

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

ADT LCC d/b/a ADT SECURITY SERVICES,

Respondent,

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION 43,

Charging Party.

Case Nos.: 03-CA-230714  
03-CA-234585

**CHARGING PARTY UNION'S POST-HEARING BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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## **INTRODUCTION**

International Brotherhood of Electrical Workers, Local Union 43 (“Charging Party” or “Union”), by its attorneys, Blitman & King LLP, submits this brief to the Administrative Law Judge (“ALJ”) pursuant to Section 102.42 of the National Labor Relations Board’s Rules and Regulations and in support of the Charging Party Union’s position in this proceeding.

On April 17, 2019, Administrative Law Judge Arthur J. Amchan heard this matter in Albany, New York. On March 1, 2019, a Consolidated Complaint and Notice of Hearing (“Consolidated Complaint”) was issued in the above captioned cases, based on charges filed by the Charging Party alleging that Respondent ADT LLC d/b/a ADT Security Services (“Respondent”, “ADT” or “Employer”) has engaged in, and is engaging in, certain unfair labor practices. [G.C. Exh. 1(p)] The Consolidated Complaint alleges a number of unfair labor practices by Respondent related to the Employer’s unlawful withdrawal of recognition from the Union.

## **ISSUES**

1. Did the Employer unlawfully interrogate bargaining unit employees concerning their union sympathies?
2. Did the Employer coercively poll bargaining unit employees concerning their support for the Union?
3. Did the Employer unlawfully solicit bargaining unit employees to withdraw from the Union by requesting that employees sign a statement indicating that they no longer wish to be represented by the Union?
4. Did the Employer unlawfully provide more than ministerial assistance to bargaining unit employees in removing the Union?
5. Did the Respondent unlawfully withdraw recognition from the Union?

6. Did the Employer unlawfully fail to execute a written contract concerning the terms and conditions of employment reached by the parties?
7. Did the Employer unlawfully fail to continue in effect all the terms and conditions of the agreement by granting a wage increase to employee Brady and repudiating the dues deduction and remittance procedure embodied in the agreement?

For the reasons and authorities set forth below, the Charging Party respectfully requests the ALJ find that Respondent violated the National Labor Relations Act (“Act”) as alleged in the Consolidated Complaint. The remedy should include the relief requested in the Consolidated Complaint and in this brief, including recognition of the Union, and a make whole remedy to the Union and all impacted employees.

## STATEMENT OF FACTS

### 1. Background.

Since 1968, Local 43 has represented residential installers and service technicians employed by ADT as the exclusive collective bargaining representative of employees employed in the bargaining unit in the Albany, New York geographic location. [G.C. Exh. 6, Art. 1, § 1] Installation technicians and service technicians install, service, and maintain residential security systems throughout the Capital Region of New York State.

On or about December 14, 2017, the Union contacted the Employer for the purpose of negotiating a successor collective bargaining agreement. [G.C. Exh. 29; Tr. 277] The extant collective bargaining agreement was effective June 11, 2015 through June 10, 2018 (“2015 Agreement”). [G.C. Exh. 6] Due to an outstanding request for information, the parties met in May 2018 and discussed the requested information, but did not engage in any formal bargaining. [Tr. 91] The parties then met two times to negotiate a successor contract -- September 7, 2018 and October 18, 2018. [Tr. 64] A complete agreement was reached at the October 18, 2018 meeting. [Tr. 67, 115-116]

### 2. On October 9, 2018, ADT Vice President Ben Clark e-mailed Johnson and Hardy to request they “help [ADT] move forward without the Union.”

On September 25, 2018, Vice President of Central Operations Ben Clark e-mailed Director of Labor Relations James Nixdorf concerning “updates for the Union in Albany.” [G.C. Exh. 19]. On October 1, Nixdorf responded to Clark, stating that he would call Clark that week to update him. [G.C. Exh. 19]

Eight days later, by e-mail dated October 9, 2018, Clark sent an e-mail message to employees David Hardy and Kenneth Johnson<sup>1</sup> generally criticizing unions, inquiring about their union sympathies, and directing the employees to sign an anti-union petition disavowing the Union, which was to be returned to ADT the following day. The e-mail provided, in full, the following:

Dave, Ken,

We are at a point where I need to get your intentions in writing to help us move forward with the union.

I wanted to give you these 4 in each area to at least inform you about Unions. Basically, they are causing more due and increased hardships for you. In the past, the unions helped create correct working cultures to ensure employees were treated fairly. That is not the case today. HR is working hard to protect your rights, and ensure you have every tool, and support needed to protect your employment. States have laws that companies must follow. Paying a union to do what a company must do to laws and regulations places a middle man in the works, that you must pay due to have, that is no longer needed.

Here are a few Pros and cons of the union.

Pros:

1. Unions can increase pay and benefits for workers.
  - a. Both union and non-union are effected by any increase.
2. Unions set up formal processes for disputes.
  - a. Can make it easier to handle disputes. These roles are now supported by HR.
3. Unions make political organizing easier.
  - a. Can make it easier to advance political causes.
4. Unions set Norms and Regulations.
  - a. Work to ensure standards are met like the 40 hour work week.

Cons:

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<sup>1</sup> Around the same time, Johnson was in the process of onboarding into a bargaining unit position. [G.C. Exh. 5; Tr. 43, 147-148, 252]. The status of Ken Johnson at the relevant points is unclear as Johnson was transitioning from a subcontractor position to an ADT employee. As of November 2, 2018, Johnson was still in transition [Tr. 252].

1. Unions can make it harder to promote great workers.
  - a. Unions tend to follow seniority. This can limit work to less experienced employees and dismiss poor work from a more senior person.
2. Unions can require dues and fees.
  - a. Unions force you to joint and set the price you must pay.
3. Unions can make it hard to diversify the workplace.
  - a. Unions can have a closed culture and tend to protect member misconduct.
4. Unions can drive up cost and cause bad relationships between labor and management.
  - a. Union leaders tend to protect their best interest at the mercy of the working relationship with management. Slow and disconnected cultures divide teams and productivity.

