

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

KUMHO TIRES GEORGIA

and

UNITED STEEL, PAPER AND  
FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION

Cases 10-CA-208255  
10-CA-208414  
10-RC-206308

**ANSWERING BRIEF OF THE CHARGING PARTY**  
**UNITED STEEL, PAPER AND FORESTRY, RUBBER,**  
**MANUFACTURING, ENERGY, ALLIED INDUSTRIAL**  
**AND SERVICE WORKERS INTERNATIONAL UNION**

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## **I. INTRODUCTION:**

Pursuant to Section 102.46(b) of the Board's Rules and Regulations, as amended, Charging Party / Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("the Union" or "the USW") hereby submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision. The USW argues that the Board should adopt the Administrative Law Judge's credibility determinations and findings that Respondent violated the Act as alleged in the Complaint.

## **II. STATEMENT OF THE CASE:**

On September 18, 2017, Charging Party / Petitioner United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers ("the USW" or "the Union") filed a petition for a representation election for a unit of hourly production and maintenance employees of Kumho Tire ("the Employer" or "Respondent"), located at the Employer's tire manufacturing plant in Macon, Georgia. An election was held on October 12 and 13, 2017, with the tally of ballots showing 315 eligible voters, 136 votes cast for representation by the USW, and 164 votes cast against. (G.C. Ex. 1(e)) The USW filed fourteen Objections to the election in Case No. 10-RC-206308. (G.C. Ex. 1(h)) The USW as Charging Party filed unfair labor practices in cases 10-CA-208255 and 10-CA-208414, and a consolidated complaint issued on July 31, 2018. (G.C. Ex. 1(k)) Region 10 issued a Report on Objections and an Order consolidating cases and Notice of Hearing on August 28, 2018, finding that the objections raise substantial and material issues of fact. (G.C. Ex. 1(n)).

The five-day hearing on the objections and the unfair labor practice charges produced overwhelming evidence that Kumho Tire engaged in a massive campaign of coercion in response to the Union's election petition. Eighteen employee witnesses who were eligible to vote in the 2017 election testified for the General Counsel. Respondent did not produce the testimony of a single witness who was eligible to vote in the 2017 election. Testimonial, documentary and recorded evidence showed that Respondent coordinated the dissemination of threats that if the employees selected the USW as their representative, the tire plant would shut down, customers would cancel contracts with Kumho Tire, employees would lose their jobs or their jobs would be transferred overseas, essential production components would be shipped overseas, employees would lose wages and benefits, and working conditions and rules would become more onerous.

On May 14, 2019, Administrative Law Judge Arthur Amchan ("the ALJ") issued his decision ("the ALJD"), finding that Respondent committed a host of unfair labor practices in violation of Section 8(a)(1) in the critical period leading up to the 2017 election. The ALJ ordered that Kumho Tire cease its unfair labor practices, post a Notice at its facility, and hold mandatory meetings for all employees where Kumho's President and Chief People Officer or equivalent representatives will read the Notice in the presence of a Board agent.<sup>1</sup> The ALJ additionally found extensive objectionable conduct warranting an order for a new election.<sup>2</sup> On June 25, 2019, Respondent filed exceptions to the ALJ's Decision.

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<sup>1</sup> Kumho Tire has filed Exceptions to the Proposed Remedy, but has not specifically excepted to the "notice reading" remedy and did not brief the issue of whether a "notice reading" remedy is appropriate. Exceptions 63; 64; 65.

<sup>2</sup> On July 25, 2019, Counsel for the General Counsel motioned the Board to sever Case 10-RC-206308 and remand the case to Region 10. The motion remains before the Board.

### **III. ANSWER TO EXCEPTIONS:**

#### **A. The ALJ's decision is free of bias and the Board should uphold the ALJ's credibility determinations. (Respondent exceptions 3, 15, 17-20, 22-25, and 63-66)**

Respondent excepts to all of the Judge's credibility determinations, and argues that the Judge's decision-making was biased and prejudicial. These exceptions are frivolous, and the Board should find that the ALJ's determinations were properly grounded in his assessment of the evidence. Kumho has not presented any foundation for its claim that Judge Amchan showed bias in favor of the General Counsel or prejudice towards Respondent. Kumho has presented "no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence." *Florida Coca-Cola Bottling Co.*, 321 NLRB 21 n.2 (1996). In *Silvercrest Industries*, the Board noted that "it is fundamental that a claim of bias, cannot be predicated on adverse credibility rulings." 220 NLRB 135 n.2 (1975). Because the entirety of Kumho's claim that Judge Amchan's decision-making was biased against or prejudicial to Respondent's case is based on adverse credibility determinations, these allegations must be dismissed.

