

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 02

BARTLE BOGLE HEGARTY, INC.,

Respondent,

Case No. 02-CA-220370

and

SCREEN ACTORS GUILD-AMERICAN
FEDERATION OF TELEVISION AND
RADIO ARTISTS,

Charging Party.

POST-HEARING BRIEF OF RESPONDENT

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RESPONDENT'S POST-HEARING BRIEF

Respondent Bartle Bogle Hegarty, Inc. (“Respondent” or “BBH”) submits this post-hearing brief in accordance with Section 102.42 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or the “Board”), with respect to the hearing held before the Honorable Kenneth Chu, Associate Chief Administrative Law Judge, on the unfair labor practice complaint (“Complaint”) issued by the Board’s General Counsel (the “General Counsel”) and the unfair labor practice charge filed by the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA” or the “Union”) on May 14, 2018 (the “Charge”).

I. INTRODUCTION.

In this unfair labor practice proceeding, the General Counsel alleges that BBH violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the “Act”) by terminating two (2) expired collective bargaining agreements between the Union and BBH, the SAG-AFTRA TV and Audio Commercials Contracts (Collectively, the “Commercials Contracts”) (J.T. Exh. 2-E), and by refusing to bargain for successor agreements. BBH concedes that, under normal circumstances, an employer’s termination of a collective bargaining relationship and refusal to bargain for a successor agreement would be a textbook violation of the Act, but under prevailing Board precedent, an exception to the general rule exists when an employer does not employ more than a single permanent employee in the purported bargaining unit. In such a case, an employer is not required to continue to recognize the union, nor to bargain a successor agreement.

Here, the record reflects that BBH does not currently, nor did it ever, employ *any* permanent employees in its purported bargaining units. In fact, all commercial performers are engaged on a production-by-production basis with no guarantee or expectation of continued

employment. Despite this absence of permanent employees, in 1999-2000, BBH voluntarily recognized SAG-AFTRA as the exclusive representative of performers appearing in BBH commercials and further agreed to sign the Commercials Contracts, a practice that continued until 2016 (J.T. Exh. 1, p.3). In doing so, BBH and SAG-AFTRA effectively imposed a pre-hire arrangement on those commercial performers for many years, applying the Commercials Contracts to all performers engaged on a temporary basis for domestic BBH commercial productions, consistent with SAG-AFTRA's practice with other advertiser and advertising agency signatories to the Commercials Contracts.

In essence, SAG-AFTRA has operated in the same manner as a Section 8(f) representative in the construction industry, without the statutory sanction afforded by Section 8(f). While BBH has acquiesced in the practice to date by voluntarily recognizing SAG-AFTRA as a Section 9(a) representative, both prevailing legal precedent and sound policy arguments support the principle that BBH should be entitled to terminate its bargaining relationship with SAG-AFTRA, on the grounds that no permanent employees exist.

The General Counsel advances several arguments in response to the facially obvious proposition that BBH should not be compelled to bargain a successor agreement in the absence of any permanent bargaining unit employees. First, the General Counsel argues that, as a Section 9(a) representative, SAG-AFTRA is entitled to a presumption of continued majority support. However, while it is true that a Section 9(a) representative is entitled to a presumption of majority support, that presumption is rebuttable. The record in this case conclusively demonstrates that BBH does not employ *any* permanent employees in the purported unit. By definition, that fact alone establishes an absence of continuing majority support, thereby

rebutting the presumption. Second, the General Counsel argues that the one-man unit rule applies only in the Section 8(f) context and is not applied to a Section 9(a) representative. That assertion not only is false, as courts have applied the one-man unit rule to Section 9(a) representatives, but it also ignores the policy considerations behind that rule, which exist to an even greater degree in the Section 9(a) context. And finally, the General Counsel suggests that BBH should be estopped from exercising its right to terminate the bargaining relationship in the absence of a bargaining unit of permanent employees, due to the fact that nothing has actually changed with regard to the hiring pattern of performers in BBH commercials and BBH has accepted the pre-hire arrangement for many years. But, established Board precedent, as well as an opinion rendered by the General Counsel's own Division of Advice in a case involving SAG-AFTRA's own affiliate union, clearly provides that waiver and estoppel will not be invoked to preserve a status quo that contravenes the fundamental principles of the Act.

Quite literally, under the facts set forth in the record, the General Counsel advances a legal position that compels BBH to continue the bargaining relationship in perpetuity, with no available mechanism for termination. The General Counsel makes that assertion, despite the fact that under applicable Board standards, there are no permanent employees that are eligible to vote in support for or against continued representation by SAG-AFTRA. In so doing, the General Counsel relies upon SAG-AFTRA's continuing presumption of majority status in the bargaining unit, but ignores the fact that such presumption is necessarily premised on a fiction that a permanent bargaining unit exists.

The Act simply cannot and does not stand for the General Counsel's proposition. Undeniably, the legal and practical effect would be to elevate the institutional interests of SAG-

AFTRA over the Section 7 rights of performers that BBH engages for individual commercial productions, a result that would fly in the face of one of the most fundamental pillars of the Act – the right of democratic self-determination that is guaranteed to employees.

For these reasons, and for reasons explained further below, the Complaint is completely devoid of merit and the Administrative Law Judge should recommend dismissal of the General Counsel’s Complaint in its entirety.

II. RELEVANT FACTS.

A. BBH’s Use of Actors in Commercials.

Established in 1998, BBH is a New York-based creative advertising agency that, among other services offered, helps its clients develop, build awareness, and position their brands to consumers. One of the ways BBH accomplishes this is through the production of television, radio, Internet and new media commercials for its numerous advertiser clients (J.T. Exh. 1, p. 1). Because the production of commercials frequently requires the engagement of actors to perform in such commercials, BBH engages a significant number of different actors to perform in these commercials.

Although BBH hires a large volume of performers to appear in commercials, the nature of the employment is always on a temporary, production-by-production basis, with no guarantee of continued employment beyond the specific commercial production for which the actor is engaged, a fact that is undisputed by all parties (J.T. Exh. 1, p. 1; Tr. 18:25-19:01). Being hired for one commercial production has absolutely no bearing whatsoever on whether an actor will be

hired for future productions and there is never any expectation of continued, permanent employment (J.T. Exh. 1, p. 1; Tr. 19:19-19:21).

These realities are clearly borne out by the employment data set forth in the detailed production reports ((J.T. Exh. 3(A-GG); J.T. Exh. 4(A-GG); J.T. Exh. 5(AA)). In the two (2) years leading up to its withdrawal of recognition from SAG-AFTRA, BBH hired an average of one hundred twenty-five (125) different actors per year (J.T. Exh. 5(AA)). The transitory, non-permanent nature of employment for those performers is illustrated by the fact that the number of performers that were engaged for more than just a single commercial is just a small fraction of the total population of temporary employees engaged:

	<u>2016</u>	<u>2017</u>
Total # of Performers	152	101
# of Performers with >1 Commercial	3	1

(J.T. Exh. 5(AA)).