To ensure we are able to move forward and hire without the limitations forcing new hires to join the union, I need a written or typed letter stating the following.

“I, Dave Hardy or Kenneth Johnson, do not want to be represented by the IBW.

Thank you,

Sign and date.” (handwritten signature)

I need your actual copy so I will sent you label to overnight to me. Please get this done tomorrow.

Thank you very much! Call if you have questions.

[G.C. Exhs. 2, 15]

Minutes later, at 5:15 p.m. on October 9, Ben Clark sent an e-mail to the ADT Materials Group, with a copy to employees Hardy and Johnson, stating:

Materials,

Can you please create an overnight label for Dave Hardy and Kenneth Johnson? I have asked them to send a physical letter to me tomorrow.

[G.C. Exh. 18] By separate e-mail, on October 10, at 10:15 a.m., Materials sent mailing labels to Hardy and Johnson. [G.C. Exh. 18]

At 10:52 a.m. on October 10, Ben Clark sent another e-mail to Hardy and Johnson, saying “Dave and Ken. Let me know when you get these sent today.” [G.C. Exh. 16]

That same day, at 4:45 p.m., Ben Clark sent a third e-mail to Hardy and Johnson stating “Dave, Ken, Let me know when you get this done! Thank you[.]” [G.C. Exh. 16]

On October 12, at 8:06 a.m., Ben Clark sent a fourth e-mail directly to Hardy and Johnson requesting an update on the status of the letter, ordering “[t]his needs to be completed today, I had planned on the letters arriving today, but I have not heard back on this from either of you.” [G.C. Exh. 17]

In addition to the multiple e-mails, Ben Clark also **sent text messages** to Mr. Hardy and Mr. Johnson, reminding them to draft and execute the Union letter contained in the October 9, 2018 e-mail.

On October 12, 2018, at 7:20 p.m., Clark sent a text message to Hardy stating “Dave, I have not heard from you about the union letter. What’s the progress?” [G.C. Exh. 28] Clark also advised that “[Y]ou can hand write it and then mail that letter back to me. It does not have to be printed very simple just says I gave [sic] Hardy do not want to be a part or represented by the IBW. Sign and date and then overnight it back to me with that label you can walk in to FedEx with that label and they can print it for you.” [G.C. Exh. 28] On October 15, Hardy advised he shipped the letter. [G.C. Exh. 28] Hardy provided the demanded letter, utilizing the exact same language given by Clark, stating “I David Hardy do not wish to be part of or represented by the IBW.” [G.C. Exhs. 23, 28]

On October 12, 2018, at 7:27 p.m., Clark sent a text message to Ken Johnson, stating “Ken, I need an update on the union I requested. Please update me on the progress. Thank you.” [G.C. Exh. 27]. Johnson did not respond. On October 22, Clark again sent a text message to Johnson stating “I have been told you have not completed the form. Do you know what he might be speaking about? Can you send a quick update of everything you got and filled out?” [G.C. Exh. 27] On October 23, Johnson returned the anti-union petition, utilizing the shipping label. [G.C. Exh. 23; Tr. 187-88]

**3. The Union learned of Clark’s October 9 e-mail and demanded ADT remedy the unlawful conduct; ADT did not sufficiently do so.**

On or about October 10, 2018, Ken Johnson shared Clark’s e-mail with employee John Brady. [Tr. 33] Brady then took photos of the e-mail with his cell phone, which he forwarded to the Union. [Tr. 33-36] It was only through member John Brady that the Union learned of Clark’s October 9, 2018 e-mail to Johnson and Hardy. On October 16, 2018, Union Business Manager Alan Marzullo contacted Nixdorf and advised of Clark’s communication. Marzullo followed that conversation with an e-mail, attaching images of the message, and demanded ADT retract the Clark communication and indicate the Union is the designated bargaining representative for the bargaining unit. [G.C. Exh. 7] At that time, and until the date of the hearing, the Union mistakenly believed Clark’s e-mail was sent as text message. [G.C. Exh. 7 (“I was informed that Ben Clark, VP of Operations, has been contacting Albany unit employees concerning their union sentiments. Specifically, a lengthy text message was sent to determine the employee’s intentions with the union . . .”). Marzullo and Nixdorf then discussed the matter on October 18, 2018, at the parties’ prescheduled contract negotiation session.

At the October 18, 2018 meeting, Nixdorf drafted an e-mail to the bargaining unit members and showed it to Marzullo. Marzullo replied “looks good to me.” [Tr. 139] The Union did not state that the e-mail was an adequate disavowal, satisfied the obligations under *Passavant*, or otherwise cured ADT’s unlawful conduct. The Union also did not waive its right to file an unfair labor practice charge in connection with Clark’s unlawful correspondence. At the time, the Union was not aware that Clark’s October 9, 2019 message was sent via e-mail, nor was it aware of Clark’s additional e-mails and text messages or that Materials provided the shipping labels. [Tr. 159-160]

On October 18, 2018, Nixdorf e-mailed Hardy, Johnson, and Brady the following:

All –

You may have received a text message from Ben Clark in response to some questions raised regarding the IBEW. I wanted to clarify any confusion which may have occurred and ensure that ADT will not retaliate in any way against any employee because of their membership in a union. ADT has a clear policy and will treat employees fairly regardless of whether they belong to a union or not. ADT will honor its obligations with the IBEW and any other union and negotiate in good faith. Make no mistake, the decision to be represented by a Union or not rests solely with employees. ADT will honor its employees decision.

As you may or may not know, there is an expired collective bargaining agreement which ADT is negotiating with the IBEW. All employees working the service territory formerly covered by the Albany office are covered by the terms and conditions of that contract; however, there are some provisions, since the contract is expired, which currently do not apply. Once the contract is renewed all provisions will apply.

If you have any further questions regarding the contract, please feel free to contact me at the number below.