Moreover, Judge Amchan's credibility determinations were well-founded in established judicial principles. It is uncontroversial that the testimony of employees testifying against their current supervisor or employer is afforded greater weight because of the likelihood that they are acting against their own pecuniary interests. *Flexsteel Industries*, 316 NLRB 745 (1995), *enfd* 83 F.3d 419 (5th Cir. 1996) ("[T]he testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest."). The Judge properly relied on *Flexsteel* in crediting some employee testimony. (ALJD at 13) The Judge further found that testimony by Respondent's witnesses, all of whom were Employer agents, was characterized by responses to leading

questions and to blanket denials of Complaint allegations. It is well-established that, “[a]s a matter of law, such denials are not sufficient to refute specific and detailed testimony.” *Merrill Iron & Steel*, 335 NLRB 171, 180 (2001) (citing *Williamson Memorial Hospital*, 284 N.L.R.B. 37, 39 (1987)). Finally, the Judge properly found that the testimony of Respondent’s witnesses was insufficient to counter that of the eighteen General Counsel employee witnesses as to a pervasive campaign of Employer threats, all of a similar nature, and conveying messages consistent with the uncontroverted evidence of speeches by Respondent’s Chief People Officer Jerome Miller and Kumho Tire Georgia President Hyunho Kim. Although Respondent raises the possibility of memory lapses, bad recall, impairment, and perspective differences, and testimony shaped by legal handlers, its Exceptions Brief raises no particular instance in which one of these factors should be relied upon to discredit General Counsel witness testimony.

Finally, it is the Board’s established policy that it will not overrule an administrative law judge's credibility resolutions unless the “clear preponderance of all relevant evidence” shows that the judge made the incorrect determination. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent has failed to meet this burden in every instance where it disputes the Judge’s credibility determinations.

**B. The ALJ correctly found that Respondent’s failure to provide a substantially compliant list of employee contact information to the Union is objectionable conduct warranting a new election. (Respondent’s exceptions 59; 60; 62).**

The ALJ was correct to find that Respondent’s “clear and blatant” violation of the *Excelsior* rule constituted an independent basis for calling for a new election “even in the absence of [the Respondent’s] unfair labor practices. (ALJD at 20:20; 20:25–26). Respondent

was required to provide an accurate list of names and contact information for all bargaining-unit workers

prior to a Board election. *Excelsior Underwear*, 156 NLRB 1236 (1966).<sup>3</sup> An employer's failure to provide an accurate list requires that an election result be set aside and a new election called. *Sonfarrel, Inc.*, 188 NLRB 969 (1971). An employer's provision of a substantially inaccurate *Excelsior* list amounts to a failure to comply, requiring a new election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). Where an employer fails to provide an accurate *Excelsior* list, the union is not required to make a showing of prejudice. *Mod Interiors*, 324 NLRB 164 (1997). Nor is it required that the union take steps to correct the list, as "the rule is prophylactic," *North Macon Health Care*, 315 NLRB 359, 361, and applied as an "administrative mechanism." *Sonfarrel*, 188 NLRB 969, 970. Finally, a showing of bad faith or gross negligence, while not required, demands the setting aside of an election and precludes a finding of substantial compliance. *Merchants Transfer Co.*, 330 NLRB 1165 (2000).

The ALJ correctly found that the Employer-provided *Excelsior* list was substantially non-compliant with Board requirements, characterizing it as "completely inaccurate." (ALJD at 20:24). The Board has held that an employer must provide a petitioner with an *Excelsior* list that is "not only timely but complete and accurate so that the union may have access to all eligible voters." *Mod Interiors*, 324 NLRB 164. Failure to do so is injurious to both the union and the employees. *North Macon Health Care*, 315 NLRB 359.

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<sup>3</sup> Respondent's challenge to amendments to the NLRB's Rules and Regulations for Representation Cases is inapposite here. While the changes to the NLRB Rules amended the requirements of *Excelsior*, these rule changes do not overrule or invalidate decades of Board law under *Excelsior* developing the standard for "substantial compliance" and for a finding of bad faith by a non-compliant employer.

The list provided by Respondent Kumho in the present case was far more egregiously inaccurate than even those typically cited as examples of substantially inaccurate *Excelsior* lists. The parties stipulated that Union Exhibit 5 is a list of employees eligible to vote in the 2017 election. (U. Ex. 5; Tr. 403–4) The USW’s Post-Hearing Brief included a comparison of Union Exhibit 5 to the *Excelsior* list provided by Respondent. Of the roughly 315 employees included on the *Excelsior* list, only one employee’s address and phone number match the contact information in Respondent’s internal address and phone records. Alexander Perkins, a USW officer and lifelong resident of Macon, testified that he independently discovered address inaccuracies in reviewing the *Excelsior* list and that, upon asking employees to check their names on the list, he confirmed that each employee’s address and phone number were incorrect. (Tr. 412:1–413:10; 419:22–420:1) Additionally, every employee who testified at the hearing confirmed that the address and phone number listed next to their name on the *Excelsior* list were inaccurate. Respondent offered no evidence at the hearing or in its Brief in Support of Exceptions to show that the *Excelsior* list information was accurate or to explain the reason for the inaccuracies.