Moreover, those few performers that did perform in more than one commercial worked extremely limited numbers of sessions and hours:

<u>Year</u>	<u>Performer</u>	<u>Commercial</u> <u>Name</u>	<u>Session</u> <u>Date</u>	<u>Hours</u> <u>Worked</u>
2016	Hill, Dwayne	Irwin “Creepy Crawl Spave” Animatic – DEMO ReRecord	5/12/16	2 hours
2016	Hill, Dwayne	Irwin “Creepy Crawl Spave” Animatic – DEMO ReRecord	5/17/16	1 hour
2016	Hill, Dwayne	Short	8/3/16	1.25 hours

2016	Knepp, Natalie	“50 Fingers” / “Cat Rub”	3/25/16	1 hour
2016	Knepp, Natalie	InkJoy Stylus / Joy	4/18/16	1 hour
2016	Rue, John	Race	2/12/16	1 hour (+/-)
2016	Rue, John	With You	2/12/16	1 hour (+/-)
2016	Rue, John	Race	2/15/16	3 hours
2016	Rue, John	With You	2/15/16	3 hours
2016	Rue, John	Race	3/9/16	1 hour
2017	Jurgens, Jami	New Day	1/16/17	1 hour (+/-)
2017	Jurgens, Jami	New Day	3/20/17	1 hour
2017	Jurgens, Jami	Brighthouse Origins Video	3/24/17	3 hours
2017	Jurgens, Jami	Drive By	9/27/17	1.75 hours

(J.T. Exh. 3(A-GG); J.T. Exh. 4(A-GG); J.T. Exh. 5(AA)).

And finally, on November 17, 2017, the date that BBH withdrew recognition from SAG-AFTRA, there was only one (1) active commercial production, a commercial for Sony Playstation entitled “Speech.” None of the performers engaged for that commercial have been engaged by BBH for any commercials since that date (J.T. Exh. 5(A)).

While the General Counsel submitted pension and health plan data that purported to demonstrate far more robust and repetitive patterns of employment for BBH performers, the unreliability of that evidence is laid bare by a cursory cross-referencing of that data against the detailed production reports that include the actual hours worked by performers and the specific commercials for which they were engaged. As set forth in greater detail in Section III.C. below, the General Counsel’s evidence includes multiple entries that do not actually represent separate and distinct commercial engagements, nor the work hours performed by actors, and therefore

must be disregarded in favor of the specific time sheets included in the production reports, which definitively and conclusively establish the number of commercials, sessions and hours worked.

B. Collective Bargaining History with SAG-AFTRA.

1. SAG-AFTRA's Negotiation of the Commercials Contracts.

SAG-AFTRA is a labor organization that represents actors, broadcasters, recording artists, and other media professionals (J.T. Exh. 1, p. 1). In negotiating the Commercials Contract, SAG-AFTRA's customary practice is to first negotiate with a nationwide multi-employer group comprised of advertisers and advertising agencies, called the Joint Policy Committee on Broadcast Talent Union Relations (the "JPC").¹ Subsequently, the Union turns its attention to non-JPC signatories. In doing so, SAG-AFTRA sends each signatory a "Letter of Adherence" that constitutes an offer for the signatory to agree to the identical Commercials Contracts that were negotiated with the JPC or "to bargain separately" (J.T. Exh. 1, p. 3).

2. BBH's Signatory Status.

In 1999 and 2000, BBH first became a signatory to the Commercials Contracts through Letters of Adherence (J.T. Exh. 1, p. 2; J.T. Exh. 2-N). From 2000 until 2016, BBH remained a direct signatory to the Commercials Contracts through subsequent Letters of Adherence to the Commercials Contracts, as it never elected to authorize the JPC to bargain on its behalf (J.T. Exh. 1, p. 2; J.T. Exh. 2-N).

¹ SAG-AFTRA customarily sends a 60-day notice of termination to both the JPC and all independent signatories, but then focuses its attention on negotiating with the JPC for successor agreements before engaging in bargaining with other signatories (J.T. Exh. 1, p. 3)

3. *Background to the Complaint.*

In January of 2016, SAG-AFTRA's National Director Lori Hunt issued a 60-day notice that the then-existing Commercials Contracts were to expire on March 31, 2016 (J.T. Exh. 1, p. 3). On June 17, 2016, Hunt sent out the 2016 Commercials Contracts along with letters of adherence to all past signatories. BBH does not have any record of receiving either the March 2016 notice of termination or the 2016 Commercials Contracts, but the Union's records indicate that both were sent to BBH (J.T. Exh. 1, p. 4). The first record of any correspondence received from SAG-AFTRA by BBH occurred on November 3, 2016, when SAG-AFTRA representative Angelica Criscuolo emailed BBH with the following message:

Hi there! I'm sending this message because we have noticed that BBH hasn't updated their LOA to the 2016 SAG-AFTRA Contract. I've attached them. Please send them to me as soon as possible!

(J.T. Exh. 1, p. 4; J.T. Exh. 2-X).

BBH did not respond to Ms. Criscuolo's November 3, 2016 email and she followed up only four (4) days later with a second email, dated November 7, 2016:

Hi everyone! Following up on the LOAs. Thank you!

(J.T. Exh. 1, p. 4; J.T. Exh. 2-X).

Again, BBH did not respond to Ms. Criscuolo's offer to sign the Letters of Adherence nor a follow-up message, which then prompted another SAG-AFTRA representative, James Alvarado, to email BBH again on November 30, 2016:

Per my phone message, in reviewing our records, we discovered that we have not yet received your signed 2016 Letters of Adherence to the SAG-AFTRA Commercials Contracts. Please sign the attached documents and return to me via email.

(J.T. Exh. 1, p. 4; J.T. Exh. 2-Y).

Notably, none of the correspondence from SAG-AFTRA actually invites BBH to engage in good-faith bargaining. Rather, consistent with its practice, SAG-AFTRA expresses the desire and expectation that BBH will simply sign the Letters of Adherence without so much as a conversation or bargaining session.

BBH declined to respond to SAG-AFTRA's offers to sign its Letters of Adherence to the Commercials Contracts, choosing instead to continue operating under the 2013 Commercials Contracts. Then, on November 21, 2017, BBH Chief Financial Officer Nikita Malhotra sent a letter to SAG-AFTRA representative Lori Hunt, in which she informed Ms. Hunt as follows:

As you may be aware, Bartle Bogle Hegarty Inc. ("BBH") has declined to execute the 2016 Letters of Adherence to the SAG-AFTRA TV and Audio Commercials Contracts. The last correspondence received from SAG-AFTRA requesting that BBH execute the Letters of Adherence was received on November 30, 2016.

To date, BBH has continued to operate under the 2013 Commercials Contracts. However, effective immediately, BBH hereby terminates and repudiates the 2013 Commercials Contracts and any asserted obligation to bargain successor agreements with SAG-AFTRA, due to the absence of a permanent bargaining unit.

We have enjoyed our partnership with SAG-AFTRA over the years and we wish you the best in your representation of performers going forward. Thank you.

(J.T. Exh. 1, p. 4; J.T. Exh. 2-Z).

