doctor's note, he provided a one-page, vague document that released him to full duty on February 25, 2018. Id.; **R. 18.** DeStefano explained to Graham that she needed further documentation—either FMLA or some sort of paperwork that provided a date when Graham would be able to return to work. DeStefano 10/23/18 Tr. at 2646:7-17; 2647:1-6. DeStefano was particularly

concerned because Graham told her that he had a surgery planned, but the note he provided released him to work on February 25, 2018—three days hence and before the scheduled surgery. Id. at 2647:19-25; 2648:1-9; **R. 18**. DeStefano emphasized that if he provided the necessary paperwork, Graham’s job would be safe. DeStefano 10/23/18 Tr. at 2646:13-16. DeStefano followed up with Graham the following day via text message asking for the additional medical documentation. Id. at 2647:6-9; **R. 21**. Graham again provided the same vague and ambiguous one-page note. Id.; **R. 18**. The last communication between DeStefano and Graham occurred on February 28, 2018 when Graham informed DeStefano that he had a surgery scheduled for the following week. **GC. 23**. Graham said that he would get more information on his arm the following Tuesday, March 6, 2018. Id. However, Graham never reported any additional information back.

Subsequently, having not received any updates or information about his condition, DeStefano called Graham every Monday when she did payroll to check on his status, but to no avail.<sup>13</sup> DeStefano 10/23/18 Tr. at 2648:10-21. Because Graham did not return to work on February 25, 2018, did not provide requested additional medical documentation about his return to work or any work restrictions, and did not respond to any contact attempts made by DeStefano or Stage Manager Estrada, Respondents terminated Graham’s employment for job abandonment

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<sup>13</sup>At the hearing, Graham provided what he purported to be phone records for the relevant time frame. However, these documents were not authenticated other than through Graham’s explanation that he printed them from online. Graham Tr. at 1665:5-8. Noticeably absent from the documentation is any identifying information for Graham such as his name or phone number making it impossible to conclude that the phone records even belong to Graham. See GC. 68; GC. 69. Further, Graham testified that he had no knowledge of whether the phone records would include an entry for missed phone calls. Graham Tr. at 1668:8-15. As such, these documents should be disregarded as entirely irrelevant in that they do not prove nor disprove that DeStefano called Graham during his time out of work.

on March 23, 2018, with an effective date of March 1, 2018. **GC. 34**; Saxe 9/11/18 Tr. at 134:5-11; 20-24; DeStefano 10/23/18 Tr. at 2648:8-9; 11-15; 23-25; 2649:1-11; Graham Tr. at 1709:4-10 (admitting he did not provide any additional medical documentation). DeStefano texted Graham on March 21, 2018 to notify him of his termination. Graham Tr. at 1711:16-25; 1712:1. Graham did not respond to the termination message, contact anyone else with Respondents, or ever ask to be re-hired. Id.<sup>14</sup>

Here, in addition to the arguments presented in section V(B)(1)-(4), General Counsel is unable to show that Respondents had knowledge of any alleged protected activity prior to the decision to terminate Graham’s employment. Further, General Counsel cannot show an adverse employment action since *Graham abandoned his job* by failing to return to work, failing to provide a requested medical documentation, and failing to respond to any agent of Respondents for nearly a month-long period. Saxe Tr. dated 9/11/18 at 134 :5-11; 20-24 (Tiffany asked Saxe about what to do about Graham and Saxe stated “If somebody doesn’t ever call you back... [it’s] job abandonment”). After Graham stopped reporting for work and ceased communication, Respondents were forced to separate him from employment. Id. Even if his job abandonment termination is viewed as an adverse action, Graham cannot prove the requisite timing or causation because his termination occurred on March 23, 2018—weeks before Respondents first became aware of any potential union campaign, weeks before Graham was passing out union cards on April 10, 2018, and over a month before the Petition for a Representation Election was filed. **GC. 34**; **GC. 1(c)**. Additionally, Graham admitted that no one indicated to him that his termination

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<sup>14</sup>Graham did send a text to DeStefano that could have been read to indicate that he was planning to return to work in two weeks, however, Graham clarified in his testimony that the text message was in fact meant for his friend, Nick, and was mistakenly sent to DeStefano. Graham Tr. at 1710:11-15; 1711:3-11.

was related to his union activity. Graham Tr. at 1712:3-7. Furthermore, Respondents have terminated other employees for similar reasons. See R. 42 (Josh Haino never returned any phone calls to discuss his employment and was subsequently terminated; Wanda Merritt failed to return to work or return any phone calls after a health issue and was terminated).

Respondents acted for legitimate business purposes that would have compelled termination of Graham regardless of any alleged protected activity. Respondent had no knowledge of whether or when Graham could return to work due to his alleged injury. Graham failed to provide adequate medical documentation or respond to any attempted communications by Respondents. Graham Tr. at 1709: 4-10; 1711:23-25; 1712:1. In fact, the only document that Graham did provide was a one page note from an ER nurse releasing him to work on February 25, 2018. **R. 18**. That note was confusing at best and fraudulent at worst since Graham appeared to have his arm in a sling and claimed that he needed surgery. He never provided a single document indicating that he required surgery, had surgery, needed time off of work, or modified duty – he provided no documentation at all. Graham Tr. at 1709: 4-10; 1711:23-25; 1712:1. Respondents waited a reasonable amount of time with no documentation and no communication until finally DeStefano asked Saxe what to do with this employee who was unreachable. Saxe simply instructed that these circumstances constituted job abandonment. Saxe Tr. dated 9/11/18 at 134 :5 -11; 20-24. Accordingly, Graham was lawfully terminated. See Fresh & Easy Neighborhood Market, Inc., 356 N.L.R.B. 546 (2011) (employee lawfully terminated for job abandonment).

Importantly, Graham testified that he was on property and backstage in Saxe Theater numerous times after his injury. However, there is no evidence to support an assertion that DeStefano knew he was on property or ever saw him on property. Furthermore, even if DeStefano had knowledge of Graham's presence, she had told him on February 24, 2018 that she needed

additional paperwork to protect his employment. It was incumbent on Graham to provide the requested documentation to DeStefano to protect his employment; DeStefano had no obligation to locate him and request the paperwork for his benefit. Graham testified that he was told by DeStefano that he did not need additional documentation and that his job would be safe. Graham Tr. at 1654:10-12. However, when asked on cross-examination if DeStefano asked for additional documentation, Graham then claimed that he did not remember. Graham Tr. at 1712:15-19. That inconsistency in Graham's own testimony should be resolved in favor of the Respondents' version of the events in which he was asked for additional documentation.

*f. Alanzi Langstaff.*

Alanzi "Bear" Langstaff was hired as a Stagehand on March 8, 2017. **R. 43**; Langstaff Tr. at 1851:1-2. During his employment, Langstaff was assigned to work on *Vegas! The Show* in Saxe Theater, but he displayed significant attendance, timeliness, and work ethic issues. Langstaff Tr. at 1825:1-2; DeStefano 10/23/18 Tr. at 2659:19-21. In fact, Langstaff constantly arrived late to work and he was tardy 31 times from January 2, 2018 through March 12, 2018. See R. 44. Langstaff was so tardy on at least one occasion that he did not arrive until *after* the show had already begun, resulting in a written discipline as it was a violation of Respondents' Timekeeping Policy. **R. 45**; **GC. 99** at 13; Langstaff Tr. at 1877:13-23 (Langstaff admitting he was late). Notably, Langstaff received this policy upon hire and was reminded of the policy on February 12, 2018 when Pendergraft held a meeting discussing, among other things, the necessity that employees abide by their schedules. **R. 24**; **R. 25**. DeStefano spoke to Langstaff individually on numerous occasions asking him to follow her schedule, but to no avail. DeStefano 10/23/18 Tr. at 2667:4-12.

Moreover, when Langstaff did come to work, he was unprepared and would often not bring the equipment necessary to do his job or wear the proper shoes. Estrada 9/17/18 Tr. at 797:2-6 (“He’d come in with his slippers. He’d have to go to his car all the time. He’d come in at 7 o’clock when the call was at 6:45. He had no flashlight. He’d have to go between shows and go get his flashlight from his car daily. This is all daily stuff...”). Further, Langstaff had a reputation for being lazy and not pulling his own weight. *Id.* at 797:6-8 (“Lazy, missed cues, talked too much to the girls...and on his phone watching sports”); Michaels Tr. at 1580:1-2 (Identifying Langstaff as a stagehand who would “slack”); DeStefano Tr. dated 9/13/18 at 373:10-13; 20-21 (“He was failing to put props away, put back the set pieces where they belong...other people had to do his prop put-aways, his dusting down of certain things); *id.* at 374:8-10; 20-23 (“It was a complaint I had heard for a while about him being lazy and not completing his tasks”).

Even more troubling for Respondents was Langstaff’s aggressive behavior which made it difficult for management to discipline him and other co-workers to work with him. DeStefano Tr. at 372:5-11. In fact, Langstaff had a recurring issue with Stagehand Ivan Barrera that resulted in Barrera complaining to management and switching shifts to avoid having to work with Langstaff. **R. 85**; Barrera Tr. at 3300:17-23; 3301:18-22; 3302:5-8. Additionally, Langstaff was inappropriate and aggressive with DeStefano when he confronted her about her choice to train Kostew as cue caller. DeStefano Tr. 9/13/18 at 376:6-9. Such threatening behavior is in violation of the Respondents’ Workplace Violence Policy, which Langstaff also received upon hire. **R. 23**. Langstaff’s termination was recommended by Estrada and DeStefano when she spoke to Saxe on or around March 15, 2018. DeStefano 10/22/18 Tr. at 2578:10-19. After the decision to terminate Langstaff was made, Langstaff displayed additional attendance issues when he no call/no showed

for work on March 17, 2018. Carrigan Tr. dated 9/14/18 at 729:21. Respondents terminated Langstaff's employment on March 19, 2018. **GC. 34** at 5.

Here, under the Wright Line analysis discussed *supra*, in addition to the arguments presented in section V(B)(1)-(4), Langstaff is unable to establish a *prima facie* case because he is unable to show that the employer had knowledge of any alleged protected activity, timing, or that his termination was the result of any alleged protected activity. In particular, Langstaff cannot prove that he even engaged in any protected, concerted activity as he is distinct from the other alleged discriminatees in this case in that he did not attend any union meetings or participate in the Facebook group chats. Glick Tr. at 1379:6-8, 13. Langstaff cannot prove timing or causation because his poor job performance was first discussed on February 6, 2018 when he was identified as the *weakest* stagehand and his termination was effective March 19, 2018 – weeks before the Employer first became aware of any potential union campaign and over a month prior to the filing of the RC Petition. **GC. 34; R. 31**. Langstaff was again identified as a lazy worker on March 4, 2018 when DeStefano said he needed a “pep talk” and “if he’s not willing to step up, we may need to look into seeing if this company really is a good fit for him.” **GC. 13** at 8. Finally, Langstaff was not terminated *because* of any union activity; he was terminated for his poor job performance, his aggressive behavior toward co-workers, and his repeated violations of the Company’s Attendance and Tardiness Policies. Id. Langstaff acknowledged that he received the Attendance and Tardiness Policies and knew of Respondents’ expectation that he abide by all policies in the Employee Handbook. **R. 25**. The facts pertaining to this employee do not establish a *prima facie* case.

Assuming, *arguendo*, Langstaff could demonstrate a *prima facie* case, Respondents acted for legitimate, business purposes that would have compelled termination regardless of any

protected activity. Respondents maintain a Timekeeping and Attendance Policy requiring employees to be present for their assigned shifts because shows are scheduled at specific times each evening. Employees are scheduled according to business needs and are expected to be present for their entire shift. An employee who is unreliable interferes with Respondents business and cannot be tolerated. Further, attendance issues are a legitimate, business reason for termination. See Health Management, Inc., 326 N.L.R.B. 801 (1998) (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (1981) (same); South Carolina Industries, 181 N.L.R.B. 1031 (1970) (same). Langstaff also displayed job performance issues, which is an additional legitimate business reason for termination. Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se., 366 N.L.R.B. No. 57 (Apr. 13, 2018) (poor work performance is a legitimate business reason for termination). Significantly, Respondents have terminated other employees for similar attendance and performance issues. See R. 37 and R. 40 described *supra*. Furthermore, to the extent Langstaff claims that his attendance practice and job performance was accepted by prior management, such a claim is unavailing as DeStefano had the right to enforce policies and hold employees to her own standards as discussed *supra*. Accordingly, Respondents would have terminated him regardless of any protected concerted activity. The termination of Langstaff was lawful.

While Langstaff claims that his girlfriend called out for him on March 17, 2018, Carrigan, and documentary evidence establish otherwise. Carrigan Tr. 10/3/18 at 2073:20-22. Further, Langstaff claimed that he was in the hospital because he had fluid in his knee. However, DeStefano was told that he was in the hospital for a suicide attempt thereby creating a conflict of testimony. DeStefano Tr. 10/23/18 at 2672:1-5. Langstaff also claimed that Estrada did not care about his

tardiness or work performance, but Estrada testified differently. Estrada Tr. 9/17/18 at 797:2-8. This conflicting testimony should be resolved in favor of the multiple Respondents' witnesses' testimony.

*g. Jasmine Glick.*

Respondents employed Jasmine Glick as a spot light operator at the V Theater. DeStefano 10/23/18 Tr. at 2689:20-21.<sup>15</sup> In January of 2018, DeStefano identified Glick as an employee with poor job performance due to Glick's unreliable attendance record and failure to follow company policies, such as the cell phone policy. *Id.* at 2695:12-13; 21-25; 2696:1-4. DeStefano discussed the attendance issues with Glick, but those conversations were ultimately unsuccessful in remedying Glick's attendance issues. *Id.* at 2696:16-25; **R. 50**. On numerous occasions during the last month of her employment (February 24, March 2, March 3, and March 13, 2018), Glick arrived late to work causing the cast and crew to panic. *Id.*; Glick Tr. at 1432:15-17 (Glick admitting that she was late four times in her last month of employment).

Additionally, Glick was on her cell phone on several occasions when she was supposed to be operating the spot light which caused her to miss cues. Glick Tr. at 1430:17-24; 1426: 12-16 (Glick admitting she had been on her phone during shows). Glick had been previously warned of Respondents' stance on cell phone use by former manager Pendergraft. **R. 10**; **R. 11**. Nevertheless, Glick was admonished by DeStefano on numerous occasions about not using her cellular telephone during shows. DeStefano 10/23/18 Tr. at 2691:8-17. Despite receiving and being spoken to about the cellular telephone policy, Glick's continued cellular telephone usage interfered with her ability to properly and safely operate the spot light. **R. 8**; **R. 12**. In fact, performers regularly complained about Glick's work performance. She missed cues during live

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<sup>15</sup> Glick had worked for the Respondents on two occasions prior. Glick Tr. at 1362:10-14.

shows that would leave performers in the dark while up on poles in the air unable to see. DeStefano 10/23/18 Tr. at 2693:7-13. Glick also missed spot lights for the star of the *Zombie Burlesque* show and failed to turn on the lights when the curtains opened. Id. at 2693:21-23; 2694:14-17. Respondents received those complaints around the end of February 2018. Id. at 2694:20-23. Ultimately, DeStefano terminated Glick’s employment on March 18, 2018 and explained that Glick’s attendance, cellular telephone usage, and Respondents’ restructuring were the basis for Glick’s termination.<sup>16</sup> Id. at 2699:9-16; 2691:6-7.

Here, under the Wright Line analysis discussed *supra*, and in addition to the arguments presented in section V(B)(1)-(4), Glick is unable to establish a *prima facie* case because she is unable to show that Respondents had knowledge of any alleged protected activity, timing, or that her termination was the result of her alleged protected activity. Glick cannot prove timing or causation because her termination occurred on March 19, 2018 – weeks before the Employer first became aware of any potential union campaign and over a month prior to the filing of the RC Petition. **GC. 34; GC. 1(c)**. Further, Glick was not terminated *because* of any union activity; she was terminated for her repeated violations of Respondents’ Attendance and Tardiness Policies and Cell Phone Use Policy. DeStefano Tr. at 2699:9-16; 2691:6-7. Glick acknowledged that she received the Attendance and Tardiness Policies, the Cell Phone Use Policy, and was aware of Respondents’ expectation that she abide by these policies and all policies in the Employee Handbook. **R. 8; R. 10; R. 11; R. 12**. The facts pertaining to this employee do not establish a *prima facie* case.

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<sup>16</sup> In addition to the work performance issues discussed *supra*, Saxe believed that Jasmine was a “terrible employee” that would not work and just hang out, but these reasons were not the basis for DeStefano’s decision. Saxe Tr. dated 9/11/18 at 105:14-15; 106:23-14.

Assuming, *arguendo*, Glick could demonstrate a *prima facie* case, Respondents acted for legitimate, business purposes that would have compelled termination regardless of any protected activity. Attendance is of utmost concern because Respondents put on shows at scheduled times each day and schedules employees according to business needs. An employee who is unreliable interferes with Respondents' business and cannot be tolerated. Further, when Glick was present for her shift, she continuously violated Respondents' Cell Phone Use Policy resulting in missed cues and dangerous errors in the show. Attendance issues and job performance are a legitimate, business reasons for termination. See Health Management, Inc., 326 N.L.R.B. 801 (1998) (employee lawfully discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (1981) (same); South Carolina Industries, 181 N.L.R.B. 1031 (1970) (same); see also Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se., 366 N.L.R.B. No. 57 (Apr. 13, 2018) (poor work performance is a legitimate, business reason for termination). Additionally, Respondents have terminated other employees for similar attendance and performance issues. See R. 37; R. 40. Furthermore, other employees have been terminated for similar cell phone policy violations. See R. 51. Finally, to the extent Glick claims that her attendance issues were not problematic to prior management, such a claim is unavailing as DeStefano had the right to enforce policies and hold employees to her own standards as discussed *supra*. Accordingly, as Glick cannot establish a *prima facie* case of discrimination and Respondents would have terminated her regardless of any protected concerted activity, the termination of Glick was lawful.<sup>17</sup>

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<sup>17</sup> In fact, the Department of Employment Training and Rehabilitation determined that Glick was terminated for misconduct in her violation of the cell phone policy and her chronic attendance issues. See R. 75.

In her testimony, Glick admitted that she had used her phone while on the clock, missed cues, and had been tardy on multiple occasions. As a result of those admissions, Respondents believe there is no factual dispute over the reason for Glick’s termination. However, to the extent there is a factual dispute, Glick’s testimony should not be credited as it is self-serving and in furtherance of her personal animosity against Respondents.

*h. Chris Suapaia.*

Chris Suapaia worked as a stagehand at the V Theater commencing October 26, 2017. DeStefano 10/23/18 Tr. at 2702:1-2; **R 52**. Suapaia—almost immediately after being hired—was unable to run tracks in two of the four theaters. Id. at 2703:2-3. Respondents moved Suapaia to the Saxe Theater. Id. at 2703:3-5. However, in February 2018, Suapaia began complaining about his ability to perform his track in the Saxe Theater necessitating another move. Id. 2703:5-6; 10-15; 17-24. Suapaia was also particular with which tracks he was willing to run because he had a fear of walking backward, which impeded the moving of props on the stage, rendering his service useless when that was his main job duty. Id. at 2704:2-3; DeStefano Tr. at 357:7-8 (“He just told me about his fear of walking backwards”). Respondents attempted to accommodate his preference, but his inflexibility rendered him unqualified to continue in employment. Id. at 2708:7-9; 2703:17-19; 22-24; Suapaia Tr. at 1464:15 (Suapaia admitting he was told “If you can’t do the job, then we can’t use you”).

Ultimately, Respondents terminated Suapaia for his lack of willingness to execute shows and his limited availability. Id. at 2702:22-25. Specifically, in addition to his issues running tracks, Suapaia kept “shrinking his availability” and could no longer work the six days a week that he was hired to work. Id. at 2704:19-22. To further exacerbate that issue, Suapaia would not inform his employer of his unavailability until *after* the schedule was distributed for the week

causing DeStefano to scramble to reschedule stagehands and ensure coverage. *Id.* at 2705:14-23; 2702:13-18; Suapaia Tr. at 1491:1-9 (admitting he would call out of work, including once because he was incarcerated). In fact, the week prior to his termination, Suapaia called out from work for an entire week without any explanation. DeStefano Tr. dated 10/23/18 at 2707:12-18. Before terminating Suapaia, DeStefano felt like she had exhausted her options in trying to schedule Suapaia so she spoke to his Stage Manager Estrada to make sure that she had all of the information; Estrada agreed with her decision. DeStefano Tr. at 351:15-16; 352:7-21; 353:18-23; 354:12-14, 20-24). As a result, Suapaia was terminated on March 19, 2018. **GC. 34** at 7.

Here, in addition to the arguments presented in section V(B)(1)-(4), the General Counsel is unable to show that Respondents had knowledge of any alleged protected activity, suspicious timing, or that Suapaia's termination was the result of his alleged protected activity. Respondents terminated Suapaia on March 19, 2018—several weeks prior to when Respondents first became aware of any potential union campaign and over a month before the Petition for a Representation Election was filed. **GC. 34; GC. 1(c)**. Further, Suapaia was identified as the third worst performing stagehand on February 6, 2018. **R. 31**. He was again identified as a poor performing employee on March 4, 2018 when DeStefano said he needed a “pep talk” and “if he’s not willing to step up, we may need to look into seeing if this company really is a good fit for him.” **GC. 13** at 8. Suapaia was not terminated because of any union activity; he was terminated for poor job performance because he struggled with his job duties and was an unreliable employee. DeStefano Tr. dated 10/23/18 at 2702:22-25.

Respondents acted with legitimate business purposes. Employee dependability is a necessary and important attribute for employees in the entertainment business as all shows are scheduled for specific times and need a specific number of employees to run them. If an employee

is undependable or ineffective, it is a huge hinderance to Respondents' ability to run its performance. Employers are not required to maintain the employment of employees with limited schedules and the General Counsel has not offered any evidence of disparate treatment of similarly situated employees. Starbucks Corp. d/b/a Starbucks Coffee Co. & Local 660, Indus. Workers of the World, 2008 WL 5351366 (Dec. 19, 2008) (finding that Employer's argument that limited availability was a factor in termination was not pretext in the absence of evidence of disparate comparators). In fact, Respondents have terminated other employees for similar attendance and performance issues. See R. 37; R. 40. Accordingly, in view of the foregoing, and as Respondents would have terminated Suapaia regardless of any alleged protected concerted activity, the termination of Suapaia was lawful, and he should not be reinstated.

Suapaia is one of the only alleged discriminatees who denied hearing any conversations at the Fremont Street bar. Suapaia Tr. at 1472:9-25; 1473:1-3. The evidence clearly establishes that multiple conversations occurred at the bar that may have been violative of the sequestration order, yet Suapaia curiously did not hear any of them. Suapaia was also allegedly "forcibly denied entry" to the NLRB offices, located in a federal building and secured by federal marshals on the day of the election. **R. 13** (stating that he was forcibly denied entry to the NLRB to vote in the election). This denial of entry was not explored at the hearing, but it necessarily implies some inappropriate behavior on Suapaia's part. Accordingly, Suapaia's credibility is impaired.

*i. Michael Gasca.*

Michael Gasca worked as an on-call stagehand at the V Theater. DeStefano 10/23/18 Tr. at 2709:11-12. At the time of his hire, Respondents employed only two on-call stagehands, Gasca and Kostyantyn Melnichenko. Id. at 2718:1-2. During his employment, Gasca exhibited work performance issues. Specifically, Gasca would complain rather than focus on performing his job

duties. Id. at 2715:21-22; 426:4-11. Notably, however, DeStefano did not identify the issue as the complaining itself, but rather the impact Gasca's complaining had on his productivity. Id. at 2715:21-26; 2716:1-4. Importantly, Gasca would threaten to walk out during a show, which would necessarily have a negative impact on Respondents. DeStefano Tr. dated 9/13/18 at 444:2; Mecca Tr. 3169:22-24 (Mecca heard him threaten to walk out). When Gasca was performing work, he would miss cues that had a detrimental effect on show quality. Id. at 2717:1-5 (DeStefano describing everything that Gasca had messed up on a show was "a disaster" and "a mess"); Mecca Tr. at 3182:6-10; 16-17; 3169:11-24 (Mecca claiming that Gasca missed cues); Sojak Tr. at 3195:21-22 (Sojak stating same). His job performance became much worse once Gasca changed from a part-time position to an on-call position. DeStefano Tr. dated 9/13/18 at 425:14-22.

Around January 2018, Gasca requested a leave of absence from work. Gasca Tr. 9/19/18 at 1145:1-5; 8. Gasca claims that he submitted a letter to Estrada explaining that the leave was for an apprenticeship program with the Teamsters Union. Id. The request was referred up to then Production Manager Pendergraft who informed Gasca that they could not give him a leave, but that Respondents could let him go and rehire him later. Id. at 1150:20-24. However, rather than let Gasca go in January, they placed him in an on-call position. Id. at 1151:9-11. At one point, Respondents offered to bring Gasca back to a part-time position, but Gasca refused because he did not want to go back to a set schedule. DeStefano Tr. 9/13/18 at 427:13-18; Gasca Tr. at 1170:19-24. In March, Respondents decided to terminate all on-call employees as they restructured the operations to be more efficient and on-call stagehands were therefore no longer needed. DeStefano 10/23/18 Tr. at 2718:1-2. As a result, Gasca was terminated on March 19, 2018. **GC. 34.**

Here, under the Wright Line analysis discussed *supra*, in addition to the arguments presented in section V(B)(1)-(4), the General Counsel is unable to establish a *prima facie* case

because Gasca did not engage in any protected concerted activity, Respondents had no knowledge of any alleged protected activity, timing, and Gasca's termination was not the result of his alleged protected activity. The facts pertaining to Gasca are different from the others in this matter because Gasca had no involvement in the union organizing campaign. Glick Tr. at 1379:6-8; 11; Gasca Tr. at 1174:11-17. Rather, Gasca claims that his protected activity is that he requested a leave of absence for an apprenticeship with the Teamsters Union in January 2018. Such activity is not concerted as required by the Act. In order to be covered by Section 7, the activity must be concerted in the sense that it is ordinarily engaged in by two or more employees. Alstate Maint. LLC & Trevor Greenidge, an Individual, 29-CA-117101, 2016 WL 3457642 (June 24, 2016). On the other hand, activity by a single individual for that person's own personal benefit is not construed as concerted activity. NLRB v. Adams Delivery Services, 623 F.2d 96 (9<sup>th</sup> Cir. 1980) (individual griping about his overtime pay was not concerted activity); Pelton Casteel Inc. , v. NLRB, 627 F.2d 23 (7<sup>th</sup> Cir. 1980) (venting of personal grievance not concerted activity). Thus, Gasca's request for leave for his sole benefit was not "protected activity" under the Act.

Gasca also cannot prove that this request is connected to his termination and he cannot show any employer animus. Gasca was denied a leave of absence as the evidence shows is the Respondents' practice. DeStefano Tr. at 2712:11 ("we don't do leaves of absence"); Glenn Tr. at 2031:15-25 (Darnell tried to take a three month leave of absence and instead was fired and later rehired). Gasca claimed that other employees were given a leave of absence; however, he only points to one employee and admits that he does not know the details surrounding that leave or if it is related to medical reasons that would require a leave under the law. Gasca Tr. at 1165:4-9, 13-16. Most importantly, Gasca admits that he suffered no negative impact for requesting a leave in January. Id. at 1168:5-11, 18-23. In fact, rather than terminate Gasca as Respondents would

normally do under circumstances in which an employee needed a leave, Respondents reduced him to an on-call position so that he would have flexibility and he could continue to work for Respondents. Id. at 1151:9-11. The facts here simply do not support a finding of union animus or causation.

Gasca also cannot prove timing since he was not terminated until March 19, 2018 when the Respondents first became aware of his purported union activity in December or January. Furthermore, after becoming aware of his alleged union activity, but before Respondents' termination of all on-call stagehands, Respondents offered to reinstate Gasca as a part-time employee, which Gasca rejected. DeStefano Tr. dated 9/13/18 at 427:13-18. Gasca was not terminated *because* of any union activity; he was terminated for undependability and poor job performance in violation of the Standards of Conduct and because Respondents decided to eliminate on-call stagehands. **GC. 34; GC. 99** at 19; **R. 1; R. 2**. In fact, on March 4, 2018, Respondents had already planned on replacing Gasca with a part-time employee and getting rid of on-call employees. **GC. 13** at 8. Notably, the evidence shows that the other on-call stagehand was terminated the same day as Gasca. **R. 55**. Accordingly, Gasca cannot establish a *prima facie* case of discrimination and the Company would have terminated him regardless of any protected concerted activity. See *Advanced Masonry Assocs., LLC d/b/a Advanced Masonry Sys. & Bricklayers & Allied Craftworkers, Local 8 Se.*, 366 N.L.R.B. No. 57 (Apr. 13, 2018) (Finding that employee who displayed poor work performance was discharged for cause).

Based on his own testimony, Gasca has some significant credibility issues. The most glaring credibility issue revolves around the reported sequestration violation in which Gasca and Hill were both reported by General Counsel for engaging in a violative discussion while at the Fremont Street bar. Gasca was even brought before the judge to be admonished and further warned

of any sequestration violations. Anzalone Tr. 9/17/18 at 777:15-25; 778:1-25; 779:1-24. However, inexplicably, when Gasca was asked about the conversation during his testimony only two days later, he denied participating in such a discussion and claimed only that he had overheard the conversation. Gasca Tr. at 1175:15-16; 1176:17-25; 1177:1-15. Such contradictory testimony begs the question of whether Gasca was untruthful in his sworn testimony or whether General Counsel's initial reporting of the violation was inaccurate.

Gasca also claimed to have never received Respondents' Employee Handbook despite signing an acknowledgment of receipt of the handbook upon hire. Gasca Tr. at 1188:10-13; 1190:4-19; **R. 1**; **R. 2**. However, the inconsistency that is most pertinent to the facts of this case is Gasca denying knowing of the other terminations that occurred on March 19, 2018 and his insistence on personally going down to the theater to speak with DeStefano rather than return her phone call. Gasca explained that he "likes to speak in person" and that it is more professional, however this explanation does not hold water in light of his later admission that he would correspond with management via email and text message. Gasca Tr. at 1164:25; 1165:1. The question remains what motivated Gasca to come to the theater on March 19, 2018 rather than return DeStefano's phone call. Gasca also denied all wrong doing and poor job performance issues when the testimony of other witnesses and documentation in the record bely his denials. Gasca Tr. at 1170:5-13 (Gasca stating that he came in for all work calls); *id.* at 1178:19-22 (Gasca claiming that he shows up every time he was called in); *id.* at 1179:20-22 (Gasca denying that he ever threatened to walk out); **R. 83**; Sojak Tr. at 3196:7-9; 3197:18-24 (Sojak reporting to Production Manager that Gasca missed rehearsal); Mecca Tr. at 3169:22-24 (Gasca threatened to walk out); DeStefano Tr. at 2616:13 (Gasca threatened to walk out). The multiple inconsistencies discredit Gasca's testimony.

## VI. OTHER ALLEGED PRODUCTION DEPARTMENT DISCRIMINATEES.

### *1. Scott Tupy's Discipline.*

Raymond "Scott" Tupy was hired by Respondents as a Lighting Technician on March 9, 2017. **R. 58.** Notably, at the time of his hire, Respondents were made aware that he was a Union member and he was still hired. Tupy Tr. at 1743:18-20. Tupy did not have an active involvement in the union campaign. Id. at 1744:21-23.