Alexander Perkins’s testimony demonstrated that the Union was prejudiced by Respondent’s failure to comply with the requirement of providing a complete and accurate voter list. Perkins testified that because of the inaccurate *Excelsior* list the Union did not possess accurate voter information and was required to expend resources attempting to compile its own accurate list. (Tr. 414:15–415:3; 419:4–21)

The ALJ correctly found that Respondent acted in bad faith in presenting the Union with an overwhelmingly inaccurate voter list. ALJ Amchan concluded that the list’s inaccuracy was “deliberate” because of the extent of its inaccuracy and Respondent’s refusal to offer any

explanation or witness testimony to explain why the addresses and telephone numbers were incorrect. (ALJD at 20:24–25).

Although evidence of bad faith or gross negligence is not required in order to find an employer non-compliant with its voter list obligations, such a showing “will preclude a finding that an employer was in substantial compliance with the rule.” *Merchants Transfer*, 330 NLRB 1165 (finding bad faith where voter list addresses were less accurate than the address records used internally by the employer).

In response to the Petitioner / Charging Party’s subpoena, Respondent provided an internal list of employee addresses and phone numbers. A comparison of this list with the *Excelsior* list provided to the Union shows the latter to be more than 99 percent inaccurate. Additionally, on the same date that Respondent submitted the overwhelmingly erroneous *Excelsior* list, September 26, 2017, Respondent mailed letters to all voting-eligible employees at their correct addresses. (Union U. Ex. 1; Tr. 57, 93, 133, 150, 171, 185, 198–99, 208–9, 245–46, 314, 347) As in *Merchants Transfer*, the Employer here had access to accurate employee contact information but presented the Union with a deliberately inaccurate voter list. 330 NLRB 1165 (distinguishing *Singer Co.*, in which voter list inaccuracies were attributable to inaccurate records. 175 NLRB 211, 212 (1969)).

Finally, Respondent failed to offer any documentary evidence or testimony to suggest that the errors were the result of mistake or inadvertence. The Board has held that it is appropriate to draw an adverse inference where a party fails to present evidence “within the control of the party whose interest it would naturally be to produce it.” *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 n.1 (1997). Since the Respondent failed to call as a witness the

employee who prepared the list or to offer any explanation for the list's inaccuracy, the ALJ correctly drew an adverse inference of deliberate non-compliance from Respondent's silence.

The Respondent excepted to the ALJ's findings as to the *Excelsior* list on the basis that the ALJ was mistaken in finding the voter list "completely inaccurate" and that this allegedly false finding of fact led to the mistaken conclusion that "the inaccuracy was deliberate," which provided an independent basis for setting aside the election. (Exceptions 59, 60, 62) Respondent additionally asserts in its Brief in Support of Exceptions that the election should not be set aside because the Union was not prejudiced by Respondent's failure to substantially comply with the voter list requirements. Exceptions Brief at 7. These exceptions are without merit and misstate the relevant law.

Respondent's contention that the ALJ erred in his finding as to the accuracy of the voter list misstates the relevant legal principle. *Excelsior* and decades of case law applying *Excelsior* demand substantial compliance with the requirement to proffer a complete and accurate voter list. Whether the voter list provided by Respondent was 90 percent, 99 percent, or 100 percent inaccurate is immaterial because, in any case, it drastically exceeded every threshold the Board has applied for failure to substantially comply with voter list requirements. *Mod Interiors*, 324 NLRB 164 (setting aside election where 40 percent of *Excelsior* list addresses were incorrect); *North Macon Health Care*, 315 NLRB 359 (setting aside election where 23 percent of *Excelsior* list addresses were incorrect and employees' full names were not given). The ALJ's finding that the voter list was "completely inaccurate" and therefore did not substantially comply with requirements properly relied on evidence presented at the hearing demonstrating that the list was more than 99 percent inaccurate. The Respondent entirely failed to controvert or even address this evidence in its Brief in Support of Exceptions.