SAG-AFTRA Assistant General Counsel David Gregoire responded to Ms. Malhotra in a letter dated December 20, 2017, in which he asserted, in part:

Please be advised that the alleged "absence of a permanent bargaining unit" does not provide a legal basis for either refusing to bargain over a successor agreement or to repudiate a previous agreement. We note that BBH has been a

signatory to a collective bargaining agreement with SAG, AFTRA, or SAG-AFTRA since 2000 and that even if there was a so-called lack of a permanent bargaining unit (which there was not), BBH has long ago waived any right to object to the bargaining unit recognized by both parties in the collective bargaining agreements. We therefore demand that you immediately meet with SAG-AFTRA to bargain a successor agreement.

(J.T. Exh. 1, p. 4; J.T. Exh. 2-AA).

On behalf of BBH, this firm responded to Mr. Gregoire by letter dated January 8, 2018, reasserting the legal basis for its withdrawal of recognition and refusal to bargain (J.T. Exh. 1, p. 5; J.T. Exh. 2-BB). Following that letter, the parties exchanged further correspondence regarding BBH's response to the Union's information requests, but SAG-AFTRA made no further demands to bargain prior to the filing of the Charge on May 14, 2018.

III. LEGAL ARGUMENT.

A. A Section 9(a) Employer May Rely on the Absence of Permanent Employees to Withdraw Recognition from a Union.

From the foregoing facts, and others discussed below, the General Counsel contends that BBH's termination of the bargaining relationship with SAG-AFTRA and refusal to bargain for a successor agreement violates Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act"). At its core, the General Counsel's contentions pose one fundamental question: Is a Section 9(a) employer permitted to rely upon the absence of any permanent employees to revoke recognition from a union? As set forth below, it is clear under prevailing legal precedent that the answer is yes.

1. *An Absence of Permanent Employees Demonstrates the Union's Lack of Majority Support Under the Levitz Standard and Invokes the One-Man Unit Rule.*

Under Section 9(a) of the Act, “a union that obtains the support of ‘the majority of the employees in a unit’ will become the recognized representative of those employees, and the employer will be obligated to communicate and negotiate with it on the terms and conditions of employment.” *Colorado Fire Sprinkler, Inc. v. Nat'l Labor Relations Bd.*, 891 F.3d 1031, 1035–36 (D.C. Cir. 2018) (quoting 29 U.S.C. § 159(a)). “The foundation for a union’s exclusive bargaining representative status is *majority support of unit employees.*” *Liberty Bakery Kitchen, Inc. & Int'l Bhd. of Teamsters, Local 653*, No. BROCKTON, MA, 2017 WL 2305436 (May 25, 2017) (quoting *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996)) (emphasis added).

A union can achieve majority status through “either Board certification or voluntary recognition by the employer[.]” *Raymond F. Kravis Ctr. for Performing Arts, Inc. v. N.L.R.B.*, 550 F.3d 1183, 1187–88 (D.C. Cir. 2008). Moreover, a union that obtains Section 9(a) recognition is entitled to “a conclusive presumption of majority status during the term of any collective-bargaining agreement, up to three years.” *Auciello*, 517 U.S. at 786. In this case, SAG-AFTRA was voluntarily recognized by BBH as a Section 9(a) representative in 1999-2000 (J.T. Exh. 1, p. 2; J.T. Exh. 2-N).

At the expiration of a collective bargaining agreement, an employer is required to bargain in good faith for a successor agreement, and further, must maintain the terms and conditions of the labor contract in the interim. *See, e.g., NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that “an employer’s unilateral change in conditions of employment under negotiation” is a violation

of the National Labor Relations Act because “it is a circumvention of the duty to negotiate”). Failure to do so is an unfair labor practice in violation of Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5) (It is “an unfair labor practice for an employer . . . to refuse to bargain with the representatives of his employees, subject to the provisions of section 9(a).”).

Thus, it is clear that under normal circumstances, at the expiration of the 2013 Commercials Contracts in 2016, BBH would have had an obligation to continue to recognize SAG-AFTRA as the exclusive representative of the BBH bargaining unit of performers and to bargain in good faith for a successor agreement. But, under two separate but complementary bodies of Board law, BBH had no such obligation based on the record in this case.

First, at the expiration of the collective-bargaining agreement, the presumption of majority status for a Section 9(a) representative is rebuttable. *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 720 (2001). In *Levitz Furniture*, the National Labor Relations Board, in overruling *Celanese Corp.*, 95 NLRB 664, 671-673 (1951), held that “an employer may rebut the . . . presumption of a . . . union’s majority status, and unilaterally withdraw recognition . . . [upon] a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” *Levitz Furniture Co. of the Pac., Inc.*, 333 NLRB 717, 725 (2001). Prior to *Levitz Furniture*, an employer could withdraw recognition by showing “a good-faith doubt based on objective considerations” that the union continued to enjoy majority support. *Celanese Corp.*, 95 NLRB 664 (1951). Post-*Levitz*, an employer withdrawing recognition generally bears the burden of proving by a preponderance of the evidence that the union has lost majority support. Withdrawal of recognition by an employer who rebuts this presumption does not violate Section

8(a)(5) of the Act. *Leggett & Platt, Inc. & Int'l Ass'n of Machinists & Aerospace Workers (Iam), Afl-Cio*, No. JD-81-17, 2017 WL 4387183 (Oct. 2, 2017).

Second, in another line of cases, the Board has established an exception to an employer's duty to bargain a successor agreement in so-called "one-man unit" cases where an employer no longer employs a permanent bargaining unit. *Stack Electric, Inc.* 290 NLRB 575 (1988); *Chemetrons Corp.*, 268 NLRB 335 (1983). In such cases, an employer is permitted to lawfully and unilaterally terminate the bargaining relationship altogether without violating the Act, even during the term of a collective bargaining agreement. *See D&B Masonry*, 275 NLRB 1403, 1408 (1985) ("It is settled that if an employer employs one or fewer unit employees on a permanent basis that the employer, without violating [the Act], may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change the employees' terms and conditions of employment without affording a union an opportunity to bargain"); *Haas Garage Door Co.*, 308 NLRB No. 174 (1992) (because employer employed no more than one employee, the employer did not violate the Act by "repudiating the contract, by refusing to execute the contract, or by refusing to furnish information to the Union").

The facts in this case fall squarely within both of these exceptions. Because the record irrefutably establishes that BBH does not employ any permanent employees, BBH has rebutted SAG-AFTRA's presumption of majority status under *Levitz*, as it is impossible for the Union to hold a majority in a unit of zero. Likewise, a bargaining unit that does not include any permanent employees meets and exceeds the standard of the one-man-unit doctrine. Incredibly, in the face of both a factual stipulation that all BBH performers are hired on a production-by-production basis, as well as the employment statistics in the record, the General Counsel

maintains that BBH does maintain a bargaining unit of permanent employees. But, as discussed below, the NLRB has established clear standards of review that bear directly on the question of what constitutes a permanent employee in the context of Board elections, and that body of law emphatically refutes the General Counsel's position.

a. **NLRB Standards Show BBH's Lack of a Permanent Bargaining Unit.**

The NLRB's standard formula for determining voter eligibility for part-time employees was established in *Davison-Paxon Co.*, 185 NLRB 21 (1970). Under the *Davison-Paxon* formula, "an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Id.* at 23-24. Based upon the employment data set forth in Joint Exhibit 5(AA), no performer employed by BBH even remotely approaches meeting this test (J.T. Exh. 5(AA)). Indeed, the very few performers with more than a single engagement in any given year barely reach four (4) hours for an entire year, let alone averaging four (4) hours per week (J.T. Exh. 5(AA)).