During his employment, Tupy never abided by a consistent schedule causing issues for DeStefano. DeStefano Tr. dated 10/23/18 at 2732:24-25; 2733:1-8. DeStefano attempted to speak with Tupy so that they could come to an agreement on consistency of when he would report to work, however, such discussions failed. Id. at 2733:9-16; id. at 2735:9-15; **R. 59.** DeStefano even explained to Tupy that she just wanted to schedule him for a time that would work best for him and asked for his cooperation in what time she should schedule him. **R. 60.** On or around June 1, 2018, Tupy was issued a verbal warning for multiple policy violations when Tupy continuously clocked in a half an hour before his shift. **R. 59.** Further, on June 20, 2018, Tupy clocked in early and then left the property to go get coffee, which resulted in another disciplinary action. **GC. 50; GC. 47.** Tupy received the Employee Handbook and acknowledged his understanding of the same upon his hire. **GC. 99; R. 61.** Upon receiving the second discipline, Tupy complained to DeStefano that coming in at 8:00 p.m. did not allow him enough time to set up. See R 48. As a result, DeStefano changed his start time to 7:45 p.m. Id.; GC 49. The discipline Tupy received was lawful and based on legitimate business concerns.<sup>18</sup>

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<sup>18</sup> Notably, Respondent's planned to terminate Tupy around March 18, 2018. **GC. 30; GC. 31.** Specifically, there were issues with Tupy's refusal to adhere to his schedule and his failure to perform work. **GC. 31.** Rather, Tupy would talk and tell stories constantly when was on the clock and he should have been working. Id. However, Respondents did not find a replacement for Tupy and thus were unable to terminate his employment prior to the RC Petition.

Under the Wright Line analysis discussed supra, Tupy cannot prove protected concerted activity, timing, or animus. Tupy admittedly was not a participant in the union campaign that occurred in April 2018. Tupy's only alleged protected activity was that he had spoken up in meetings with the union persuader and expressed his support for the Union. Such action is not of a concerted nature to establish a protected activity under the Act as it is not for the mutual aid and benefit of Tupy's co-workers. Alstate Maint. LLC & Trevor Greenidge, an Individual, 29-CA-117101, 2016 WL 3457642 (June 24, 2016). Timing cannot be established as the Respondents would have learned of Tupy's Union sympathies in April or May of 2018, but his intervening policy violations did not result in discipline until June. See D & W Food Centers, Inc. & Debbie Vanderwall, an Individual, 305 N.L.R.B. 553 (1991) (holding that protected activity that occurred two weeks prior was intervened by alleged discriminatee's performance failure and thus alleged discriminatee would have been discharged even without engaging in protected activity). Finally, animus can absolutely not be shown in this case as Respondents were informed of Tupy's union sympathies at the time of his hire, yet still hired him and employed him for over a year despite that knowledge. Tupy's discipline is clearly unrelated to any alleged protected activity, thus General Counsel cannot meet its burden under Wright Line. Additionally, even assuming *arguendo*, a *prima facie* case could be established, Respondents have provided a legitimate, business reason for disciplining Tupy. Tupy repeatedly refused to abide by his assigned schedule and instead came into work a half hour early on eight consecutive days despite being told not to do so. A minor formal discipline is wholly appropriate under these circumstances. Tupy's discipline was lawful.

## ***2. Schedule Changes for Glenn and Tupy***

Glenn was hired as an audio technician on April 10, 2017. **R. 56.** During his employment, he had had several schedule changes, including working four days a week to working six days a

week to back down to four days and having his work calls eliminated on at least a couple occasions. Id. at 2723: 14-25; 2724:1-9; **R. 57**; DeStefano Tr. dated 9/13/18 at 706:9-15; 23-24. Glenn was informed of the reduction in his work calls on March 6, 2018 when he was told that he would be scheduled whenever there was work for him to perform and his extra hours would be approved. **R. 57** at 1.

Significantly, Respondents made two department-wide changes to schedules in May 2018: (1) all work calls were reassigned to only full-time employees, meaning that part-time employees such as Tupy and Darnell were no longer scheduled for hours outside of their show calls, DeStefano Tr. dated 10/23/18 at 2736:14-15 (“In May all work calls were taken away”); and (2) show calls were reduced by fifteen minutes when employees began reporting for shows at 7:45 p.m., rather than 7:30 p.m. Id. at 2741:9-22.

Notably, employees’ hours have been changed in the past even when there was no union campaign occurring. Id. at 2742:6-15. Specifically, work calls were taken away from part-time employees in December 2017 and work calls were taken away from everyone for about a week in March 2018. Id. Importantly, those hours were not only taken away from the alleged discriminates, Tupy and Glenn, but rather were applied to everyone. DeStefano at 2722:9-19; 2723:2-9; 2724:7-8; 2729:16-17; 2741:9-18; 20-25 (the show call change affected all main audio, lighting and spot operators); 2728:24-25; 2729:1-3 (the work call change affected all part timers). In fact, Tupy also acknowledges that other employees were affected other than just him and Glenn. Tupy Tr. at 1813:11-17 (Tupy admitting that Saxe stagehands also had their hours cut). An employer has a right to change hours/schedules in the absence of a collective bargaining relationship or collective bargaining obligation.

To the extent General Counsel argues that this schedule charge was discriminatory or

retaliatory, such an argument must fail. As discussed above, Tupy did not engage in any protected activity and even assuming *arguendo* that he did, there is no proof that his schedule was changed because of that protected activity. Rather, Respondents made a legitimate business decision to reduce work calls and reschedule show call times for all employees. A change in terms and conditions of employment is not discriminatory if it is applied across the board and department wide. The same analysis applies to Glenn. Thus, the General Counsel cannot prove a violation of 8(a)(3) of the Act.

### 3. *Steven Urbanski's Leave and Return to Work.*

At the time of trial, Urbanski was employed by Respondents as a lighting maintenance technician. DeStefano 10/23/18 Tr. at 2743:13-19. General Counsel claims that Urbanski was discriminated against upon his return because he was given his assignments differently and he was being supervised by Saxe. On or around April 5, 2018, Urbanski sustained a workplace injury when he cut his hand while grinding the bandstand on April 5, 2018. *Id.* at 2744:1-9; Saxe 10/31/18 Tr. at 3485:4-5; 3486:18-19; 3487:1-3; Urbanski Tr. at 2268:25. Urbanski was placed on workers' compensation leave and offered light duty, which he initially accepted, but later informed Saxe that he did not want to work. Carrigan 10/24/18 Tr. at 2873:23-25; 2874:1-2; 2877:19-25; 2879:18-20; Saxe Tr. dated 9/12/18 at 232:6-11 (Saxe stating it was Urbanski's choice to not perform light duty as "he didn't care about the money. He already had a trip planned"); Urbanski Tr. at 2269:8-11; 15-16 ("I got light duty for a while... Then after I just decided to wait until I got surgery"). As a result, Respondents returned Urbanski to work when he was fully released to work on July 8, 2018. Carrigan Tr. 10/24/18 at 2873:23-25; 2874:1-2; 2877:19-25; 2879:18-20.<sup>19</sup>

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<sup>19</sup>Urbanski's return to work date, or whether he actually planned to return to work, was entirely unclear to the Respondents causing Respondents to not schedule specific tasks for Urbanski upon his return. See GC. 93 (asking Urbanski to notify the Company if he planned to return to work by

Upon his release on July 8, 2018, Urbanski returned to his position at the theaters. Significantly, however, during his leave, Respondents substantially restructured its operations in Urbanski's absence and Urbanski's position as part of the "day crew" was eliminated and all former day crew members were either eliminated or placed on show calls. DeStefano 10/23/18 Tr. at 2745:25; 2746:1-4; Urbanski Tr. at 2289:18-21. Additionally, Urbanski's supervisor, Peter "Andy" Schwartz, resigned leaving no management in place at the theater during Urbanski's work hours. Saxe 10/31/18 Tr. at 3489:21-25; 3488:1-9. When Urbanski returned to work, there was no line supervisor available to give him assignments or direct his work. Saxe 10/31/18 Tr. at 3488:10-15. Additionally, since the Respondents had eliminated the day crew during Urbanski's leave, he returned to work as the only lighting maintenance technician that does not work on a show. Saxe Tr. dated 9/12/18 at 229:8-9, 13, 23-24; Urbanski Tr. at 2261:18-19. The supervision of Urbanski would have been delegated to DeStefano, but she was on vacation upon Urbanski's return. Id.; see also GC. 37 (Saxe and DeStefano discussing assignment of tasks to Urbanski). As a result of some confusion, both DeStefano and Saxe emailed Urbanski a list of assignments to complete. Id. Saxe Tr. dated 9/12/18 at 242:16-21; **GC. 42** (assignment from DeStefano). These email assignments occurred primarily because Urbanski returned to work with very little notice and while DeStefano was on vacation. Saxe Tr. dated 9/12/18 at 249:6-10, 12-14 ("I was telling [DeStefano] to assign [Urbanski] tasks, and I didn't know she was on vacation...So I wanted to make sure he's down there and he needs work to do. I typically don't like calling the employees

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June 26, 2018 and extending the deadline to June 28, 2018); **GC. 94** (asking to hear from Urbanski by June 29, 2018 whether he planned to return to work); **GC. 95** (giving Urbanski an extension to July 8, 2018 to return to work); **R. 73**. After the multiple failed attempts to get Urbanski to commit to showing up for work, his tasks were delegated to other employees. Additionally, Respondents were under the impression that Urbanski was not returning to work and that he essentially abandoned his job by failing to communicate his return and failing to actually return to work. **GC. 96** (saying that Urbanski had been terminated).

directly and telling them what to do, but it happens a lot.”) As such, Saxe prepared a task list for Urbanski to complete. Id. In unique situations such as this one, Saxe steps in and supervises line level employees, especially when no other management is available. Id.

Upon DeStefano’s return, she began supervising Urbanski again, however, since the department had changed, the task lists and the way Urbanski received his assignments also changed. DeStefano Tr. 9/13/18 at 537:12-14; 573:1-4, 21; 578:14-18, 20-22; **GC. 45.** Specifically, before day crew was eliminated, DeStefano gave Urbanski an Excel task list, blown up and hung in the tech room as well as the theater itself. DeStefano Tr. at 2745:10-19. Then, in end of April and beginning of May, DeStefano discontinued that task list because Respondents got rid of day crew and everybody started running shows and they were put on work calls. Id. at 2745:24-25; 2746:1-9. As Urbanski was the only person left on day crew, the Excel sheet that was used to assign tasks to several people was no longer necessary and his tasks were assigned individually.

Applying the Wright Line Analysis, the General Counsel cannot establish a prima facie case because there is no evidence of knowledge, timing, or animus. In addition to the arguments discussed in section V(B)(1)-(4), timing and animus cannot be established because Urbanski injured himself in April 2018 and was returned to work on July 8, 2018. The fact that Respondents went to great lengths to return Urbanski to work despite his non-committal responses necessarily belies the claim that the Respondents harbored any animus toward Urbanski. See GC. 93- GC. 96. In fact, Carrigan provided Urbanski with five opportunities to return to work which he disregarded until July 8. Id.

Further, once Urbanski returned to work, he was returned to the same position, the same facility, with the same days off and the same times as before his injury. Urbanski Tr. 10/5/18 at

2379:18-21; 2382:16-17. The changes to Urbanski's working conditions were predicated entirely on the changes that had occurred during his leave--specifically, the resignation of his supervisor and the elimination of the day crew. As the only member left in a day crew position, Urbanski cannot show that any similarly situated employee was treated differently. Rather, the evidence shows that the changes to Urbanski's employment occurred because the business had changed its operation, which is not a discriminatory or unlawful motivation. Brown Truck & Trailer Mfg. Co., Inc., 106 NLRB 999, 1000 (1953) (Board holding that closing of plant and transfer of employees was not motivated by union activity but rather motivated by economic considerations). The General Counsel also claims that Urbanski was discriminated against based on the fact that he served as an election observer for the Union, however, his direct supervisor was entirely unaware that he had done so. DeStefano Tr. dated 9/13/18 at 516:11-14 ("That wasn't... the name I was given I was told who was there... Bryce Petty is who I was told."). Notably, Bryce Petty was still employed by Respondents at the time of the hearing. Petty Tr. at 2404:16-18. Consequently, this claim must fail.

## **VII. AGENCY AND SUPERVISOR ISSUES.**

### **A. The General Counsel Did Not Prove Courtney Kostew Was Respondent's Agent.**

The General Counsel does not contend that Courtney Kostew was a supervisor under the definition set forth at Section 2(11) of the Act. Instead, the General Counsel contends that because Kostew was the "significant other" of Stage Manager Tommy Estrada, she was an agent of Respondent within the meaning of Section 2(13) of the Act. **GC. 1(am)** at ¶ 4(b). The General Counsel seeks a ruling that Kostew was Respondents' agent so that it can hold Respondent liable for her alleged conduct during the union campaign. The Charging Party alleges that Kostew is an agent of the employer because of three factors: (1) her relationship with Estrada; (2) Respondents'

designation of her as an election observer; and (3) Respondents' alleged promotion of Kostew to "assistant manager/cue caller." Soto Tr. 10/5/18 at 2398:1-6. The Charging Party contends that Kostew surveilled, intimidated and interrogated employees. Soto Tr. 10/22/18 at 2489:8-11. Respondent denies Kostew's agency. See GC. 1(ai) at 1.

***1.Chronological Facts Regarding Kostew.***

1. Courtney Kostew was and is a stagehand employed by David Saxe Productions.
2. In the beginning of 2017, Kostew began dating Stage Manager Thomas Estrada. Kostew Tr. 9/17/18 at 860:1-6.
3. On February 21, 2018, Kostew was invited by Laney Hill into a Facebook Group Chat about the union campaign. Kostew Tr. 9/17/18 at 859, 877; **J. 2** at 3. No one objected to her joining the group or questioned her participation. See J. 2. Kostew and others in the Group Chat were told not to discuss the content of the Group Chat with managers. **J. 2** at 6 ("management cannot know"). Kostew stated on February 21, that her vote was "obviously yes" for the union; she further stated: "Zach stated that he spoke with \_\_\_\_ [redacted] and he wasn't on board cuz of the potential of being fired." **J. 2** at 6. Kostew testified that she did not discuss the Facebook Chat with Estrada because she did not want to betray her friends. Kostew Tr. 9/17/18 at 861:8-862:9; Kostew Tr. 10/24/18 at 2959-60. Her testimony is consistent with her messages in the Group Chat. See J. 2 at 6 (expressing reservations about telling others who could "easily tell Tommy").<sup>20</sup>

4. In late February 2018, DeStefano selected Kostew and Joey Slezak to learn cue calling after Zach Graham was injured; DeStefano needed coverage for this task on Estrada's days off. DeStefano Tr. 10/23/18 at 2753-54; Graham Tr. 10/1/18 at 1653:19-20 (Graham testifying that he

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<sup>20</sup>Despite her reservations, Kostew was later assured by DeVito that Estrada "could know" about the campaign. **J. 2** at 6.

broke his arm on February 21, 2018).<sup>21</sup> Kostew and Slezak were chosen because they knew the show well and were dependable. DeStefano Tr. 10/23/18 at 2754. The cue caller oversees the main curtain to ensure it opens and closes when it should and oversees the progression of the overall show. Kostew Tr. 10/24/18 at 2953; Estrada Tr. 10/25/18 at 3095-96; Graham Tr. 10/1/18 at 1648:15-17 (Graham testifying that calling cues is “telling everybody when to move certain props, open curtains, close curtains, generally just make sure the show runs smoothly”).

5. On March 1, 2018, Kostew posted a message to the Facebook Group Chat worrying about management finding out about the campaign. She stated: “I guess this process has occurred twice before. Something about the claim/whatever being dismissed or denied the 1<sup>st</sup> time, and the 2<sup>nd</sup> time everyone involved was fired.” She did not state how she learned this information but asked about Hill participating in the Group Chat because Hill was friends with DeStefano. Kostew stated: “I’m just worried. I really can’t afford to be fired.” **J. 2** at 25. Hill became angry that Kostew stated she was friends with DeStefano, and the two bickered. Id. at 25-29. Kostew became frustrated and stated on March 2, that she is “going to sit out of this now” and is “tapping out.” Id. at 28-29. On March 2, 2018, Hill removed Kostew from the Facebook Group Chat “to avoid drama.” **J. 2** at 30. The Facebook Group Chat continued through March 23, 2018. **J. 2** at 43.<sup>22</sup>

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<sup>21</sup>Typically, during a show, the Stage Manager, Estrada, covers the cue caller track. When Estrada is off work, however, someone else must handle the cue caller track. DeStefano Tr. 10/23/18 at 2753:3-21. Zach Graham performed this work on Estrada’s days off. Id. However, when Graham was injured, the employer needed someone else to handle the cue caller track when Estrada was off work. Id.

<sup>22</sup>A second group chat was apparently started on March 2, 2018 by Urbanski between those employees who were at a union meeting. **J. 4**. A third group chat was apparently started on April 1, 2018. **J. 5**.

6. On or about March 13, 2018 at 11:25 a.m., Kostew sent a text at Estrada's request to some of her coworkers letting them know of a work call opportunity to help repair the stage. **GC. 59.**<sup>23</sup> Kostew clearly identified that she was sending the message on Estrada's behalf. Id. (stating "Tommy's in a production meeting and asked me to send out a group text"). She further indicated that the work call was voluntary. Id. (stating "to anyone who wants to get hours" and "feel free to volunteer"). Kostew explained that she sent the text because Estrada was in a meeting and was unable to text the crew about the issue. Kostew Tr. 9/17/18 at 906, 919. She testified that this was the first time she sent this type of message for Estrada. Kostew Tr. 10/24/18 at 2981. Estrada testified that he occasionally asked other stagehands to message employees for him. Estrada Tr. 10/25/18 at 3099.

7. Kostew posted to her Facebook account on April 8 that she acted as cue caller that evening for the first time with Estrada "shadowing" her. **GC. 61.** She represented that her "boss' boss" appointed her to these duties. She stated: "I don't have an official title but judging from a bunch of the crew calling me boss/new boss etc. – it's something along the lines of lead tech / assistant stage manager." Id. She then posted on April 23 that she ran the show alone for the first time. **GC. 60.** Kostew performed cue calling duties only occasionally. Kostew Tr. 10/24/18 at 2954 (testifying that between April 2018 and October 2018, she had acted as cue caller "about a dozen or less" times"); Estrada Tr. 10/25/18 at 3096 (testifying that she did so only when they were not off of work on the same day which was rare); id. at 3134 (testifying that when Graham was first hurt, Kostew acted as cue caller "three or more times," for only a "couple of weeks" and that Joey Slezak and David Funk did "more of it").

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<sup>23</sup>DeStefano directed Estrada to repair the stage during a 13-14 hour window of opportunity; the work call was not mandatory. DeStefano Tr. 9/13/18 at 490:3-15.

8. On May 16, 2018, after the show, at 9:00 or 11:00 p.m., Kostew met with her fellow stagehands and explained that she was voting against the union and encouraged others to do the same. Kostew Tr. 10/22/18 at 2497:14-24; 2498:6-14. Two other employees also spoke about their feelings against the union. *Id.* at 2498:15-25; 2499:1-7. Approximately 11-12 employees attended that meeting. *Id.* at 2497:20-24. Kostew testified that the meeting was her idea; she was not asked by Saxe, Estrada or DeStefano to speak to the employees. *Id.* at 2499:24–2500:7; Kostew Tr. 10/24/18 at 2965:7-12. Instead, she asked a manager, Michael Moore, if she could tell other employees her opinion on the union; he did not know the answer to her question and “walked her over to the lawyer.” Kostew Tr. at 10/24/18 at 2964:24–2966:24. Prior to that meeting, Kostew talked to a few employees and encouraged them to vote. Kostew Tr. 10/22/18 at 2501:18-23. Between those conversations and the meeting, Kostew encouraged the stagehands and two audio technicians of Saxe Theater to vote against the union. *Id.* at 2483:19-23; 2484:14-24; 2485:15-24; 2486:2-9.<sup>24</sup>

9. Kostew served as the election observer for the employer at the May 17, 2018 election. She was suggested by DeStefano as a person who knew the employees well enough to verify identities, DeStefano Tr. 9/14/18 at 663-664, and she was asked to serve as the observer by a lawyer, Kostew Tr. 9/18/18 at 1054:23–1055:20.

10. Kostew and Estrada began living together in April or May of 2018. Kostew Tr. 10/22/18 at 2481.

## ***2. Legal Analysis Regarding Kostew.***

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<sup>24</sup>Although Kostew tried to get in touch with Bryce Petty, a V Theater Audio Technician, before the election, they did not speak. CP. 6; Petty Tr. 10/5/18 at 2409:19–2410:23 (testifying that Kostew messaged him, but he did not respond); Kostew Tr. 10/22/18 at 2507:2-4 (testifying Petty did not respond to her).

The burden of proving an agency relationship is on the party asserting its existence. Millard Processing Services, 304 N.L.R.B. 770, 771 (1991), enfd, 2 F.3d 258 (8<sup>th</sup> Cir. 1993); Pierce Corp., 288 N.L.R.B. 97, 101, n. 65 (1988). The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. Cornell Forge Co., 339 N.L.R.B. 733 (2003); Pan-Oston Co., 336 N.L.R.B. 305, 306 (2001) (party who has burden to prove agency must establish agency relationship with regard to specific conduct that is alleged to be unlawful). The Board applies common law agency principles to determine whether a non-supervisory employee is an agent of the employer and thus whether the employee's conduct is attributable to the employer. Kawa Sushi, 359 N.L.R.B. 607, 612 (2013). To find agency, the Board will look for actual authority, apparent authority and/or ratification. Id. According to the Restatement (Third) of Agency § 1.01 (2006), agency is:

the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Actual authority "is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf." Id. at § 3.01. The Restatement's comments stress that *manifestation by the principle* is an *essential* element:

b. Manifestation an essential requirement. As defined in § 2.01, an agent's actual authority originates with expressive conduct by the principal toward the agent by which the principal manifests assent to action by the agent with legal consequences for the principal. A principal's unexpressed willingness that another act as agent does not create actual authority. *The principal must make a manifestation, as defined in § 1.03, that expresses this willingness.* The manifestation may be made directly by the principal to the agent or may reach the agent through a more circuitous route. The principal's unexpressed reservations and qualifications do not reduce the agent's actual authority.

Id. at cmt. b (emphasis added). In addition to the need for the principal’s manifestation, *the agent must also manifest* “assent or otherwise consent[s] to a relationship of agency.” Id. “A person manifests assent or intention through written or spoken words or other conduct.” Id. at § 1.03. “Agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other.” Id. at § 1.01, cmt. d.

Here, there is no evidence to support an allegation that Respondents gave Kostew actual authority to act as their agent or that they held her out as their representative. It is undisputed that Kostew never hired or fired any employees or participated in any decisions regarding hiring or firing an employee. She did not adjust grievances, transfer employees, or direct the work of others. She was paid hourly like all other stagehands. Kostew Tr. 10/24/18 at 2950-52. There is no evidence to support an allegation that Respondents asked Kostew to campaign against the union or engage in any acts alleged to have interfered with employees’ Section 7 rights or that Kostew assented to do so. The record is devoid of any evidence that Respondents and Kostew consented to an agency relationship. Indeed, Kostew denied ever talking to David Saxe about the union or the campaign prior to the election. Kostew Tr. 10/22/18 at 2504:20-2505:24; Kostew Tr. 9/17/18 at 856:21–858:5.<sup>25</sup> She further denied being asked to speak to the employees about her viewpoints on the election. Kostew Tr. 10/24/18 at 2966. No convincing evidence was presented to contradict that testimony.<sup>26</sup> Without proof of some type of manifestation on the part of the employer and

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<sup>25</sup> Kostew testified that she had only a few brief conversations with Saxe – none of which could constitute a meeting. See Kostew Tr. 10/24/18 at 3028–3033.

<sup>26</sup>The General Counsel attempted to show that Kostew had a meeting with Saxe via **GC. 54**, a May 21 email from DeStefano that references approved overtime for Kostew during the payroll period of May 14-May 21 as being in part attributable to “an unexpected meeting with David.” However, DeStefano could not remember the specifics of this notation, DeStefano Tr. 9/14/18 at 660:16-19, and Kostew specifically denied ever having a meeting with Saxe, Kostew Tr. 10/24/18 at 3041; see also Kostew Tr. 10/22/18 at 2504-05. Other than DeStefano’s notation, there is *no* evidence

some type of assent on the part of the alleged agent, the General Counsel cannot prove agency via actual authority. Restatement, *supra*, at § 3.01, cmt. b.

Instead, the evidence reveals that Kostew was asked by managers and/or other representatives of the employer to do only three things: (1) serve as Respondents' observer during the election; (2) occasionally cover the cue calling duties when Estrada was unavailable; and (3) send one text message in March asking employees to help with a work call. Those limited requests are not sufficient to establish the broad authority General Counsel and the Charging Party seek to impose upon Kostew to hold Respondents liable for her conduct during the union campaign. See United Builders Supply Co., 287 N.L.R.B. 1364, 1365 (1988) (finding that the union's requests that Wentworth solicit and collect authorization cards, set up union meetings and inform employees of the meetings, and serve as election observer were not "a 'manifestation' to employees broad enough to render Wentworth a general agent"); Knogo Corp., 265 N.L.R.B. 935, 936 (1982) (reversing ALJ's determination of agency where lead Gonzalez checked the work of others, monitored production, reported rule infractions or repeated incidents of poor performance by other employees, and recommended certain employees be transferred from one type of work to another as production needs changed; "Gonzalez' transmittal of working orders from Rizzi to the employees is of a purely routine nature. We find it indicates no more than that Gonzalez is an experienced employee entrusted with nonsupervisory lead authority."). Indeed, Kostew cannot be said to be a conduit between management and employees or even a lead. Contrast Northshore

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of any meeting between Kostew and Saxe. Inasmuch as this payroll period was the week of the election, it is likely that DeStefano's note references the employer's request, via counsel, that Kostew serve as the observer for the election. DeStefano testified that she does not know who, specifically, asked Kostew to be the observer; Kostew clearly testified that a lawyer asked her. DeStefano Tr. 9/14/18 at 662:24–663:9; Kostew Tr. 10/22/18 at 2503:23–2504:6.

Sheet Metal, Inc., 2013 WL 3865066 (N.L.R.B. Div. of Judges, July 25, 2013) (finding McBee and Champeaux agents because they were “the link between employees and upper management”).

Although Kostew did occasionally work as the cue caller starting in April 2018, neither the General Counsel nor the Charging Party has proven that Respondents designated those duties as reserved only to managers or that an assignment to those duties constituted a promotion. The evidence instead revealed that the task of cue caller is simply another track; it is not a separate position. Kostew Tr. 10/23/18 at 2752; Estrada Tr. 10/25/18 at 3095; Graham Tr. 10/1/18 at 1721:13-20. The cue caller track is not considered a promotion, and the stagehand covering those duties does not receive extra compensation. Kostew Tr. 10/24/18 at 2954; Estrada Tr. 10/25/2018 at 3097; Graham Tr. 10/1/18 at 1721:13-20. In fact, when a stagehand fills in for Estrada to perform the cue calling duties, he/she does not direct other employees’ work and does not have authority to discipline other employees; he/she does not even decide whether to skip a prop or skip a scene. Graham Tr. 10/1/18 at 1699:23–1770:5, 1701:6-12; 1701:24–1702:2; 1702:7–1704:20. While being assigned the cue calling duties may have carried some prestige amongst the employees, proving actual authority requires more – it requires an affirmative action on the part of the employer to hold the alleged agent out as its representative. This, Respondents did not do. And, even if Respondents did assign some responsibility to those duties, the alleged agent would be authorized only to act as the cue caller during a show – not to represent or speak for the employer in other matters.

While a few of the employees testified that they believed Kostew was a manager or assistant manager, they testified that this was a conclusion they drew *on their own* because she acted as the cue caller; none of the employees testified that they were told by Respondents or their supervisors that Kostew was a manager or agent of Respondents. Franco Tr. 9/20/18 at 1343

(testifying that he believed Kostew was a manager because she was doing cue calls and getting more manager-type responsibilities); Urbanski Tr. 10/5/18 at 2327 (testifying that he believed Kostew was an assistant stage manager because she called cues, but that no one told him this); Petty Tr. 10/5/18 at 2408:14-18 (testifying that he heard a rumor that Kostew called cues which, to his knowledge, is a stage manager's job); Petty Tr. 10/22/18 at 2463:4-8 (testifying that in or about May 2018, he was told by other employees that Kostew was a supervisor). A third party's impression is not controlling without some type of manifestation from the principal. See Trump Ruffin Commercial, LLC, 2016 WL 3971037 (N.L.R.B. Div. of Judges, July 22, 2016) (rejecting agency for timekeeper/lead administrative assistant based on her actual duties as opposed to employees' vague impressions of her title, position or authority). Instead, the Board considers the position and duties of the employee in addition to the context in which the behavior occurred. Jules V. Lane, 262 N.L.R.B. 118, 119 (1982).

While Kostew, on one occasion, delivered a work call message to her fellow employees on behalf of Estrada, the act of simply relaying a message does not provide her with general authority to act or speak for Respondents, especially where she made it clear she was simply relaying a message for Estrada at his request. Laborers Int'l Union of N. Am., Local 270, 285 N.L.R.B. 1026, 1028 (1987) (finding no actual agency where wife of union's business manager occasionally relayed messages for him because "[t]here is no evidence that [wife] had actual authority to act or speak for Respondent. Nor is there any evidence that Respondent held out [the wife] to the employees or the public as one of Respondent's representatives."). Moreover, the fact that Kostew served as Respondents' election observer is insufficient, as a matter of law, to render her their agent. See Advance Prods. Corp., 304 N.L.R.B. 436, 436 (1991) (rejecting general agency even though employee solicited support for the union, discussed the union with employees, answered

their questions and gave them the business card of the union representative involved in the organizing effort, distributed union literature, buttons, hats, and shirts, kept the union representative informed of events that occurred in the plant, and served as the union's election observer).

The General Counsel's theory that a dating relationship can establish apparent agency is a novel one that has not been addressed by the Board. The Board recognizes that family and spousal relationships are relevant to the issue of apparent authority in cases, for example, where a father owns a company and retires, leaving the company to his children, or a wife is intimately involved in helping her husband, the owner, run a business. See, e.g., Feldkamp Enters., Inc., 323 N.L.R.B. 1193, 1196-97 (1997) (finding the semi-retired father and former owner of the company to be an agent under the apparent authority theory because the employees had not been told of his retirement and his "former position and . . . parental relationship to the Company's three principal officers, [gave] the employees . . . good reason to regard the senior Feldkamp as the Respondent's agent"); Kawa Sushi, 359 N.L.R.B. 607, 607, n.1, 612 (2013) (finding owner's wife to be an agent where she worked in the restaurant on her own schedule, did not punch a clock, exercised authority in her husband's absence over the business, and gave an employee time off). However, extending those cases to the dating relationships of low-level managers is a significant stretch and, respectfully, a slippery slope. Perhaps it would be reasonable to argue in certain cases that an owner's long-term paramour could be an apparent agent given an owner's clear ability to control and effect all terms and conditions of employment. But a low-level manager's dating relationship is quite a different matter especially where the manager has limited control over terms and conditions of employment and the employees view him/her as non-management. See, e.g., J. 2 at

6 (DeVito stating that Estrada can know about the campaign) and 24 (DeVito stating that Estrada can be included in the union).

Even if the Board were willing to consider a dating relationship as a factor in the apparent authority analysis, however, the fact that Kostew was the girlfriend of Estrada is not sufficient, on its own, to establish apparent authority. More is needed. Jennings and Webb, Inc., 288 N.L.R.B. 682, 684 (1988) (affirming ALJ's determination that the "*spousal relationship between Timothy and Linda Jennings, standing alone, is insufficient evidence on which to base a finding of agency status on behalf of the Respondent*" where Jennings testified that his wife had nothing to do with the business; as such, her conversation with the alleged discriminatee's wife "during their chance encounter on the steps of the company office" characterizing the alleged discriminatee as a backstabber because of his union involvement "cannot be attributed to the Respondent") (emphasis added); Laborers Int'l Union of N. Am., Local 270, 285 N.L.R.B. 1026, 1028 (1987) (explaining that "[f]amily relationship is *one of the facts* to be considered in determining apparent authority and, *when viewed in the context of other factors*, may be sufficient for a finding of agency based on apparent authority" but concluding that wife of business manager, who was not an employee, was not an agent where Respondent's employees knew that her "occasional delivery of messages was a gratuitous act requiring little or no judgment") (emphasis added).

Under the doctrine of apparent authority, "an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question." Kawa Sushi, 359 N.L.R.B. at 612. To determine whether the alleged agent had such apparent authority, the Board will consider "whether, under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for

management.” Id. In this case, it is simply not reasonable to conclude that because Kostew was permitted to occasionally call cues, sent one text message regarding a work call, and served as Respondents’ election observer, she had authority to campaign against the union on Respondents’ behalf.