Thanks,  
Jim

[R. Exh. 3] This correspondence was the sole communication to Johnson, Brady, and Hardy concerning the impropriety of Clark's October 9, 2018 e-mail. Nixdorf did not identify or reference Clark's October 9, 2018 e-mail in his October 18 communication, did not identify which Clark text message he was referencing, did not identify what questions Clark was responding to, and did not indicate the employees were not obligated to sign and return the anti-union petition demanded in Clark's October 9, 2018 e-mail.<sup>2</sup> Rather, Nixdorf closes the e-mail by offering to discuss "any further questions regarding the contract." [R. Exh. 3]

Following Nixdorf's e-mail, on October 24, 2018, Clark sent the improperly solicited Hardy and Johnson petitions to Nixdorf. [Tr. 207; G.C. Exh. 23]

**4. On October 18, 2018, the Union and ADT reached complete agreement on a successor collective bargaining agreement.**

On October 18, 2018, the Union and ADT reached a complete agreement on the terms and conditions of employment to be incorporated in a successor collective bargaining agreement. [Tr. 116 (stipulating existence of a full and complete agreement)] At the time, the parties shook hands, signaling agreement. [Tr. 69:4-6] No condition was made prior to, or at the time of agreement, that the Union membership must ratify the successor agreement. [Tr. 121-122] Ratification is also not required by the Union's By-Laws. [G.C. Exh. 8]

Pursuant to the Union's past practice, the Union submitted the agreement to the Union members in the bargaining unit for ratification. At the time, there was only one Union member in the bargaining unit, John Brady, and Mr. Brady was on the negotiating committee. On October 23, 2019, Nixdorf contacted Union Business Manager Marzullo and Assistant Business

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<sup>2</sup> Notably, Johnson utilized the mailing label after the October 18, 2018 Nixdorf letter was sent. [G.C. Exh. 23]

Manager Richard Godden and requested the Union “delay the vote” a few days until onboarding issues with Ken Johnson were resolved. [G.C. Exh. 5] The Union agreed and moved the ratification meeting originally scheduled for October 25, 2018 to November 2, 2018. [Tr. 72]

On November 2, 2018, at approximately 5:42 p.m., the bargaining unit voted to ratify the successor agreement. [Tr. 74-75]

On November 7, the Union provided ADT with the written contract incorporating the terms of the tentative agreement for execution. [G.C. Exh. 12] ADT has not responded to that request and has refused to execute the agreement. [Tr. 129]

**5. On November 2, 2018, ADT unlawfully withdrew recognition from the Union.**

On November 1, 2018, Clark sent a text message to Brady advising that a new hire packet needed to be completed [G.C. Exh. 26], which Clark testified was due to ADT’s intention to switch him from a union employee to a non-union employee. [Tr. 208:23-209:11].

On November 1, 2018, Hardy contacted Godden to discuss the CBA; at that time, Hardy said that he would vote down the contract, but was going to try to make the meeting. [Tr. 95, 108]

Around noon on November 2, 2018, ADT began circulating information to attempt to authenticate the signatures of Johnson and Hardy. [Tr. 261-263; R. Exhs. 8-9]

On November 2, 2018, at 2:35 pm, Hardy sent a text message to Nixdorf with a statement that he and Johnson “choose not to be members” of the Union. [R. Exh. 7] At some time following the message, Nixdorf replied to Hardy, stating that the statement “Needs to say not represented by...” [R. Exh. 7].

At 2:46:12 p.m., Nixdorf e-mailed Marzullo and withdrew recognition, stating “ADT has objective evidence Local 43 no longer represents a majority of the employees in Albany. As such, the company is withdrawing recognition of the union immediately.” [G.C. Exh. 9] At that time, Nixdorf was not in possession of any objective evidence and did not include any evidence in the e-mail to Business Manager Marzullo.

Following Nixdorf’s directive to change the language, Hardy then sent a second text message to Nixdorf, changing the language in the statement to include the word “represented.” [G.C. Exh. 10, p. 2] Hardy’s second statement contains a time stamp of “November 2, 2018 at 2:51 p.m.” [G.C. Exh. 10, p. 2] As Nixdorf was on a flight, he did not receive this message until after he landed. [Tr. 266: 20-21]

That evening, at 6:27 p.m.,<sup>3</sup> Hardy messaged Clark stating, “Hi Ben, here’s an update on the Union vote...” [G.C. Exh. 28, p. 4]

At 7:36:46 p.m., after Nixdorf landed and almost two hours after the successor contract was ratified, Nixdorf sent Marzullo the purported objective evidence. [G.C. Exh. 10, p. 1; Tr. 266:24-25]

On November 5, 2018, Business Manager Marzullo responded to Nixdorf, advising he did not believe ADT could legally withdraw recognition and advised the Union would provide the final successor collective bargaining agreement for execution. [G.C. Exh. 11]

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<sup>3</sup> While the text message to Clark states it was received on November 2 at 4:27 p.m., Clark resides in Orem, Utah, which is in the Mountain Time Zone. [Tr. 181]

On November 7, 2018, Business Manager Marzullo provided the successor collective bargaining agreement for execution, which he requested be returned by November 9, 2018.

[G.C. Exh. 12] Neither Nixdorf nor anyone at ADT responded or executed the document.