Although no BBH employees qualify under the *Davison-Paxon* formula, within the entertainment industry, the NLRB has fashioned alternative eligibility formulas to take into account the unique patterns of employment that exist, in order to "permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3d Cir. 1993). The most frequently cited formula for voter eligibility in the entertainment industry was established in *Julliard School*, 208

NLRB 153 (1974). The *Julliard* formula provides that part-time employees may be considered members of a bargaining unit for election eligibility purposes if they have (i) worked on at least two productions for a total of forty (40) hours during the year prior to the eligibility date, or (ii) worked a total of one hundred twenty (120) hours during the past two years. Again, however, *exactly zero* performers employed by BBH would meet even this diluted eligibility test that is designed to capture employees with an intermittent employment pattern (J.T. Exh. 5(AA)).

It is true that, in a number of cases, in order to maximize voter enfranchisement in entertainment industry elections, the NLRB has crafted tests that are even more lenient than the *Julliard* formula. See, e.g., *Medion, Inc.*, 200 NLRB 1013 (1972) (employees eligible where they worked two productions for 5 days over a 1-year period); *American Zoetrope Productions, Inc.*, 207 NLRB 621 (1973) (employees eligible where they worked two productions during the prior year). However, even in *American Zoetrope Productions, Inc.*, the case with the most lenient test for voter eligibility, the NLRB framed its approach as an effort to confer voting rights upon “employees who have a reasonable expectancy of further employment with the employer.” *American Zoetrope Productions, Inc.* at 622. This represents the thrust of the Board’s approach in all of these cases, seeking to identify those employees who possess a continuing interest in the terms and conditions of employment with the employer because the employees possess a reasonable expectation of repeat employment.²

² See also *Tracinda Invest. Corp.*, 235 NLRB 1167 (1978) (no certification election for stagehands after play was closed because the NLRB was “unable to find that the stagehands have a reasonable expectation of recall to their former positions with the employer in the foreseeable future”).

Although the NLRB has crafted more lenient voting criteria for part-time or temporary workers in the entertainment industry (which BBH employees don't meet in any event), the Board's more recent cases have trended back toward a more traditional analysis. In *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523 (2007), the NLRB reversed the Regional Director's application of a modified *Davison-Paxon* formula to a symphony orchestra, stating that: "the Board, in recent years, however, has consistently applied the standard *Davison-Paxon* formula to entertainment industry employers that operate on a year-round basis." *Id.* at 524. The NLRB went on to observe that "the employment pattern over the past several years does not establish that the stagehands who worked during the summer of 2006 could reasonably expect that they would be employed in the summer of 2007." *Id.* at 525. Applying this analysis to BBH, it is indisputable that the performers engaged by BBH would not come close to clearing the bar for voter eligibility test established by the Board. As the parties have stipulated and the record clearly demonstrates, actors engaged for BBH commercial productions are not hired with the intention or expectancy of continued or repeat engagements (J.T. Exh. 1, p. 1; Tr. 19:19-19:21). They are hired for short-term, production specific engagements and simply do not share a community of interest with other performers that might be hired for wholly unrelated productions (J.T. Exh. 1, p. 1; Tr. 19:04-19:07).

The General Counsel may argue that the *Davison-Paxon* formula is not relevant to the Complaint because this is not a certification election. However, the 7th Circuit, in upholding the employer's right to repudiate a collective bargaining agreement under the one-man unit rule in *J.W. Peters, Inc.*, expressly relied upon the fact that the absence of a certifiable unit meant that

the employees would otherwise be deprived of the ability to remove the union as their representative:

... [A]s a matter of common sense, it seems illogical to continue to bind Peters to a pre-hire agreement simply because it has no employees who could reject the Union as their bargaining representative in a Board-conducted election.

J. W. Peters, Inc. v. Bridge, Structural & Reinforcing Iron Workers, Local Union 1, 398 F.3d 967, 975 (7th Cir. 2005).

Those words could not possibly ring more true in this case. If the performer employees of BBH wished to remove SAG-AFTRA as the exclusive bargaining representative in a de-certification election, none of those workers would even qualify to vote under the *Davison-Paxon* or *Juilliard* tests. No union is entitled to that level of protection and lack of accountability under the Act.

Finally, even the Union's own practices reflect the absence of a permanent bargaining unit amongst BBH's performers. Following the negotiation and signing of the Commercial Contracts with the JPC, the Union issues Letters of Adherence to the Commercial Contracts to all non-signatories of the JPC (J.T. Exh. 1, p. 3). These Letters are, in reality, little more than an agreement to be bound by the Commercial Contracts negotiated and agreed to by the JPC. In the case of BBH, there has been no independent negotiation, no attempt by the Union to consult with past, present, and future BBH-hired performers to fashion any kind of strategy for the negotiation between the Union and BBH, and, after the contract is agreed to by BBH, no attempt by the Union to provide a ratification process with the performers who have worked for BBH

(Tr. 87:01-87:04). Clearly then, even SAG-AFTRA recognizes that there is no permanent complement of performers that work for BBH that can participate in a contract ratification vote.

In sum, because BBH can show that there are no permanent employees in the relevant bargaining unit and that there are no employees eligible to vote under any of the NLRB's articulated election standards, it has objectively established the absence of continuing majority support for the Union, thereby rebutting SAG-AFTRA's presumption of majority support under the *Levitz* standard and invoking the application of the one-man-unit rule.

2. *The "One-Man Unit" Rule Permits Repudiation Outside of Section 8(f).*

Although BBH's satisfaction of the *Levitz* standard, standing alone, is sufficient to require a dismissal of the Complaint in this case, BBH is also entitled to withdraw recognition from SAG-AFTRA under the one-man unit rule. The General Counsel, recognizing the clear applicability of the one-man unit doctrine, has attempted to distinguish this case on the basis of a groundless assertion that the one-man unit rule is limited to Section 8(f) representatives and cannot be applied to a Section 9(a) representative (Tr. 14:04-14:08; 14:17-14:25; Tr. 16:21-16:23). However, contrary to the General Counsel's assertions, the one-man unit rule, which permits an employer who no longer employs a permanent bargaining unit to lawfully and unilaterally terminate an existing collective bargaining agreement, as well as the bargaining relationship, is not limited to Section 8(f) representatives.

As noted above, an employer is entitled to voluntarily recognize a union as a Section 9(a) representative upon receipt of evidence of majority support in the bargaining unit.

Correspondingly, it is unlawful for an employer to make a collective bargaining agreement with a union that does not enjoy majority support. *International Ladies Garment Workers Union v.*

NLRB, 366 U.S. 731, 739 (1961). Such an agreement is generally referred to as a pre-hire agreement. *Tri-Gen, Inc. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 433 F.3d 1024, 1037 (7th Cir.2006). When an employer grants recognition to a union prior to the existence of majority support, an unfair labor practice is committed by both the employer and the union under Sections 8(a)(1), 8(a)(2) and 8(b)(1)(A) of the Act, as it deprives employees of their right of democratic self-determination by imposing an illegal “pre-hire” arrangement. *Id.* at 737-38.