Kostew was clearly considered by most witnesses to be a stagehand – not the Respondents’ agent. Kostew herself testified that she was a stagehand. Kostew Tr. 9/17/18 at 854:2-7. DeStefano testified that Kostew was a stagehand and that she was selected as an observer in part because she was *not* a manager. DeStefano Tr. 9/13/18, 376:21–377:1; DeStefano Tr. 9/14/18 at 663:2-19, 25–664:2. Hill testified that Kostew was a stagehand, Hill Tr. 9/18/18 at 1112, and added her to the employee’s Facebook Group Chat about the union organizing campaign where she was clearly treated by members of the group as non-management, **J. 2** at 3-30. She was referenced, repeatedly as a potential voter in other group chats regarding organizing. **J. 2, 4-5.**<sup>27</sup> While a few employees believed cue calling rendered Kostew a manager, their conclusion is unreasonable in light of the fact that calling cues means simply running a different track, it is not a separate position, and does not constitute a promotion. There is only one instance of Kostew conveying information for management – for the March work call. Indeed, Kostew cannot even be said to have been a lead. As such, it is simply not reasonable to believe that Kostew was acting on Respondents’ behalf. See Rescare of West Virginia, 2002 WL 1883792 (N.L.R.B. Div. of Judges, Aug. 9, 2002) (rejecting apparent authority argument for LPN Coordinator who was a

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<sup>27</sup>After notifying her coworkers that she was “out,” **J. 2** at 28-29, Kostew was not invited to join a second group chat which was started amongst those who attended a March organizing meeting and were clearly voting for the union. **J. 4** at 1. Nevertheless, there is no indication in this chat that the employees believed Kostew was acting on behalf of Respondents, **J. 4**, and instead, the employees continued to reference her as an eligible voter, id. at 7; **J. 5** at 5. Indeed, on March 11, 2018, Josh Preto texted Kostew to encourage her to attend a meeting and vote for the union. **GC. 58.**

former supervisor who retained her supervisor pay based upon the employer's "independent business justifications" for her unique status).

The Board has rejected a finding of apparent agency in cases where the alleged agent was much more involved in lead and/or management-type duties than Kostew. See Mack's Supermarkets, Inc., 288 N.L.R.B. 1082, 1087 (1988) (Board affirming ALJ's conclusion that lead cashier was not placed "in a position such that employees could reasonably have believed she spoke on behalf of management with respect to her actions in the union campaign" even though she interviewed applicants, trained new cashiers, communicated management decisions to the cashiers, and assisted with making their schedules); Knogo, supra, 265 N.L.R.B. at 936 (rejecting apparent authority theory for lead who checked the work of others, monitored production, reported rule infractions or repeated incidents of poor performance by other employees, and recommended certain employees be transferred from one type of work to another as production needs changed and explaining, "there is no evidence that Gonzalez attended management meetings or directed employee meetings on behalf of management. Gonzalez did not have the authority to hire, fire, or discipline employees. The record does not indicate that Gonzalez arranged the employees' work schedules. Her direction of production work was found to be of a routine nature, with the evidence failing to show the exercise of independent judgment.").

Kostew's April 8 Facebook comment about a new title does not change the analysis. The General Counsel has not proven that other employees saw that post or that Respondents saw that post. Kostew cannot make herself an agent without some assent from Respondents. See Cornell Forge, supra, 339 N.L.R.B. at 734 ("Nor is it material that Aviles apparently told employees that he would be the department steward after the Union was certified. . . . Aviles could not make himself an agent of the Union solely by his own statements."); California Gas Transp., Inc., 347

N.L.R.B. 1314, 1317 (2006) (“Statements by the putative agent . . . do not constitute evidence of agency status.” (citing MPG Transp., Ltd., 315 N.L.R.B. 489, 493 (1994), enf’d, 91 F.3d 144 (6<sup>th</sup> Cir. 1996); Virginia Mfg. Co., 310 N.L.R.B. 1261, 1266 (1993), enf’d, 27 F.3d 565 (4<sup>th</sup> Cir. 1994); Restatement 2d, Agency, § 284, Comment d.). Moreover, because the General Counsel has not proven that Respondents were even aware of her Facebook statements, there is no evidence of ratification. Restatement, *supra*, § 4.06 (“A person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge.”).

Finally, Kostew’s efforts to encourage her fellow employees to vote against the union were clearly made on her own behalf – not on Respondents’ behalf. There is no evidence that Respondents asked her to campaign against the union or held her out as their spokesperson. Indeed, Kostew testified that she asked a manager and then a lawyer whether she could state her opinions to her coworkers – a request that would not have been necessary if Respondents asked or directed her to speak. Moreover, Respondents hired a persuader as their representative, and Saxe provided Respondents’ position to employees in a meeting before the election. Saxe Tr. 10/31/18 at 3534:4-6, 16-17. The General Counsel failed to put forth any evidence to suggest that Kostew assisted the persuader or Saxe, acted in concert with them, or held herself out as their representative. Indeed, Kostew testified that she was late to Saxe’s speech and sat in the back of the room by the door. Kostew Tr. 10/24/18 at 2976:1-13 (testifying, “I got there late so I just kind of crept in and just sat down”). Kostew’s meeting with her coworkers on May 16 did not interfere with work duties and was held after the show for that evening. She did not direct her coworkers to attend and, instead, sought Estrada’s help assembling them. Kostew Tr. 10/22/18 at 2498:1-2; Kostew Tr. 10/24/18 at 3022:23-25 (testifying that she did not have the authority to hold a meeting). She

clearly presented her own thoughts at the meeting, as did others, Kostew Tr. 10/24/18 at 2969:12-16 (testifying to writing notes to reflect what she wanted to say), and there is no evidence to suggest that Respondents gave her any assistance or materials to use. While Estrada was aware of the meeting and generally present on the stage during the meeting, id. at 3023:2-15, the employees clearly viewed him as non-management and believed he could be part of the bargaining unit. There is no evidence that any other manager or supervisor was aware of Kostew's meeting on May 16.

Given these facts, it is not reasonable for employees to believe that Kostew was speaking on Respondents' behalf on May 16 or that Respondents ratified her conduct. Contrast Technodent Corp., 294 N.L.R.B. 924, 924-25 (1989) (finding apparent agency where employee with only one year of seniority posted a notice advertising an employee meeting, held two meetings that went beyond break time, assured employees they could continue the meetings into work time, handed out the employer's handbook – which a supervisor gave him – telling employees it was fair and answering questions about it, solicited during worktime, and had employees sign a petition in front of supervisors even after employees had complained about him; the Board found that “[s]urely, employees would view the action by Hamilton-done without objection by management—as being done with the imprimatur of management” especially when, in handing out the handbook, he became the employer's “first spokesman, in regard to the new handbook” and management failed to disavow and actually acquiesced to “Hamilton's soliciting support during work time for the petition renouncing support for the Union.”). Instead, Kostew was simply exercising her own Section 7 rights; such actions do not render her Respondents' agent. See United Builders Supply, 287 N.L.R.B. at 1365 (finding that where the union “did not abdicate its role in the campaign” and had its agent conduct meetings and engage in other activities, “it was clear to employees that the Petitioner had its own spokesman separate and apart from union activists such as Wentworth” and

holding that “[t]he Board has never held . . . that such status [union activist] alone is sufficient to establish general union agency”); Advance Products Corp., 304 N.L.R.B. 436 (1991) (affirming ALJ’s determination that Frank was not the union’s agent even though he clearly supported the union, served on an in-house organizing committee, solicited support for the union, answered questions, distributed literature, buttons, hats and shirts, served as the election observer and kept the union informed, because the union did not hold Frank out as agent and hired organizers to actively conduct the campaign); Corner Furniture Disc. Ctr., Inc., 339 N.L.R.B. 1122, 1122 (2003) (evidence that Cosgrove organized and spoke at the union’s campaign meetings, solicited authorization cards, and played a leading role in the campaign does not establish that he was a general agent of the union; “[s]uch conduct merely reflected his status as a leading union supporter during the election campaign.” Moreover, “Zirpoli’s participation in the Union’s campaign meetings, as well as his individual contact with employees during the election campaign made it clear to the employees that the Union had its own spokesman separate and apart from active and enthusiastic union adherents such as Cosgrove.”).

**B. The General Counsel Did Not Prove That Steve Sojak and/or Dan Mecca Are Supervisors.**

The V Theater Stage Managers Dan Mecca and Steve Sojak are not supervisors under the Act. Indeed, Section 2(11) of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The possession of any one of the indicia specified above is sufficient to confer supervisory status on an employee provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. The exercise of some otherwise supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on an employee.

29 U.S.C. §152.

In Chevron Shipping Co., 317 N.L.R.B. 379, 380-381 (1995), the Board stated that it has a duty “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect” (citations omitted). The Board goes on to instruct that the “burden of proving supervisory status is on the party who alleges that it exists.... [and that] supervisory authority must be exercised with independent judgment, rather than in a routine or clerical fashion.” Id. at 381.

Here, the General Counsel does not carry its burden in proving that Mecca or Sojak are supervisors as required by Chevron Shipping. In fact, the testimony clearly shows that both Mecca and Sojak are non-supervisory employees who perform routine or clerical functions but do not possess the authority to use independent judgement. Neither Mecca nor Sojak possess the authority to carry out the explicit tasks listed in the Act, nor do they exercise independent judgment as contemplated by the Act. Neither Stage Manager has the ability to hire, fire, discipline, adjust grievances, transfer, suspend, recall, or promote any employees.<sup>28</sup> See Mecca Tr. at 3168:1-25; 3169:1-8; Sojak Tr. at 3192:22-25; 3193:1-16. Further, both are hourly employees, thus belying an implication of management or executive status. Mecca Tr. at 3166:13-14 and Sojak Tr. at 3192:9-10.

Notably, Mecca only “supervises” one other stagehand in V3. Mecca Tr. at 3166:16. Further, the stage manager and the stagehands in V3 “do pretty much the same thing.” Mecca Tr. at 3167:14-16. The only real difference is the stage manager is in charge during the show and will

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<sup>28</sup> The fact that their title is “Stage Manager” is not evidence of their legal status under the Act. See Davis Supermarkets, 306 N.L.R.B. 426, 458 (1992), enf’d. 2 F.3d 1162 (D.C. Cir. 1993) (That employee was called “office manager” is not conclusive since title is in and of itself insufficient to confer supervisory status.).

work with the cast if there is an issue during the show. Id. at 3167:18-23. This collaborative effort to resolve a problem during a live show does not meet the standard for using “independent judgement” as it does not relate to the assignment of work tasks to subordinates. For example, if a prop is broken and a scene needs to be skipped as a result, the stage manager would simply inform the other stagehands of the decision to eliminate a scene and the stagehands independently know how to proceed. Sojak Tr. at 3208:15-3209:1. There is no need for the stage manager to independently instruct stagehands or direct work. Even if it is found that Mecca or Sojak did direct work in such seldom occasions, the mere fact that an employee gives other employees instructions from time to time does not in and of itself render the instructing employee a supervisor for purposes of the Act. Stop & Shop Co. v. NLRB, 548 F.2d 17, 19 (1<sup>st</sup> Cir. 1977).

Sojak has additional responsibilities as Stage Manager in V1, such as scheduling, but even that additional responsibility does not elevate him to the level of supervisor under the Act. Sojak Tr. at 3193:19-25. Importantly, scheduling is of a clerical nature which is specifically contemplated by the Act and excluded from the supervisory tasks considered. 29 U.S.C. §152. Additionally, in the instance that Sojak is not working, stagehand Josh Prieto fills his role if any issues occur during the show. Prieto Tr. at 1977:2-25. It is unconvincing that Sojak would be a “supervisor” and Prieto would not be a supervisor when they are performing the same functions. In fact, even the alleged discriminatees prior to the hearing have admitted that the stage managers are “just stage hands as well.” **R. 13** at 16, 5/19/18 8:17pm.<sup>29</sup>

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<sup>29</sup> Admittedly, there are multiple statements on the record in which the alleged discriminatees state that Sojak and Mecca are managers. However, whether any witness believed Mecca or Sojak to be a supervisor is not sufficient to establish that Mecca or Sojak, in fact, are supervisors, because conclusory statements made by witnesses in their testimony, without supporting evidence, do not establish supervisory authority. See Sears, Roebuck & Co., 304 N.L.R.B. 193 (1991).

Furthermore, there is no dispute that Mecca and Sojak both reported to the acting Production Manager, which would be either Pendergraft or DeStefano in this case. The fact that they may have from time to time recommended a discipline, created a schedule, or directed an employee in the rare case of an emergency, does not confer supervisory status. See Operating Engineers Local Union No. 3 of Int'l Union of Operating Engineers, Afl-Cio, 324 N.L.R.B. 1183, 1187–88 (1997) (alleged supervisor was subject to the direction and control of an admitted statutory supervisor and was not supervisor under the Act, despite the fact that alleged supervisor interviewed job applicants and made recommendations, executed policies as set by admitted supervisors, and granted time off after checking with admitted supervisors).

Assuming *arguendo*, they are found to be supervisors, their knowledge of any union organizing cannot be imputed onto Respondents. Importantly, there is no evidence that either took any action or reported the union campaign to anyone in upper management. Rather, the testimony shows that Sojak did not remember when he first heard of the union campaign and denied ever reporting any union activity to upper management. Sojak Tr. Vol. 18 at 3202:6-8. Mecca, although he was initially included in a Facebook chat with organizing employees, did not read the chat and identified that he first became aware of union organizing activities after the terminations of the alleged discriminatees. Mecca Tr. Vol. 18 at 3172:17-25; 3173:1; 3174:8-11. General Counsel's other allegations of improper surveillance and interrogation are addressed separately *infra*.

#### **VIII. UNFAIR LABOR PRACTICE CHARGES PERTAINING TO THE PRODUCTION DEPARTMENT.**

Through the conduct alleged in paragraph five (5) of the Amended Consolidated Complaint dated August 20, 2018—and additional amendments during the hearing—the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by interfering with, restraining, or

coercing employees in the exercise of the rights guaranteed in Section 7 of the Act. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5. More specifically, the General Counsel alleges that Respondent maintained overly broad and discriminatory rules, that Respondent engaged in surveillance or created the impression of surveillance, that Respondent threatened employees, that Respondent interrogated employees, and that Respondent promised benefits and improved terms and conditions of employment for its employees if they did not support the Union. Id. The General Counsel offers no significant evidence that Respondents or its managers violated the Act. Instead, the General Counsel only offers suppositions, conjecture, and assertions made by a handful of disgruntled former employees which Respondents, their managers, and employees have denied under penalty of perjury. For the following reasons, the General Counsel's allegations that Respondent violated Section 8(a)(1) of the Act should be dismissed.

**A. Respondents Did Not Promulgate Overly Broad Rules.**

The General Counsel alleges that Respondent, through Estrada, promulgated and maintained overly broad work rules by telling certain employees not to be seen talking to other employees. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(c)(ii). The General Counsel also alleges that Respondents, through Estrada, promulgated and maintained an overly broad directive or rule not to engage in concerted activity by telling employees he was sick of hearing them complain about other employees not performing their jobs. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(d)(i). The General Counsel further alleges that Respondents maintained overly broad and discriminatory rules in its Employee Handbook, specifically portions of its rules regarding email communications, blogging, and solicitation/distribution. See GC. 99 at 26-32; GC. 1(am), Consolidated Complaint at ¶ 5(b).

The General Counsel has not proven that Estrada promulgated any unlawful work rules.

Estrada denied telling employees not talk to others. Estrada 9/17/18 Tr. at 843:21-25; 3111:7-13. The only witness to testify on this issue was Langstaff, who testified that in late February, after Graham asked him to join the union, Estrada stated to him, “I’d be careful being seen talking to Zach [Graham] if I were you.” Langstaff 10/2/18 Tr. at 1825-26, 1871:16-19. Yet Langstaff did not offer any evidence to prove that Estrada heard his conversation with Graham or knew what they were talking about, and Langstaff believed that Estrada did not like Graham. Id. at 1872-74. There is no evidence that Estrada knew of Graham’s support for the union when this alleged statement was made. Estrada testified that he was not aware of the union campaign until April, 2018. Estrada Tr. 9/17/18 at 820-22; Estrada Tr. 10/25/18 at 3101:16-23; see supra n. 7. Langstaff’s testimony is also suspect because it conflicts with Estrada’s obvious disinterest in the union campaign. See, e.g., Estrada Tr. 9/17/18 at 820-22, 844:1-14; Estrada Tr. 10/25/18 at 3106-08. Even if Estrada did make this statement to Langstaff, however, one casual comment in passing to one employee cannot be characterized as a “rule” without evidence that it was disseminated to others. There is no evidence that Langstaff told anyone about Estrada’s alleged statement.

Estrada also denied stating that he was tired of hearing employees complain about others not performing their jobs. Estrada 10/25/18 Tr. at 3110:11-17. Kostew corroborated Estrada’s denial of this statement. Kostew 10/24/18 Tr. at 2964:9-14 (testifying that although she was present at stagehand meetings, she never heard Estrada state that he was tired of hearing employees complain). While the General Counsel called at least 5 other stagehand witnesses to testify, only Michaels testified that Estrada made that statement. Estrada’s alleged statement is not referenced or discussed in any group chats and there is no other evidence to prove that it actually occurred. The General Counsel has failed to prove that Estrada made this statement or that it had any effect on the unit.

The General Counsel has also failed to prove that Respondents promulgated and maintained overly broad and discriminatory handbook policies. First, the General Counsel does not allege that the rules set forth in the Consolidated Complaint explicitly restrict activities protected by Section 7 or were promulgated in response to union activity. See GC 1(am) at ¶ 5(b). Instead, the alleged discriminatory rules are facially neutral, rendering the Board’s decision in The Boeing Co., 365 N.L.R.B. No. 154 (Dec. 14, 2017) applicable.

In Boeing, the Board overruled Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004), which articulated the Board’s previous standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the Act. Under the Lutheran Heritage standard, the Board found that employers violated the Act by maintaining workplace rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be “reasonably construed” by an employee to prohibit the exercise of NLRA rights. In place of the Lutheran Heritage “reasonably construe” standard, the Board established a new balancing test which applies here. Under Boeing, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate justifications associated with the rule. Under Boeing, “ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.” Memorandum GC18-04, 2018 WL 2761555 (N.L.R.B.G.C., June 6, 2018).

The employer’s Email and Communications Activities and Blogging policies are both a part of the policy titled: Acceptable Use of Computers. GC. 99 at 24-28. That policy is designed

to ensure proper use of computers and avoid “risks such as viruses, compromise[s] of the network system, and legal issues.” Id. at 25. With regard to email, the policy stresses the need for emails to be appropriate, lawful and professional. Id. at 27. It states that email “may not be used for transmitting . . . any communication of a discriminatory or harassing nature or materials that are obscene, explicit or for any other purpose which is illegal” and lists, along with customized signature lines, inappropriate jokes, pornography, “ASCII art,” chain letters, derogatory messages, abusive or profane language, and harassing materials. Id. at 27-28. The Blogging Policy permits blogging provided it is professional and responsible and seeks, like the email policy, to protect against harassment and other harmful comments. Id. at 31-32. These policies are consistent with the employer’s social media policy that expressly supports employees’ use of social media for self expression Id. at 29.

Requiring employees to limit their email signature lines to name, job title and contact information has little to no impact on Section 7 rights. The policy restricts *all* personal quotes, agendas or solicitations, not just those related to Section 7 rights. It was clearly designed to ensure that business emails are professional. Reviewing the entire computer policy and the employer’s social media policy demonstrates that Respondent’s employees have many other areas and avenues in which they can express their personal views. This limitation, to one narrow area – an email signature line -- is minimal, and Respondent has reasonable justifications for its rule as set forth above.

Respondent’s blogging policy allows an employee to use company computers to blog provided the employee is professional and responsible. Respondent’s restrictions on blogging are reasonable and designed to protect employees from unlawful harassment and discrimination. Its

restrictions also clearly seek to promote civility. The Board specifically held in Boeing that rules addressing civility are lawful even when they could potentially interfere with Section 7 rights. See GC Memorandum, *supra*, at \*2-3 (“the Board held that even if some rules of this type could potentially interfere with Section 7 rights, any adverse effect would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility. For instance, while protected concerted activity may involve criticism of fellow employees or supervisors, the requirement that such criticism remain civil does not unduly burden the core right to criticize. Instead, it burdens the peripheral Section 7 right of criticizing other employees in a demeaning or inappropriate manner”). Moreover, this type of rule clearly “advances substantial employee and employer interests, including the employer's legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity, . . . and other legitimate business goals.” Id. at \*3. The Blogging policy’s restrictions also seek to limit defamation, another area declared lawful in Boeing. Id. at \*7 (“Much like civility rules, rules banning defamation will not likely cause employees to refrain from protected concerted activity. The vast majority of conduct covered by these rules is unprotected... Employees will generally understand that these types of rules do not apply to subjectively honest protected concerted speech”).

Finally, the employer’s Non-Solicitation/Distribution policy is clearly lawful. It is well-settled that an employer may exclude non-employee organizers from its property. Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992). The Board has found lawful policies requiring non-employees to obtain prior approval for solicitations. Wal-Mart Stores, Inc., 349 N.L.R.B. 1095 (2007). There is no evidence that the employer applied this rule in a discriminatory fashion. The employer’s

solicitation and distribution policy clearly and lawfully gives employees the ability to engage in protected conduct. Indeed, the section cited by the General Counsel impacts only the rights of “outside people and organizations”; as such, this section has no effect on employees’ Section 7 rights.

**B. Respondent Did Not Engage In Or Create The Impression of Surveillance.**

The General Counsel makes several allegations that Respondents engaged in or created the impression of surveillance. The General Counsel alleges that Respondents, through Estrada, created the impression of surveillance by telling employees not to be seen talking to other employees.<sup>30</sup> G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(c)(i). Langstaff testified that Estrada stated, “I’d be careful being seen talking to Zach [Graham] if I were you.” Langstaff 10/2/18 Tr. at 1871:16-19. However, Langstaff then testified that it was his impression that Estrada did not like Graham because Graham “flirted” with Estrada’s girlfriend, Kostew. Langstaff at 1872:12-25; 1873:1-7. Estrada testified that he and Graham were “friends.” Estrada 9/17/18 Tr. at 806:2-12. When questioned as to whether or not he made the alleged statement, Estrada testified that the statement was never made. Estrada 9/17/18 Tr. at 843:21-25; Estrada 10/25/18 at 3111:7-13.

The General Counsel alleges that Respondent, through Saxe, created the impression of surveillance at the V Theater by telling employees that he knew they supported the Union and that they were going to vote yes for the Union. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(h)(i). Saxe testified that during conversations with others or with the specific individuals, he became aware that Prieto and Tupy supported the Union. Saxe 10/31/18 Tr. at 3536:5-11; 3540:25; 3541:1-9. Saxe testified that he had conversations with Prieto and Tupy where the Union came

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<sup>30</sup> Although the Complaint states that Estrada made this statement “on the stage at Saxe Theater,” the testimony elicited at trial places Estrada in the parking lot talking to Langstaff.

up. Saxe 10/31/18 Tr. at 3536:5-11; 3540:25; 3541:1-9. During a conversation with Josh Prieto he told Prieto that he was a good employee and that knew he was pro-union but that he was okay with that. 10/31/18 Saxe Tr. at 3537:19-25; 3538:1-8. Saxe testified that Prieto thanked him. 10/31/18 Tr. at 3538:9-12. Similarly, Prieto testified that Saxe stated that he knew Prieto was pro-union and that he was okay with that but that no matter the outcome of the vote, he hoped it didn't cause a rift between them. Prieto 10/3/2108 Tr. at 1953:12-25; 1954:1-17; 2010:15-25; 2011:1-25. Prieto stated that he appreciated Saxe's comments and thanked him. Id. Shortly before speaking with Prieto, Saxe also spoke to Tupy with Glenn present. 10/31/18 Saxe Tr. at 3539:10-15. Tupy told Saxe that he was pro-union and that he has been a union member for almost 30 years. 10/31/18 Saxe Tr. at 3541:2-9. Saxe told Tupy that he was okay with him being a union member and that he had also been a union member himself. 10/31/18 Saxe Tr. at 3541:2-9. Such employee-driven conversations do not constitute surveillance or the impression of surveillance by Respondents.

The General Counsel alleges that on May 16, 2018, Respondent, through DeStefano, engaged in surveillance and created the impression of surveillance by texting employees and asking whether they needed to be bussed to the election site. Complaint Paragraph 5(k)(i); 5(k)(ii). DeStefano explained that she sent text messages to *every* employee to remind them to bring an ID and to offer them a ride to the election site if they wanted. DeStefano 10/23/2018 Tr. at 2754:16-25; 2755:1-5; 2789:6-22. DeStefano also sent messages to employees who were scheduled off to make sure they had a ride. Id.; DeStefano 9/13/18 Tr. at 558:9-14. Importantly, the bus ride was voluntary. Glenn 10/3/2018 Tr. at 2033:8-25; 2034: 1-4.

The General Counsel alleges that Respondent surveilled and created the impression of surveillance by relocating the time clock and Notice of Petition for Election and by posting the

Notice of Election in the managers' suite. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(g)(i) and 5(g)(ii). As a threshold matter, Saxe testified that there is no such thing as a "managers' suite" at the theaters. Saxe 9/11/2018 Tr. at 84:11-12. This was confirmed by Prieto who testified that he did not know of a "managers' suite." Prieto 10/3/2018 Tr. at 1948:3-7. Instead, a few managers' offices are accessible by utilizing two hallways. The first hallway is a common hallway that is utilized by other tenants of the Miracle Mile Shops as well as Respondents. **R. 93**; Prieto 10/3/2018 Tr. at 1951:3-9; 1984:2-19. The common hallway allows an individual to access various locations within the Miracle Mile Shops, including Respondents' space. **R. 93**. One of the locations accessible by the common hallway is a space leased by Respondents that consists of a small hallway and a few managers' offices. **R. 93**; Prieto 10/3/2018 Tr. at 2015:7-12. At one point, a timeclock was located in the common hallway just outside of the doorway that is used to gain access to the small hallway that leads to a few of the managers' offices. **R. 93**. Eventually, this timeclock was moved inside of the doorway appropriately within Respondents' space. *Id.* Prieto 10/3/2018 Tr. at 1986:19-23. The door that permits access to the timeclock remains unlocked. Prieto 10/3/2018 Tr. at 1950:17-20; 2013:18-24.

When determining whether an employer's statement created an impression of surveillance the applicable test is whether, under the circumstances, the employee would reasonably assume from the statement in question that the employee's union or protected concerted activity had actually been placed under surveillance by the employer. Schrementi Bros., 179 N.L.R.B. 853 (1969). Information that is provided to the employer and not sought by the employer is not evidence of surveillance. See North Hills Office Servs., Inc., 346 N.L.R.B. 1099, 1103-04 (2006) ("The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*. Volunteering

information concerning an employee's union activities [received from] other employees..., particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.”) (emphasis in original); Register Guard, 344 N.L.R.B. 1142, 1144 (2005) (finding that employer's statements indicating employees had volunteered information about coworkers' union activities did not create an impression of surveillance). Furthermore, so long as an employer's speech does not contain a threat of reprisal or force or a promise of benefits it is protected speech. See 29 U.S.C. § 158(c) (protecting employer speech opposing union organization so long as it “contains no threat of reprisal or force or promise of benefit.”).

Here, DeStefano did not engage in surveillance nor would her messages lead an employee to reasonably assume that their union or protected activities were placed under surveillance. DeStefano did not ask employees how they would vote, elicit employee's union views, inquire into whether that employee would vote, or insinuate that the employees should vote in favor of Respondent. Nor is there any evidence that her text messages were targeted at employees who would vote in favor of the Union. Instead, the text messages were sent to every employee to remind them to bring an ID and sent to employees who were not scheduled to work the day of the election and thus would not be on property. Moreover, the evidence shows that employees who openly expressed favor for the Union were offered transportation to the election site, thus belying any argument of employer bias or union animus. The text messages were sent purely for logistical reasons to ensure that any employee who needed a ride to the election site would have one. DeStefano 9/13/18 Tr. at 558:9-14. From those text messages, a reasonable employee could not assume that DeStefano was referring to, and watching, their protected activity.

Further, the allegations of surveillance pertaining to Estrada's statement fail because Estrada's vague statement would not lead an employee to reasonably assume that their union or

protected activities were placed under surveillance. When asked whether or not he told Langstaff to be careful talking to Graham, Estrada testified that he never made the statement. Estrada 9/17/18 Tr. at 843:21-25. Although Estrada denies telling Langstaff to be careful talking to Graham, under the circumstances described by Langstaff, even if Estrada did make the alleged statement, it would not be reasonable to assume that Langstaff or any other employee's protected activities had been placed under surveillance from such a vague statement. Notably, there is no allegation that Estrada mentioned anything about a union or any protected activity. Moreover, Langstaff testified that he was not even aware of whether or not Estrada had knowledge that Graham was pro-union, decreasing the risk that the statement under those circumstances would reasonably lead an individual to believe that their union or protected activities were under surveillance. Langstaff 10/2/18 at 1882:21-24. Langstaff did testify that Estrada did not like Graham because Graham "flirted" with Estrada's girlfriend, Kostew, giving a more plausible explanation for the statement. Langstaff at 1872:12-25; 1873:1-7. Although Estrada denied ever making the statement, under the circumstances, it seems unreasonable to conclude that an employee in the alleged circumstance would have thought Estrada was surveilling the Union or Langstaff's protected activities.

The allegations of surveillance pertaining to Saxe's statements also fail as neither Saxe nor any member of management solicited any information on employees' union views. Rather, any information that Saxe acquired was provided to him directly by the employee or from other employees without any solicitation. Information that is provided to the employer and not sought by the employer is not evidence of surveillance. See North Hills Office Servs., Inc., 346 N.L.R.B. 1099, 1103-04 (2006) ("The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*. Volunteering information concerning an employee's union activities [received from] other

employees...., particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.”) (emphasis in original); Register Guard, 344 N.L.R.B. 1142, 1144 (2005) (finding that employer’s statements indicating employees had volunteered information about coworkers’ union activities did not create an impression of surveillance). Furthermore, so long as Saxe’s speech did not contain a threat of reprisal or force or a promise of benefits—which it did not—it is protected speech. See 29 U.S.C. § 158(c) (protecting employer speech opposing union organization so long as it “contains no threat of reprisal or force or promise of benefit.”).

Finally, the allegations that Respondents engaged in surveillance or the impression of surveillance by relocating a timeclock and a Notice of Petition for Election are devoid of merit. It is uncontroverted that a timeclock was moved about six to seven feet from a common hallway that is utilized by the employees of multiple tenants at the Miracle Mile Shops into a small hallway near offices that were used by managers of Respondents. There was no evidence presented that would indicate that employees were engaged in union activities either in the common hallway where the timeclock was originally placed or inside of the small hallway where the timeclock was moved. There was no evidence presented that would indicate that Respondents were surveilling employees who clocked-in or out of the small hallway near offices that were used by managers of Respondents or that employees felt their union activities were somehow being surveilled by clocking in and out near the office. Further, seeing an employee clocking in and out or reading a Notice of Petition for Election would not afford Respondents any information about an employees’ union activities, nor would it be reasonable for an employee to assume that it would. Moreover, neither the common hallway used by all the tenants’ employees or the small hallway near the offices utilized by managers were areas where employees were known to discuss protected

activities. Simply put, there was nothing for Respondents to surveil and no reason to think there was anything to surveil.