**6. Following withdrawal of recognition, ADT unilaterally implemented a wage increase and terminated the dues deduction and remittance procedure.**

Since about January 1, 2019, the Employer has unilaterally ceased deducting dues from bargaining unit employees' paychecks, as well as ceased remitting dues to the Union on behalf of the employees. Since about January 1, 2019, the Employer also unilaterally implemented a wage increase to employee John Brady. The Employer admits that it unilaterally implemented a wage increase and terminated the dues deduction and remittance procedure after it withdrew recognition of the Union. [G.C. Exhs. 1(r) ¶ 10(e); 3]

## ARGUMENT<sup>4</sup>

### POINT I

#### RESPONDENT ENGAGED IN UNLAWFUL INTERROGATION, POLLING AND SOLICITATION WHEN CONTACTING EMPLOYEES HARDY AND JOHNSON

The Respondent, through Ben Clark and James Nixdorf, initiated an anti-union petition, solicited signatures for the petition, and interrogated and polled employees in connection with their Union sympathies. It is well settled that an employer violates Section 8(a)(1) if a supervisor solicits signatures for a decertification petition, *Sociedad Espanola De Auxilio Mutuo y Beneficia de P.R.*, 342 NLRB 458, 459 (2004) ("Respondent violated Section 8(a)(1) by unlawfully encouraging and assisting in the circulation of a decertification petition. An employer may not initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition." (internal citations and quotations omitted)), or polls employees in connection with their union sympathies, *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 505 (2001) ("an employer may not initiate a poll of employee sentiments in an attempt to create--as opposed to confirm--a good faith doubt of the union's majority support among employees.").

Employer attempts to poll employee sentiment require that certain fundamental safeguards be followed. *Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063 (1967). In *Struksnes*, the Board held, "[a]bsent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority;

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<sup>4</sup> The Charging Party joins the General Counsel in all arguments and offers the below in further support of the Consolidated Complaint allegations.

(2) this purpose is communicated to employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere." The burden of establishing that such safeguards are complied with is on the employer and a failure to comply with just one of these requirements renders the poll unlawful. See *Lackawanna Electrical Construction*, 337 NLRB 458 (2002), and cases cited therein.

In *Process Supply*, 300 NLRB 756 (1990), the Board found that an employer violated Section 8(a)(1) by sponsoring and assisting in the circulation of a decertification petition. In that case, the employer posted on the company bulletin board a letter from its attorney indicating, in detail, the manner in which a decertification petition should be prepared. The day after this letter was posted, an employee circulated a petition seeking to oust the union. The petition was circulated during work time and with the knowledge of management. In finding the employer's conduct to be unlawful, the Board noted:

The law is clear that an employer must stay out of any effort to decertify an incumbent union. After all, the employer is duty-bound to bargain in good faith with that union. Although an employer may answer specific inquiries regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such petition where the employees would reasonably believe that it is sponsoring or instigating the petition. Such unlawful assistance includes planting the seed for the circulation and filing of a petition, providing assistance in its wording, typing, or filing with the Board, and knowingly permitting its circulation in work time. [Citations omitted]

*Id.* at 758. Applying this standard, the Board found that the posting of the letter, where there was no prior evidence of employee disaffection, planted the seed of the decertification effort.

*Id.* at 759.

In several other cases, the Board has found an employer's involvement in instigating or encouraging a decertification petition to be unlawful. In *Armored Transport, Inc.*, 339 NLRB 374 (2003), the Board found an employer unlawfully solicited a decertification petition in violation of Section 8(a)(1) of the Act by issuing a letter to employees outlining various courses of action the employees could take, including inviting employees to prove that the Union did not represent a majority of the employees. *Id.* at 377 ("The decision regarding decertification responsibility to prepare and file a decertification petition belongs solely to the employees. Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in the activity, either to instigate or to facilitate it." (internal citations and quotations omitted)). The Board found such conduct was unlawful, "a thinly-veiled admonition to decertify the Union." *Id.* at 378.

Here, on October 9, 2018, ADT Vice President Clark, unsolicited and without any evidence of employee disaffection, e-mailed Hardy and Johnson, while omitting Brady, directing the employees provide evidence to justify withdrawal of recognition. The e-mail included a trifecta of violations – polling, interrogation, and solicitation – while also providing sample language and demanding the employees return a signed anti-union petition renouncing the Union. Clark then relentlessly followed up on this e-mail, sending a series of additional e-mails and text messages to ensure that his directive was carried out. ADT went so far as to provide the mailing label for return of the petitions. Any purported polling associated with Clark's e-mail was not to determine majority status, but only to undermine the Union, and offered no assurances against reprisal, or was conducted by secret ballot. See *Struksnes Construction Co., Inc.*, 165 NLRB at 1063. Thus, Clark's October 9, 2018 e-mail, as well as the subsequent text

messages and e-mails, unlawfully interrogated, solicited, and polled bargaining unit employees in an effort to encourage the decertification of the Union.

Further, ADT provided unlawful assistance in the October 9 e-mail by setting forth the details about how evidence of a loss of majority status should be worded, circulated, and provided to the Employer. *See Process Supply*, 300 NLRB at 759. This e-mail clearly planted the seed for the decertification effort. *Id.* at 758.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

## POINT II

### RESPONDENT DID NOT EFFECTIVELY REPUDIATE ITS UNLAWFUL CONDUCT UNDER *PASSAVANT*

Despite ADT's claims, Labor Relations Director Nixdorf's ambiguous, non-specific e-mail on October 18 failed to satisfy the *Passavant* standard and did not remedy ADT's unlawful conduct. While an employer may repudiate its unlawful conduct in an effort to avoid an unfair labor practice finding, the employer must satisfy clearly established procedures to ensure employees' Section 7 rights are protected. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). *Passavant* and its progeny require that the repudiation is "timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." *Id.* at 138-139. The disavowal must be communicated to all employees involved and the employer must not engage in prohibited conduct after the repudiation. *Id.* Moreover, the disavowal must give assurances to employees that the employer will not interfere with their Section 7 rights in the future. *Id.* The Board has made clear that it is the employer's burden to establish this defense. *Id.* at 138-139.