Section 8(f) of the Act creates an exception to this rule for construction industry employers, providing as follows:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act [Section 159 of this title] prior to the making of such agreement . . .

29 U.S.C. § 158(f).

Thus, through Section 8(f), Congress has conferred a unique and specific right upon construction industry employers, allowing them to enter labor agreements with unions prior to hiring any employees that are capable of expressing support for union representation. As a logical extension of this arrangement, an employer that enters a Section 8(f) relationship with a union on a voluntary basis has an absolute right to terminate that bargaining relationship with the

union at the expiration of a collective bargaining agreement, with no duty to bargain a successor agreement, as the arrangement at its inception was a voluntary one that was not founded on the basis of employee support. *In Re Staunton Fuel & Material, Inc.*, 335 NLRB 717, 718 (2001).

In addition to the fundamental right of an employer to terminate a Section 8(f) bargaining relationship at the expiration of a collective bargaining agreement at least three (3) separate Circuit Courts of Appeals have applied and upheld the one-man unit rule to permit an employer who employs one or fewer employees on a permanent basis in its relevant bargaining unit to unilaterally repudiate an existing collective bargaining agreement without violating Section 8(a)(5). *See, e.g., Baker Concrete Constr., Inc. v. Reinforced Concrete Contrs. Ass'n*, 820 F.3d 827, 831 (6th Cir. 2016); *J. W. Peters, Inc.*, 398 F.3d at 975 (7th Cir. 2005); *Laborers Health & Welfare Trust Fund v. Westlake Dev.*, 53 F.3d 979, 982 (9th Cir. 1995) . The rationale for permitting such a repudiation is simple:

[T]he NLRB has long held that the very concept of collective bargaining 'presupposes that there is more than one eligible person who desires to bargain.' Foreign Car Center, Inc., 129 NLRB 319, 320 (1960). If there are no employees within the relevant unit for a collective bargaining agreement, then the agreement is nugatory. Intuitively, a collective bargaining agreement should be voidable where there is no one with whom and nothing about which to bargain.

Baker Concrete Constr., Inc., 820 F.3d at 831.

The General Counsel maintains that the one-man unit rule is wholly unavailable outside of Section 8(f) and the construction industry (Tr. 14:17-14:19). But, that is simply not true, as courts have not used the absence of a Section 8(f) relationship as a basis for declining to apply the one-man unit rule. *See, e.g., Cremation Soc'y of Illinois, Inc. v. Int'l Bhd. of Teamsters Local 727*, 869 F.3d 610, 618 (7th Cir. 2017) (applying the one-man unit rule outside of the

construction industry); *Grand Elec., LLC v. Int'l Bhd. of Elec. Workers Local 265*, No. 4:09CV3160, 2011 WL 3046959, *8 (D. Neb. July 25, 2011) (applying the one-man unit rule despite no conclusive finding that the agreement in question was a Section 8(f) agreement).

To place this issue in context, it is important to remember that a Section 8(f) representative is not required, as a threshold matter, to establish majority support of the bargaining unit – the parties are legally entitled to impose a pre-hire contract on the workers with no democratic ratification of any kind. In kind, the employer is entitled to withdraw recognition at the expiration of the collective bargaining agreement, as the relationship was entered into voluntarily, without employee sanction. But, during the term of the contract, the law imposes an obligation to abide by the contract unless the bargaining unit has been reduced to a single employee or less, at which point the employer can repudiate the labor contract and withdraw recognition from the union. In a sense then, the one-man unit rule, as applied in the context of Section 8(f) relationships, is applied where the *least stringent* test for democratic majority support for a union exists. Indeed, there is no requirement of majority support for a Section 8(f) representative at all. Given this, it is wholly illogical not to apply that same rule in a Section 9(a) context, which actually requires an initial demonstration of majority support as a condition of valid recognition, when the very foundation and rationale for the rule is derived from the absence of majority support. *Baker Concrete Constr., Inc.*, 820 F.3d at 831. The General Counsel cannot cite any legal authority that holds otherwise and such policy considerations clearly favor application of the one-man unit rule to a Section 9(a) relationship, particularly at the expiration of a collective bargaining agreement.

3. *BBH Was Entitled to Withdraw Recognition from SAG-AFTRA at the Expiration of the Commercials Contracts Because the Commercials Contracts Constitute Pre-Hire Contracts without the Statutory Sanction of Section 8(f).*

As set forth above, BBH is entitled to withdraw recognition from SAG-AFTRA under two separate, but related, legal doctrines that apply to Section 9(a) relationships: (i) the *Levitz* standard for rebutting the presumption of a union's majority support; and (ii) the one-man unit rule. However, in addition to having established these clear legal bases for terminating a Section 9(a) relationship, a compelling argument can be made that BBH also was entitled to withdraw recognition from SAG-AFTRA at the expiration of the Commercials Contracts as a matter of right, because the essence of SAG-AFTRA's role is more akin to a Section 8(f) representative than a Section 9(a) representative, albeit without the statutory sanction.

The Commercials Contracts bear all the hallmark attributes of pre-hire agreements. Under Section 5 of the TV Commercials Contract and the Preamble of the Audio Commercials Contract, the Commercials Contracts are applied to all U.S.-based commercial productions, thus treating all performers in those individual productions as part of a single permanent bargaining unit (J.T. Exh. 2-F). While BBH has acquiesced with this historical practice, it is legally flawed and represents a classic "pre-hire" contract arrangement that imposes the Commercials Contracts on separate groups of performers before they are hired for independent commercial productions, which is technically improper under the Supreme Court precedent established in *International Ladies Garment Workers Union*. 366 U.S. at 731. The system has prevailed for decades, but others have taken note of its lack of statutory support, including the entertainment unions themselves.

In 1989, entertainment unions lobbied on behalf of proposed legislation that was introduced in both the U.S. Senate and House of Representatives, seeking “to amend the National Labor Relations Act to give employers and performers in the live performing arts . . . the same rights given by Section 8(f) of such Act to employers and employees in the construction industry . . .”. *H.R. 2025/S. 1216, Live Performing Arts Labor Relations Amendments (1989-92)*. That bill ultimately died without being enacted, leaving not only the continuing absence of a statutory sanction for pre-hire contracts in the advertising and entertainment industries, but adverse legislative history in its wake.