**C. Respondent Did Not Make Any Threats or Promises.**

The General Counsel makes allegations that Respondents, through Estrada, threatened employees with unspecified reprisals or discipline by telling them not to be seen talking to other employees and by telling them that there were fifteen people lined up to replace them. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(c)(ii) and 5(d)(ii). The facts surrounding Langstaff's allegation and Estrada's denial are discussed above. With regard to the second alleged threat by Estrada, Michaels testified that at some time in March, Estrada called a meeting of at least twelve stagehands that worked that night. Michaels 9/21/2018 at 1525:3-6. He testified that Estrada was upset with a lot of the stagehands complaining about other stagehands not doing their work. Michaels 9/21/2018 at 1525:7-11. Michaels was unsure if any of the other stagehands who had been terminated were present at the meeting. Michaels 9/21/2018 at 1562:9-25; 1563:1-10. At the meeting, Michaels alleges that Estrada stated that they needed to quit complaining about other stagehands because there were fifteen people lined up to replace them. Michaels 9/21/2018 at 1525:12-19. However, *none* of the other witnesses corroborated Michael's testimony, despite the General Counsel calling at least four other Saxe stagehands as witnesses. In fact, Saxe Stagehand Kostew testified that she *never* heard Estrada tell employees to stop complaining about the performance of other employees or that there were fifteen people lined up to replace them. Kostew 10/24/18 Tr. at 2964:9-19. Estrada testified that he never made the statement. Estrada 10/25/18 Tr. at 3112:18-22. This alleged threat by Estrada is not discussed or even referenced in the employees' group chat discussions. **J. 2, 4-5.** As such, the General Counsel has failed to prove that Estrada made two threats.

Nevertheless, these allegations are not sufficient to sustain a Section 8(a)(1) claim because neither would reasonably tend to interfere with the free exercise of employee rights. Estrada did not reference the union or employees' protected activity in either statement, and there is no basis upon which to reasonably infer that his alleged remarks had anything to do with protected activity. Such remarks from a low-level supervisor whom the employees saw as a part of the bargaining unit are not coercive under the totality of the circumstances.

The General Counsel alleges that Respondent at the V Theater, through Saxe, promised employees increased benefits by soliciting employee complaints and grievances. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(h)(ii). Prieto testified that Saxe asked him if there was ever anything that he tried to contact Saxe about. Prieto 10/3/18 Tr. at 1954:7-24. Prieto testified that he told Saxe that at one point he asked about getting a raise through an aerial act to which Saxe responded that he had never heard about it. Prieto Tr. at 2011:6-25. Prieto characterized Saxe's question as a "general question" about whether or not he ever tried to reach out to Saxe. Prieto 10/3/18 Tr. at 1954:18-24. Saxe testified that he did not want Prieto to feel uncomfortable and to know that he heard he is a good employee. Prieto 3537:19-25; 3538:1-12.

The essence of a solicitation of grievances/implicit promise of benefit violation is the promise of remedying the grievances, not the mere solicitation. See Airport 2000 Concessions, LLC & Unite Here Local 7, Hotel & Rest. Employees Union, Clc, 346 N.L.R.B. 958, 960 (2006) (citing Ryder Transp. Servs., 341 N.L.R.B. 761, 769 (2004), enfd. 401 F.3d 815 (7<sup>th</sup> Cir. 2005)). In Airport 2000, the respondent contended that an agent of the respondent who solicited grievances did not violate the Act where the agent made no promise to remedy any of the grievances that were raised by the employees. Id. at 960. The Board agreed and stated that "although the record shows

that [the employer] solicited grievances from [employees], it does not support finding a violation.  
Id.

Here, Saxe did not solicit grievances from Prieto. However, even if he did, it is clear that Saxe did not make any promise to rectify the grievance. In fact, Saxe's response to Prieto's previous raise request was that he had never heard about it. Further, Saxe did not imply that he would remedy the grievance. Saxe's equivocation that he had never heard about the issue would not lead an employee to reasonably believe that their airing of this grievance was going to result in a desired change. Therefore, Respondent, through Saxe, did not violate the Act by making a promise of benefits through solicitation of employee grievances.

**D. Respondent Did Not Engage in Interrogation.**

The General Counsel also alleges that Respondent, through Dan Mecca, interrogated Darnell Glenn about his union activities. Demirock Tr. at 1931:6-10. Glenn testified that Mecca asked him if he knew anything about a union meeting and asked Glenn why his girlfriend was texting him about union meetings; Mecca told Glenn that he did not want to get the text messages. Glenn Tr. at 1892:24-25; 1893:1-11; 1894:3-25. Mecca testified that he did not have any conversations with Glenn about the union but that Glenn's girlfriend, Glick, texted Mecca about the union and that he showed Glenn the messages and asked Glenn why she was messaging him. Mecca 10/25/18 Tr. at 3174:16-18; 3175:7-18; 3176:7-10. Mecca stated that he never asked Glenn or any other employee how they were going to vote in the union election. Mecca 10/25/18 Tr. at 3176:11-16.

As discussed *supra*, Respondents could not interrogate an employee through Mecca because Mecca is not a supervisor under the Act. However, even if Mecca were a supervisor, he did not unlawfully interrogate Glenn about his union activities. Notably, Mecca testified that he

did not have any conversations with Glen about the union and did not ask Glen or any other employee how they were going to vote in the union election. Mecca 10/25/18 Tr. at 3174:16-18; 3175:7-18; 3176:7-10; 3176:11-16. Mecca only asked Glen why his girlfriend was sending him messages and if he knew what they were about. Mecca 10/25/18 Tr. at 3175:7-18; 3176:7-10. Such a conversation could not reasonably tend to interfere with, restrain or coerce Glenn in the exercise of his rights and no violation of Section 8(a)(1) can be found on this evidence.

**E. Respondent Did Not Unlawfully Grant Wage Increases.**

The conferral of benefits during a union campaign, let alone in the absence of a union campaign, is not per se unlawful, particularly if “the employer can show that its actions were governed by factors other than the pending election.” Guard Publ’g Co., 344 N.L.R.B. 1142 (2005). Here, Respondents increased the wages of employees in the Production, Accounting, Box Office, and Call Center Departments on March 14, 2018. Saxe Tr. Vol. 20 at 3494:15-17; 3498:1-2; Carrigan Tr. at 754:9-11, 14-15; **GC 15**; **GC 16**. The wage increases, particularly for the Production Department employees, had been planned for months prior as a way to standardize the wages of newly hired employees and existing employees. Id. at 3494:22-25; 3495:1; 9-10; see also R. 76 (showing that wage increases were being discussed in December 2017). In fact, Carrigan had been working with former manager Karlo Pizarro to organize and institute wage increases as early as October 2017. Carrigan Tr. at 755:5-12. The wage increase was instituted out of fairness to the long-term employees who were being paid a lower rate of \$15.00 an hour when new employees were being hired at \$17.00 an hour. Saxe Tr. 9/12/18 at 290:12-13, 21-23; **GC. 97**. Additionally, the evidence shows that similar wage increases were discussed during Pendergraft’s tenure by Pendergraft; however, those increases never went into effect. The evidence in its totality shows that the wage increase had been discussed for at least three months prior to

implementation.<sup>31</sup> Any argument that the wage increase was tied to the union campaign must fail because the increase pre-dated the RC Petition, the employer did not have knowledge of a union organizing effort at the time of the increase, and the wage increase affected employees in multiple departments--it was not targeted to the Production Department.

Further, even if Respondents had knowledge of the organizing effort, Respondents had a legitimate, business reason for its action. Specifically, its wage increase was essential to remain competitive regarding the attraction and retention of a stable work force. NLRB v. Circo Resorts, 646 F.2d 403 (9<sup>th</sup> Cir. 1981), enforcing as modified 244 N.L.R.B. 880 (1979); Arpro Co. m/v Arctic Producer, 265 N.L.R.B. at 318 (recognizing industry practice as a legitimate business reason to grant a wage increase). Further, there was never any link between the wage increase and the discouragement of union activities. Coca Cola Bottling Co., 132 N.L.R.B. 481 (1961) (“an offer of money accompanied by an urging to vote a particular way can be viewed as interference”). Importantly, there is no evidence of any insinuation or comment indicating that Respondents expected the employees to refrain from union activity in exchange for the wage increase. Rather, the wage increase was enacted to even out the compensation of new employees and existing employees and to remain competitive in the industry and was completely unrelated to any Union activity. Therefore, there was no violation and this claim should be dismissed. See Beverly Enters. v. NLRB, 139 F.3d 135 (2d Cir. 1998) (holding that discussion of potential pay increase was not an unfair labor practice because there was no suggestion that election outcome would affect determination of whether to increase pay).

## **IX. DAVID SAXE PRODUCTIONS WAREHOUSE ALLEGATIONS.**

### **A. Scott Leigh Termination.**

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<sup>31</sup> Other pay structures were also discussed such as switching to a “per show” rate, but those structures were abandoned in favor of the current hourly rate.

Leigh started working at DSP as a Warehouse Technician/Welder in March of 2017. Leigh Tr. at 1596:22-25; **R. 62**. When he was hired, Leigh received the Employee Handbook and separately acknowledged Respondents' Company Email Addresses Policy requiring that he maintain and check his company email address. Leigh Tr. at 1641:24-25; 1642:1-6; **R. 17**; **R. 62(a)**; Carrigan Tr. at 2847:4-9. Leigh's duties included welding and fabricating props and set pieces, as well as assisting in building the office space and cleaning. Id. at 1597:15-17. During the relevant time period, Leigh was supervised by Office Manager Jasmine Hunt, who communicated his job tasks and issued his discipline based on performance. Leigh Tr. at 1598:5-6. However, all attendance disciplines are administered through Human Resources. Carrigan Tr. dated 10/24/18 at 2849:2-4. Accordingly, Carrigan sent Leigh an email on January 9, 2018 warning him that he had called out or been late an excessive amount of times. **R. 67**; Carrigan Tr. dated 10/24/18 at 2865:9-10. The email stated, "Please consider this your final warning that you may be terminated for showing up late and/or not showing up to work, regardless of your reason. Id.

When Leigh did report to work, he displayed serious job performance issues, which worsened over time. Specifically, on March 29, 2018, Leigh refused to complete his job tasks, including wiping down the partitions, mopping the theater, and Lysoling the doorknobs leading to a verbal warning. **R. 63**; Carrigan Tr. at 2849:14-18. On April 12, 2018, Leigh was captured on surveillance video on his cell phone during work hours in violation of the Company's Cell Phone Policy. **GC. 99** at 24. As a result, he was issued another verbal warning. **R. 64**; Carrigan Tr. dated 10/24/18 at 2852:19-25. On April 16, 2018, Leigh refused to move a large pile of materials after being instructed to do so by Saxe and he failed to protect a metal prop from the rain by moving it into storage causing the prop to rust. Id. at 2854:24-25; 2855:21-22; 2857:9-14; 2861:8-12;

2863:10-25; 2864:1-9. He received a written warning and another verbal warning for those respective failures. Id.; **R. 65**; **R. 66**.<sup>32</sup>

Despite his numerous work performance disciplines and receiving a final warning for his attendance on January 9, 2018, Leigh continued to have unsatisfactory attendance on five more occasions between January 9, 2018 and April 6, 2018. **R. 68**; Carrigan Tr. dated 10/24/18 at 2867:23-25. Those attendance issues culminated on April 17, 2018 when Leigh called out of work a final time. Leigh Tr. at 1613:1-15. On that same day, Hunt, sent an email to Saxe and Carrigan pleading to terminate Leigh for his abundant performance issues. Carrigan Tr. dated 10/24/18 at 2869:12-14; **R. 69** (stating “Please allow me to term him today. Scott does not follow the company policies and procedures, is insubordinate, hides, is constantly on his phone, and simply put is a real jerk”). Leigh was subsequently terminated on April 17, 2018. Leigh Tr. at 1613:1-15; Carrigan Tr. at 2871:13-17; **R. 70**.

Here, under the Wright Line analysis discussed *supra*, General Counsel is unable to establish a *prima facie* case because it is unable to show that the employer had knowledge of any alleged protected activity, timing, or that Leigh’s termination was the result of any alleged protected activity or animus. It was not until after the Charge was filed on April 24, 2018 that Respondents learned of Leigh’s protected activity--that he had solicited other DSP employees to sign union authorization cards on or around April 10 and/or April 11, 2018. **GC. 65**. Indeed, Respondents did not have any knowledge of the authorization cards until after Leigh’s termination on April 17, 2018. In fact, Respondents did not have any knowledge of even a union campaign at

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<sup>32</sup> In addition to these policy violations, Leigh also spent time training other warehouse technicians how to weld without Saxe’s approval and received many complaints for the way he spoke to the women in the office. Saxe Tr. 9/11/18 at 140:9-23; 141:1, 14-17. There were also some issues about Leigh leaving work while on the clock, which Saxe experienced on at least one occasion and believed other warehouse technicians would cover for Leigh. Id. at 139:15-19.

DSP until the filing of the RC Petition. GC 1(c). Leigh cannot prove timing or causation because his termination was effective April 17, 2018 - before the filing of the RC Petition. **GC. 34; GC. 1(c)**. Further, Leigh was not terminated *because* of any union activity; he was terminated for his poor job performance and his repeated violations of Respondents' Attendance Policy, which he acknowledged receipt of upon hire and was warned about as his infractions became more serious and job threatening. **GC. 99** at 32; **R. 63-R. 67**. Further, Leigh was issued a final written warning on January 9, 2018, where he was warned he "may be terminated for showing up late and/or not showing up to work, regardless of [his] reason." **R. 67**.

At the hearing, Leigh claimed that he never received this email, however, such a claim does not absolve him from his violations under the attendance policy as he had received the attendance policy and he had received the policy requiring that he check his email. **R. 17; R. 62(a)**. The fact that he ignored his responsibility under the policy does not negate the fact that he was warned of his impending termination if he continued being tardy and/or absent. Leigh then called into work three more times and was tardy once more over the next three months after receiving a final warning. *Id.* Further, there is no evidence of anti-Union animus pertaining to Leigh as Leigh was not fired because of his union activities. Rather, he was terminated for his repeated dereliction of his job duties and abysmal attendance record – despite receiving numerous opportunities to correct his behavior through progressive discipline. **R. 63-R. 67**. The facts pertaining to this employee do not establish a *prima facie* case.

Even if, *arguendo*, the General Counsel could demonstrate a *prima facie* case, Respondents acted for legitimate, business purposes that would have compelled termination regardless of any protected activity. Respondents maintain an attendance policy and expects employees to abide by their schedules. See Health Management, Inc., 326 N.L.R.B. 801 (1998) (employee lawfully

discharged for just cause where employee had continuing attendance and tardiness problems); Cambridge Chemical Corp., 259 N.L.R.B. 1374 (1981) (same); South Carolina Industries, 181 N.L.R.B. 1031 (1970) (same). . Further, even when Leigh would show up for work, he would either fail or refuse to complete his assigned work, which cannot be tolerated by Respondents. Hunt pled with Respondents to allow her to terminate Leigh citing those issues as well as the way Leigh treated her and her female staff members. Respondents could no longer ignore Leigh's dereliction of his duties nor his treatment of his co-workers as he was becoming a liability to Respondents. As such, Leigh was terminated. Notably, Respondents have terminated other employees for less egregious policy violations and attendance issues. See R. 37 (Harris terminated for unsatisfactory work performance; Clay and Pullen terminated for not completing job tasks and hiding during work; Crabtree terminated for not completing tasks as assigned and quality of work decreasing; Boudreau terminated for poor work performance and unreliability); See also R. 40 (Rayner terminated after receiving final warning for excessive tardiness and absences; Hollis terminated for excessive absences and tardiness; Stumpf terminated for frequent call outs and decreased work performance; Brown terminated for undependability and calling out for invalid reasons). The employment termination as lawful.

Leigh's self-serving testimony should not be credited. Leigh's testimony changed significantly between when he was called for General Counsel's case in chief and for General Counsel's rebuttal on various topics. See Leigh Tr. 10/1/18 at 1596:25; 3798:10 (referring to himself as a warehouse tech and then later referring to his title as a welder); Leigh Tr. 10/31/18 at 1599:19-22; 3801:8-13; 3804:11-12; 3806:19-21 (Leigh claiming that Stumpf was employed during the union campaign as a warehouse tech and then omitting Stumpf from being eligible to

sign a card); Leigh Tr. at 3826:13-25; 3827:1-5; **R. 103** (Leigh claiming that he never saw Stumpf after April 10, 2018 despite Mario being employed until April 13, 2018).

Additionally, Leigh claimed that he had a conversation with Saxe in March of 2018 in which Saxe asked him what the benefit is for an employer to be union. Leigh Tr. at 1603:1-9. However, Saxe denies ever having any conversations about union with Leigh. Saxe Tr. 10/31/18 at 3493:5-7. Further, there is no logical reason that Saxe would ask a line level employee such as Leigh about benefits to an employer when Saxe owns several businesses, has been in the industry since he was 16 years old, and he himself was a member of the Union 30 years ago. Saxe Tr. 10/31/18 at 3427:23-24; 3428:10-12, 18-23; 3541:4-6; Saxe Tr. 9/11/18 at 54:19-23. Saxe asking Leigh for his advice and/or opinion is simply nonsensical. Leigh also claims that he had a second conversation with Saxe on April 13, 2018 in which Saxe asked him if he was signing people up for free union training. Leigh Tr. at 1609:19-25; 1610:1-11. However, this version of events conflicts with Saxe's testimony which is corroborated by the testimony of other warehouse technicians and contemporaneous documentation. Saxe Tr. 10/31/18 at 3493:5-7 (claiming that he asked Leigh if he was offering people free welding training, the word "union" was not mentioned); Thomas Tr. at 3331:15-25; 3332:1-19 (Leigh was training him to weld); **GC. 88** (email discussing Leigh training Blake Scott to weld).

Leigh also denied ever receiving any paperwork, including disciplines and emails from Respondents despite the numerous disciplines in the record and his acknowledged obligation to check his company email address. Leigh Tr. at 1638:2-19; 1639:11-15. Additionally, Leigh was evidently giving strategic testimony when he was asked on direct about his duties as a warehouse technician and specifically excluded a significant portion of duties that he later admitted to when directly asked in cross-examination. Leigh Tr. at 1642:21-25; 1643:1-14. In totality, Leigh's

testimony is entirely unreliable and geared toward effectuating General Counsel's case at the particular moment based on the numerous inconsistencies discussed here and in section XI *infra*.

**X. UNFAIR LABOR PRACTICE CHARGES PERTAINING TO THE WAREHOUSE UNIT.**

**A. Saxe Did Not Engage In Unlawful Interrogation.**

The General Counsel alleges that Respondent, on April 13, 2018, through Saxe, interrogated employees about their union membership, activities and sympathies and the union membership, activities, and sympathies of other employees at Respondents' Warehouse. More specifically, and as discussed *supra*, the General Counsel alleges that Saxe asked employees in Respondents' Warehouse if they were signing up for free union training. G.C. Ex. 1(am), Consolidated Complaint at ¶ 5(e)(i). Saxe denied making the statement and said the words "union training" were never used in any conversation with warehouse employees. Saxe 10/31/18 Tr. at 3490:7-25; 3491:1-25; 3492:1-25; 3493:1-7. Saxe explained that he was asking Leigh why he was giving other employees welding training and explained to Leigh that he did not want any other employees welding. Saxe 10/31/18 Tr. at 3492:19-25; 3493:1-7.

Although Saxe did not ask Leigh why he was offering "union training," interrogate Leigh about union activities, or even discuss union activities with Leigh, even if Saxe asked Leigh why he was offering "training," Saxe had a legitimate reason to do so. The Board recognizes that employers have a legitimate business interest in investigating safety concerns or complaints relating to employee misconduct. See, e.g., Fresenius USA Mfg., Inc., 362 N.L.R.B. No. 130 (June 14, 2015) (post-Noel Canning decision holding that ); see also Walmart Stores, Inc., JD-03-16, 2016 WL 275280 (Jan. 21, 2016) (citing Fresenius); Bridgestone Firestone South Carolina, 350 N.L.R.B. 526, 528-529 (2007) (holding that the employer lawfully questioned employee concerning his *alleged* violation of employer's no-profanity policy while engaging in union-related

discussion). Here, Saxe clearly had a valid concern about Leigh training other employees (including an electrician) how to undertake a potentially dangerous activity at the DSP facility. Saxe 10/31/18 Tr. at 3491:5-8. Respondent did not unlawfully interrogate Leigh through the conduct of Saxe.

**B. Saxe Did Not Engage In Surveillance Or Create The Impression Of Surveillance.**

The General Counsel alleges that Respondents, on April 13, 2018, through Saxe, created the impression of surveillance by asking employees in the warehouse if they were signing up for free union training. Complaint Paragraph 5(e)(i). Saxe testified that he never spoke or heard the words “union training” in any conversation with employees. Saxe 10/31/18 Tr. at 3490:7-25; 3491:1-25; 3492:1-25; 3493:1-7. Rather, Saxe asked Leigh if he was offering employees welding training after being informed by another warehouse technician that Leigh offered to train him how to weld. Saxe 10/31/18 Tr. at 3490: 7-25; 3491:1-8; 3492:19-25; 3493:1-7.

When determining whether an employer’s statement created an impression of surveillance the applicable test is whether, under the circumstances, the employee would reasonably assume from the statement in question that the employee’s union or protected concerted activity had actually been placed under surveillance by the employer. Schrementi Bros., 179 N.L.R.B. 853 (1969). Information that is provided to the employer and not sought by the employer is not evidence of surveillance. See North Hills Office Servs., Inc., 346 N.L.R.B. 1099, 1103–04 (2006) (“The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*. Volunteering information concerning an employee’s union activities [received from] other employees..., particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.”) (emphasis in original); Register Guard, 344 N.L.R.B. 1142, 1144

(2005) (finding that employer’s statements indicating employees had volunteered information about coworkers’ union activities did not create an impression of surveillance). Furthermore, so long as an employer’s speech does not contain a threat of reprisal or force or a promise of benefits it is protected speech. See 29 U.S.C. § 158(c) (protecting employer speech opposing union organization so long as it “contains no threat of reprisal or force or promise of benefit.”).

The allegations of surveillance pertaining to Saxe’s statement fails as neither Saxe nor any member of management solicited any information on employees’ union views. Rather, Saxe was informed by another employee that Leigh was offering free welding training. Information that is provided to the employer and not sought by the employer is not evidence of surveillance. See North Hills Office Servs., Inc., 346 N.L.R.B. 1099, 1103–04 (2006). Further, Saxe entirely denies any union aspect of this comment and explains that he was concerned of the safety implications of having Leigh train his employees how to weld on his property. As such, Saxe asked him to stop training the other employees. There is no evidence of unlawful surveillance under those corroborated facts and this claim must fail.

**C. Respondents Did Not Refuse to Bargain In Violation of 8(a)(5).**

The General Counsel alleges that “at all times since about April 11, 2018, based upon Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Warehouse Unit.” **GC. 1(am)**, Consolidated Complaint at ¶ 7(i). The General Counsel contends that “[a]bout April 26, 2018, the Union, by filing the Petition in Case 28-RC-219130, requested that Respondents recognize it as the exclusive collective-bargaining representative of the employees in the Warehouse Unit.” Id. at ¶ 7(e); G.C. Ex. 64 (amending this paragraph). The General Counsel further contends that “[s]ince April 11, 2018, Respondent DSP has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining

representative of the Warehouse Unit,” and that Respondent has, therefore, violated Section 8(a)(1) and (5) of the Act. Id. at ¶¶ 7(k), 10.<sup>33</sup>

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees, subject to the provisions of Section 9(a)" of the Act. Section 9(a) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." A demand for bargaining is a critical element of a Section 8(a)(5) claim. See Production Plating Co., 233 N.L.R.B. 116 (1977) (holding that: "As the Union made no demand as such on Respondent for recognition and/or bargaining, we find that the evidence fails to establish that Respondent violated Section 8(a)(5) of the Act"), enfd., 614 F.2d 1117 (6<sup>th</sup> Cir. 1980); Flav-O-Rich, Inc., 234 N.L.R.B. 1011, 1018 (1978) (Board affirming ALJ's conclusion that "since the Union never made a formal request for recognition and bargaining, the allegation that the Respondent violated Section 8(a)(5) must be dismissed"); Eagle Material, 558 F.2d 160, 170 (3d Cir. 1977) ("the settled rule [is] that a demand by the Union for recognition is a prerequisite to the finding of a section 8(a)(5) violation by the employer"; "[i]n the absence of any evidence in this case that the Union made a demand upon the employer for recognition, we cannot sustain the 8(a)(5) violation.").

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<sup>33</sup>It does not appear, based upon the amendments to the Consolidated Complaint, that the General Counsel intends to assert a Section 8(a)(5) violation for the alleged Theater Unit. If such an assertion is made, however, it too must fail for the reasons stated herein. In summary, the Charging Party never demanded recognition or bargaining, see GC. 1(c) (disavowing a prior demand), and the filing of a representation petition is not sufficient.

The General Counsel has failed to prove that a demand for bargaining on behalf of the alleged warehouse unit was ever made. The record is devoid of any evidence of a demand for bargaining or request for recognition for this group of employees (or even the theater employees). Neither the General Counsel nor the Charging Party have submitted evidence of any correspondence or testimony proving that the union requested recognition or demanded bargaining on behalf of any employees. As such, the General Counsel's Section 8(a)(5) claim must fail as a matter of law.

The General Counsel contends that the union made its demand for bargaining and recognition via the April 26, 2018 RC Petition. **GC. 1(am)** at ¶ 7(e); G.C. Ex. 64 (amending this paragraph). However, that allegation is patently false because the warehouse employees were never a part of the representation proceedings in this matter and were excluded from the unit described in the representation petition.<sup>34</sup> The RC Petition, which states that recognition was *not* requested prior to filing, describes the unit involved as including: "All stagehands, riggers, lighting and audio technicians currently employed at David Saxe Productions . . . as well as V Theaters . . . ." and excluding: "*All other employees*, including wardrobe, hair and make-up employees, box office employees, ushers, food/beverage servers, talent, security guards and supervisors as defined by the Act." **GC. 1(c)** (emphasis added).

Notably, even if the Charging Party had included the warehouse employees in the RC Petition, the General Counsel's Section 8(a)(5) allegation still fails. The Board has long held that the "mere filing of a representation petition does not constitute a request for recognition or bargaining such as to make an employer's failure to bargain, without more, a violation of Section

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<sup>34</sup>Indeed, the warehouse employees are not mentioned in any filings until the August 20 Consolidated Complaint where the General Counsel first sought Gissel bargaining orders.

8(a)(5).” Production Plating, *supra*, 233 N.L.R.B. 116; Flav-O-Rich, *supra*, 234 N.L.R.B. at 1108 (affirming ALJ’s decision; “The Board has found that the filing of a representation petition does not, per se, constitute an appropriate demand. Accordingly, since the Union never made a formal request for recognition and bargaining, the allegation that the Respondent violated Section 8(a)(5) must be dismissed.”) (citations omitted); Bakers of Paris, Inc., 288 N.L.R.B. 991, 1010 (1988) (affirming ALJ’s conclusion that filing a petition for election does not constitute a demand for bargaining or recognition sufficient to sustain a Section 8(a)(5) allegations), *enfd*, 929 F.2d 1427 (9<sup>th</sup> Cir. 1991); Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp., 258 N.L.R.B. 1081, n. (1981) (Board holding that “consistent with well-settled Board law, . . . the Union’s Petition for Certification of Representative filed on September 29, 1979, does not constitute a demand for recognition. However, the Union’s certified letter, mailed on September 29, 1979, . . . constitutes a valid demand for recognition.”) (citations omitted), *enfd*, 705 F.2d 1537 (11<sup>th</sup> Cir. 1983); Naum Bros., Inc., 240 N.L.R.B. 311, 311 (1979) (reversing ALJ’s finding of a Section 8(a)(5) violation, explaining: “The Board has long held that the mere filing of a representation petition does not constitute a request for recognition or bargaining such as to make an employer’s failure to bargain, without more, a violation of Section 8(a)(5). As the Union made no demand as such on Respondent for recognition and/or bargaining, we find that the evidence fails to establish that Respondent violated Section 8(a)(5) of the Act.”), *enfd*, 637 F.2d 589 (6<sup>th</sup> Cir. 1981). Accordingly, the General Counsel cannot rely upon the RC Petition to meet Section 8(a)(5)’s requirement for a bargaining demand.

The warehouse employees were not involved in the representation proceedings and were excluded from voting via the parties Stipulated Election Agreement, **GC. 1(j)**. Even if the Charging Party made a bargaining demand on behalf of the theater employees (which the evidence

does not support), it did not make any such demand for the warehouse employees. Where a demand for bargaining is made for a substantially different unit than the one found to be appropriate by the Board, there has been no proper demand. Color Tech Corp., 286 N.L.R.B. 476, 476 (1987) (Board reversing judge's findings of 8(a)(5) violations because the union failed to make a demand in an appropriate unit; union's demand was for bargaining in a unit to which the photo technicians would be added as an accretion but, because accretion was denied as improper and photo technicians were found to constitute a separate unit, the Board determined the employer did not refuse a request for bargaining in an appropriate unit); Grandee Beer Distributors, Inc., 247 N.L.R.B. 1280, 1280 & n.5 (1980) (Board affirming ALJ's "finding that Respondent has not violated Sec. 8(a)(5) of the Act because the Union has never made a proper demand for bargaining in an appropriate bargaining unit" where the union's demand was for an "inappropriate unit of different scope and composition" ), enforced in relevant part, vacated in part, 630 F.2d 928 (2d Cir. 1980); Washington Coca-Cola Bottling Works, Inc., 117 N.L.R.B. 1163, 1166 (1957) (finding that "it is evident that a substantial variance from the requested unit will preclude a finding that a proper bargaining demand has been made"), set aside and remanded by 257 F.2d 194, 196-76 (D.C. Cir. 1958) (disagreeing in part because "we do not think the variance between the unit sought and the unit later found appropriate can be characterized as 'substantial.' The vast majority of employees were driver-salesmen; those added by the Board, the Examiner and the General Counsel were employees in training to become driver-salesmen").

The General Counsel has failed to prove an essential element of a Section 8(a)(5) claim. The Charging Party never requested bargaining or recognition on behalf of the warehouse employees, and this claim, must, therefore, be dismissed.

#### **XI. THE GENERAL COUNSEL'S DEMAND FOR A BARGAINING ORDER FAILS.**

“The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board’s election and certification procedures under Section 9(c) of the Act; it is also, from the Board’s point of view, the preferred route.” NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969). A bargaining order is an extraordinary remedy. Avecor, Inc., v. NLRB, 931 F.2d 924, 934 (D.C. Cir. 1991) (“Freedom of employee choice is ‘a matter at the very center of our national labor relations policy,’ and a secret election is the preferred method of gauging choice.”).

The Board may issue a bargaining order in two categories of cases: “exceptional cases marked by outrageous and pervasive unfair labor practices” (“category I”) and “less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process” (“category II”). Gissel, 395 U.S. at 613-14. The Supreme Court explained in Gissel that “[i]n fashioning a remedy in the exercise of its discretion, . . . the Board can properly take into consideration the extensiveness of an employer’s unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.” Id. at 614. The Court emphasized, however, that “there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.” Id. at 615 (“There is, the Board says, no per se rule that the commission of any unfair practice will automatically result in a Section 8(a)(5) violation and the issuance of an order to bargain.”).

Before the D.C. Circuit will enforce a category II order, it must find that substantial evidence supports three conclusions:

1. The Union, at some time, must have had majority support within the bargaining unit.
2. The employer's unfair labor practices must have had the tendency to undermine majority strength and impede the election process.

3. The Board must determine that the possibility of erasing the effects of past practices and of ensuring a fair rerun election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order.

Avecor, 931 F.2d at 934-35. The General Counsel has failed to prove these necessary elements for a bargaining order.

**A. Procedural Background.**

On August 20, 2018, seven days before trial was scheduled to begin, the General Counsel served a new Consolidated Complaint in this matter. **GC. 1(am)**. For the first time, the General Counsel asserted the existence of *two* bargaining units -- a “Theater Unit” and a “Warehouse Unit” -- for which it sought two bargaining orders. Id. at ¶ 7(a), 7(b).

As to the Warehouse Unit, the General Counsel alleged that the following employees constitute a unit appropriate for the purposes of collective bargaining under Section 9(b) of the Act: “[a]ll full-time and regular part-time warehouse technicians, employed by Respondent DSP at its facility in Las Vegas, Nevada.” **GC. 1(am)** at ¶ 7(b). The General Counsel contended that from “about April 10, 2018, to about April 11, 2018, a majority of the Warehouse Unit designated the Union as their exclusive collective-bargaining representative.” Id. at ¶ 7(d). The General Counsel alleged that the Charging Party sought recognition for this group of employees by filing the recognition petition in Case 28-RC-219130. Id. at ¶ 7(e). The General Counsel contended that Respondent committed such serious and substantial unfair labor practices in this case that “there is only a slight possibility of traditional remedies erasing their effects and conducting a fair election.” Id. at ¶ 7(f). The General Counsel alleged that “on balance, the employees’ sentiments regarding representation, having been expressed through authorization cards, would be protected

better by issuance of a bargaining order.” Id. The General Counsel detailed 8 factors that support a bargaining order in this case. Id. at ¶ 7(g).