As explained below, Nixdorf's October 18 e-mail was deficient in all respects -- it was not "timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." Under the circumstances, Respondent's purported repudiation misses not only many of the details, but the gravamen of *Passavant*. Not only did ADT fail to admit wrongdoing, Nixdorf's e-mail did little more than emphasize the employees' right to remove the Union. The final sentence of the e-mail only further reinforces that the e-mail was not an attempt to disavow Clark's unlawful October 9 message, as Nixdorf offered that "any further questions regarding the contract" to be directed to him. [R. Exh. 3]

**1. Nixdorf's October 18, 2018 e-mail was untimely.**

Nixdorf's October 18, 2018 email was not a timely repudiation of Clark's October 9, 2018 e-mail and failed to satisfy the *Passavant* standard. The Board has found that repudiation that occurred as little as one week after the unlawful conduct was untimely and deficient under *Passavant*. *Comcast Cablevision*, 313 NLRB 220 (1993). In *Comcast*, a supervisor told employees that they were not allowed to wear union buttons while working. *Id.* at 224. Approximately one week after the employees were told they could not wear the buttons, other supervisors advised a group of unit employees that they were in fact allowed to wear buttons. *Id.* The Board concluded that the meeting one week later was not a timely cure. *Id.* at 253. The Board has found similar durations to be deficient. *See Intermet Stevensville*, 350 NLRB 1349, 1385 (2007) (repudiation over two weeks later was untimely); *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77, 78 (1999) (repudiation occurring "more than a week later" was not timely).

Here, between October 9 and October 12, 2018, Clark sent at least six e-mails and three text messages to employees Clark and Hardy in connection with his directive to return a signed, anti-union statement. Nixdorf's October 18 e-mail was sent more than a week after the initial Clark message, and after repeated communications from Clark demanding a return of the anti-union statement. Under the circumstances, Nixdorf's e-mail was insufficient to satisfy the timeliness requirement under *Passavant*.

Accordingly, ADT failed to satisfy its *Passavant* burden.

**2. Nixdorf's October 18 e-mail was intentionally vague, ambiguous, and non-specific.**

Nixdorf's October 18 e-mail attempting "to clarify any confusion" failed to identify the offending Clark e-mail, failed to acknowledge any wrongdoing, failed to retract the repeated directive to sign and return the anti-union statement, and is deficient under *Passavant*. At its core, Nixdorf's e-mail never once referenced or identified Clark's October 9, 2018 e-mail, but inaccurately referenced a "**a text message** from Ben Clark" that may have caused "confusion."

[R. Exh 1]

The Board has made clear that an employer does not sufficiently repudiate its unlawful conduct when the repudiation does not explicitly concede its actions were unlawful and instead merely attempts to "clarify any confusion." *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003); *Rivers Casino*, 356 NLRB 1151, 1152 (2011). The Board has reasoned that clarification attempts or similar statements are neither sufficiently unambiguous nor specific enough in nature to satisfy *Passavant*; the employer must acknowledge the wrongdoing on its part. See *Rivers Casino, supra* at 1152 (characterizing conduct as a "misunderstanding" was insufficient because it did not admit any wrongdoing on the part of the employer);

*Powellton Coal Co.*, 355 NLRB 407 (2010), incorporating 354 NLRB 419, 422 (2009) (employer did not repudiate conduct when a document circulated referenced “clearing up confusion” because the employer did not disavow any past behavior). Simply, when an employer does not specifically admit wrongdoing to the affected employees, repudiation is ineffective. *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003); *Rivers Casino*, 356 NLRB 1151, 1152 (2011); *Holly Farms*, 311 NLRB 273, 274 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1994).

For example, in *Pacific Coast M.S. Industries Co., Ltd.*, 355 NLRB 1422, 1428 n. 9 (2010), the Board affirmed an ALJ’s decision that the employer did not effectively repudiate threats that were made to employees where the attempted repudiation attempt was riddled with indefinite phrases, such as “may” and “if [the threat] was made.” *Id.* at 1436. The employer also failed to address all of the supervisor’s unlawful conduct. *Id.* Therefore, the Board determined the employer did not was deficient under *Passavant*.

Here, it cannot be disputed that Nixdorf both failed to identify the offending correspondence and acknowledge that the correspondence sent by Clark was unlawful. Nixdorf’s October 18 e-mail also failed to retract Clark’s repeated unlawful directives to return a signed anti-union petition. Nixdorf’s e-mail does not specifically acknowledge that Clark impermissibly solicited information about the Union’s status and did not mention that Clark impermissibly polled employees with respect to their sentiments about the Union. Rather, Nixdorf used equivocal phrasing such as “you may have received a text message” and that he “wanted to clarify any confusion which may have occurred.” [R. Exh. 3 (emphasis added)] This “clear limitation on actual acknowledgement” does not admit any wrongdoing, nor does it acknowledge ADT’s unlawful conduct in early October. *See Pacific Coast, supra* at 1436. Even

the reference to “questions raised regarding the IBEW” was a wholly manufactured reason, and ADT offered no evidence in support of this claim at the hearing.

Finally, this confusion is perpetuated by the undisputed evidence that Clark sent multiple text messages and e-mails to both Hardy and Johnson before October 18, 2018. [G.C. Exhs. 16, 17, 18, 27, 28] Due to the ambiguous and non-specific nature of Nixdorf’s purported repudiation, Johnson responded to Clark’s October 22 directive to return missing forms by mailing the anti-union petition, utilizing the mailing label provided by ADT. [G.C. Exh. 23, 27]

Accordingly, ADT failed to satisfy its *Passavant* burden.

**3. Nixdorf’s October 18 e-mail was not free from other proscribed illegal conduct.**

In the two weeks following Nixdorf’s e-mail, Clark again demanded Johnson complete and return “the form” and Nixdorf unlawfully assisted in drafting a statement disavowing the Union. [G.C. Exhs. 27, p.3; R. Exh. 7] When an employer attempts to repudiate conduct, but the same or additional unlawful conduct occurs shortly after an attempted repudiation, the *Passavant* standard is not met and any attempted repudiation is deficient. *See Evergreen America Corp.*, 348 NLRB 178, 181 (2006) (after attempting to repudiate threats of a loss of benefits if the union were to be elected, a letter threatening the same and a postelection granting of benefits was sent the next day, which was not enough for repudiation).