Just three (3) years ago, the prevalence of and lack of statutory support for pre-hire contracts in the entertainment industry was addressed by NLRB Member Phil Miscimarra in his dissenting opinion in *David Saxe Productions, LLC*. 364 NLRB No. 100 (2016) (Miscimarra, dissenting). Member Miscimarra, in the context of addressing the legality of individual performer contract language that required performers to acknowledge that a Las Vegas stage production was not under the jurisdiction of any labor union, stated the following:

In the performing arts, dancers and other performers may be represented by unions such as the American Guild of Musical Artists (AGMA), Actors' Equity, the American Guild of Variety Artists (AGVA), the Screen Actors Guild (SAG), and the American Federation of Television and Radio Artists (AFTRA), which are collectively known as SAG-AFTRA. Under a common industry practice, many productions from the outset are mounted with the expectation that they will be "union" shows—even though no performers have yet been hired, which means no employees exist who can express a desire for or against union representation. Unlike in the construction industry, where "pre-hire" agreements are permitted under NLRA Section 8(f), the NLRA does not permit the entertainment industry to have "pre-hire" union agreements.

David Saxe Productions, LLC, 364 NLRB No. 100 (2016) (emphasis added).

While the NLRB was not directly confronted with a challenge to pre-hire contracts in *David Saxe Productions*, Member Miscimarra flatly acknowledged the fact that the entertainment industry regularly deploys pre-hire contracts without statutory sanction under the Act. While Member Miscimarra did appear to accept the existence of pre-hire contracts in the entertainment industry as a pragmatic practice, neither he nor his fellow Board members were asked to analyze whether an entertainment industry employer might be entitled to withdraw recognition from a union at the expiration of a collective bargaining agreement in the same manner as a Section 8(f) representative. However, logic and equity dictate that if an employer that is a party to a legitimate pre-hire contract under Section 8(f) has an absolute right to withdraw recognition from a union at the contract's expiration, a union that imposes a pre-hire contract on workers without the statutory sanction of Section 8(f) should not enjoy any greater protection.

4. *Waiver and Estoppel Do Not Apply.*

The General Counsel also asserts that BBH should be estopped from terminating the bargaining relationship with SAG-AFTRA, claiming that BBH long ago waived any right to object to the bargaining unit recognized by both parties in the collective bargaining agreements. (Tr. 14:14-14:16). However, the notion that BBH should be sentenced to continue to adhere to a pre-hire arrangement that deprives BBH employees of their Section 7 rights – in perpetuity, no less – simply because the technically improper arrangement has occurred for a long period of time, is not only nonsensical on its face, it has been soundly rejected by the NLRB.

The Board has long held that when one party to a collective bargaining agreement seeks to sustain an arrangement that contravenes the fundamental principles of the Act, waiver and

estoppel cannot be asserted to compel the continuation of that arrangement. *See Oakland Press Co.*, 266 NLRB 107 (1983). In *Oakland Press*, the employer had previously stipulated in an election agreement that certain district managers were not statutory supervisors. *Id.* at 107. Of course, if the district managers were statutory supervisors, they would not have been eligible for inclusion in the unit under the Act, but based upon the stipulation that the managers were not supervisors, the employer included the district managers in the unit for two successive collective bargaining agreements. *Id.* Upon expiration of the second contract, the employer withdrew recognition and refused to bargain with the Union on the grounds that the district managers were statutory supervisors. *Id.* In turn, the Union argued that the employer should be equitably estopped from revoking recognition on the basis of its prior acceptance of the arrangement. The Board ruled as follows:

... [T]he Board has in a number of cases held that it is obliged to give paramount consideration to the provisions of the Act regardless of earlier positions taken by any party. Thus, the Board has consistently found that a pre-election agreement wherein, as here, an employer stipulates that certain individuals are not supervisors within the meaning of the Act does not estop the employer from subsequently contesting their status because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act.

Id. at 108.

Similarly, in *Children's Miracle Network*, 2001 WL 1782903, Case 31-CA-25115 (2001), the Office of the NLRB General Counsel's Division of Advice issued an advisory opinion relevant to the issues raised in the instant Complaint. *Id.* In that case, Children's Miracle Network ("CMN") sought to discontinue a practice that had existed for eighteen (18) years, whereby it had contracted with a performers' union, Theatre Authority, to make certain

charitable payments in lieu of compensation to the performers and celebrity hosts that appeared on an annual telethon. *Id.* at *1. Ironically, Theatre Authority was established by SAG-AFTRA's predecessor unions, SAG and AFTRA, along with Actors Equity Association, the American Guild of Musical Artists, and the American Guild of Variety Artists, in order to represent their members when they perform for charity benefit organizations. *Id.* at *1, n.2.

In withdrawing recognition from Theatre Authority, CMN relied upon the assertion that such individuals were not statutory employees under the Act. *Id.* at *1. Theatre Authority argued estoppel, which the Division of Advice emphatically rejected:

The Board will not obligate an employer to bargain with a Union on behalf of a unit that could not have been certified under the Act. *Because none of the performers who appeared on the 2001 broadcast were employees of CMN, a unit comprised of those performers could not have been certified by the Board, and thus no Section 8(a)(5) duty attached to the 2001 broadcast. **Any recognition that CMN may have previously extended to the Union was purely voluntary, and CMN was free to withdraw that recognition when the parties' contract terminated.***

...

As in Oakland Press, requiring CMN to recognize a unit composed entirely of individuals who are not its employees would "without question contravene the Act." Furthermore, although CMN stipulated in its prior charge that the Union was a "labor organization engaged in representing employees of Children's Miracle Network," and although that charge resulted in a Board settlement, the issue of employee status was not litigated in the prior charge. Accordingly, as in Oakland Press, CMN is not estopped from now contesting the performers' employment status."

Id. at *4-5 (emphasis added).

Just as in *Children's Miracle Network*, the record in this case clearly establishes that BBH does not employ a bargaining unit that could be certified under the Act in the form

expressed in the Commercials Contracts, as it imposes a pre-hire contract on non-permanent employees in the absence of statutory sanction. In that sense, this case rests on all fours with *Children's Miracle Network*, as BBH is seeking to withdraw its voluntary recognition of SAG-AFTRA under an arrangement that could not have been certified by the Board. The Division of Advice's opinion in *Children's Miracle Network* squarely and conclusively addressed this issue, ruling that "any recognition that CMN may have previously extended to the Union was purely voluntary, and CMN was free to withdraw that recognition[.]" *Id.* at *4. There are no distinguishing facts in this case that justify a different result.

B. This Case is Readily Distinguishable from Authority Cited by the General Counsel and SAG-AFTRA.

At the hearing, the General Counsel and SAG-AFTRA cited a series of cases that purportedly stand in opposition to BBH's right to withdraw recognition from SAG-AFTRA in this case. However, not only are those cases easily distinguished and dispensed with, they actually underscore the reasons that this case deserves different treatment.

In *Raymond Kravis Center for the Performing Arts*, the employer was a party to a collective bargaining agreement that established a hiring hall for stagehands. *Raymond F. Kravis*, 550 F.3d at 1186. The employer commenced bargaining with the Union, but later declared impasse and implemented the terms of its final bargaining proposal, which changed the hiring hall to a non-exclusive arrangement and allowed the employer to engage personnel outside the scope of the labor contract. *Id.* Later, the employer withdrew recognition from the Union altogether. *Id.* The Board and the D.C. Circuit Court of Appeal found that the employer committed an unfair labor practice, violating Sections 8(a)(1) and (5) of the Act. *Id.*

Specifically, the Board and the D.C. Circuit found that: (i) it was improper to negotiate to impasse over the scope of the bargaining unit, as the scope is a permissive subject of bargaining; and (ii) the employer did not even attempt to present evidence to rebut the Union's presumption of majority support. *Id.* at 1187.