During the trial, the Judge and the Respondent were surprised as the General Counsel began to introduce evidence regarding wardrobe technicians, seeking to exclude them from the Theater Unit under the community of interest standard. Tr. 9/11/18 at 67-71. Pursuant to the Respondent’s objections that the parties had stipulated to the appropriate Theater Unit as including the wardrobe technicians, the Judge requested briefing on the issue and ruled that, for the time being, the General Counsel could not introduce evidence on the community of interest standard. Id. at 72; see also Tr. 9/12/18 at 149-67.

On September 17, 2018, the Respondent filed a Motion in Limine to Preclude Evidence Regarding Bargaining Unit/Motion to Strike Portions of Consolidated Complaint; the General Counsel filed a Brief on the Appropriateness of a Gissel Bargaining Order in Appropriate Units that Differ from a Unit Stipulated in a Representation Case. The General Counsel then announced the Region’s intention to withdraw its demand for a bargaining order for the Theater Unit. Tr. 9/17/18 at 849. There was some debate among the parties about what effect this decision had on the filed briefs and whether the Charging Party agreed with the General Counsel’s decision; no decisions were officially made on these issues and the hearing progressed. Id. at 849-51. On September 18, the General Counsel confirmed that the Region was withdrawing its demand for a bargaining order for the Theater Unit. Tr. 9/18/18 at 957. The parties discussed the General Counsel filing a motion to amend the Consolidated Complaint, and the Respondent indicated that once that amendment was filed, it would take a position on the briefs filed September 17. Id. at 957-60. The ALJ agreed not to rule on such briefs until these events occurred. Id.

Thereafter, Respondent repeatedly requested the amended complaint allegations. Tr. 9/19/18 at 1263; 9/20/18 at 1388. On September 21, 2018, the General Counsel filed a Motion to Amend Consolidated Complaint removing allegations relating to the bargaining order for the Theater Unit and amending the remaining allegations seeking a bargaining order for the Warehouse Unit. Tr. 9/21/18 at 1583-84. For the first time, the General Counsel alleged that there are “approximately 6 employees in the Warehouse Unit.” **GC. 64** at 2 (amending ¶ 7(g)(iii)).

On October 1, 2018, the Judge addressed the Respondent’s Motion in Limine/Motion to Strike, ruling that the General Counsel’s amendment to the Consolidated Complaint obviated the need to rule on a portion of Respondent’s motion. Tr. 10/1/18 at 1593-95. Regarding the Warehouse Unit, the Judge ruled that the parties could introduce evidence about this unit and that although Respondent’s motion was denied for the time being, Respondent was not precluded from again raising these arguments. Id.

The General Counsel’s demand for a bargaining order for the Warehouse Unit fails as a matter of law because it failed to prove majority support in an appropriate unit. The parties’ binding Stipulated Election Agreement provides that the appropriate unit in this matter is the Theater Unit. The General Counsel has not put forth any evidence to prove majority support for this unit and has removed its demand for a bargaining order for the Theater Unit. The newly proposed Warehouse Unit is inappropriate because it is contrary to the parties’ Stipulation, has been established in violation of Section 9(c)(5) of the Act, and is contrary to Board law as expressed in PCC Structurals. Should the Judge be willing to evaluate a unit outside of the parties’ Stipulated Election Agreement, that unit would appropriately include all manual laborers employed by Respondent, rather than the narrow unit of warehouse technicians proposed by the General Counsel. The General Counsel has not proven majority support for this larger unit of 15 employees

or for a smaller unit of 10 warehouse employees; moreover, 2 of the authorization cards offered to prove majority support are invalid. The General Counsel has further failed to prove that the employer's alleged misconduct impacted any support the union enjoyed among the warehouse employees or that the employer's conduct was sufficiently severe to warrant the extraordinary remedy of a bargaining order. Accordingly, the General Counsel's demand for a bargaining order must fail.

**B. The General Counsel Failed to Prove Majority Support in an Appropriate Unit.**

“A showing of majority status is a prerequisite to the imposition of a Gissel bargaining order.” Holly Farms Corp., 311 N.L.R.B. 273, 280 (1993). The General Counsel has failed to show majority status for an appropriate unit because: (1) the parties stipulated that the appropriate unit in this matter is the Theater Unit for which the General Counsel has not proven majority support; (2) should the Judge be willing to entertain a new, additional unit, the proposed Warehouse Unit is inappropriate and should include all warehouse employees and/or all manual laborers; and (3) the General Counsel failed to prove majority support in an appropriate unit of either 10 warehouse employees or 15 manual laborers.

***1. The Parties' Stipulation Should Control the Unit.***

The Charging Party filed its RC Petition on April 26, 2018, initiating Case No. 28-RC-219130 (“the representation case”). **GC. 1(c)**. Warehouse employees are *not* mentioned in this Petition. Instead, the Charging Party described the unit involved as including: “All stagehands, riggers, lighting and audio technicians currently employed at David Saxe Productions . . . as well as V Theaters . . . .” and excluding: “All other employees, including wardrobe, hair and make-up employees, box office employees, ushers, food/beverage servers, talent, security guards and supervisors as defined by the Act.” Id.

On May 7, 2018 a pre-election hearing was held in the representation case. **GC. 1(h)**. During that hearing, the Employer argued that Wardrobe Technicians should be included in the bargaining unit. After two days of hearing, the parties negotiated a Stipulated Election Agreement dated May 9, 2018. **GC. 1(j)**. The parties agreed that the election petition was amended to conform to their Agreement and that the “*record of this case shall include this Agreement.*” Id. at ¶ 1. In this Agreement, the parties expressly stipulated to the appropriate unit by agreeing as follows:

**5. UNIT AND ELIGIBLE VOTERS.** The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

**Included:** All full-time and regular part-time Stagehands, Lighting Technicians, Audio Technicians, Spotlight Operators, and Wardrobe Technicians employed by the Employers at the Saxe Theater and V Theater facilities in Las Vegas, Nevada.

**Excluded:** All other employees, including Warehouse Techs, box office employees, ushers, food/beverage servers, talent, security guards and supervisors as defined by the Act.

Id. at ¶ 5. This Agreement was recommended by Field Attorney Elise F. Oviedo and approved by the Regional Director on May 9, 2018. Id. at p. 4. Again, warehouse employees were excluded.

Thereafter an election was held on May 17, 2018 for the following unit:

**VOTING UNIT**

**EMPLOYEES ELIGIBLE TO VOTE:**

All full-time and regular part-time Stagehands, Lighting Technicians, Audio Technicians, Spotlight Operators, and Wardrobe Technicians employed by the Employers at the Saxe Theater and V Theater facilities in Las Vegas, Nevada who were employed during the payroll period ending May 6, 2018.

**EMPLOYEES NOT ELIGIBLE TO VOTE:**

All other employees including Warehouse Techs, box office employees, ushers, food/beverage servers, talent, security guards and supervisors as defined by the Act.

**GC. 1(o).**

Both the Employer and the Union filed objections to the election. Neither party objected to the scope of the bargaining unit agreed upon by the parties in the May 9 Stipulation. **GC. 1(n)**; **GC. 1(m)**. On June 13, 2018, an Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections was issued. **GC. 1(o)**.

On July 9, the Regional Director issued a Complaint and Notice of Hearing in Case No. 28-CA-219225 (the “ULP case”). **GC. 1(y)**. This Complaint alleged that the employer violated Section 8(a)(1) and (3) of the Act when it: created the impression of surveillance, threatened employees, maintained overly broad policies, interrogated employees, discharged 10 employees, and granted a wage increase. On July 10, 2018, the Regional Director consolidated that case with the representation case, Case No. 28-RC-219130. **GC. 1(aa)**. A trial was scheduled to begin on August 27, 2018. Id.

The warehouse employees were not mentioned in *any* of these filings. On August 20, however, the Regional Director further consolidated these cases with Case Nos. 28-CA-223339, 28-CA-223362, 28-CA223376, and 28-CA-224119, adding allegations of overly-broad and discriminatory Handbook rules, allegations regarding discrimination toward three additional employees, and additional allegations of surveillance. **GC. 1(am)**. In this Consolidated Complaint, the General Counsel sought, for the first time, bargaining orders. Id. at ¶¶ 7(f)-(g). Moreover, seven days before trial was to begin, the General Counsel sought to *change* the bargaining unit agreed upon by the parties in the representation case by adding a *new* Warehouse Unit and seeking the Board’s ultimate penalty for this new unit – a bargaining order. Id. at ¶¶ 7(b). The General Counsel did not provide any special notice to the parties about this change in direction, seek the Judge’s permission to bypass the Stipulated Election Agreement, or seek sufficient time for the parties to brief these novel issues before beginning a complicated trial.

The parties' Stipulated Election Agreement specifically provides that the "record of this case *shall* include this agreement." GC. 1(j) at ¶ 1 (emphasis added). The General Counsel's Consolidated Complaint seeks to side-step the Agreement which the Region specifically approved. The Board lacks the discretion to change the unit and must instead enforce the parties' Stipulated Election Agreement.

It is well-settled that the Board is bound to a stipulated election agreement "unless the stipulation violates applicable statutes or settled Board policy." NLRB v. Sonoma Vineyards, Inc., 727 F.2d 860, 865 (9<sup>th</sup> Cir. 1984) (technical refusal to bargain case considering both ULPs and election objections); Television Signal Corp., 268 N.L.R.B. 633, 633 (1984) ("the Board's function is to ascertain the parties' intent with regard to the disputed employee and then to determine whether such intent is inconsistent with any statutory provision or established Board policy." . . . . When the objective intent is clear, the Board will hold the parties to their agreement."); Butler Asphalt, L.L.C., 352 N.L.R.B. 189, 189-90 (2008) ("Where the parties' intent can be ascertained, the Board will give it effect unless it is 'inconsistent with any statutory provision or established Board policy.'"). Indeed, the "[t]he Board *is prohibited* . . . from applying the 'community of interest' standard to change a result mandated by an unambiguous pre-election stipulation which does not contravene the Act or settled Board policy." NLRB v. O'Daniel Trucking Co., 23 F.3d 1144, 1149 (7<sup>th</sup> Cir. 1994) (emphasis added) (technical refusal to bargain case; "Our cases make clear that once the parties stipulate to an appropriate bargaining unit, that unit is binding regardless of whether the 'community of interest' standard has been met.").

The Board only resorts to the community of interest doctrine if the objective intent of the stipulation is ambiguous. Television Signal, 268 N.L.R.B. at 633; Genesis Health Ventures of West Virginia, L.P. (Ansted Center), 326 N.L.R.B. 1208, 1208 (1998) ("Only where the objective

intent is unclear or the stipulation ambiguous does the Board consider community of interest principles to determine whether the disputed employee belongs in the unit.”) (citing Lear Siegler, Inc., 287 N.L.R.B. 372 (1987)); Red Coats, Inc., 328 N.L.R.B. 205, 207 (1999) (holding, in a Section 8(a)(5) case involving employer’s withdrawal of recognition based on claim of changed circumstances rendering single-location bargaining units inappropriate, that “where a unit has been agreed to by the parties, and is not prohibited by the statute, such a unit is appropriate under the Act, regardless of whether the Board would have certified such a unit ab initio”).

The parties cannot later change a stipulated unit, nor can the Board, even if a different unit would be crafted with a community of interest analysis. White Cloud Prods., Inc., 214 N.L.R.B. 516, 517 (1974) (explaining that even if a hearing officer found that “one of the parties subjectively entertained an intent at odds with this stipulation, that intent cannot be given recognition. To do so would only undercut the very agreement which served as a basis for conducting the election.”); Indeed, the Board in White Cloud explained:

As also indicated above, we permit parties to stipulate to the appropriateness of the unit, and to various inclusions and exclusions, if the agreement does not violate any express statutory provisions or established Board policies. But a stipulated inclusion or exclusion which may not coincide with a determination which the Board would make in a nonstipulated unit case on a “community of interest” basis is not a violation of Board policy such as would justify overriding the stipulation. In Tribune Company, *supra*, we cited with approval this observation by the Courts of Appeals for the Second Circuit:

In our view no established Board policy or goal of the Act is contravened by including [the employee]. We view community of interest as a doctrine useful in drawing the borders of an appropriate bargaining unit, a function well within the discretion of the Board. But we do not conclude that the doctrine remains as an established Board policy sufficient to override the parties’ intent when the Board, in the interests of furthering consent elections, allows the parties to fix the unit.

214 N.L.R.B. at 517 (quoting The Tribune Co., 190 N.L.R.B. 398 (1971)). Moreover, the Second Circuit Court of Appeals held in Tidewater Oil Co. v. N.L.R.B., 358 F.2d 363, 365 (2d Cir. 1966),

that “where the parties stipulate that the appropriate unit will include given jobs, the Board *may not alter the unit*; its function is limited to construing the agreement according to contract principles, and its discretion to fix the appropriate bargaining unit is gone.” The court explained as follows:

We view community of interest as a doctrine useful in drawing the borders of an appropriate bargaining unit, a function well within the discretion of the Board. But we do not conclude that the doctrine remains as an established Board policy sufficient to override the parties’ intent when the Board, in the interests of furthering consent elections, allows the parties to fix the unit. While the doctrine might permissibly be used to exclude an employee with no contacts at all in the unit, it is quite another matter for the Board to weigh White’s contacts with Newburgh against those elsewhere, de novo, in order to exclude him. Compare J.J. Collins’ Sons, supra. If community of interest is not a valid basis for expanding the unit by expanding job categories, as in Collins, it is no more a basis for contracting the unit by deciding what employees work ‘at’ the Newburgh plant.

Id. at 366 (emphasis added) (citing NLRB v. J. J. Collins’ Sons, 332 F.2d 523 (7<sup>th</sup> Cir. 1964)).

The General Counsel does not contend that the parties’ Stipulated Election Agreement violates Board policy or is inconsistent with any statutory authority. Moreover, the Stipulated Election Agreement is unambiguous. The unit agreed upon clearly excluded Warehouse Technicians. **GC. 1(j)** at ¶ 5. As such, the Board has no discretion to modify the unit or engage in a community of interest analysis for a new unit; it must instead enforce the Stipulated Election Agreement.

The General Counsel argues that the Stipulated Election Agreement is only binding in the representation case and that it can seek a bargaining order in the consolidated ULP case for a new additional unit. Yet the Board has never limited the above-authority regarding the binding nature of stipulations to representation proceedings. See, e.g., Sonoma Vineyards, supra, (technical refusal to bargain case considering both ULPs and election objections); O’Daniel Trucking, supra, (technical refusal to bargain case); Red Coats, supra, (Section 8(a)(5) case). Moreover, in Douglas

Foods, Corp., 330 N.L.R.B. 821 (2000), a ULP and election objections case with a Gissel demand, the Board affirmed the ALJ's decision to firmly hold an employer to the parties' stipulated unit. In Douglas Foods, the employer allegedly committed unfair labor practices during and after a union organizing drive and election. The parties eventually stipulated to the appropriate unit for the election. 330 N.L.R.B. at 830. The employer won the election, and the union filed objections. Id. at 831. During the hearing over the election objections and the ULPs, which included allegations of unlawful terminations, threats, and surveillance and a demand for a Gissel bargaining order, the employer argued that the General Counsel had failed to prove majority support because the appropriate unit included several additional employees. Id. at 839. The ALJ rejected the employer's argument and determined that it was bound by the stipulated election agreement:

The purpose of consent elections is to secure speedy resolution of representation issues. *If a party feels strongly enough about the inclusion or exclusion of a particular group of employees, it must litigate in the representation proceeding and not wait until a unfair labor practice proceeding to raise issues that could have been resolved months or even years earlier, Atlanta Hilton & Towers, 278 NLRB 474, 478 (1986); Tribune Co., 190 NLRB 398 (1971); Maremont Corp., 325 NLRB No. 29 (1997) (not reported in Board volume). It is totally contrary to statutory scheme to allow a party to repudiate such a stipulation after an election. This is true regardless of whether the union won or is asking for a Gissel order in the wake of a defeat.*

Id. at 839 (emphasis added). Moreover, it rejected the employer's late attempt to include another employee in the bargaining unit, finding that the employer was "*foreclosed* from doing so by its failure to raise this issue prior to the election," and determining that the employee's exclusion from the Excelsior list was "*an admission* that she was not part of the bargaining unit." Id. at n.38 (emphasis added).

The ALJ then determined that majority support in the stipulated unit had been proven and that a Gissel bargaining order was warranted. A majority of the Board affirmed the ALJ's decision and rejected the employer's exceptions to the Gissel ruling. Id. at 821-22 (modifying only the order).<sup>35</sup> See also Reno Hilton v. Int'l Alliance of Theatrical Stage Employees & Moving Pictures Operators, 282 N.L.R.B. 819, 822 & n. 10 (1987) (ALJ refusing to consider whether a smaller unit was appropriate for a Gissel bargaining order because, in part, "the parties have agreed [at trial] that the broader unit is an appropriate one, and because previous representation elections were conducted in that broader unit").

As in Douglas Foods, it would be clearly unfair and "contrary to [the] statutory scheme" to allow the General Counsel to create a new unit of warehouse employees after the election and in violation of a stipulation. "If a party feels strongly enough about the inclusion or exclusion of a particular group of employees, it must litigate in the representation proceeding and not wait until a unfair labor practice proceeding to raise issues that could have been resolved months or even years earlier." Douglas Foods, 330 N.L.R.B. at 839. Neither the Charging Party nor the Region sought representation of the warehouse employees during the election proceedings; they cannot now by-pass their stipulation of the appropriate unit to create a new unit and then demand the Board's most extreme remedy for that new unit. Such a result is fundamentally unfair. As in Douglas Foods, the General Counsel and the Charging Party should be foreclosed from creating a

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<sup>35</sup>The dissenting Board member did not disagree with the ALJ's ruling regarding the stipulated unit, id. at 824-25, and indeed, the Board ordered bargaining for that stipulated unit, compare id. at 830 (explaining the parties stipulated to a unit of: "all full-time and regular part-time employees, including drivers, cooks, mechanics, maintenance, store employees, and lease route operators") with id. at 826 (ordering bargaining for: "All full-time and regular part-time drivers, cooks, mechanics, maintenance and store employees, including lease route operators."). The D.C. Circuit Court ultimately overturned the Gissel bargaining order, finding that the Board failed to "discharge its obligation to consider the proper factors and provide a reasoned explanation" to support such an extreme remedy. 251 F.3d 1056, 1065-67 (D.C. Cir. 2001).

new unit due to their failure to raise the issue of warehouse technicians prior to the election. See id. at n.38. Because the parties are bound by Board law to the unit they stipulated to, and the General Counsel has withdrawn its demand for a Gissel bargaining order for that unit, no bargaining order can issue in this matter.

**2. *The Proposed Warehouse Unit Is Inappropriate.***

Should the ALJ be inclined to consider the General Counsel's newly proposed Warehouse Unit, despite the parties' Stipulated Election Agreement, the demand for a bargaining order still fails because the proposed Warehouse Unit is inappropriate. This unit violates both the Board's direction in PCC Structurals and Section 9(c)(5) of the Act.

In overturning Specialty Healthcare & Rehabilitation Center of Mobile, 357 N.L.R.B. 934 (2011), the Board stressed in PCC Structurals, Inc., 365 N.L.R.B. No. 160, 2017 WL 6507219 (Dec. 15, 2017), that the Board must conduct a "meaningful evaluation" whenever unit appropriateness is questioned and must consider "multiple unit configurations," approving only a "unit configuration that 'assure[s]' employees their 'fullest freedom' in exercising protected rights." Id. at \* 4-5. In overturning the "overwhelming community of interest" standard of Specialty Healthcare, and returning to its prior standard, the Board explained:

[T]he Board traditionally has determined, in each case in which unit appropriateness is questioned, whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit. Throughout nearly all of its history, when making this determination, the Board applied a multi-factor test that requires the Board to assess whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. Thus, in Wheeling Island Gaming, where the Board applied its traditional community-of-interest test, the Board indicated that never addresses, solely and in

isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests “in common.” *Our inquiry--though perhaps not articulated in every case--necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.*

*The required assessment of whether the sought-after employees’ interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or “fractured”--that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 rights of excluded employees who share a substantial (but less than “overwhelming”) community of interests with the sought-after group are taken into consideration.*

Id. at \*6-7 (emphasis added). The test returned to in PCC Structurals protects against violations of Section 9(c)(5) by making the extent of organizing only a factor to be considered, not the controlling or dominant factor. See, e.g., NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 441-42 (1965) (“Although it is clear that in passing this amendment Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization, both the language and legislative history of Section 9(c)(5) demonstrate that the provision was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination.”); NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4<sup>th</sup> Cir. 1995) (Section 9(c)(5) “prohibit[s] the Board from assigning this factor either exclusive or ‘controlling’ weight”). The court in Lundy explained:

[T]he Board has generally avoided § 9(c)(5) violations by applying a multi-factor analysis that was sufficiently independent of the extent of union organization--the so-called “community of interest” test. Several criteria, no one of which was more dominant than another, would determine whether employees shared a community of interest sufficient to form an appropriate unit:

- (1) similarity in the scale and manner of determining the earnings;
- (2) similarity in employment benefits, hours of work, and other terms and conditions of employment;
- (3) similarity in the kind of work performed;
- (4) similarity in the

qualifications, skills, and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Id.

The proposed Warehouse Unit focuses on the authorization cards and the interest warehouse technicians have in common with one another; in other words, it is “inward looking” only. It does not consider those excluded from the group – an issue the Board focused on in PCC

Structurals:

the Specialty Healthcare standard discounts--or eliminates altogether--any assessment of whether shared interests among employees within the petitioned-for unit are sufficiently distinct from the interests of excluded employees to warrant a finding that the smaller petitioned-for unit is appropriate. This aspect of Specialty Healthcare is obvious from the majority test itself, under which, if the petitioned-for employees are deemed readily identifiable as a group and share a community of interests among themselves, this inward-looking inquiry is controlling, regardless of the interests of excluded employees, except for the rare instance where it can be proven that the excluded employees share an ““overwhelming”” community of interests with employees in the petitioned-for unit. As noted previously, *we believe this aspect of Specialty Healthcare undermines fulfillment of the Board’s responsibility to “assure” to employees “in each case” their “fullest freedom” in the exercise of Section 7 rights, as stated in Section 9(b) of the Act. Moreover, by extinguishing scrutiny of the interests that excluded employees have in common with those in the petitioned-for unit except in the rare case where the employer can satisfy its burden of proving that excluded employees share an “overwhelming” community of interests with employees in the proposed unit, Specialty Healthcare created a regime under which the petitioned-for unit is controlling in all but narrow and highly unusual circumstances.*

In these respects, Specialty Healthcare detracts from what Congress contemplated when it added mandatory language to Section 9(b) directing the Board to determine the appropriate bargaining unit “in each case” and mandating that the Board’s unit determinations guarantee to employees the “fullest freedom” in exercising their Section 7 rights. Most importantly, the enumeration of potential unit configurations in Section 9(b) demonstrates, inescapably, that Congress intended that the Board “in each case” would carefully consider the interests of all employees. This is evident from the fact that the types of bargaining units mentioned in Section 9(b), to be evaluated by the Board in each case, include “the employer unit, craft unit, plant unit, or subdivision thereof.” In contrast with this language, Specialty

Healthcare gives all-but-conclusive deference to every petitioned-for “subdivision” unit, without attaching any weight to the interests of excluded employees in potential “employer,” “craft,” “plant,” or alternative ““subdivision” units, unless the employer proves the existence of ““overwhelming” interests shared between petitioned-for employees and those outside the petitioned-for “subdivision.” The discrepancy between what Section 9(b) requires, on the one hand, and what Specialty Healthcare precludes, on the other, is reinforced by Section 9(c)(5), added to the Act in 1947, where Congress expressly states that “[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling.” *We believe Specialty Healthcare effectively makes the extent of union organizing “controlling,” or at the very least gives far greater weight to that factor than statutory policy warrants, because under the Specialty Healthcare standard, the petitioned-for unit is deemed appropriate in all but rare cases.* Section 9(b) and 9(c)(5), considered together, leave no doubt that Congress expected the Board to give careful consideration to the interests of all employees when making unit determinations, and Congress did not intend that the Board would summarily reject arguments, in all but the most unusual circumstances, that the petitioned-for unit fails to appropriately accommodate the Section 7 interests of employees outside the “subdivision” specified in the election petition.

Id. at \*6-8 (emphasis added). Indeed, the Fourth Circuit Court in Lundy recognized that an inward-looking analysis giving controlling weight to the interests of the petitioned-for unit creates a “classic § 9(c)(5) violation.” Lundy, 68 F.3d at 1581.

Accordingly, under PCC Structurals, the ALJ must determine whether the warehouse technicians have a community of interest sufficiently distinct from the interests of other employees who engage in manual labor for the employer to warrant a finding that the warehouse technicians constitute a separate appropriate unit. This analysis reveals that others share a community of interest with the warehouse technicians and should not be excluded from the unit – namely runners who are considered part of the warehouse department and porters who, like warehouse technicians, engage in cleaning and other manual labor tasks.<sup>36</sup>

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<sup>36</sup>Although the General Counsel now contends that the effective date for determining the appropriate unit is April 14, the Respondent whole-heartedly disagrees, as will be discussed below. For the community of interest analysis, it is appropriate to use the date set forth in the Consolidated Complaint where the General Counsel alleged that the Charging Party had majority support for the Warehouse Unit on April 10-11, 2018. **GC. 1(am)** at ¶ 7(d).

Respondent's organizational charts show several categories of employees. There are administrative/office employees, such as those working in the Controller's Department, Human Resources Department, IT Department, and Executive Department; there are those working in the theaters as production employees, such as stagehands, lighting technicians, and audio technicians; there are those serving customers, such as box office employees, ushers, and bar employees; and there are manual laborers, such as porters and warehouse technicians, a classification that includes runners, carpenters, welders, and electricians. See R. 97.

Although most of the manual laborers employed in Respondent's warehouse are warehouse technicians, some have specific specialties, such as carpenters, welders, electricians and runners. Saxe Tr. 10/31/18 at 3489:10, 3533:23-3544:15-18; Carrigan Tr. 10/23/18 at 2831:19-20; Thomas Tr. 10/26/18 at 3325:1; Leigh Tr. 10/1/18 at 1596:25 (Leigh testifying that he was a warehouse technician and lead welder), at 1597:14-17 (Leigh testifying that his duties as a warehouse technician were "to weld and fabricate the props or set pieces for the shows and also to help with the building of the offices"), at 1615:13- 1616:5 (testifying that all the warehouse technicians worked together including the carpenters and welders). Without regard to whether they were called "runner," "carpenter," "welder," "electrician," or "warehouse technician/runner," "warehouse technician/carpenter," etc., they are all warehouse employees who share a community of interest, as set forth below. Indeed, the General Counsel's evidence reveals that the employees refer to themselves generally as "warehouse" employees. See GC. 65.

The warehouse technicians did a variety of work. They built offices and furniture; built and repaired props; helped in the theaters<sup>37</sup> with lights, equipment, and repairs; painted; cleaned; helped with auto maintenance; loaded and unloaded trucks and organized supplies and warehouse

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<sup>37</sup> Leigh explained that he worked both in the show theaters at Planet Hollywood and at a rehearsal theater housed in the warehouse. Leigh Tr. 10/1/18 at 1625:4-1626:4.

inventory; and ordered construction supplies. See Saxe Tr. 10/31/18 at 3553:16-21; Leigh Tr. 10/1/18 at 1615:18-1616:23, 1618:25-1623, 1628:7-14, 1633:15-1635:3; Thomas Tr. 10/26/18 at 3325:7– 3329:7; Leigh Tr. 10/2/18 at 3798:18-19, 3804:5-12.

While the warehouse technicians had different specialties, such as welding or carpentry, the warehouse technicians “all worked together and helped each other out.” Leigh Tr. 10/1/18 at 1615:11-15. For example, one of the projects the warehouse technicians worked on was building the offices at the warehouse building. Id. at 1615:18-1616:19. On the office project, the carpenters built cabinets and the others, including Leigh, the welder, would install “the box, the cabinets, or a door, or a conference table.” Id. at 1616:1-5. The warehouse technicians also worked together to build props. Id. at 1619:18-21. For example, they built go-go boxes for dancers to dance on for *Vegas! The Show*. Leigh cut the steel with help from Lamar Rayner or Mario Stumpf; he then welded the steel. Then Marck Capella and he cut the Plexiglas for the boxes, and he helped install lighting for the boxes. Id. at 1620: 5– 1621:5. Leigh testified that he spent about 35% of his time welding; the rest of his time was spent on other warehouse technician tasks. Id. at 1618:16–1619:4.

With regard to cleaning, the warehouse technicians, mopped, swept, took out trash, cleaned bathrooms, and stocked vending machines in the warehouse building. Leigh Tr. 10/1/18 at 1642:21-1643:12; Thomas Tr. 10/26/18 at 3325:8–3326:9. Some warehouse technicians drove company vehicles. Leigh Tr. 11/2/18 at 3820:7-12 (testifying that Kendrick Dotson and Dwuane Thomas drove); Antonelli Tr. 11/13/18 at 3870:16–3871:7. Some warehouse technicians also worked as runners when they were injured, when a runner was not employed, and when the runner was busy. Stumpf Tr. 3917:24–3921:16. Although the warehouse technicians spent the majority of their time in the warehouse building, some of their work was performed in the theaters. Leigh Tr. 10/1/18 at 1621:21– 1622:16. The warehouse technicians generally used the same tools and

protective gear. Id. at 1617:6-14, 1618:6-9. They carried walkie-talkies so that the Office Manager could call them when needed. Id. at 1631:8-19 (explaining that when “Ms. Hunt needed a water change upstairs, she can call and ask for it, or we got a delivery or something, she can call for one of the guys to come pick it up and bring it into the back”).

Warehouse technicians were supervised by the Office Manager and/or David Saxe. Saxe Tr. 10/31/18 at 3564:19-21; Thomas Tr. 10/26/18 at 3326-3327:13. Warehouse technicians worked a full-time schedule, Monday-Friday from 8:30 to 5:00. Saxe Tr. 10/31/18 at 3566:1-3, 3563:9-12. They had a 30-minute lunch period at 12:30 and two 10-minute break periods at 10:30 and 3:00. Id. at 3566:10-17. Warehouse technicians did not wear a uniform. Id. at 3566:23-25. Warehouse technicians received their work assignments from David Saxe via Smartsheets. Leigh Tr. 10/1/18 at 1627:16–1628:1. They participated in a pre-shift meeting in the lobby before starting work for the day, where Jasmine Hunt, the Office Manager, would go over the Smartsheet assignments and make other announcements. Id. at 1630:2-18.

The runner delivered items between the warehouse and the theaters and picked up supplies needed by warehouse technicians and others. Thomas Tr. 10/26/18 at 3329:10-19; Leigh Tr. 11/2/18 at 3800:22– 3801:2; Antonelli Tr. 11/13/18 at 3861:6-19, 3862:8-14. The runner drove a cargo van or a box truck for his runs. Antonelli Tr. 11/13/18 at 3887:10-19. The runner helped warehouse technicians by lending an extra hand with organizing or moving items in the warehouse. Id. at 3863:2-10, 3864:13-16, 3865:13-14, 3877:5-21, 3879:5-16; Stumpf Tr. 11/13/18 at 3926:6-15 (testifying the runner helped build call center desks and helped with inventory). The warehouse technicians loaded and unloaded supplies into and out of vehicles from the warehouse for the runner to deliver; the runner would sometimes help with loading and unloading. Antonelli Tr. 11/13/18 at 3873:2-8. The runner also stocked vending machines in the office. Id. at 3873:11-23.