Here, almost immediately after unlawfully soliciting evidence to support withdrawal from the Union, ADT again demanded return of the form and offered more than mere ministerial aid by directing Hardy on the precise language to disavow the Union. [G.C. Exh. 27; R. Exh. 7] On October 22, 2018, Clark sent a text message to Johnson demanding the return of “the form” and Johnson returned the disavowal statement the following day. [G.C. Exhs. 23

(dated October 23, 2018), 27] This clearly demonstrates the deficient nature of Nixdorf's October 18 e-mail.

Additionally, on November 2, 2018, Hardy sent a letter to Nixdorf, with the language "I Dave Hardy and Ken Johnson choose not to be members of the international brotherhood of electrical workers." [R. Exh. 7] In response, Nixdorf told Hardy that the letter needed to include that the employees did not wish to be represented by the union. *Id.* Hardy's letter would indicate his potential interest in *Beck* objector status, not the complete removal of the Union. However, Nixdorf, unsolicited, responds to the letter, offering additional language. Nixdorf offered more than ministerial aid by providing the precise language needed to qualify as objective evidence in order to decertify the Union. *See Vic Koenig Chevrolet*, 321 NLRB 1255, 1259-60 (1996) (employer provided more than ministerial aid in correcting language on a decertification poll), *enf. denied in rel. part* 126 F.3d 947 (7th Cir. 1997). Thus, Respondent's repudiation was followed with further unlawful conduct occurring a mere 17 days later.

Accordingly, ADT failed to satisfy its *Passavant* burden.

**4. Nixdorf's October 18 e-mail failed to offer adequate assurances that ADT will not violate the Act in the future.**

In order to cure unlawful conduct, it is crucial for an employer to inform affected employees that the employer will not interfere with their Section 7 rights in the future. *Passavant, supra* at 139 (respondent's omission of assurance of rights in the future was "most important[]" to repudiation analysis). "Absent effective repudiation, it is reasonable to infer that [the employer's unlawful conduct] continued to chill employee exercise of Section 7 rights." *Teletech Holdings, Inc.*, 342 NLRB 924, 927 (2004) (citing *Solutai, Inc.*, 339 NLRB 60 (2003)). An employer must also address each violation in its repudiation in order for it to be

sufficient. See *Pacific Coast M.S. Industries Co., Ltd.*, *supra* at 1436 (repudiation did not address all violations, so “[c]learly, it did not cover all of the unfair conduct”).

As explained above, Nixdorf failed to address the unlawful nature of Clark’s October 9 e-mail and the October 18 e-mail similarly lacks any assurance to the unit employees that the Section 7 rights violated in the Clark e-mail will not be repeated in the future. Nixdorf’s e-mail similarly makes no assurances to the employees that ADT would not interrogate employees regarding their union status, coercively poll employees about the union, and that it would not provide more than ministerial aid to employees in the future. Rather, Nixdorf only offered employees that “the decision to be represented by a Union or not rests solely with employees.” [R. Exh. 3] Nixdorf’s October 18 e-mail, rather than assuring their rights will be respected in the future, operates merely as another attempt by ADT to undermine the Union.

Accordingly, ADT failed to satisfy its *Passavant* burden.

**5. Under the circumstances, Nixdorf’s October 18, 2018 e-mail wholly failed to satisfy the *Passavant* burden.**

Because ADT satisfied none of the required elements of *Passavant*, ADT’s October 18, 2018 e-mail did not effectively repudiate the unlawful conduct between October 9 and 18, 2018. In addition, the unlawful solicitation, polling, and interrogation during that period remained and tainted any purported objective evidence ADT sought to rely on when it withdrew recognition from the Union on November 2, 2018.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

### POINT III

#### THE UNION'S PURPORTED "ACQUIESCENCE" IS NOT SUFFICIENT TO RELIEVE RESPONDENT OF ITS BURDEN UNDER *PASSAVANT*

For the above reasons and authorities, ADT failed to satisfy the *Passavant* standard. ADT's novel argument that the Union approved the October 18 e-mail, and therefore satisfied *Passavant*, must be rejected. Even if the Union agreed to the language in Nixdorf's October 18, 2018 e-mail (which it did not), the e-mail still fails under *Passavant* as the Union could not, and did not, knowingly waive its rights.

The *Passavant* standard is intended to inform employees of their rights and correct the infringement on those rights. In *Webco Industries, Inc.*, 327 NLRB 172 (1998), the Board explained that:

Repudiation signals unambiguously to the other employees that the Respondent recognizes that it has acted wrongfully, that it respects their Section 7 rights, and that it will not interfere with those rights again. Without such signals, there is no assurance that the coercive effects of the initial wrongful conduct will not linger in the workplace. The Board requires the posting of notices to like effect when it finds that employers and unions have violated employees' rights; parties should be required to do no less in order to avoid being found to have violated the Act by engaging in similar conduct.

*Id.* at 173. Repudiation serves to correct the employees' perception, not the union's.

Here, ADT's acquiescence argument is a red-herring, and nothing more than an attempt to obfuscate the facts and transfer the Employer's burden to the Union. This cannot be countenanced. As described in Point II, Nixdorf's October 18, 2018 e-mail was wholly inadequate. Any communication with Marzullo concerning the contents of the October 18, 2018 e-mail is irrelevant as Marzullo is not an employee entitled to the *Passavant*

correspondence. Thus, the Union’s “acquiescence” is insufficient to relieve Respondent of its illegal conduct and deficient repudiation attempt.

Further, even if relevant, any purported acceptance by Marzullo of the October 18, 2018 e-mail was not a knowing acceptance in light of Clark’s numerous communications. [Tr. 159-160] At that time, and until the hearing, the Union believed Clark’s October 9 e-mail was sent as text message. [G.C. Exh. 7 (“I was informed that Ben Clark, VP of Operations, has been contacting Albany unit employees concerning their union sentiments. Specifically, a lengthy text message was sent to determine the employee’s intentions with the union . . .”)] Thus, ADT’s communication with the Union did not effectively satisfy the requirements of *Passavant* or otherwise repudiate its conduct when it unlawfully sent text messages and e-mails to unit employees in an effort to decertify the Union.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

#### **POINT IV**

#### **ADT’S NOVEMBER 2, 2018 WITHDRAWAL OF RECOGNITION WAS UNLAWFUL AS ADT LACKED OBJECTIVE EVIDENCE OF THE LOSS OF MAJORITY SUPPORT**

ADT’s withdrawal of recognition from the Union was both untimely and tainted by ADT’s unfair labor practices. At the time ADT withdrew recognition, it was not in possession of any objective evidence, and any purported evidence was not received until after the successor agreement was ratified. ADT’s purported objective evidence was both tainted by the unremedied unfair labor practices relating to Clark’s October 9, 2018 e-mail, and subsequent communications, as well as Nixdorf’s unlawful assistance in drafting language on November 2, 2018.