Neither of these elements are present in this case. In fact, quite pointedly, BBH declined to engage in bargaining with SAG-AFTRA for a successor agreement, precisely because negotiating to impasse regarding SAG-AFTRA's continuing representational status and the scope of the unit does not serve as a valid legal basis for withdrawing recognition (J.T. Exh. 1, p. 4; J.T. Exh. 2-Z).³ Also, unlike the employer in *Kravis*, BBH has painstakingly established, through detailed production reports, that SAG-AFTRA does not enjoy majority support, because no permanent employees exist in this case (J.T. Exh. 3(A-GG); J.T. Exh. 4(A-GG); J.T. Exh. 5(AA)). Therefore, the core violations that existed in *Kravis* and that served as the basis for the Board and D.C. Circuit decisions simply do not exist in this case – BBH did not bargain to impasse over a permissive subject and it did not withdraw recognition from SAG-AFTRA without establishing an absence of majority support.

The employer in *Kravis* also raised a defense that has not been asserted by BBH, arguing that the Union in that case never enjoyed majority support at the time that it first recognized the Union, years earlier. *Raymond F. Kravis Ctr. for Performing Arts, Inc. v. N.L.R.B.*, 550 F.3d 1183, 1189 (D.C. Cir. 2008). The Board and the D.C. Circuit found this argument to be time-

³ It is noteworthy that, historically, SAG-AFTRA has allowed signatories to withdraw recognition from the Union and to operate as non-signatories after negotiating to impasse (Tr. 88:06-88:14). But, given the precedent of *Kravis*, BBH could not responsibly assume that SAG-AFTRA would continue its past practice and therefore elected not to engage in such a charade.

barred. *Id.* Seizing upon this, the General Counsel and SAG-AFTRA have sought to impute the identical defense to BBH, but BBH has consistently stated that it is not seeking to challenge the original recognition of SAG-AFTRA in 1999-2000 (Tr. 25:02-25:06). Rather, BBH simply wishes to assert its right to withdraw recognition on November 21, 2017, a moment in time at which there were indisputably *zero* permanent employees in the purported bargaining unit (Tr. 25:09-25:16).

Once again, *Children's Miracle Network* is precisely on point on this issue. In that case, like the General Counsel and SAG-AFTRA, Theatre Authority sought to argue that the employer's withdrawal of recognition was improper because it effectively challenged the original recognition that had occurred eighteen years earlier. *Children's Miracle Network*, 2001 WL 1782903, *4-5 (2001). But, the Division of Advice distinguished *Children's Miracle Network* from *Bryan Manufacturing*, 362 U.S. 411 (1960) because, unlike in the *Bryan Manufacturing* line of cases, CMN was not defending its withdrawal of recognition by asserting that the initial recognition was unlawful, but instead, was asserting that because the unit could not have been certified by the Board, there could be no Section 8(a)(5) violation. That analysis applies equally to BBH in this case.

Finally, the other cases cited by the General Counsel and SAG-AFTRA, *Strand Theatre* and *Colorado Symphony* are even more inapposite. *Strand Theatre of Shreveport Corp. v. N.L.R.B.*, 493 F.3d 515 (5th Cir. 2007); *Colorado Symphony Ass'n & Denver Musicians Ass'n, Local 20-623, Am. Fed'n of Musicians*, 366 NLRB No. 60, 2018 WL 1794789 (Apr. 13, 2018). In *Strand Theatre*, the employer commenced bargaining with the Union (as in *Kravis*), but later withdrew recognition without demonstrating a lack of majority support or even reaching

impasse. *Strand Theatre*, 493 F.3d at 519. Unsurprisingly, the Fifth Circuit found an unfair labor practice violation in that case, but as noted, BBH did not replicate any of those transgressions. *Colorado Symphony* was a simple refusal-to-provide-information case in which the employer did not even attempt to withdraw recognition. *Colorado Symphony*, 2018 WL 1794789 at *1. It has no application to the fact pattern in this case whatsoever.

C. The General Counsel’s Evidence Should Be Disregarded.

The General Counsel’s proffered Exhibits GC-2 and GC-3 must be disregarded on the basis that they are incomplete, irrelevant, misleading, and ambiguous. Exhibit GC-3 is purported to be an “analysis of the data in GC-2, summarized by calendar year” (Tr. 38:19-38:20). At the outset, the original production files and summary spreadsheets provided by Respondent clearly set forth an authentic and comprehensive outline of the commercial engagements for the performers, thereby negating any need for a summarized version which emanates not from the original source (e.g., the production files), but rather as extrapolated data derived from SAG-AFTRA plan data. Under Rule 401 of the Federal Rules of Evidence, evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. Evid. 401. GC-2 and GC-3 fail on both counts. Because Respondents have provided the original production files as well as summary spreadsheets created therefrom, there is no need for a summary that is duplicative, let alone one that was created, not from the original source (e.g., the production files), but rather was derived from SAG-AFTRA health and pension plan data. Far from making the existence of any fact more or less probable without the evidence, the evidence actually serves to mislead, by depicting and calculating separate session payments and residual payments as “separate

commercials,” when in fact the separate session payments and residuals were tied to the exact same commercial.

While there may not be deceptive intent, the General Counsel’s submission of GC-2 and GC-3 casts certain edits and other postproduction cut downs that occur well after the actor’s performance – which create a *separate commercial* for the purposes of entitling a performer to residual compensation payments under the Commercials Contracts – as conclusive evidence that the performers hired by BBH were in fact hired to perform in separate commercial projects. Of course, the fact that a commercial is edited months after the spot is in the can and that edit entitles a performer to additional compensation does not reflect, in any way, the actual pattern of employment or performance. Thus, the artificially inflated statistics in GC-2 and GC-3 that purport to set forth the number of performers appearing in more than one BBH commercial are in fact both misleading and factually inaccurate.

Even if such evidence may be considered relevant, GC-2 and GC-3 would be inadmissible under Rule 403 of the Federal Rules of Evidence. Rule 403 permits the court to exclude otherwise “relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, *confusing the issues*, misleading the jury, undue delay, wasting time, or *needlessly presenting cumulative evidence*.” Fed. R. Evid. 403 (emphasis added). The needlessly duplicative nature of this evidence unquestionably falls within the confines of Rule 403, favoring inadmissibility. Further, GC-2 and GC-3 are at best misleading, and at worst *factually incorrect*, depicting an artificially and inaccurately inflated count of the number of performers that BBH hired for more than one commercial project. These numbers are *directly* contradicted by BBH’s original production files. There is absolutely no rational justification to

give credence to duplicative, prejudicial, and misleading evidence when BBH has already provided the original production files.