Like the other warehouse technicians, the runner was supervised by the Office Manager and/or David Saxe. Saxe Tr. 10/31/18 at 3545:1-6. He generally received his assignments before or after the warehouse technicians' pre-shift meetings. Antonelli Tr. 11/13/18 at 3868:12-25. Those assignments were communicated to him orally and through Smartsheets. Id. at 3869:1-12. The runner worked the same schedule as the other warehouse technicians. Id. at 3862:15-16. The runner was an hourly employee; he received the same breaks and lunch periods as the other warehouse technicians. Id. at 3876:3-22. The runner did not wear a uniform. Id. at 3876:23-24. The runner could use the walkie-talkie to communicate with the warehouse technicians. Stumpf Tr. 11/13/18 at 3928:21–3929: 9.

The porters worked in the theaters; they cleaned, vacuumed, swept, took out trash, loaded and unloaded trucks and organized supplies and inventory, and helped with assembling VCards and nightclub passes. Saxe Tr. 10/31/18 at 3554:24–3555:15; 3556:17-25. The porters loaded supplies and inventory to be delivered to the warehouse where warehouse technicians unloaded and stored them. Id. at 3567:19–3568:8. The porters and warehouse technicians shared some tools, especially bigger cleaning equipment, such as carpet cleaners and upholstery cleaners. Id. at 3568:18–3569:13. The porters were supervised by the Theater Managers. Id. at 3564:17-18. The porters worked varying shifts. Id. at 3566:6-9. They were entitled to the same breaks and lunch periods as warehouse technicians, but took their breaks and lunch periods at different times depending upon their shift. Id. at 3566:18-22. The theaters are about 15 minutes away from the warehouse. Saxe Tr. 11/1/18 at 3646:19-24.

There are no prior experience requirements for warehouse technicians or porters. Saxe Tr. 10/31/18 at 3558:25–3559:8. Porters, runners, and warehouse technicians receive the same insurance benefits. Id. at 3557:24–3558:9, 3562:5-7. The wages for porters and warehouse

technicians are determined by David Saxe. Id. at 3562:8-13. The porters and warehouse technicians are paid hourly and use a time clock. Id. at 3562:14–3563:1. Their payroll, personnel documents, benefits and employment policies are all administered and determined by the Human Resources Department and David Saxe. Id. at 3559:15–3561:19. Although there are separate handbooks applicable to warehouse technicians and porters, the policies are identical with the exception of holidays. Compare GC 99, 1-47 with GC 99, 48-95.

The General Counsel contends that an appropriate unit is one made up of only warehouse technicians. This unit is inappropriate, however, because it excludes the runner and others that have a community of interest with the warehouse technicians, such as the porters. While the runner's job duties were different from the other warehouse technicians' duties, there was considerable overlap. Specifically, the runner and the warehouse technicians drove vehicles; they both stocked vending machines. The runner picked up items the warehouse technicians needed, they unloaded his vehicle, and he helped them when an extra hand was needed. It is logical to conclude, therefore, that the warehouse technicians and the runner had contact with each other during the day.<sup>38</sup> Moreover, warehouse technicians have served as the runner and have helped perform runs when he was busy. The runner and warehouse technicians also have much in common. They all worked the same schedule and were all assigned to the same building; they had the same breaks and lunch periods; they did not wear uniforms; they all received their assignments via Smartsheets and had the same supervisor(s); they were all hourly employees. They all enjoyed the same benefits, and their payroll, personnel documents, wages, and employment policies were all governed, controlled and managed by the same individuals. Moreover, the warehouse

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<sup>38</sup>Indeed, warehouse technician Mario Stumpf testified that he saw the runner almost every day. Stumpf Tr. 11/13/18 at 3926:18-25 (explaining that the runner was often walking through the warehouse to get to his vehicle or the office).

technicians and runner were considered by the employer to be in the same organizational category.

See R. 97.

The fact that employees perform different job duties does not justify their exclusion from a unit that otherwise shares a great deal of commonality. The Board routinely approves units of individuals with different job duties. See, e.g., Montgomery Ward & Co., 259 N.L.R.B. 280, 280-81 (1981) (approving unit of various classifications of employees performing clerical and other support functions related to warehouse operations to include salespersons and maintenance employees who all worked in the same facility and reported to the same manager); Kalamzaoo Paper Box Corp., 136 N.L.R.B. 134, 136-37 (1962) (rejecting contention that truck drivers should be excluded from a production/maintenance unit); NLRB v Bayliss Trucking Corp., 432 F.2d 1025 (2d Cir. 1970) (affirming Board's determination that a single bargaining unit of oil truckdrivers and oil burner serviceman was appropriate given comparable hourly wages, common supervision, identical benefits, and a substantial history of bargaining as a single unit); Kmart Corp. v. N.L.R.B., 174 F.3d 834 (7th Cir. 1999) (Board reasonably determined that meat department employees, including meat cutters, meat wrappers, and perishable service associates, in two shopping-center stores constituted appropriate bargaining units). Indeed, in International Bedding Co., 356 N.L.R.B. 1336, 1337 (2011), the Board concluded that drivers and jockeys share a sufficient community of interest with production and warehouse employees to permit including both groups in a single unit, explaining:

Like the drivers and jockeys in this case, the truckdrivers in Marks Oxygen had different job functions from the production employees and spent most of their time away from the plant, and there was no interchange between the two groups. The Board nevertheless concluded that the petitioned-for unit was appropriate. The Board pointed out that there was some interaction between the two groups of employees when the production employees assisted the truck drivers in loading certain trucks. The Board also noted that there was an inherent community of

interest between truck drivers and production employees in relation to the flow of materials into and out of the plant. . . .

As in Marks Oxygen, we find the petitioned-for unit in this case appropriate. As described, the drivers and jockeys have much in common with the production and warehouse employees, including shared benefits (such as vacation leave and paid holidays), work rules, employee meetings, and break rooms. In addition, production and warehouse employees and jockeys are all paid on an hourly basis and work the same schedule. There is also some evidence of common supervision as well as interaction between production employees and jockeys.

Id. at 1337 (also finding it significant that the union sought to represent the drivers and jockeys).

Similarly, while the runner in the instant case has different job duties, there is clearly overlap and interaction between these employees who are jointly responsible for the flow of inventory and supplies into and out of the warehouse. Given their shared schedule and hours, shared supervision, and shared benefits, there is sufficient community of interest between the runner and warehouse technicians to include them in one unit. See Dadco Fashions, Inc., 243 N.L.R.B. 1193 (1979) (including janitor in production and maintenance unit where he reported for work while others were still working and shared essentially same benefits with the other employees and would “otherwise be unrepresented”); Calpine Containers, 251 N.L.R.B. 1509, 1510 (1980) (including truck drivers and forklift operators in a production/maintenance unit where all were paid hourly and used a time clock, they were all supervised by the same manager, had the same break and lunch periods, which the truck drivers joined when they were on the premises, and where the truck drivers occasionally helped with production tasks). Moreover, the employer clearly considers the runner to be a part of the warehouse technician group and has organized these positions all under the same management structure and department.

The General Counsel’s proposed Warehouse Unit also excludes the porters. While these individuals worked in the theaters and were supervised by Theater Managers, they engaged in the same cleaning duties as the warehouse technicians. Warehouse technicians and porters both

cleaned bathrooms, mopped floors, swept and vacuumed, and took out trash. Moreover, the porters, like the warehouse technicians, loaded and unloaded supplies. The warehouse technicians and porters shared some cleaning tools. The porters enjoyed the same benefits of employment and were entitled to the same breaks and lunch periods as warehouse technicians. They were hourly employees who used timeclocks and their payroll, personnel documents and employment policies were administered and managed by the same individuals.

The Board does not apply a presumption in favor of or against multifacility units. Exemplar, Inc., 363 N.L.R.B. No. 157, 2016 WL 1272893, \*3 (March 31, 2016); see also Rocky Mountain Planned Parenthood, Inc., 2017 WL 5665355, \*4 (N.L.R.B. Nov. 13, 2017) (“The Board does not apply a presumption in favor of finding petitioned-for multi-facility units to be appropriate. Nor does it apply a presumption against finding a petitioned-for multi-facility to be appropriate.”). Instead, in determining whether a petitioned-for multifacility unit is appropriate, the Board evaluates the following community-of-interest factors among employees working at the different locations: similarity in employees' skills, duties, and working conditions; centralized control of management and supervision; functional integration of business operations, including employee interchange; geographic proximity; bargaining history; and extent of union organization and employee choice. Exemplar, supra.

The fact that the porters work in a different location does not justify excluding them from a unit of employees with which they have much in common, especially when the distance between the two locations is small and there is clear evidence that employees and supplies often travel back and forth between the two locations. See, e.g., Exemplar, supra, (approving a multilocation unit of janitors where the “geographic distance of 2.1 miles does not limit full employee participation in union activities” and finding that “the Board has routinely approved multilocation units of

facilities located further apart”) (citing Stormont-Vail Healthcare, Inc., 340 N.L.R.B. 1205, 1205, 1208 (2003) (distances of 10 to 70 miles from main facility did not warrant excluding outlying facilities from unit); Capital Coors Co., 309 N.L.R.B. 322, 325 (1992) (distance of 90 miles between facilities did not preclude finding a community of interest)). Indeed, the porters send supplies to the warehouse, which the warehouse technicians unload and organize, the runner is constantly moving back and forth between the theaters and the warehouse, and the warehouse technicians come to the theaters to make repairs and build. Moreover, the porters and warehouse technicians share cleaning equipment, and both groups of employees perform the same work. While the direct, day to day supervision of warehouse technicians and porters differs, there is clearly a centralized control of both groups’ wages, terminations, payroll, personnel documents, and policies via the HR Department and David Saxe.

The Respondent respectfully submits that should the ALJ be willing to consider a unit outside of the parties’ Stipulated Election Agreement, that unit should include all warehouse technicians, the runner, and the porters. Even if the porters are excluded, however, the General still fails to prove majority support as set forth below.

**3. *Lack of Majority Support – Denominator Issues.***

The parties dispute how many employees should be included in the proposed Warehouse Unit. In its first description of the Warehouse Unit, in the August 20 Consolidated Complaint, the General Counsel described the unit as including “warehouse technicians,” but did not designate how many or which specific employees were included. See GC. 1(am) at ¶¶ 7(b)-(k). On September 21, 2018, the General Counsel amended the Consolidated Complaint and, for the first time, alleged that there are “approximately 6 employees in the Warehouse Unit.” **GC. 64** at 2 (amending ¶ 7(g)(iii)).

The parties agree that the following 5 employees were warehouse technicians during the relevant time period of April 11: Scott Leigh, Brandon Duran, David Montelongo, Lamar Rayner, and Dwuane Thomas. See GC. 65 (cards signed by these 5 employees on April 10 or 11); Carrigan Tr. 10/4/18 at 2176:8–2177:6.

Saxe testified that as of April 11, 2018, he employed 10 warehouse technicians, including: Brandon Duran, Mario Stumpf, Scott Leigh, Lamar Rayner, Blake Scott, Dominic Antonelli, David Montelongo, Kendrick Dotson, and Dwuane Thomas. Saxe Tr. 10/31/18 at 3569:17-25 (testifying that he could not recall one more name). He further testified to employing approximately 6-9 porters. Id. at 3570:1-9 (Saxe testifying that he could specifically remember the following 5 porters: Touey, Saul, Cristobal, Jorge Ramirez, and Pedro).

Scott Leigh, a witness for the General Counsel, testified during the General Counsel’s case-in-chief that Marck Capella and “Kendrick” were warehouse technicians with whom he worked. Leigh Tr. 10/1/18 at 1614:13-20 (testifying that Capella was a warehouse technician, as was Kendrick, but that he could not recall Kendrick’s last name); at 1597:20-21 (testifying that upon his hire, Marck Capella was his supervisor who later “stepped down”). Carrigan testified during the General Counsel’s case-in-chief that in April 2018, Marck Capella, Kendrick Dotson, and “Blake” were also employed as warehouse technicians. Carrigan Tr. 10/4/18 at 2177:7-16, 2258:7–2259:2. The Respondent’s Statement of Position in the Representation case demonstrates that as of May 4, 2018, Marck Capella and Blake Scott were warehouse technicians. **GC. 106** at its Attachment D.

Although it is unclear, the General Counsel may be contending that Blake Scott should not be included in the unit. Carrigan testified that Scott was a warehouse technician who was also an electrician. Carrigan Tr. 10/4/18 at 2258:7–2259:9. Leigh seemed to contend that Scott was

distinct from the warehouse technicians and worked only as an electrician. Leigh Tr. 11/2/18 at 3809-10. He admitted, however, that Scott reported to the Office Manager and attended the warehouse technicians' pre-shift meetings to obtain his daily assignments. Id. at 3830:1-8; see also Stumpf Tr. 11/13/18 at 3908:13-21 (testifying that everyone – including the carpenters, welder and electrician – participated in pre-shift briefings). Respondent's Smartsheet assignment documentation shows that electrical work was assigned together with other warehouse technician work. See GC. 85. Leigh further testified that Scott had a role in the office building project – installing the electricity. Leigh Tr. 11/2/18 at 15:12-21. Leigh admitted that he himself was a warehouse technician/welder, Leigh Tr. 10/1/18 at 1596:25, supporting the Respondent's contention that Scott, like Leigh, was considered a warehouse technician/electrician. Leigh's initial testimony makes clear that the warehouse technicians with specialties, like David Montelongo, a carpenter, and himself, the welder, all worked together to build the offices, build props and make repairs. See, e.g., id. at 1615-16. Given the evidence presented by the General Counsel as to how the warehouse technicians worked together, it is not reasonable to conclude that one employee with one specific skill should be excluded from the unit when the General Counsel offers cards for others with specific skills to include in the unit. See, e.g., GC. 65 (offering David Montelongo, a carpenter, as part of the unit). Indeed, Respondent classified Blake Scott as a warehouse technician in its May 4, 2018 Statement of Position in the Representation case, putting the parties on notice that Scott was considered to be a warehouse technician. See GC. 106 at its Attachment D. The General Counsel has not put forth any evidence to prove that one warehouse

employee – an electrician – was somehow classified differently than the other warehouse technicians with skilled specialties.<sup>39</sup>

The General Counsel contends that Dominic Antonelli and Mario Stumpf should not be counted in the proposed Warehouse Unit because the Respondent failed to produce documents in response to the Region's subpoenas that included those individuals as warehouse technicians. Demirok Tr. 10/31/18 at 3589; Demirok Tr. 11/1/18 at 3681:9-11. The General Counsel also seeks to change the operative date for purposes of determining majority support for the bargaining unit to April 14; indeed, in an effort to exclude Stumpf, who was discharged on April 13, **ALJ. 3**, the General Counsel asked for leave to amend the Consolidated Complaint on the last day of the hearing. Demirok Tr. 11/13/18 at 3948:1-6, 3949:1-3, 11-18. The Respondent vigorously objected that this late amendment seeks to change the denominator and was prejudicial. Kamer Tr. 11/13/18 at 3948–50, 3952. The General Counsel's request was denied, and the parties were invited to brief the issues of whether the Consolidated Complaint already put the Respondent on notice that April 14 could be the operative date and whether the General Counsel should be permitted, under the doctrine of unclean hands, to make a late amendment to the Complaint due to the Respondent's alleged failure to adequately respond to the subpoena. Tr. 11/13/18 at 3966-3970. These issues are addressed below.

*a. Because Respondent Acted in Good Faith, Additional Sanctions Are Not Appropriate.*

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<sup>39</sup> Leigh's contention that Saxe said Scott should not be performing warehouse work, Leigh Tr. 11/2/18 at 13:16-17, 36:21-23, is inadmissible hearsay if it was offered to prove that Scott did not perform warehouse work. Nevertheless, Leigh admitted that Saxe never said Scott was not a warehouse technician, *id.* at 36:24–37:1. Even if the employer directed Scott to focus on his skilled work, he clearly shares a community of interest with the other warehouse technicians and should not be excluded from the unit without regard to this title.

First, failing to count the true number of employees that should be included in an appropriate unit for purposes of a bargaining order is not a proper sanction for the late production of documents. The Judge has already excluded Respondent's exhibits offered to prove the number of employees that should be included in the unit. The Judge excluded Respondent's Exhibits 100-104, which sought to show how many porters and how many warehouse technicians it employed as of April 11, 2018. Tr. 11/1/18 at 3710, 3725. Recognizing the importance of the Gissel analysis, the Judge refused to make an adverse inference and granted the General Counsel the time and opportunity to re-open her case on the issue of the composition of the unit. Tr. 11/1/18 at 3690:22–3693:10 (notifying the parties that the hearing will continue until the General Counsel is “satisfied that she can get to the bottom of this issue”). The General Counsel did so and offered additional testimony from Scott Leigh and Carrigan, as well as testimony from Antonelli. Tr. 11/1/18 at 3763; Tr. 11/2/18 at 3797; Tr. 11/13/18 at 3859. Respondent offered testimony from Stumpf. Tr. 11/13/18 at 3907. The testimony presented by both sides on the composition of the unit can and should be used to facilitate proper administration of the Act, and no further sanctions are appropriate. See Tr. 11/1/18 at 3745:10-16 (Judge finding that testimony will be more helpful to show the correct denominator).

As set forth above, the Respondent lacked any notice that this trial would involve any unit other than the one the parties stipulated to – the Theater Unit – until August 20 when the General Counsel filed the Consolidated Complaint and first sought a bargaining order for a brand-new unit. The first corporate subpoena served upon Respondent in this matter was served on *August 10* – prior to Respondent being notified of a new unit. **R. 98.** It was voluminous and contained 73

separate requests for documents, many with subparts.<sup>40</sup> The definition of “employees” was extremely broad. *Id.* at 1 (seeking documents for “employees or former employees employed by Respondents . . . at Respondents Facilities”). Upon the employer’s objection, the General Counsel agreed to limit the definition of employees to the following classifications of employees: “audio technicians, lighting technicians, wardrobe technicians, warehouse technicians, and stagehands.” **R. 98**, Petition to Revoke Corp. Subp. I at its Ex. 2, Email from S. Demirok of 8/15/18. The General Counsel served a second corporate subpoena on August 30 which set forth another 42 requests for documents. **R. 98**, Corp. Subp. II. A third corporate subpoena was served on September 27, 2018. **R. 98**, Corp. Subp. III.

Respondent vigorously objected to the undue burden involved in responding to these voluminous requests. **R. 98** at Petition to Revoke Corp. Subp. I. Although its arguments were denied by the Judge, Respondent produced in response to the first subpoena over 6,000 documents; these documents were produced on September 11, the first day of trial. On September 11, Respondent also produced another 587 documents in response to the second corporate subpoena. **R. 98**. On October 3, Respondent produced additional documents responsive to the third corporate subpoena, **R. 98**, and supplemented its response to the second corporate subpoena, **R. 98**, and the first corporate subpoena, **R. 98**. Respondent supplemented its response to the second subpoena again on October 23. **R. 98**. The General Counsel raised *no* objections to Respondents’ production of documents and on at least two occasions asked Respondents for additional information that was timely produced. Aside from these two minor requests, General Counsel never notified

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<sup>40</sup>The subpoena was organized according to the allegations in the Complaint which did not yet include an allegation of a unit of warehouse workers or any requests for bargaining orders. Compare *id.* with **GC. 1(am)**.

Respondents that anything was lacking, incomplete or insufficient in the responses to the subpoenas.

Carrigan testified that gathering responsive documents was her main priority from the time the subpoenas were served until documents were produced and that she spent 10-12 hours a day on this work, including some weekends. Carrigan Tr. 11/1/18 at 3698– 3700. She explained that documents were located in a variety of places. Id. at 3694:21-24. Carrigan enlisted the help of 4 other individuals. Id. at 3697:5-8. The Respondent also offered evidence of the extensive time its counsel spent on subpoena production. Sarafina Tr. 11/2/18 at 3836:22–3841:3 (testifying to spending 100 hours herself in one month on the subpoena production and explaining the number of documents involved and the shortened time frame counsel had to review what was provided for production).

The facts demonstrate that Respondent acted in good faith to comply with the subpoenas. The reality is -- the General Counsel changed the case on August 20, by alleging a new unit and seeking a bargaining order; it then continued to define this unit as the case progressed. It was not until *September 21*, at the end of the second week of trial, that the General Counsel alleged that approximately 6 employees were included in the new unit. It was not until *October 1*, 2018, the third week of trial, that the General Counsel introduced its evidence to support an argument of majority support for the new unit – its Exhibit 65, cards signed by warehouse employees. Tr. 10/1/18 at 1611:6-10. Given these new allegations and developments, Respondent developed new defenses. It did so as the trial progressed and as the General Counsel put forth its evidence; Respondent then presented its evidence to challenge the alleged warehouse unit’s composition during its case-in-chief which did not start until October 23.

The first subpoena did not ask Respondent to identify how many employees were employed as warehouse technicians as of a specific date. Instead, it generically sought documents showing scheduled start and end times for employees, Request No. 48, documents showing when employees clocked in and out each day, Request No. 49, and employee attendance records, Request No. 50. As set forth above, originally the subpoena related to all employees – thus burying warehouse technicians in one big group. It was only upon the employer’s objection that the General Counsel specified what classifications she was truly seeking documents about and even then, there was no explanation about the importance of warehouse employees – indeed the warehouse unit was not even disclosed to Respondent until the day before it filed its petition to revoke the corporate subpoena. See R. 98, Petition to Revoke Corp. Subp. I.

In response to Request No. 49, Respondent produced on September 11 clock in/clock out records for warehouse employees and production employees. **R. 98**, Response to Corp. Subp. I. These documents included carpenter Marck Cappella and electrician Blake Scott, putting the General Counsel on notice that Respondent considered these employees to be warehouse technicians. Id. at Request No. 48. The clock in/clock out documents did not list Dwuane Thomas, Mario Stumpf or Dominic Antonelli as warehouse employees.<sup>41</sup> However, the General Counsel produced a card signed by Dwuane Thomas where he identifies himself as a warehouse employee, see GC 65, and both Stumpf and Antonelli offered live testimony as to their positions. Moreover, the General Counsel’s own witness, Leigh, admits that Stumpf was a warehouse technician with whom he worked, Leigh Tr. at 1599, 1620:5–1621:5 (Leigh testifying that Mario Stumpf helped

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<sup>41</sup>Carrigan explained that an employee could be missed in running a payroll report if he is a dual employee who works for more than one of Respondent’s companies or he has multiple job classifications. Carrigan Tr. 11/1/18 at 3726:1–3727:10. She explained that Stumpf is a dual employee who is classified as a warehouse technician and also works for Epic Advertising, Respondent’s billboard driving company. Id. at 3730:15-23.

him cut steel), and the General Counsel acknowledged obtaining knowledge of Stumpf from Leigh, Tr.11/13/98 at 3953:25-3954:1. This live testimony should be considered. See Noblit Bros., Inc., 305 N.L.R.B. 329, 386 (1992) (determining that live testimony, “wholly independent” from a late-produced document, would be considered on the issue of serious strike misconduct).

Respondent did not produce documents showing the number of porters it employed. However, no subpoena request sought information on porters as they were not included in the definition of employees; the only request that would have required production of documents regarding porters was Request No. 73 from the first corporate subpoena, which sought documents supporting Respondent’s defenses. Respondent did not have a defense involving porters when the trial began and it was responding to subpoenas served before it was even on notice of a new unit. Instead, this defense was developed during the trial.

This is not a case where the Respondent refused to respond to a subpoena or willfully withheld documents; indeed, Respondent began gathering documents immediately upon receipt of the subpoenas, despite its petitions to revoke, and produced thousands of documents, making several supplements to its productions. Compare Bannon Mills Inc., 146 N.L.R.B. 611 (1964) (employer willfully refused to respond to subpoena and tried to introduce subpoenaed documents in its case in chief) and McAllister Towing & Transp. Co., 341 N.L.R.B. 394 (2015) (employer failed to gather any documents while petition to revoke was pending and failed to produce any documents upon the judge’s denial of the petition) with People’s Transport Serv., Inc., 276 N.L.R.B. 169, 225 (1985) (finding “this is not a background conducive to finding there was a willful refusal to produce, particularly where there is no clear or direct refusal to produce such documents declared of record” and the employer produced “literally thousands of documents”). Instead, during the trial, the Respondent developed a new defense to a new issue that General

Counsel added to the case at the last minute and developed as the case progressed. In developing its defense to this new theory and new facts, Respondent ran payroll reports on the specific issue presented – how many warehouse employees and how many porters were employed on April 11 – which it sought to introduce at trial without first producing to the General Counsel. The Judge has already issued sanctions by excluding this evidence and provided the General Counsel with additional time to develop testimony on the composition of the unit. No further sanctions are warranted given Respondent’s good faith efforts to comply with the subpoenas.<sup>42</sup>

Neither the Board nor the federal courts require perfection in the production of documents. See, e.g., People’s Transport Serv., Inc., 276 N.L.R.B. 169, 225 (1985) (discussing, in detail, the issue of late produced documents despite good faith efforts and setting forth factors to consider when such issues occur); Reinsdorf v. Skechers USA, Inc., 296 F.R.D. 604, 614-15 (2013) (the federal rules do not demand perfection and the analysis requires a determination of whether the responding party's actions were objectively reasonable, but not necessarily “error-free”). Essentially, the clock/in and clock/out document produced by Respondent was missing the names of three employees. This omission was not intentional, and these names were not willfully or

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<sup>42</sup>The Ninth Circuit Court of Appeals holds that an ALJ does not have the authority to impose evidentiary sanctions because the General Counsel must seek enforcement of the subpoena in federal court. NLRB v. International Medication Systems, 640 F.2d 1110 (9th Cir. 1981) (“agency subpoenas must be resolved by the judiciary before compliance can be compelled. The agency could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Nor, we believe, may the agency impose discovery sanctions, which may have more serious consequences than a fine, before the judicial questions have been asked and answered. Congress has made elaborate provisions for obtaining and enforcing (NLRB) subpoenas, and (i)t was obviously its intention that this machinery be utilized. We may not infer that Congress intended to authorize agencies to bypass district court enforcement proceedings. An efficient and fair enforcement mechanism has been provided and was meant to be used. We therefore conclude that Congress granted the district courts exclusive authority to compel compliance with NLRB subpoenas.”), cert denied, 455 U.S. 1017 (1982).

purposefully withheld. Any prejudice to the General Counsel caused by Respondent's late production was cured by the ability to re-open its case-in-chief to explore the proper composition of the unit. Therefore, no further sanctions in this matter are warranted. See Reinsdorf, 296 F.R.D. at 627 (party "must show prejudice to the point it affected Respondent's ability to go to trial or 'threatened to interfere with the rightful decision of the case'") (quoting Leon v. IDX Systems Corp., 461 F.3d 951, 959 (9th Cir. 2006)).

*b. The Judge Properly Denied the General Counsel's Motion to Amend.*

The Judge properly exercised her discretion to deny the General Counsel's motion to amend on the last day of hearing to change the effective date for the denominator from April 11 to April 14. The General Counsel's contention that this amendment is simply a matter of form to comport the pleading to the evidence is false. The Consolidated Complaint did not contain a factual error or misstatement about an employee's date of termination or an error in the date of a public filing. It set forth an *essential element* to a *critical* claim – the date upon which majority support existed for purposes of issuing a bargaining order.

Respondent respectfully submits that changing the date from April 11 to April 14 would violate the Board's clear law on timing for a Gissel bargaining order. Where a bargaining order is based on violations of 8(a)(1) and/or 8(a)(3), rather than on a demand for bargaining under 8(a)(5), bargaining is ordered as of *the earliest possible date* when both of the following conditions are met: (1) the employer has commenced its unlawful conduct; and (2) the union has attained majority status. See Holly Farms Corp., 311 N.L.R.B. 273, 281 (1993); Beasley Energy, Inc. (Peaker Run Coal Co.), 228 N.L.R.B. 93 (1977) (holding that where the union has not made a demand for recognition, the employer will be ordered to bargain with the union as of the date on which it initiated its campaign of unfair labor practices if, as of that date, the union had obtained majority

status in the bargaining unit); California Gas Transport, Inc., 347 N.L.R.B. 1314, 1326-27 (2006) (where union achieved majority status among the unit employees on August 30 but did not demand recognition, ordering bargaining under Gissel from “the approximate date thereafter that the Respondent embarked on its course of unlawful conduct”); Joy Recovery Tech. Corp., 320 N.L.R.B. 356, n. 4 (1995) (affirming ALJ’s issuance of bargaining order but altering the date to conform with the rule in Peaker Run, explaining: “The record in this case shows that the Union achieved majority status among the unit employees on July 9, 1994, and did not subsequently demand recognition from the Respondent. Therefore, we will date the bargaining order from the approximate date thereafter that the Respondent embarked on its course of unlawful conduct . . . ”). The General Counsel contends that Respondent began its campaign of unlawful conduct in March 2018; as cards were signed on April 10 and April 11, April 11 is the earliest possible date for the conditions mandated by Holly Farms and Peaker Run. As such, April 11 is the correct date to use for this essential element of the Gissel demand.

Changing the date would also be inequitable. Respondent did not have access to the authorization cards, dated April 10 and April 11, until October 1 when they were produced as exhibits in the trial. But the General Counsel had access to those cards in drafting its very first Complaint in this matter, filed on July 9, and the Charging Party has always had access to those cards. Yet neither of these parties notified Respondent of the potential existence of a warehouse unit until August 20 and even then, the evidence to support the existence of that unit – the alleged number of and identity of unit members – was not revealed until September 21 and October 1. Once all the evidence was finally provided to Respondent, Respondent prepared a defense based upon April 11 – the date alleged in the Consolidated Complaint. In preparing that defense, it became evident that several other employees should be included in any warehouse unit. One of

those employees is warehouse technician Mario Stumpf, who was terminated on April 13. To exclude him from the denominator, the General Counsel seeks to change a critical allegation in the Consolidated Complaint by now alleging that the Charging Party did not have majority support until April 14. This is not amending an allegation to comport with evidence; this is changing an essential element to save a claim. Permitting such an amendment on the last day of trial would be improper. Stagehands Referral Serv., 347 N.L.R.B. 1167, 1171 (2006) (affirming judge's denial of a motion to amend the complaint to add a new allegation at the end of the hearing as unjust in part because the respondent had not been given notice that the hiring hall operation would be placed in issue and the General Counsel did not move to amend as soon as the evidence came to light); King Soopers, Inc. v. NLRB, 859 F.3d 23, 33 (D.C. Cir. 2017), denying enf. in relevant part 364 N.L.R.B. No. 93, slip op. at 1 n. 1 (2016) (reversing the Board and finding that the General Counsel's mid-trial motion to amend the complaint came too late because the General Counsel had access to all of the relevant information necessary to investigate the charge for a full year before the hearing, provided no valid excuse for failing to include the charge in the initial complaint, and did not make the motion to amend until after the company had finished cross-examining the General Counsel's key witness).

*c. The Correct Denominator.*

Despite the General Counsel's attempt to exclude Mario Stumpf, Leigh's initial testimony clearly shows that Stumpf was a warehouse technician who helped Leigh with his work. Leigh Tr. 10/1/18 at 1620:20-22 (testifying that Mario helped him with steel in the welding area when he did not have other work). Leigh also testified that Mario Stumpf was a warehouse technician with whom he spoke about the union. Id. at 1599:19-22. Mario Stumpf clearly testified that he was a warehouse technician employed on April 11, 2018. Stumpf Tr. 11/13/18 at 3907:18-24.

Leigh also testified that Dominic Antonelli was “a coworker at the warehouse” who worked as a runner. Leigh Tr. 11/2/18 at 3800:12–3801:2. Although he agreed that the runner reported to the Office Manager, like the warehouse technicians, id. at 3829:24-25, Leigh generally contended that the runner’s work was separate from the warehouse technicians’ work. Antonelli testified that he was not called a warehouse technician. Antonelli Tr. 11/13/18 at 3862:17-24. Nevertheless, he testified in contradiction to Leigh, that he did help warehouse technicians with their work and that he occasionally helped them load his truck. Id. at 3863:2– 3865:17, 3873, 3877, 3879:5-8. He further testified that other warehouse technicians drove the box truck and cargo van he also used, id. at 3870:16–3871:7, 3881:13-24, 3887:9-19, that he and the warehouse technicians stocked vending machines, id. at 3873:11-23, that he received the same breaks as warehouse technicians, id. at 3876:9-22, and that he did not wear a uniform, id. at 3876:23-24. Leigh’s contention about the separation of the runner was also contradicted by Stumpf who testified that he worked as a warehouse technician and a runner at the same time, Stumpf Tr. 11/13/18 at 3917:24–3918:14, and that another warehouse technician temporarily served as runner when he was injured, id. at 3919:5-16. Stumpf also testified that the runner Antonelli helped him and another employee with a part of a project to build call center desks and that Antonelli helped with inventory. Id. at 3926:10-17.