ADT failed to present objective evidence that the Union lost the support of a majority of unit employees as of the time ADT withdrew recognition. The Board has placed the burden of proof entirely on the employer when it decides to withdraw recognition to later prove in the event of an unfair labor practice charge that it had objective evidence of actual loss of majority support. *HQM of Bayside, LLC*, 348 NLRB 758, 759 (2006), *enfd.* 518 F.3d 256 (4th Cir. 2008) (union has no duty to demonstrate majority support prior to withdrawal of recognition).

**1. ADT was not in possession of any objective evidence at the time it withdrew recognition.**

ADT has failed to establish its burden that it was in possession of objective evidence at the time it withdrew recognition. While ADT withdrew recognition at 2:46 pm, it was not in possession of the purported objective evidence until after Nixdorf landed that evening.

An employer that withdraws recognition bears the initial burden of proving that the incumbent union suffered a valid, untainted numerical loss of its majority status. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001). And an employer withdraws recognition at its peril; if the employer is incorrect in its assessment of the evidence of the Union's loss of support, it will violate Section 8(a)(5) by withdrawing recognition. *Id.* It must also show that it had objective evidence of that fact when it withdrew recognition. *Highlands Regional Medical Center*, 347 NLRB 1404, 1407 n. 17, 1413 (2006); *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 331-34 (D.C. Cir. 2015).

Here, at the time ADT withdrew recognition from the Union, it was not in possession of any objective evidence indicating the loss of majority support. As of 2:46 p.m. on November 2, 2018, when Nixdorf e-mailed Marzullo to withdraw recognition, Nixdorf was only in possession

of a statement from Hardy and Johnson that they “choose not to be members” of the Union. [R. Exh. 7] Nixdorf testified that he was not in possession of a second statement, stating Hardy and Johnson do not want to be “represented” by the Union, until after he landed. [Tr. 266: 20-21 (“I hadn’t received the second one until I landed.”)] It was at that time he sent this statement to the Union. [G.C. Exh. 9; Tr. 266: 22-25 (“I sent a follow-up e-mail after I landed with the second document and e-mailed that to the Union”)] According to the time stamp on Nixdorf’s second e-mail to Marzullo, Nixdorf was not in possession of this statement until 7:36 p.m. Hardy also sent the second statement to Clark at 6:27 p.m. [G.C. Exh. 28, p. 4] Therefore, as of 2:46 pm, the time ADT withdrew recognition, ADT was not in possession of objective evidence that the Union lacked majority support.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

**2. ADT tainted any purported objective evidence.**

ADT cannot rely on the November 2, 2018 anti-union petition since it was tainted by ADT’s October 9 e-mail. As detailed above, ADT engaged in conduct that directly tainted the anti-union petition upon which it relies to demonstrate the Union’s loss of majority status. It is well established that an employer cannot rely on an expression of disaffection by its employees which is attributable to its own unfair labor practices directed at undermining support for the Union. *Hearst Corp.*, 281 NLRB 764 (1986), *enfd.* 837 F.2d 1088 (5th Cir. 1988). ADT engaged in more than passive observance in the decertification effort, actively planting the seed on October 9, 2018 and then continuing active assistance by allowing such activities to occur on working time and providing Hardy with the exact petition language.

The Board's decision in *Master Slack Corp.*, 271 NLRB 78, 84 (1984), describes four factors in determining whether or not an employer's unfair labor practices taint an otherwise valid decertification petition: (1) the length of time between the ULP and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities and membership in the Union.

Here, all of these factors establish the requisite connection between the unfair labor practice and the Union's alleged loss of support. The November 2 anti-union petition materialized in a matter of days following the unfair labor practice, the October 9 e-mail was the motivating force behind the anti-union petition, and the unfair labor practice had a tendency to cause employee disaffection. Prior to October 9, there was no employee effort to remove the Union as representative; it was ADT that ferreted out employee disaffection and on that basis, unilaterally withdrew recognition. The employees did not seek to remove their Union; ADT did.

Therefore, since the purported objective evidence was tainted by ADT's unfair labor practices, ADT could not rely on that evidence as a valid expression of employee sentiment and ADT's withdrawal of recognition based on that evidence violated Section 8(a)(1) and (5) of the Act. See *Davies Medical Center*, 303 NLRB 195, 206-207 (1991), *enfd. mem.* 991 F.2d 801 (9th Cir. 1993) (unlawful to withdraw recognition on basis of anti-union petition tainted by supervisors' unlawful encouragement of signatures); *Texaco, Inc.*, 264 NLRB 1132 (1982) (unlawful to terminate collective-bargaining agreement based on tainted antiunion petition).

Moreover, ADT has failed to establish that the Union had lost majority status as of November 2, 2018 and that it had objective evidence of a loss of majority status on November 2, 2018. As explained above, the petition was tainted by the unremedied unfair labor practices between October 9, 2018 and October 18, 2018, as well as the unfair labor practices on November 2, 2018. For the reasons described in Points II and III, the October unfair labor practices were not adequately remedied.

Even if the October unfair labor practices were cured (which they were not), ADT engaged in further unfair labor practices by assisting Hardy in preparing a decertification petition. Nixdorf, unsolicited, provided the exact language that needed to be included on the petition, testifying only that Hardy “explained what he wanted to do.” [Tr. 258:24] There cannot be any finding other than ADT crossed the line and promoted decertification, as opposed to providing mere ministerial aid. *See Condon Transport*, 211 NLRB 297, 302 (1974).