The fact that this data was extrapolated from a non-original source composed primarily of materials of unknown accuracy submitted and filed by third parties – namely, SAG-AFTRA plan data – at minimum should provide considerable pause. If that wasn't enough, Respondents, utilizing the original, authenticated production files, have been unable to reconcile the significant discrepancies between exhibit GC-2 and Respondent's own summaries of the information contained in the original production files. In addition, during cross-examination, the General Counsel's witness admitted on five (5) separate occasions that he was unable to definitively answer questions posed to him concerning how GC-2 represented aspects and details of earning session payments to various artists (Tr. 47:05 (“We didn't have sufficient data to do that.”); 54:15 (“...I can't discern from this data.”); 55:14-15 (“...I can't say definitively, based on the data that we have.”); 56:08 (“...I can't account for those two values based on the data”; 64:22-23 (“...I can't say exactly, what accounts for this . . . based on this data.”)). Moreover, the analysis sourced from the SAG-AFTRA plans failed to provide even enough information to answer basic questions, such as how many hours were worked per year by individuals that SAG-AFTRA claimed had worked more than one session per calendar year (Tr. 47:01-05).

Upon closer review of GC-2 and GC-3, troubling inaccuracies emerge. In 2017, for example, GC-3 provides that there were three performers employed by BBH who worked more than one commercial in that calendar year. A review of GC-2, however, shows only one performer who worked more than one BBH commercial during that calendar year: Arianna G. Further, the General Counsel's witness admitted during cross examination that he was unable to

explain the significance of two equal payments listed for the same production and performer (Tr. 54:10-54-14) (“That could be someone was engaged to do – to create two commercials on that same production date. That could mean that another commercial was created using footage from that production date into a separate commercial. It could be an over scale payment.”).

While the above mentioned issues are not an exhaustive list of inaccuracies, misrepresentations, and ambiguities presented by the General’s Counsel proffered evidence, it is more than sufficient for a finding that GC-2 and GC-3 are unreliable on any number of grounds. At minimum, the evidence is unclear and misleading. “Logically, unclear evidence triggers a search for more evidence, *not reliance on the unclear evidence to support a particular conclusion.*” *Lor v. Comm’r of Soc. Sec.*, No. 2:15-CV-0548-DMC, 2019 WL 1060049, at *5 (E.D. Cal. Mar. 6, 2019) (emphasis added). For these reasons and those articulated above, Respondent requests that the General Counsel’s proffered Exhibits GC-2 and GC-3 be disregarded on the basis that the exhibits are incomplete, irrelevant, misleading, and ambiguous.

IV. CONCLUSION

At the hearing, the General Counsel and SAG-AFTRA sought to portray BBH as a scofflaw that has brazenly advanced unprecedented legal positions that fly in the face of decades of Board precedent, thereby imperiling the very foundation of SAG-AFTRA’s representation of actors in the advertising and entertainment industries. Such dramatic scare tactics grossly distort the factual record, the applicable legal framework for this case and the practical implications of a dismissal of the Complaint in this case.

First, according to the General Counsel’s own witness, there is nothing unprecedented about the legal position taken by BBH in this matter. SAG-AFTRA’s Chief Contracts Officer

confirmed that other signatories to the Commercials Contracts have withdrawn as signatories, either by refusing to bargain and withdrawing recognition as BBH has done, or by negotiating to impasse with SAG-AFTRA, after which the Union has permitted those signatories to proceed to act as non-signatories (Tr. 87:20-88:13). With prior refusals to bargain, SAG-AFTRA has merely “threatened litigation” (Tr. 88:18-89:06). In the case of those signatories that have bargained to impasse, SAG-AFTRA has elected to ignore the precedent of *Kravis*, allowing such withdrawals to occur. *Raymond F. Kravis Ctr. for Performing Arts, Inc. v. N.L.R.B.*, 550 F.3d 1183, 1190 (D.C. Cir. 2008). Either way, signatories have withdrawn from the bargaining relationship with SAG-AFTRA. It may well be that SAG-AFTRA has decided to draw a line in the sand with BBH because it believes that the withdrawal of BBH represents a heightened threat to its control of the labor market, but that is something entirely different from saying that BBH is doing something unprecedented. Instead, the factual record clearly shows that BBH is embarking down a well-worn path, and the only thing that has changed is the Union’s response.

Equally misleading and irrational is the General Counsel’s suggestion that a dismissal of the Complaint in this case would be destabilizing to the commercial production industry. To be clear, BBH has not sought to interfere with SAG-AFTRA’s continuing bargaining relationship with the JPC or other direct signatories. To the extent that those parties wish to continue to recognize SAG-AFTRA and bargain successor agreements to the Commercials Contracts, they are free to do so voluntarily. Here, BBH’s withdrawal of recognition from SAG-AFTRA is based on the specific factual record in this case, which irrefutably establishes an absence of a permanent bargaining unit that could not be certified for a Board election. As the General Counsel’s own Division of Advice determined in *Children’s Miracle Network*, the essence of

such an arrangement is that it is purely voluntary. *Children's Miracle Network*, 2001 WL 1782903, at *4. BBH and SAG-AFTRA entered the relationship voluntarily and BBH is entitled to terminate the relationship voluntarily. For various competitive reasons, BBH has determined that a continuation of the bargaining relationship no longer serves its interests. It is wholly illogical to think that an entire industry that has established a bargaining relationship with SAG-AFTRA, uniformly through voluntary recognition, will immediately reverse course, let alone be in a position to establish the requisite factual foundation to do so.

SAG-AFTRA's Chief Contracts Officer also conceded that many non-signatory agencies do produce commercials under the Commercials Contracts, by partnering with co-producer signatories (Tr. 81:25-83:04). These are the agencies that BBH competes with and BBH is merely seeking to compete on a level playing field with those agencies. Like those agencies, BBH would love to be able to continue hiring SAG-AFTRA performers under the Commercials Contracts, in partnership with signatory co-producers. In reality, such a model more closely aligns the production-by-production employment pattern in commercials with the democratic principles of the Act. In cases where performers express a desire for SAG-AFTRA representation, the non-signatory agencies partner with a signatory co-producer to cover the work under the Commercials Contracts. But, in cases where performers do not express such a preference, those agencies are free to produce outside the Commercials Contract. The practice is inherently democratic, reflecting the production-by-production employment pattern of the industry. In short, BBH is not blazing new ground in seeking to operate as a non-signatory for its own business reasons, but its achievement of that objective would actually have the effect of helping to preserve the Section 7 rights of the performers it engages.

In view of the foregoing facts, as established and supported by the record evidence herein, and on the basis of the authorities cited herein, and for all of the above, BBH respectfully submits that the General Counsel has failed to meet his burden to sustain any aspect of the unfair labor practice Complaint issued herein; accordingly, the Complaint must be dismissed in its entirety.

Respectfully Submitted,

Dated: April 12, 2019

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CERTIFICATE OF SERVICE

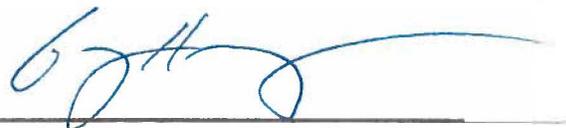
I hereby certify that a copy of Respondent's Post-Hearing Brief to the Administrative Law Judge in the Matter of *Bartle Bogel Hegarty Inc.*, Case No. 02-CA-220370 was served by E-Gov, E-filing and E-mail on this 12th day of April 2019, on the following:

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