As set forth above, the runner shared a community of interest with the warehouse technicians and should be included in the unit. As such, Antonelli, Respondent’s runner as of April 11, should be included in the denominator. Mario Stumpf should also be included as set forth above. As such, a unit of warehouse employees only, excluding porters, would constitute at least 10 employees: Scott Leigh, Brandon Duran, David Montelongo, Lamar Rayner, and Dwuane Thomas, **GC. 65**; and Marck Capella, Mario Stumpf, Blake Scott, Dominic Antonelli, and Kendrick Dotson, Saxe Tr. 10/31/18 at 3569:17-25 (testifying to 10 warehouse employees), Leigh

Tr. 10/1/18 at 1597:20-21, 1614:13-20 (testifying that Capella and Dotson were warehouse technicians, Carrigan Tr. 10/4/18 at 2177:7-16, 2258:7– 2259:2 (testifying that Capella, Dotson, and Scott were warehouse technicians), **GC. 106** at its Attachment D (showing Capella and Scott as warehouse technicians). A unit of manual laborers, including the porters, would include at least 15 employees. Saxe Tr. 10/31/18 at 3570:1-9 (Saxe testifying that he could remember the following names of porters: Touey, Saul, Cristobal, Jorge Ramirez, and Pedro).<sup>43</sup>

*d. Authorization Cards.*

“A showing of majority status is a prerequisite to the imposition of a Gissel bargaining order.” Holly Farms Corp., 311 N.L.R.B. 273, 280 (1993). The General Counsel seeks to prove majority support via authorization cards. “In a Gissel bargaining order case, the cards are relied upon not to demonstrate employee support for a Gissel bargaining order, but rather, to demonstrate that at one time there was majority employee support for union representation.” A.S.V., Inc. (Terex), 366 N.L.R.B. No. 162, 2018 WL 4003419 (Aug. 21, 2018). The cards must be authenticated by witnesses, the employees themselves or handwriting comparison. See Action Auto Stores, 298 N.L.R.B. 875, 879 (1990) (citing Fed. R. Evid. 901(b)(3)) (authenticating cards by comparing the signature on the card with the employee's name and social security number on employment application).

The Supreme Court has made clear that for the most part, “employees can be counted on take responsibility for their acts” and are thus, “bound by the clear language of what they sign.” Gissel, 395 U.S. at 606. The exception to this is where the card's “language is deliberately and

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<sup>43</sup>Should the Judge determine that exclusion of Respondent’s Exhibit 100 is not required in light of the Respondent’s good faith in responding to the subpoenas and evidence set forth above regarding the late nature of the General Counsel’s evidence as to a new unit and failure to notify the parties and the Judge that it did not intend to adhere to the parties’ Stipulated Election Agreement, R. 100 documents 7 porters employed as of April 11.

clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.” Id. 395 U.S. at 606-607. Cumberland Shoe Corp. established that an unambiguous card is valid unless and until it is rendered invalid through solicitation misrepresenting the sole purpose of the card. 144 N.L.R.B. 1268, 1269 (1963) (“there is no evidence here to negative the overt action of the employees in signing cards designating the Union as their bargaining agent, and the instant situation is not one in which the Union has beguiled employees into signing union cards”). Because authorization cards are “inferior to the election process” for determining employee choice, Gissel, 395 U.S. at 603, they should be carefully scrutinized, id. at 607-08 (explaining, “trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule).

The General Counsel has presented 5 authorization cards. **GC. 65**, Cards. Scott Leigh testified that he presented these cards to his coworkers and obtained their signatures. Leigh Tr. 10/1/18 at 1605-07. The cards, entitled “Representation Authorization” state their purpose to be to: “authorize and designate IATSE Local 720 as my exclusive representative for the purposes of collective bargaining with my employer.” They state: “I understand that this card can be used by the union to obtain recognition from my employer without an election.” Id. Respondent challenges the validity of two cards (2) – those signed by David Montelongo and Dwuane Thomas – because Leigh misrepresented to them the purpose of the card.

Montelongo testified that Leigh asked him if he wanted “some special training to do some side work with him.” Montelongo stated that he would be available to do that, and Leigh stated, “okay, I’ll sign you up.” Montelongo Tr. 10/25/18 at 3244:2-10.<sup>44</sup> A few days later, Leigh

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<sup>44</sup>Montelongo testified that the training was for rigging work which Leigh did for the Spearmint Rhino as a side job. Id. at 3253:19–3254:6.

approached Montelago at his car with a card. Montelago rolled down his window and Leigh said, “here you go. This is where you can sign up for the training.” Id. at 3244:9-15. Montelago quickly signed the card, without reading it, and Leigh “grabbed it right away” and put it in his backpack. Id. at 3244:15–3245:3 (testifying he held the card for probably 6 seconds). While Montelago verified his signature on the card as accurate, he testified that the email address, physical address and telephone number written on the card are incorrect. Id. at 3248:2-15. Montelago testified that he never signed a union authorization card. Id. at 3262:20. At the Judge’s request, Montelago provided an example of his handwriting and signature. **ALJ. 1.**

Thomas testified that he told Leigh he wanted to learn how to weld; Leigh encouraged him, let him weld and gave him pointers. Thomas Tr. 10/26/18 at 3332:5-14. Leigh told Thomas he could get free training to be certified as a welder and do side jobs with Leigh to earn extra money. Id. at 3334:5-12. Thomas eagerly agreed and signed a card without reading it. Id. at 3334:12-17. Thomas verified his signature on the card and testified that he completed the card in his own handwriting. Id. at 3344:21–3345:6. However, he believed the card provided him with free welding training. He learned later from his parents and speaking with a person on the telephone that he had signed a union authorization card. Id. at 3335:16–3337:14. When this person, who had his card, tried to convince him to join the union, he stated: “no, no, no, take my name off the card, I don't want my card.” Id. at 3336:21–3337:10; 3347:14–3348:3. The person then “finally said, okay, I'll take your name off.” Id. at 3348:2-3.

Leigh clearly misrepresented the purpose of the cards to Montelago and Thomas. In telling these employees that they were signing up for free training, Leigh canceled the language of the card. Leigh did not even mention the word “union” in his discussion with Montelago and Thomas, thereby giving them an opportunity to understand that they should read the card before signing it.

Moreover, he did not tie the card to terms and conditions of employment with this employer. Instead, he hid the true purpose of the card, telling them it was for training, so they could do side work with him. Both expressed an interest in side work. Thus, when Leigh presented the card, they quickly signed it without reading or even examining it. Leigh did not tell them to read the card or give them a chance to hold onto the card long enough to consider it and realize its true purpose. In this way, he tricked them into quickly signing a document designed for an entirely different purpose.

Both Montelago and Thomas believed they were signing up for training and both testified that they did not intend to or wish to sign up for union representation. Montelago maintains that he did not sign a union authorization card, and Thomas was clearly upset and surprised to learn that he had done so. There is no evidence that Montelago or Thomas were aware of a union organizing campaign in the warehouse or in the theaters, and neither of them was involved in the group chats regarding the union. See Joint Exs. 2, 4, 5. Thus, in the totality of the circumstances, it is evident that Leigh misrepresented the purpose of the cards, told two employees the cards would get them free training, and obtained their signatures via fraud, deceit and misrepresentation. These two cards cannot, therefore, be considered valid. See Dlubak Corp., 307 N.L.R.B. 1138, 1175 (“Cards will not be invalidated unless the solicitor told the employee that the sole purpose of the card was something other than stated on the face of the card.”)

While a representation that a card will be used to obtain more information about a union or will protect the employee from discharge may not cancel unambiguous language of the card, these types of cases involve clear union organizing activity that puts the employee on notice that they are signing something related to a union. See, e.g., Healthcare Servs. Grp., Inc., 2005 WL 3272354 (N.L.R.B. Div. of Judges Nov. 25, 2005) (finding cards valid even though solicitor told

employees they were for informational purposes where the employees engaged in a discussion about the union with the solicitor, knew they were talking to a union representative, and had time to read the cards before signing); Miller Trucking Serv., Inc., 176 N.L.R.B. 556, 564 (1969) (finding cards valid even though employees were told the cards were to protect them from discharge where “there is substantial evidence that individually and as a group the employees knew that they were authorizing the Union to represent them and to seek a meeting with Respondent for the purpose of collective bargaining”). The present situation is entirely different because there is no evidence of any discussion about the union amongst these employees and there is no evidence that Montelago and Thomas knew Leigh was working to obtain support for a union. All they knew was that their coworker, who was a welder who did side work, was offering them a chance for training so they could earn additional money working side jobs with him. There is no indication that these employees had any inkling that the card they signed had anything to do with a union. As such, these two cards are invalid and should not be counted.

The General Counsel has presented valid authorization cards from three employees, Leigh, Duran and Rayner. These cards clearly do not establish majority support for the union within the warehouse unit. As such, a Gissel bargaining order cannot be issued. Berenson Liquor Mart, 223 N.L.R.B. 1115, 1118 (1976) (“General Counsel has failed to prove that the Union has at any time represented a majority of Respondent's employees in the unit found appropriate for the purposes of collective bargaining, the imposition of a bargaining order is not warranted”).

**C. The General Counsel Has Failed to Prove That A Bargaining Order Is Necessary.**

The General Counsel seeks to impose the extreme remedy of a bargaining order upon a newly created Warehouse Unit for alleged violations directed mainly at the Theater Unit. Yet the

General Counsel has not proven majority support for the Warehouse Unit, as set forth above, nor proven that the Respondent's alleged misconduct had a negative impact on the Warehouse Unit so as to impede a fair election. Finally, the General Counsel has failed to prove that Respondent's conduct has so undermined the union's support as to make a fair election unlikely.

Most of the alleged misconduct giving rise to the demand for a bargaining order predates the alleged majority support in the Warehouse Unit and/or relates specifically to the Theater Unit. Indeed, the General Counsel alleges the following acts to support a bargaining order for the Warehouse Unit:

1. creating an impression of surveillance "[a]bout *March 2018*" by Estrada "on the stage at the *Saxe Theater*";
2. alleged threats and overly broad rules designed to prohibit protected concerted activities "[a]bout *March 2018*" by Estrada "at the *Saxe Theater*";
3. discharge of *Theater employee Hill* "[a]bout *March 2, 2018*";
4. surveillance of employees by alleged relocation of time clock and Notice of Petition for Election "[a]bout *April 30, 2018*" at "*V Theater*";
5. impression of surveillance "[a]bout early or mid-May 2018, at "*V Theater*";
6. surveillance of employees by posting Notice of Election in manager's suite at *V Theater* "[a]bout *May 14, 2018*";
7. impression of surveillance at "*V Theater*" "[a]bout *May 15, 2018*";
8. impression of surveillance via *DeStefano's* text message about election site "[a]bout *May 16, 2018*";
9. discharging *Theater* employees Glick, Franco, Bohannon, Langstaff, Gasca, Suapaia, and Graham about *March 18-21*," imposing more rigorous terms and conditions of employment upon *Theater* employee Tupy "[a]bout late *March 2018*," disciplining Tupy in *July 2018*, and reducing Tupy's hours in *July 2018*, discharging *Theater* employees Kevin Michaels about *April 2, 2018*, reducing hours of *Theater* employee Glenn "[a]bout early *May 2018*," failing to offer light duty to *Theater* employee Urbanski in *June 2018*, and imposing more onerous conditions upon Urbanski in *July 2018*;

10. granting a wage increase “[a]bout *March 5, 2018*”;

11. soliciting *Theater* employees to participate in a work call “[a]bout *March 13, 2018*”;

**GC. 1(am)** at ¶¶ 5(c)-(d), 5(f)-(k), 6(a)-(i), 6(k)-(o), 6(r)-(s) (emphasis added). Yet the General Counsel has failed to offer any evidence to show that this alleged conduct was known by or had any effect upon warehouse employees. One cannot simply assume that such conduct had an impact on the warehouse employees especially since the alleged majority support in that unit occurred after much of the misconduct alleged above.

The Seventh Circuit Court has stressed the importance of determining whether the employer’s conduct actually influenced the employees in question: “We have consistently held that Gissel contemplates that the Board must make ‘specific findings’ as to the immediate and residual impact of the unfair labor practices on the election process . . . .” Peerless of America, Inc., 484 F.2d 1108, 1118 (7<sup>th</sup> Cir. 1973); see also Scott v. Stephen Dunn & Assocs., 241 F.3d 652, 664 (9<sup>th</sup> Cir. 2001) (“Because a bargaining order is both an extreme and unusual exercise of the Board’s authority, the Board must support the implementation of this remedy with ‘specific findings as to the immediate and residual impact of the unfair labor practices on the election process”). The Seventh Circuit Court explained:

But because [the employer’s conduct] might reasonably be thought to induce such fear or expectation hardly means the employees involved were actually coerced or that their voting sentiments would be affected. Were it otherwise the Supreme Court would not have required an inquiry into the effect of second category unfair labor practices on the election process nor posited “a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.” What may reasonably be thought capable of dampening the exercise of Section 7 rights may be far short of what it takes to change an employee’s mind about the need for a union.

Id. at 1120 (refusing to enforce bargaining order where the evidence indicated that the employees were not daunted by their supervisors' questions and remarks). The court has further held that Gissel requires a separate analysis of the impact of the conduct upon employees:

In its brief, the Board has attempted to supply a basis for the bargaining order by relying on the ALJ's discussion of the impact of the employer's actions in the context of determining whether a Section 8(a)(1) violation occurred. To be an unfair labor practice, however, conduct need not have as demonstrably severe an impact on employee rights as conduct requiring a bargaining order. Thus, this discussion, which applies a lesser impact standard than that required for a bargaining order is no substitute for the reasoning needed to support a bargaining order.

Red Oaks Nursing Home v. NLRB, 633 F.2d 503, 510 (7<sup>th</sup> Cir. 1980) (finding "the most compelling evidence that a bargaining order was not warranted is the clear evidence in the record that the employer's unfair labor practices did not drive the employees directly involved to abandon the union").

Here, the General Counsel has failed to offer any proof of the impact of Respondent's alleged misconduct upon union support in the warehouse. There is no proof to show that Leigh or any other warehouse employees were even aware of the alleged misconduct aimed at the Theater Unit. Instead, Leigh contended that he picked up authorization cards in *April*, signed his immediately and quickly thereafter obtained the signatures of an alleged majority of his coworkers. In the face of this evidence, the General Counsel must show an actual impact upon the warehouse. Contrast California Gas Transp., Inc., 347 N.L.R.B. 1314, 1323-24(2006) (finding that bargaining order was appropriate for unfair labor practices directed at one unit of drivers where the election results demonstrated the negative effect on employees and there was clear evidence that the other unit of drivers was well aware of their peers' concerted activities and resulting terminations); Holly Farms Corp., 311 N.L.R.B. 273, 282 (1993) (out-of-unit violations appropriately considered for Gissel remedy, where conduct concentrated among units close to each other, employer's labor

relations centrally controlled, unlawful conduct overt and highly publicized, and employer brought violations to the attention of unit employees), enfd. 48 F.3d 1360 (4th Cir. 1995). The General Counsel has failed to do so.

The only allegations that relate specifically to the Warehouse Unit are: (1) an alleged interrogation and creation of impression of surveillance “[a]bout April 13, 2018” by Saxe; and (2) the discharge of Scott Leigh “[a]bout April 17, 2018.” **GC. 1(am)** at ¶¶ 5(e), 6(j).<sup>45</sup>

Leigh testified that on April 13, Saxe asked him if he was signing people up for free union training. Leigh said “nothing in life is free”; Saxe sighed at Leigh’s answer and let him leave. Leigh Tr. 10/1/18 at 1609:11-20, 1610:5-11. Leigh got the impression that Saxe was not pleased with his answer because he was not his usual “cheery self.” Id. at 1610:12-22. Saxe testified that he was frustrated Leigh was teaching warehouse technicians to weld and had asked him to stop doing so. Saxe Tr. 9/11/18/ at 139:6-15. In April, a few days before his discharge, after seeing Rayner weld for some time, he asked Leigh why he was offering to train others to weld and why he was not listening to him. Saxe Tr. 10/31/18 at 3491:13-25, 3492:22–3493:4. Saxe testified that Leigh just smiled and acted like he did not care. Saxe denied talking about “union training” during this conversation. Id. at 3493:3-7. Even if the General Counsel proved this conversation constituted an unlawful interrogation or surveillance, there is no evidence that anyone else was aware of this conversation.<sup>46</sup>

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<sup>45</sup> Leigh also testified that in March 2018, Saxe asked him about his involvement with the union and asked him “what are the benefits to an employer with going union.” Leigh Tr. 10/1/18 at 1603:1-9. Although it is unclear whether the General Counsel relies upon this conversation to support a bargaining order, there is no evidence that anyone else heard their conversation or Leigh told the others about Saxe’s questions.

<sup>46</sup>In fact, the evidence indicates the Leigh did not continue talking with his coworkers about the union after they signed cards. See Leigh Tr. 11/2/18 at 3808:9-12 (Leigh testifying that after Thomas signed his card on April 11, 2018, they did not talk about the union again).

The General Counsel has offered no evidence of the impact these two alleged violations had upon the bargaining unit. There was no letter seeking withdrawal of support or revocation of cards, no lost election, no proof of a reduction in attendance at union meetings, not even any statements from warehouse employees indicating that they were no longer interested in joining the union. Moreover, the General Counsel has not offered proof to show that other warehouse employees knew of Leigh's protected activities, connected his discharge to those activities, or knew of Saxe's alleged interrogation of Leigh. Indeed, the General Counsel has completely failed to prove that "all of the employees in the Unit[]learned or were likely to learn" of the employer's alleged misconduct. See GC. 1(am) at ¶ 7(g)(v) and (viii).

As such, the General Counsel has failed to prove the second element of the Gissel standard. See Corella Elec., Inc., 317 N.L.R.B. 147, 153 (1995) (Board affirming ALJ's rejection of bargaining order where no majority support was proven and the General Counsel failed to show "that the unlawful terminations of Brown and Heath or their surveillance by the Buehlers were disseminated to other bargaining unit employees, particularly those working at the Ft. Huachuca project"); Walter Jack and Dixie A. Macy (7-Eleven Food Store), 257 N.L.R.B. 108 (1981) (Board affirming denial of bargaining order where unlawful threat of plant closure was made to one employee who was not a union supporter and, who did not discuss the threat with any of the other employees). Contrast Traction Wholesale Ctr., Co., 328 N.L.R.B. 1058, 1077 (affirming ALJ's recommendation of a bargaining order where discharged employee notified employees in other stores of his termination and the employer's threats and union mailed flyers to all employees notifying them that an employee was discharged for engaging in protected activities).

Finally, even if the Judge were to find that Respondent interrogated and surveilled Leigh and unlawfully discharged Leigh due to his protected concerted activities, a bargaining order for

the Warehouse Unit would not be warranted. Respondent did not threaten a plant closure or physical violence; it did not publicly announce Leigh's discharge and connect it to the union or his protected activities; and it did not engage in any of the type of conduct toward the other warehouse employees that would warrant the imposition of a bargaining order. As such, the General Counsel has failed to prove that Respondent's conduct was sufficient to destroy the laboratory conditions needed for a fair election, and the Board's preferred and traditional remedies should prevail. See, e.g., Avecor, Inc., 309 N.L.R.B. 73, 74 (1992) (finding, on remand, that one discharge, interrogations, the threats of stricter rule enforcement, the promises of benefits, and one threat of plant closing, while serious, do not warrant imposition of a Gissel bargaining order); Burlington Times, Inc., 328 N.L.R.B. 750, 752 (1999) (Board declined to issue a bargaining order where an employer threatened to close the plant, made noneconomic grants of benefits, promised to improve wages and other benefits, and solicited grievances in a unit of 11 employees); Sturgis-Newport Bus. Forms, Inc., 227 N.L.R.B. 1426, 1434 (1977) (Board affirming ALJ's denial of Gissel where "interrogations, threats to two employees, and surveillance of the union meeting are insufficient to destroy the laboratory conditions deemed necessary by the Board for the conduct of an election, nor are they so pervasive and widespread as to warrant a bargaining order"); Bruce Duncan Co., 233 N.L.R.B. 1243 (1977) (Board held that an assault, a threatened assault, and a single threat to close a plant did not warrant a bargaining remedy); Swanson-Nunn Elec. Co., 256 N.L.R.B. 840, 849-50 (1981) (affirming ALJ's conclusion that "the unfair labor practices in this case [interrogations and solicitations of grievances] were not so serious that they cannot be eradicated by traditional remedies or that a fair election cannot be held in the future"); Aqua Cool, 332 N.L.R.B. 95, 97 (2000) (Board finding that a bargaining order was not warranted in a unit of eight

employees where the unfair labor practices committed by the employer included only a single hallmark violation).

The Respondent respectfully submits that when the Gissel demand is analyzed in the context of the Warehouse Unit, this case falls into Gissel's "third category" of "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." Id. at 615. The Board's traditional remedies are sufficient to address any violations the Judge finds. Avecor, Inc., v. NLRB, 931 F.2d 924, 934 (D.C. Cir. 1991) ("where a fair rerun election is possible, it must be held"); Desert Aggregates, 340 N.L.R.B. 289, 294-295 (2003) (Board finding that traditional remedies were adequate to redress the employer's discriminatory layoff of two union supporters and its solicitation and promise to remedy employee grievances in spite of the unit's small size of 11 employees); Hialeah Hosp., 343 N.L.R.B. 391, 395-96 (2004) (Board rejecting bargaining order for small unit that suffered one retaliatory discharge, and the employer's surveillance and threats: "Bearing in mind that a Gissel bargaining order is an extraordinary remedy and should be reserved for those exceptional cases where the possibility of erasing the effects of the unfair labor practices is slight, we are persuaded that our traditional remedies—including reinstatement of Rodriguez—are sufficient here and that the issuance of a Gissel bargaining order is unnecessary.").

## **XII. OBJECTIONS TO ELECTION.**

The Charging Party asserted 14 objections to the election. **GC. 1(m)**. During the hearing, the Charging Party stressed that the most important objection was to the discharge of pro-union employees, Objection No. 1; it contended that should those individuals be reinstated, and their ballots opened and counted, its remaining objections would likely become moot. Soto Tr. 10/5/18

at 2396:6-20. Respondent has addressed the discharge decisions in detail and will not do so here. Instead, Respondent will address the Charging Party's other objections herein.

“It is well settled that ‘[r]epresentation elections are not lightly set aside.’” Delta Brands, Inc., 344 NLRB 252, 252-53 (2005) (quoting NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325,328 (5th Cir. 1991)). “Accordingly, ‘the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.’” Id. at 253 (quoting Kux Mfg. Co. v. NLRB, 890 F.2d 804, 808 (6th Cir. 1989)).

When an election objection asserts that the “laboratory conditions” of an election were violated, an objective test is used to determine whether “the conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election.” Baja's Place, Inc., 268 N.L.R.B. 868, 868 (1984). The objecting party must show that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election. Delta Brands, supra, at 253 (citing Avante at Boca Raton, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of alleged coercive incident); Antioch Rock & Ready Mix, 327 NLRB 1091, 1092 (1999)).

In evaluating whether a party's misconduct has “the tendency to interfere with employees' freedom of choice,” the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9)

the degree to which the misconduct can be attributed to the party. See Taylor Wharton Div., 336 NLRB 157, 158 (2001).

The Charging Party has failed to put forth sufficient evidence to prove its objections and they should be denied.

**Objection No. 2. Inadequate voter eligibility list.**

The Charging Party contends that the Respondent failed to include the alleged discriminatees on the voter eligibility list and did not include employer-issued email addresses or personal email addresses for most of the employees on the list. Soto Tr. 10/5/18 at 2395:1-7. The only evidence offered by the Charging Party on this objection was the voter eligibility list, CP. 7, and the testimony of Apple Thorne, its Business Agent. Thorne testified that the voter eligibility list she received before the election did not include employer-issued email addresses or the names of the alleged discriminatees; Thorne did not mention personal email addresses during her testimony. Thorne Tr. 10/5/18 at 2441:3-25.

The parties agreed, pursuant to the Stipulated Election Agreement, that “[t]hose eligible to vote in the election are employees in the above unit who were employed during the payroll period ending May 6, 2018, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.” GC. 1(j) at ¶ 5. The parties agreed that the Respondent must provide a list of “all eligible voters.” Id. at ¶ 6. That list was required to set forth the following information: “full names, work locations, shifts, job classifications, and contact information (including home addresses, *available* personal email addresses, and *available* personal home and cellular telephone numbers.” Id. (emphasis added).<sup>47</sup> Contrary to the Charging Party’s

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<sup>47</sup>The parties’ stipulation regarding the contents of the Excelsior list conformed to the Board’s Rule 102.62(d).

objection, neither the Board nor the parties' Stipulated Election Agreement requires an employer to provide employer-issued email addresses. See 79 FR 74308-01, 74335-36, 2014 WL 7007229, Representation Case Procedures – Final Rule (Fed. Reg. Dec. 15, 2014) (“The final rule does not require employers to furnish the other parties or the regional director with the work email addresses and work phone numbers of the eligible voters and the work email addresses and work phone numbers”).

The Excelsior list provided by the employer complied with the parties' Stipulated Election Agreement. It set forth the names of 49 eligible voters. **GC. 7.** The Excelsior list does not set forth the names of the alleged discriminatees because they did not meet the definition, agreed upon by the parties, for “eligible voters.” The parties did not address these individuals in their Stipulated Election Agreement, and Respondent had no duty to list them.

For each eligible voter, Respondent provided names, job titles, work locations, addresses, available telephone numbers, and available personal email addresses, as required by the Stipulated Election Agreement. **GC. 7.** A telephone number, address and work location were listed for *every* employee on the list – 49 voters; for 19 of those employees, a personal email address was missing. Id.

The Charging Party offered no evidence to prove that personal email addresses were available and purposefully withheld by Respondent. As such, it has failed to prove a violation of the Stipulated Election Agreement. When the Charging Party bears the burden of proof, it cannot simply point to missing email addresses and win the day especially when the Board's new personal email requirement requires Respondent to list only *available* email addresses. The Charging Party must offer proof as to which addresses were actually available to the employer.

Even if some personal email addresses were missed by mistake, the Charging Party does not contend that it was unable to contact any of the eligible voters with the information Respondent provided. Moreover, the Charging Party does not contend that any information listed on the Excelsior list was inaccurate. Respondent timely produced full names, accurate addresses, and accurate telephone numbers for each of the 49 eligible voters listed. Even though It did not list 19 personal email addresses, the Charging Party had two key pieces of contact information for each eligible voter – address and telephone number. As such, Respondent substantially complied with the Stipulated Election Agreement and the Board’s rules, and this objection should be denied. See Women in Crisis Counseling, 312 NLRB 589 (1993) (overruling objection where 30 percent of the addresses on the Excelsior list were incorrect and holding that the Board has more latitude to determine substantial compliance where an address is inaccurate than where a name is missing because “[a] party with an employee's name but an inaccurate address at least has a key piece of information which can be used to identify and communicate with the person by means other than mail”); Washington Fruit & Produce Co., 343 NLRB 1215, 1222 (2004) (overruling objection where 28 percent of the addresses on the Excelsior list were incorrect); Paragon Sys., Inc., Case 10-RC-15827, 2011 WL 6042790 (N.L.R.B. Dec. 5, 2011) (finding “that the Employer substantially complied with the requirements of Excelsior” where the employer “provided telephone numbers for employees whose addresses were alleged to be inaccurate, and there is no evidence that the telephone numbers were inaccurate”).

**Objection No. 3. Wage increases during critical period.**

The Laboratory Conditions Doctrine only applies in times of election in order to conduct an election in “an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from the other

elements which prevent or impede a reasoned choice.” Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962). Conduct violates the laboratory conditions only if it occurs during the “critical period” - - defined as the period between filing of an election petition and the holding of the election itself. Ideal Elec. & Mfg. Co., 134 NLRB 1275, 1278 (1961). It is “well established that a party’s actions before an election petition is filed do not warrant overturning an election even if the actions would otherwise be objectionable.” Id.

Here, the critical period is between April 26, 2018, when the RC Petition was filed, and May 17, 2018, when the election was held. **GC. 1(c); GC 1(k)**. The wage increase at issue occurred on March 14, well before the critical period began. The Charging Party has failed to offer any evidence to suggest that Respondent increased wages during the critical period, announced the increase during the critical period, or that the increase became effective during the critical period. Accordingly, this objection should be denied. See Kokomo Tube Co., 280 NLRB 357, 358 (1986) (“It is undisputed that the wage increase was both announced and effective before the petition was filed. Accordingly, . . . , we find that the wage increase occurred before the critical preelection period and, under the Board's longstanding Ideal Electric rule, cannot serve as a basis to set aside the election.”).

**Objection No. 4. The Employers intimidated voters and engaged in surveillance including through the Employer's agent, Courtney Kostew, whose agency existed due to her (a) serious relationship with Stage Manager Thomas Estrada, (b) designation by the Employer as its election observer, and (c) promotion to cue caller and/or assistant stage manager.**<sup>48</sup>

As set forth *infra* at VII(A), Kostew is *not* an agent, and Respondent is *not* liable for her conduct. She was entitled, like all other employees, to engage in protected activity.

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<sup>48</sup> This objection was amended during the hearing, Tr. 10/5/18 at 2488:6-12. Respondent has used the amended version herein.

Even if she were the employer's agent, however, her conduct during the critical period<sup>49</sup> does not amount to unlawful interference with the laboratory conditions or violate the rule of Peerless Plywood Co., 107 N.L.R.B. 427 (1953). The record reveals the following protected conduct by Kostew during the critical period:

(1) During a May 16, 2018 meeting with her fellow stagehands she explained that she was voting against the union and encouraged others to do the same, saying: "It was along the lines of whether you're for or against the Union, I would like you to keep DSP union free. . . . And then it was like if you want a union gig, go join a union and work the gigs that they give you. This company has been fine without it. And if you're that dead set on a union, just go join one. And it's Vegas; they get conventions and stuff all the time, so it's easy to get union work. But keep this not unionized." " I know a few of you said that you're not going to vote, but it really helps if you do because if you if you don't vote if you don't care and you don't vote, then the people who do care may potentially get screwed over, if they want to keep it out and then the people who do vote want it. So your voice counts, I guess." Kostew Tr. 10/22/18 at 2497–2502; see also CP. 8.

(2) Prior to the election Kostew talked to a few Saxe Theater employees and encouraged them to vote, Kostew Tr. 10/22/18 at 2486:2-9; 2501:18-23, tried to contact Petty, a V Theater Audio Technician, **CP. 6**, and asked Petty's mother whether he was for or against the union, **CP. 8.**

(3) Kostew served as the election observer for the employer at the May 17, 2018 election.

First, Kostew's presence as an observer cannot be said to have interfered with employee's free choice. It is not alleged that Kostew did or said anything improper during the election, and

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<sup>49</sup> Kostew's participation in the Facebook Group Chat was limited to a few days from February 21 to March 2. J. 2 at 3, 30. Any alleged intimidation or surveillance allegations associated with her participation in the Group Chat fail because this activity was clearly outside the critical period and, therefore, irrelevant here.

there is no evidence of any misconduct on her part at the polling site. Instead, it appears that the Charging Party contends Kostew's presence was intimidating because of her alleged agency. As set forth *infra*, it is simply not reasonable to believe that Kostew had any authority to harm an employee or affect his terms and conditions of employment. The evidence made clear that employees believed Kostew and even Estrada were part of the bargaining group. Thus, it is not reasonable to conclude that her mere presence so interfered with employees' free choice as to require a new election.