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

#### **POINT V**

##### **ADT WAS BARRED FROM WITHDRAWING RECOGNITION AS THE PARTIES HAD AN EFFECTIVE CBA**

Even if ADT had objective evidence of a loss of majority support (which it did not), its withdrawal of recognition was untimely as the parties already reached a final agreement and ratification was not a precondition to a final, binding agreement.

In determining whether a binding agreement exists in circumstances where employee ratification is involved, the Board examines whether the parties had an express agreement that ratification was a condition precedent to reaching a binding contract or whether ratification was a self-imposed requirement by the union. In circumstances where there is an express

agreement on the need for ratification, the Board has generally found that a contract cannot become effective until ratification has occurred. See *Hertz Corp.*, 304 NLRB 469 (1991); *Beatrice/Hunt Wesson*, 302 NLRB 224 (1991). However, in cases in which a union has self-imposed an internal ratification requirement, the Board has long held that an employer must sign the agreement upon request, regardless of whether or not ratification has taken place. *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989) (employer unlawfully refused to execute a contract after the union accepted the employer's offer without obtaining ratification; although the union had informed the employer during negotiations that any agreement would have to be ratified before it became a binding contract, the union's self-imposed limitation of its own authority did not constitute a condition precedent). See also *Martin J. Barry Co.*, 241 NLRB 1011 (1979) (employer ordered to sign agreement rejected by first ratification vote but later accepted by a small minority of members); *C & W Lektra Bat Co.*, 209 NLRB 1038 (1974) (employer ordered to sign agreement even though union dispensed with earlier stated intent to obtain ratification where ratification looked impossible). *North Country Motors*, 146 NLRB 671 (1964) (employer ordered to sign agreement even though initially rejected and then approved by a single employee at second vote).

Here, there is no evidence that the parties either explicitly conditioned their agreement upon unit employee ratification or that the Union negotiators had limited their authority to agree to the full terms of a collective-bargaining agreement without unit member ratification. There is no evidence that ADT tendered a final offer that remained to be accepted upon the condition of a bargaining unit ratification vote. ADT's withdrawal of recognition was unlawful by virtue of the fact that a full contractual agreement had been reached and embodied in a

written document, which only remained to be signed after the formality of a ratification vote. The Union negotiators' authority to reach agreement was not subject to a ratification vote, that such a vote was an internal union matter, and was not a precondition to contract agreement. [Tr. 121-122] In the face of that contract agreement, ADT was prohibited from raising a question concerning representation.

Alternatively, while ADT argues that the tentative agreement was not yet voted on when it withdrew recognition, as explained in Point IV, *supra*, the purported objective evidence ADT relies upon was not received until after Nixdorf landed, and after the successor agreement was ratified at 5:42 p.m. Accordingly, even if ratification was required, the withdrawal was untimely as ADT lacked objective evidence until after the successor agreement was ratified.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

## **POINT VI**

### **ADT UNLAWFULLY REFUSED TO EXECUTE A COMPLETE AGREEMENT**

It is axiomatic that "Section 8(d) of the Act requires the parties to a collective-bargaining relationship, once they have reached agreement on the terms of a collective-bargaining contract, to execute that agreement, at the request of either party[,]" and a failure to do so constitutes an unfair labor practice. *TTS Terminals, Inc.*, 351 NLRB 1098, 1101, 1103 (2007) (citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) (employer violated Section 8(a)(5) by failing to execute contract, because there was a meeting of the minds on all substantive terms when union unconditionally accepted employer's final proposal)). An obligation to sign an agreement arises when the parties reach a "meeting of the minds" over the substantive issues and material terms of an agreement. *Id.* at 1101.

Here, ADT stipulated that a complete agreement was reached by the parties. [Tr. 115:13-116:3] For the reasons outlined above, ratification was not required for a final agreement and ADT unlawfully withdrew recognition. As the parties have a final and complete agreement, ADT was obligated to execute the written agreement.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

## POINT VII

### **ADT'S UNILATERAL CHANGES FOLLOWING WITHDRAWAL OF RECOGNITION ARE UNLAWFUL**

Section 8(a)(5) of the Act provides that “[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees,” 29 U.S.C. § 158(a)(5), and Section 8(d) identifies the subject matter of such bargaining as including “wages, hours, and other terms and conditions of employment.” *Id.* § 158(d). An employer violates the Act when it unilaterally alters wages, hours, or other terms or conditions of employment without first negotiating to a valid impasse with the union representing the employees. *Covanta Energy Corp.*, 356 NLRB 706, 727 (2011), citing *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962)). It is well-established that, once a company unlawfully withdraws recognition from the union, its subsequent unilateral changes regarding wages, hours and other mandatory subjects are similarly unlawful. *See, e.g., Northwest Graphics, Inc.*, 342 NLRB 1288, 1288 (2004); *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009). When an employer has objective evidence tending to show the union’s loss of majority status, it assumes the risk that the evidence on which it relies will be determined later not to show an actual loss of majority status. *Highlands Regional Medical Center*, 347 NLRB 1404, 1406-1407, n. 15 (2006).

Here, ADT admitted in its answer that it unilaterally implemented a wage increase and terminated the dues deduction and remittance procedure following the November 2, 2018 withdrawal of recognition. [G.C. Exh. 1(r), ¶ 10(e)] In addition to the unlawful unilateral changes, ADT also failed to bargain in good faith with the Union concerning wages, hours, and other terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act by its conduct.

Accordingly, ADT violated the Act as alleged in the Consolidated Complaint.

### **CONCLUSION**

For the foregoing reasons, the Charging Party Union respectfully requests the Administrative Law Judge find that Respondent ADT violated the Act as alleged in the Consolidated Complaint. The remedy should include the relief requested in the Consolidated Complaint and in this brief.

Respectfully submitted,

Dated: June 12, 2019

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