The fact that one employee became upset during the election is irrelevant to this analysis for two reasons: (1) the Charging Party did not call this employee to testify and no one could credibly state whether Kostew's presence was the cause of his purported distress; and (2) "[t]he Board has long held that 'the subjective reactions of employees are irrelevant to the question of whether there was, in fact objectionable conduct.'" Hopkins Nursing Care Ctr., 309 N.L.R.B. 958, n.4 (1992) (quoting Emerson Elec. Co., 247 N.L.R.B. 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981)).

Second, the rule of Peerless Plywood Co. does not prohibit an employer, or its agent, from "talking individually with employees, . . . as long as the words or actions of the employer are not coercive." Dyncorp, 343 N.L.R.B. 1197, 1211 (2004). The Charging Party has offered *no* evidence to show that Kostew's individual discussions with employees were coercive. She testified that she did not ask employees how they were going to vote and instead asked whether they were going to vote and explained her position on why they should vote no. Kostew Tr. 10/22/18 at 2495:2-7, 2497:7-11, 2501:18-25. Kostew did not speak to Petty and her text message to him contained nothing more than his name. **CP. 6**; Petty Tr. 10/5/18 at 2409:19–2410:23 (testifying that Kostew messaged him, but he did not respond); Kostew Tr. 10/22/18 at 2507:2-4

(testifying Petty did not respond to her). The only evidence of Kostew asking how someone was going to vote was Kostew's text messages with Petty's mother, CP. 6; however, the Charging Party offered no proof that Petty was aware of that conversation either before or after the election. See Petty Tr. 10/5/18 at 2404-15; Petty Tr. 10/22/18 at 2462-70. As such, that evidence is irrelevant to this analysis.

Even if Kostew were an agent or a supervisor, speaking to employees before an election and encouraging them to vote no does not violate the rule of Peerless Plywood or any other rule. Associated Milk Producers, Inc., 237 N.L.R.B. 879, 879-80 (1978) (finding no violation of Peerless Plywood when, on the morning of the election, the Employer's plant manager spoke to employees in groups and individually and told them that they did not need a union and that they should vote "no" in the election, explaining that: "Since Livingston [Shirt Corporation], 107 N.L.R.B. 400 (1953)], the Board consistently has declined to expand the limited restriction of the Peerless Plywood rule to cover noncoercive antiunion statements made by management representatives to individual employees at their work stations within the 24-hour period prior to an election"); Electro-Wire Prods., Inc., 242 N.L.R.B. 960, 960 (1979) (finding no violation when, on morning of election, employer's President spoke to each eligible voter, encouraging them to vote and suggesting that they vote no); Pacific Coast Sightseeing Tours & Charters, Inc., 365 N.L.R.B. No. 131, 2017 WL 4161683 (Sept. 18, 2017) (Board affirming ALJ's rejection of 5<sup>th</sup> election objection, ALJ finding: "the Board has held that supervisors or even high-ranking employer officials may speak to employees one-on-one on the day of the election and exhort them to vote against a union, so long as those conversations are not threatening or coercive, and take place away from the polling area and away from the 'locus of final authority,' such as a manager's office").

Third, the Charging Party has failed to prove that Kostew's impromptu meeting with 11-12 of her fellow Saxe Theater stagehands on May 16 after working hours constituted an unlawful 24-hour speech. The record reveals that this meeting took place after work, and the Charging Party offered no evidence that the meeting was mandatory. Kostew's comments were clearly noncoercive, and she made no threats or promises. The Board does not prohibit employers and unions from making campaign speeches during the 24-hour period "if employee attendance is voluntary and on the employees' own time." Peerless Plywood Co., 107 NLRB 427, 430 (1953); Foxwoods Resort Casino, 352 NLRB 771, 771, 780-81 (2008).

Kostew's conduct during the critical period was noncoercive and nonthreatening. She conveyed her viewpoints and encouraged her fellow employees to vote. No evidence has been presented by the Charging Party of surveillance or intimidation by Kostew. The Charging Party has clearly failed to prove conduct by Kostew that would reasonably tend to interfere with employees' free and uncoerced choice in the election. As such, this objection fails.

**Objection No. 5. The employer interfered with the laboratory conditions of the election by failing to post the NLRB's required notice of petition in all applicable break rooms and conspicuous places visible to eligible voters.**

The Charging Party seems to contend that the employer failed to properly post the Notice of Petition in proper locations as required by Rule 102.63(a)(2) (requiring employer to post Notice of Petition for Election "in conspicuous places, including all places where notices to employees are customarily posted"). The Charging Party has failed to prove this objection.

Saxe testified that the Notice of Petition was posted. Saxe Tr. 10/31/18 at 3504:24–3505:6. He directed Jasmine Hunt and Michael Moore to post the Notice of Petition, received pictures to confirm that they had done so, and verified the locations of the postings himself. Saxe Tr. 10/31/18 at 3502:8-20, 3512:9-23, 3513:10-13, 3518:3-10. Saxe Tr. 11/1/18 at 3600:5-17, 3604:13-22. **R.**

99. Respondent's Exhibit 99 clearly shows a Notice of Petition posted with other employee postings. **R. 99** at DSP2-322. Saxe explained that Employer's Exhibit 93 shows the locations of the notices. **R. 92**; Saxe Tr. 10/31/18 at 3504:21–3505:4, 3507:7-10. Certain portions of the maps were highlighted by Saxe in pink to show where the notices were posted. 10/31/2018 Saxe Tr. at 3506:7-9; 3507:5-10; 3511:9-12. Through testimony, Saxe correlated the pictures in **R. 95**—that show pictures of the posted notices—with the pink highlights in **R. 93**. Saxe Tr. 10/31/18 at 3516:10-25; 3517:1-25; 3518:1-2; 3519:17-25; 3520:1-25; 3521:1-25; 3522:1-25; 3523:1-25; 3524:1-21.

The Charging Party presented evidence to suggest that the Notice of Petition was not posted near a time clock. See **CP. 1**; Tupy Tr. 10/2/18 at 1770; Prieto Tr. 10/3/18 at 1815:2-8, 1947:16–1948:3, 1950:10-14 (testifying that a Notice of Petition was posted inside what he called “the managers’ office” at V Theater and that a week later, the time clock was moved into that same area); **CP. 4**; Prieto Tr. 10/3/18 at 1964:23–1965:6 (testifying that on April 30, he took a picture of the time clock he used, the one outside of the “managers’ office” because the Notice of Petition was not posted there). But Rule 102.63(a)(2) does not require the employer to post the Notice of Petition at time clocks. It requires posting in “conspicuous places, including all places where notices to employees are customarily posted.” The Charging Party did not offer evidence to prove that time clocks are where employee notices are customarily posted and has failed to rebut Saxe’s testimony that the Notice of Petition was posted in many locations throughout the Theaters.

As such, the Charging Party has failed to prove this objection and it should be denied.

**Objection No. 6. The employer interfered with laboratory conditions by surrounding the Notice of Elections with “vote no” signs and other anti-union propaganda.**

The Charging Party admitted one picture of the Notice of Election posting surrounded by “vote no” signs. **CP. 5**. Prieto testified that on or about May 14, he took this picture of a corkboard

located down the hallway from a time clock just before the entrance to the backstage of the V Theater. Prieto Tr. 10/3/18 at 1967:5–1968:5. The Charging Party failed to present any evidence as to who posted the “vote no” signs and did not prove that Respondent was responsible for or even aware of them.

Tupy testified that he took a picture of “vote no” signs posted next to a bulletin board before the election. CP. 2; Tupy Tr. 10/2/18 at 1775:9-19. It is not clear from this picture whether a Notice of Election is in the vicinity, but the “vote no” materials do *not surround* a Notice of Election as alleged. See CP. 2; Tupy Tr. 10/2/18 at 1777:4-13 (admitting he cannot tell what the documents on the bulletin board are and does not remember what they were). Saxe testified that he did not see “vote no” signs posted at the Theaters next to the Notice of Election postings. Saxe Tr. 11/1/18 at 3663:3-7.

The Charging Party has not proven that Respondent was responsible for the “vote no” postings displayed in CP. 5. Nevertheless, attaching anti-union literature to official NLRB postings is not objectionable if the employees “are likely to discern that the source of the message was not the Board.” Emergency One, Inc., 2001 WL 1589694 (N.L.R.B. Div. of Judges, Aug. 16, 2001) (employer attached anti-union literature to the official posting of the sample ballot); see also Rosewood Mfg. Co., 278 N.L.R.B. 722, 722-23 (1986) (where employer’s president handwrote “Vote No” on the top of election documents, drew an arrow to the “No” portion of the sample ballot and marked the “No” box with an “X, the Board determined that “an altered ballot that on its face clearly identifies the party responsible for its preparation is not objectionable and will not serve as the basis for setting aside an election”); Nash-Finch Co., 117 N.L.R.B. 808, 810-11 (1957) (“the Board has consistently held that it will not censor or police preelection propaganda by parties to elections, absent threats or promises of benefits and that exaggerations, inaccuracies, partial

truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate propaganda, provided that they are not so misleading as to prevent the exercise of a free choice by employees in the selection of their bargaining representative”). The “vote no” materials displayed in CP. 5 are clearly different in form, format, font, and color from the Board’s Notice of Election posting. There is nothing on the face of these documents that would lead an employee to believe they were issued by the Board, and they are clearly campaign propaganda. This objection should be denied.

**Objection No. 7. The employer interfered with laboratory conditions by failing to distribute the Notice of Election to employee’s regularly-used company email addresses.**

The parties’ Stipulated Election Agreement provided that the Employer “must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election.” The Agreement further provided that “[t]he Employers must also distribute the Notice of Election electronically, if the Employers customarily communicate with employees in the unit electronically.” **GC. 1(j)** at ¶ 8; see also Rule 102.67(k).

The Respondent posted the Notice of Election in multiple places throughout the workplace. Saxe Tr. 10/31/18 at 3501:24–3502:6, 3514:11-20, 3515:7-3518; **R. 93, 94, 95**. The Notice was not emailed to employees. Nevertheless, the Board’s rule regarding posting and distribution of the Notice of Election is intended to give all employees a reasonable chance to read the notice, know when the election will be held, and understand their rights under the Act. Pac. Beach Corp., 344 N.L.R.B. 1160, 1168 (2005). Respondent’s failure to email the Notice of Election clearly had no effect on voter turnout as 48 of the 49 eligible voters voted. **GC. 7; GC 1(k)**. As such, Respondent substantially complied with this rule and the objection should be denied.

**Objection No. 8. The employer interfered with laboratory conditions by changing employees' work reporting times and instructing them to report to the worksite early to board a charter bus or shuttle to the polling location.**

The evidence revealed that Respondent offered free transportation to the polling location and that DeStefano scheduled a work call for 3:00 p.m. on May 17 so that employees could come to the Theater and use that transportation to get to the polling location. DeStefano Tr. 9/14/18 at 556:21–557:5. Prieto testified that he was working on May 17 and was directed by DeStefano to report for work at 3:00 to catch the bus to the polling location. Prieto Tr. 10/3/18 at 1990:2-12. His normal start time was 3:30. *Id.* at 1959:16-17. DeStefano communicated with Glenn on May 16 to let him know that even though he was not scheduled to work May 17, he could use this transportation if he wanted. **GC. 71**; Glenn Tr. 10/2/18 at 1903:2-18. Glenn responded, “Ok, thanks.” **GC. 71**. DeStefano also texted Tupy on May 16 regarding his start time. **GC. 40**. Tupy indicated that he would drive himself to the polling location to which Tiffany responds, “OK.” *Id.* DeStefano testified that other employees also called to say they were not going to use the employer’s transportation. DeStefano Tr. 10/23/18 at 2755:1-5. The Charging Party does not allege that employees were disciplined for not using the bus or that employees suffered any consequences because of the employer’s attempts to help them get to the polling location. The Charging Party does not allege that any misconduct occurred on the shuttle bus.

There is nothing objectionable about offering employees’ transportation to the polling location where all employees are offered the same opportunity. John S. Barnes, Corp., 90 N.L.R.B. 1358, 1359 (1950) (“An employer is not guilty of interference with the conduct of an election by furnishing the employees free transportation so long as such transportation is extended to all employees without distinction.”). DeStefano’s messages to Glenn and Tupy were noncoercive and nonthreatening; she simply let them know they could use the transportation even though they

were not scheduled to work during voting time. Glenn testified that he was not forced to vote but was simply given the option to use the provided shuttle if he chose to vote. Glenn Tr. 10/3/18 at 2033:8-23 (also testifying that he did not use the bus access to vote at election site).

Changing an employee's start time by 30 minutes so that he can report for work in time to access free transportation to the polling site is also not objectionable. See New Era Cap Co., 336 NLRB 526, 526-27 (2001) (Board holding that "the employer is also free to compensate employees for their time in coming to the polls where the purpose of the compensation is to encourage employees to vote").

Additionally, any allegations that the March 13, 2018 work call was scheduled in an effort to identify and surveil pro-Union employees is without merit. As discussed in section V(B)(2)(b) *supra*, the work call was ordered due to a serious safety issue with the stage and the General Counsel has not provided any evidence to the contrary. This objection should be denied.

**Objection No. 9. The employer interfered with laboratory conditions and intimidated and interrogated employees to determine their position on unionization.<sup>50</sup>**

The following two conversations during the critical period are potentially related to this objection:

1. According to Glenn, after his May 15<sup>51</sup> speech, Saxe approached Glenn and Tupy and stated that he knew they were both pro-union but would not hold it against them. He stated that "everybody has a choice basically. I'm not going to fire you for, you know, being pro-union or if you're not pro-union. He stated that he could not hire or fire anyone or give pay raises because of a "union freeze." Glenn Tr. 10/2/18 at 1901:20–1902:14. Saxe also allegedly stated that: "if they

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<sup>50</sup> The Charging Party amended this objection during the hearing. Tr. 10/5/18 at 2499:9–2500:1.

<sup>51</sup> The election was held on May 17 from 11:00 a.m. – 4:30 p.m. Saxe's speech was held on May 15, 2018. Saxe Tr. 10/31/18 3534; Tupy Tr. 10/2/18 at 1745.

came in, they would, you know, just be there to take your money and not to help you really. He also mentioned that they can it's not for sure, but they can potentially like take someone's job with a different union employee.” Id. at 1919:11-15. Tupy’s version of this conversation varies from Glenn’s. Tupy testified that Saxe said: “that he lost both of us, that he knows he lost us, and we should think about, you know, what, you know, how we're going to vote and please think about not voting for the Union, and that he has plans for the theaters. He's going to get new equipment and, you know, I guess a lot of things he'd like to say, but he can't because the law prevents him from saying it.” Tupy Tr. 10/2/18 at 1752:8–1753:20. When Glenn turned to Tupy, Tupy stated: “I said, look, I said I didn't start this whole union thing. I said, I'm a union member, been a union member a long time. I didn't start this, the vote to go union, but I've been a union member for all these years, and I'm going to vote union.” Id. at 1753:12-16. When asked if Saxe elaborated on his statement, “I lost you,” Tupy testified: “No, no.” Id. at 1756:9-16. Saxe testified that he approached Tupy after his speech because Tupy had brought up something during the speech that Saxe did not feel he should address in front of the group.<sup>52</sup> He testified that after he explained why he did not want to talk about Tupy’s challenge during the meeting, Tupy “began to tell me his view on the Union, and he said he's been there, he's been a union member 30 years, and he's pro union, and I should know.” Saxe testified that he said: “And I said, great, I joined the Union 30 years ago, like I was in the Union, too, when I was at the Landmark Hotel in late '80s. I said, me, too, I understand. You're right, I'm not mad at you, it's fine. There's no problem with you being in the Union. I'm not mad. I don't care.” Saxe Tr. 10/31/18 at 3540:19–3541:9. Saxe testified that

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<sup>52</sup>Saxe testified that during his speech, he referenced his open-door policy and that employees had his cell number and could call him at any time; Tupy challenged him about a time he tried to get help from Saxe, but the issue was about Tupy’s medical condition. As such, Saxe did not feel he should address the specifics of this challenge in front of the group. Saxe Tr. 10/31/18 at 3539-40.

Glenn asked him why his girlfriend, Glick, was discharged to which he responded: “I go, I can't tell you. I said just because you're the boyfriend, I can't breach HR. I can't just tell you what happened with another employee; I just can't do it. But I did say, I go, but Darnell, you know, you know I've had issues in the past with your girlfriend. And he said, yeah, okay.” Id. at 3541:16-23.

2. After his May 15 speech, Saxe approached Prieto, stating, essentially, that he heard “I am a very good worker, and I do a great job around there, and that I am also pro-union. David then continued to say that he doesn't think he'd be able to change my mind on anything, but he hopes that no matter the outcome of the vote, it doesn't cause a rift between us. Which I appreciated, and I said thank you. He then proceeded . . . to ask me if there is anything I ever tried to contact him about, any changes, any questions, anything like that.” Prieto Tr. 10/3/18 at 1954:1-17. Saxe explained Vittorio Arata, a performer in the V Theater, had told him that Prieto was “spouting off saying talking shit about me and saying that he was going to get the Union in here and F me up and stuff like that . . .” Saxe Tr. 10/31/18 at 3536:6-11. Saxe ran into Prieto on the stage in between shows and told Prieto: “that I knew he was pro union, and that's okay. I just wanted him to know that I heard he's a good employee and he has nothing to worry about, that he's not being fired and all is good, he can be pro-union and it's okay. I just didn't want him to feel uncomfortable, like there was some beef or something between him or anyone.” Id. at 3535:25–3536:5, 3537:19–3538:4.

First, this evidence does *not* establish interrogation. There is no testimony that Saxe asked anyone to identify their affiliation. He simply made a statement to Tupy, Glenn, and Prieto – either “I know you are pro-union” or “I know I lost you.” Saxe’s conversations with these employees were not threatening or hostile. He simply asked Tupy and Glenn to think about voting no, and he

specifically assured all three men that he did not hold their union affiliation against them. There is no evidence that Saxe asked them to discuss their feelings or disclose their reasons for their affiliation. Instead, Tupy *voluntarily* identified himself as a union supporter during his discussion with Saxe. As such, there was no interrogation. Hudson Wire Co., 236 NLRB 1263, 1265 (1978) (holding that “casual” conversations where employees “initiated the conversation or volunteered information” is not unlawful interrogation and does not violate the Act; See also Seda Specialty Packaging Corp., 324 NLRB 350, 352 (1997)).<sup>53</sup>

Second, as set forth above at section XII, the Board does not prohibit an employer from talking individually with employees before an election as long as those conversations are not threatening or coercive. Dyncorp, *supra*; Associated Milk Producers, *supra*; Electro-Wire Prods., *supra*. Saxe’s conversations with Tupy, Glenn and Prieto were not objectionable. The tone of their conversations with Saxe was clearly not threatening or intimidating. Instead, Tupy and Glenn testified that Saxe was cordial and apologetic in his remarks during the group meeting. Tr. 10/2/18 at 1751, 1899. Glenn testified that Saxe then repeatedly assured them privately that they would not get fired because of their choice and stated that they each had a choice. Prieto stated that Saxe was conciliatory and reassuring toward him as well.

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<sup>53</sup>Interrogation is not per se unlawful or objectionable. Rossmore House, 269 N.L.R.B. 1176, 1177 (1984). The test is whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. Id. In evaluating the “totality of the circumstances,” the Board considers such factors as: whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, the truthfulness of the reply, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisals. Id. at 1178 fn. 20; Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964); Sunnyvale Med. Clinic, 277 N.L.R.B. 1217, 1218 (1985).

Such conciliatory, non-threatening conversations, at their workstations, could not reasonably interfere with their exercise of free choice. See Saunders Leasing Sys., 204 N.L.R.B. 448, 451 (1973) (Board affirming ALJ's rejection of threats, coercion and interrogation allegation where supervisor asked what the employee was trying to get out of the union and stated he was sure that employee had signed a union card); Springfield Hosp., 281 N.L.R.B. 643 (1986) (Board affirming ALJ's rejection of unlawful interrogation allegation where supervisor questioned outspoken union advocate in his workplace in an attempt to understand why he was pro-union but "did not expressly or impliedly threaten Grant with reprisals because of his union activity or his support for the Union" and where employee "freely expressed his pro-union sentiments"); E.L.C. Elec., Inc., 344 N.L.R.B. 1200, 1217-18 (2005) (Board affirming ALJ's determination that conversation between supervisor and employee was not coercive where supervisor asked a rhetorical question and employee opined that he would not get a good review and would be terminated because of his union affiliation, to which the supervisor responded: "nonsense" and "hogwash").

To the extent that the Charging Party contends Saxe's remarks to these three employees constitutes surveillance, the evidence also fails. Tupy contended that everyone knew he was a union member. Tupy Tr. 10/2/18 at 1743:15-16. He testified that he stated in the persuader meeting that he had served as a union steward before and that he openly challenged the persuader during the meeting. Id. at 1748-49. Glenn testified to openly discussing the union with Dan Mecca on several occasions, Tr. 10/2/18 at 1894:3-5, and Prieto testified to openly discussion the union with Steve Sojack on several occasions, Tr. 10/3/18 at 1938-41. Clearly, none of these individuals hid their affiliation. When Saxe approached them, none of them felt the need to be untruthful to him or deny his identification of their affiliation, demonstrating the noncoercive nature of the

conversations. Indeed, Prieto thanked Saxe for assuring him that there would be no reprisals. The Charging Party has failed to prove that an employee would reasonably assume from Saxe's statement that their activities had been placed under surveillance. Tres Estrellas de Oro, 329 N.L.R.B. 50, 51 (1999).

For these reasons, this objection should be denied.

**Objection No. 10. During the critical period, the employer engaged in surveillance of union meetings resulting in destruction of the laboratory conditions of the election.**

During the hearing, the Charging Party did not explain the basis for this objection or what facts allegedly support it. The Charging Party does not appear to have presented any evidence to support this objection. Indeed, the Charging Party's Business Agent, Thorne, testified but did not offer any evidence regarding alleged surveillance of union meetings. The evidence revealed that at least two union meetings were held – one in late February, early March at Planet Hollywood at the Elara and a second meeting on March 13, 2018 at Tommy Rockers. See J. 2 at 17-20; J. 4 at 24; Bohannon Tr. 9/19/18 at 1204:3-13 (testifying that first meeting was at Elara); id. at 1206:17-20 (testifying that second meeting was at Tommy Rockers). Although numerous witnesses testified about these meetings, no evidence was presented that Respondent's supervisors attended them. See, e.g., Bohannon Tr. 9/19/18 at 1204:18-23 (identifying attendees at first meeting); id. at 1207:4-13 (identifying attendees at second meeting). There is also no evidence that Kostew or any other alleged agent attended these meetings; instead, the evidence revealed that Kostew did not attend either meeting. J. 2 at 24 (Kostew messaging on March 1 "Lemme know how it goes guys" and DeVito later responding "I asked about Tommy's role as a stage manager and he can

still be included!"); S'uapaia Tr 9/20/18 at 1459:2–1462:11 (testifying that Kostew was involved in the work call on March 13).<sup>54</sup> Accordingly, this objection should be denied.

**Objection No. 11. During the critical period, the employer, through upper management and its observer, Courtney Kostew, threatened employees with job loss and closure of the theater shows if the union won the election. This was widely disseminated.**

The following evidence, during the critical period, is potentially relevant to this objection:

1. Glenn alleges that during the May 15 speech, Saxe discussed a show at Bally's, *Jubilee*, closing after its workforce unionized. Glenn Tr. 10/2/18 at 1899:22–1900:9. Glenn is the *only* employee to testify that Saxe made this statement. Tupy also detailed Saxe's speech for the record but did *not* contend that Saxe discussed or even referenced *Jubilee*. See Tupy Tr. 10/2/18 at 1750:25–1751:12. Saxe denied discussing or referencing *Jubilee* during this speech. Saxe Tr. 10/31/18 at 3534:4-10.

2. As discussed *infra*, Kostew met with her coworkers on May 16, 2018, after the show, at 9:00 or 11:00 p.m., to explain why she was voting against the union to encourage others to do the same. Kostew Tr. 10/22/18 at 2497:14-24, 2498:6-14. Kostew testified that she essentially said: “whether you're for or against the Union, I would like you to keep DSP union free. . . . And then it was like if you want a union gig, go join a union and work the gigs that they give you. This company has been fine without it. And if you're that dead set on a union, just go join one. And it's Vegas; they get conventions and stuff all the time, so it's easy to get union work. But keep this not unionized. I know a few of you said that you're not going to vote, but it really helps if you do because if you if you don't vote if you don't care and you don't vote, then the people who do care may potentially get screwed over, if they want to keep it out and then the people who do vote want

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<sup>54</sup> Kostew was removed from the Facebook chat on March 2, 2018, after a dispute with Hill. **J. 2** at 30. She was not involved in the second chat group. **J. 4.**

it. So your voice counts, I guess.” Id. at 2497–2502; see also **CP. 8**. Kostew testified that two others spoke about their feelings against the union during this meeting. The first, a stagehand, stated: “He just said that he had also worked other gigs. It was like two or three other gigs that he had worked that wound up closing down because the union came in and it just shut the job down. So he was kind of like agreeing with me saying like don't bring the Union in if you want to keep working, because there's a good chance that it could shut the show down.” Kostew Tr. 10/22/18 at 2498:15-25, 2499:1-7; Kostew Tr. 10/24/18 at 2970:16-21, 2971:23–2972:4. The second, a former dancer, stated: “She said that a lot of our dancers came from Jubilee and Jubilee was shut down when the union was brought in. So she just urged everybody to keep the Union out so Vegas! The Show could keep going.” Kostew Tr. 10/22/18 at 2972:10-12, 2973:22–2974:2.

Kostew is not Respondent’s agent and her comments on May 16 cannot be attributed to the employer. Even if she was an agent, however, she did not make the alleged job loss/closure threats – those comments were made by other employees and are protected. There is no evidence in the record that Kostew made any other comments to employees about job loss or closure during the critical period. Further, in light of Saxe’s denial and Tupy’s testimony, the Charging Party has failed to prove that Saxe made the *Jubilee* comment attributed to him by Glenn.

Even if Saxe did make the statement alleged by Glenn, this one comment, of an example of another workforce, is not so threatening or coercive as to interfere with employee free choice as to affect the outcome of the election. The Charging Party has offered no evidence to suggest that this alleged comment had any effect on the election, and this objection should be denied. See Crown Bolt, Inc., 343 N.L.R.B. 776, 779 (2004) (Where proof of dissemination of coercive statement is required, the objecting party will have the burden of proving it and its impact on the election by direct and circumstantial evidence.).

**Objection No. 12. During the critical period, the employer disrupted the laboratory conditions by altering employees' work schedule to conduct six-hour captive audience meetings.**

DeStefano testified that when she created schedules for the production employees for the time period in which meetings were to be held, she ensured that the schedules accommodated the meetings. DeStefano Tr. 9/13/18 at 511:10-16. This may be resulted in a different reporting time than an employee was used to having; however, the difference was slight. Tupy testified that he was told he had to attend a mandatory meeting and that although he had a personal scheduling conflict, he was able to change his schedule and attend the meeting. Tupy Tr. 10/2/18 at 1746:2-13. Glenn testified that his schedule was changed because of the mandatory meetings. Glenn Tr. 10/2/18 at 1916:1-4. He testified that on May 14 he was scheduled to report for work at 2:30 instead of 3:30 and that on May 15, he was scheduled to report at 3:15 instead of 3:30. *Id.* at 1959:10-60:6.

Requiring employees to attend meetings during a union election campaign is not objectionable conduct. Fontaine Converting Works Inc., 77 N.L.R.B. 1386, 1387 (1948) (employer did not violate the Act by “compelling its employees to attend and listen to speeches on company time and property”). An employer has a right to voice its position on a union campaign provided it is not coercive or threatening. Holding a mandatory meeting for this purpose outside regular working hours is permissible provided the employer compensates employees at their regular rate of pay. See Imperial Prods. Corp., 1996 WL 33321323 (N.L.R.B. Div. of Judges Feb. 26, 1996) (finding that “if an employer may hold an antiunion meeting during regular work hours” it may hold “such a meeting outside regular work hours so long as it pays each employee” for the time); Comet Elec., Inc., 314 N.L.R.B. 1215, 1216 (1994) (“the Employer was privileged to conduct a captive audience meeting for its employees” but failed to pay them). Given the

complexity of the scheduling involved for the production employees, altering schedules to make sure that everyone attended a meeting is not unreasonable. The evidence demonstrates only a slight change to employees' reporting times. There is no evidence that altering schedules was coercive or threatening or that employees were not properly paid for their time; as such, this objection should be denied.

**Election Objection No. 13. During the critical period, the employer disrupted the laboratory conditions by taking adverse actions against known union supporters that negatively impacted terms and conditions of employment.**

Although the Charging Party does not identify the facts to support this allegation, the General Counsel contends that Respondent reduced the work hours of employees, Scott Tupy and Darnell Glenn, and disciplined Tupy on June 20, 2018. Tupy's discipline is outside of the critical period, after the election, and cannot be used to support an objection. Respondent has already addressed department-wide changes to scheduling procedures in May that resulted in a reduction to Tupy's and Glenn's hours, *infra* at VI(B), but also the hours of all other production employees and/or part-time employees. The Charging Party has failed to offer any further evidence to support this objection, and the evidence makes clear that scheduling changes were department-wide and not focused only upon known union supporters. There is no evidence in the record that Respondent linked the change to protected activity or that the unit widely perceived the change to be retaliatory. As such, it cannot be found to have interfered with the employees' free and uncoerced choice in the election. This objection should be denied.

**Election Objection No. 14. The Employer maintained unlawful workplace rules in its employee handbook.**

The Charging Party does not identify any facts to support this objection nor has it offered any evidence to support it. The Consolidated Complaint alleges that Respondent maintained three overly-broad and discriminatory rules in its Handbooks. **GC. 1(am)** at ¶ 5. As set forth *infra*,

these policies are lawful. Nevertheless, there is no evidence in the record to show that the alleged objectionable rules were implemented during the critical period or in response to the union campaign. Moreover, there is no evidence that, during the critical period, the employer enforced these rules, drew employees' attention to these rules, or re-issued these rules. Indeed, there is no evidence to show that the employees were even aware of these rules during the critical period or that protected conduct was deterred because of these rules. Instead, they were simply a part of a lengthy Employee Handbook that employees received upon their hire. As such, they could have no impact on the election and this objection should be denied. Delta Brands, Inc., 344 N.L.R.B. 252 (2005) (Board denying objection where "the mere presence of an overbroad rule in a much larger document, with no showing that any employee was affected by the rule's existence, no showing of enforcement, and indeed no showing of any mention of the rule" resulted in "no showing that the mere existence of the rule could have affected the results of the election").

The Charging Party has failed to prove that Respondent engaged in conduct during the critical period that interfered with the employees' free and uncoerced choice in the election. The Charging Party has largely failed to offer evidence regarding the number of employees subjected to the alleged misconduct, the degree of persistence of the alleged misconduct in the minds of bargaining unit employees, the extent of dissemination of the alleged misconduct among bargaining unit employees, and the effect, if any, of the alleged misconduct on the bargaining unit. See Taylor Wharton Div., 336 N.L.R.B. 157, 158 (2001).

Proving that alleged misconduct has been disseminated amongst a bargaining unit is "a relatively easy matter to establish through testimony of employees." Crown Bolt, Inc., 343 N.L.R.B. 776, 778 (2004) (quoting General Stencils, Inc., 195 N.L.R.B. 1109, 1114 (1972)). As such, this burden of proof "should not be relieved" especially in a consolidated "C and R case,

where Board procedures make it even more difficult for the employer to obtain the information it needs to prepare a nondissemination defense.” Id. (citing NLRB v. General Stencils, Inc., 472 F.2d 170, 173 (2d Cir. 1972)). The Charging Party has failed to meet its burden of proof, and its objections should be rejected.

### **XIII. CONCLUSION.**

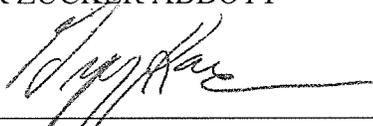
For the aforementioned reasons, the General Counsel has failed to establish that the Respondent’s actions in this matter were in any way violative of the Act. Accordingly, Respondent respectfully requests that the Administrative Law Judge dismiss this action in its entirety.

DATED this 8th day of January, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 8<sup>th</sup>, 2019, I did serve a copy of the **Respondent's Post-**

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