The Respondent's exception to the ALJ's finding of bad faith is without merit. This exception is premised solely on the Respondent's claim that the record evidence did not show that the voter list was "completely inaccurate," as the ALJ found. The Respondent concedes that the record evidence shows that "all or virtually all of the addresses were incorrect" and some number of phone numbers were also incorrect, but argues that, in the off chance an accurate phone number or address slipped through, the list could not qualify as *completely* inaccurate. The Respondent's pedantic distinction is irrelevant because the legal standard is non-compliance, not accuracy. The ALJ based his determination of deliberateness on his finding of non-compliance and on an adverse inference drawn from Respondent's failure to explain *why* the list was inaccurate. Respondent's Brief in Support of Exceptions evades any explanation for its non-compliance, buttressing the ALJ's adverse inference.

Respondent's claim that the election should not be set aside because the Union was not prejudiced is unsupported by the record evidence and incorrect as to the relevant Board precedent. The hearing testimony of Alexander Perkins, discussed above, demonstrated that the Union was prejudiced by Respondent's non-compliance because the Union lacked accurate contact information for many bargaining-unit members and was forced to expend resources collecting this information. (Tr. 414:15-415:3; 419:4-21)

However, the Board does not require any showing of prejudice to find that an employer has failed to comply with the voter list requirements. *Thrifty Auto Parts*, 295 NLRB 1118 (1989); *URS Federal Services*, 365 NLRB No. 1, slip op. 3, fn. 8 ("[The Rules and Regulations have] articulated a prophylactic rule concerning voter list service that obviates the need for Regional Directors to delve into a showing of prejudice in order for the elections to be set

aside”). An employer’s non-compliance in preparing a voter list is sufficient to overturn an election.

The Board does not require the recipient of a non-compliant list to notify the non-compliant employer. The rule imposing a duty to proffer a complete and accurate list is applied as a “prophylactic.” *North Macon Health Care*, 315 NLRB 359, 361. *See also Merchants Transfer*, 330 NLRB 1165 (setting aside election where union had not protested an employer’s non-compliant voter list). There is no additional requirement of showing bad faith or negligence where the employer has failed to comply with voter list requirements. *North Macon Health Care*, 315 NLRB 359, 361 (“evidence of bad faith ... is unnecessary because the potential harm from list omissions is deemed sufficiently great.”) (citing *Thrifty Auto Parts*, 295 NLRB 1118). That the Union did not notify Respondent of the erroneous voter list therefore does not indicate that the Union was not prejudiced, nor would such a finding obviate Respondent’s failure to comply with the voter list requirements.

Respondent has presented no viable argument for overturning Judge Amchan’s findings and conclusions regarding Respondent’s non-compliant voter list. The exception regarding the degree of the list’s inaccuracy is based on a misstatement of the relevant Board precedent. The exception regarding the ALJ’s finding of bad faith ignores the core of the ALJ’s reasoning. And Respondent’s claims regarding a showing of prejudice have no basis in applicable Board rulings. The ALJ’s findings that Respondent deliberately failed to comply with its obligation to provide a complete and accurate list and that this failure provided an independent basis for setting aside the election are legally sound and supported by the record evidence.

**C. The ALJ correctly found that statements by Chief People Officer Jerome Miller violated Section 8(a)(1) (Respondent’s Exceptions 4; 29-37)**

Judge Amchan correctly held that one day before the election, Respondent’s Chief People Officer Jerome Miller threatened massed employees in a captive audience meeting with plant shutdown, loss of work, futility, and loss of benefits if the employees voted for unionization. (ALJD at 15-16) The evidence is uncontroverted that on or about October 11, 2017, the Kumho Tire Georgia “A shift” group was required to attend a meeting in Respondent’s cafeteria to listen to management representatives speak about the upcoming representation election scheduled for October 12 and 13, 2017. (Tr. 77:7-22) Between sixty and one hundred employees were in attendance at the meeting. (Tr. 77:25) At that meeting, employees were shown videos asking them to vote “no” in the upcoming election, including messages from local politicians. President Hyunho Kim spoke about his history with the plant and told the massed employees that Kumho would not be successful with a union. (Tr. 80:5-10; 535:17-23; 536:2-5) The centerpiece of the meeting was a speech by Miller, Kumho’s “Chief People Officer.” (Tr. 81:1-82:5; 324:15-326:3; G.C. Ex. 7; G.C. Ex. 8) The recording that captured a majority of Miller’s captive audience speech is quoted in its entirety in the ALJ’s decision.<sup>4</sup> (ALJD at 3-5)

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<sup>4</sup> Kumho in its Exceptions renews its objection to the introduction of the recording of Miller’s speech into evidence, citing Federal Rule of Evidence 106. This objection is without basis and the Board should not find merit to this exception. There is no rule against the introduction of a properly authenticated recording of part of a speech. Federal Rule of Evidence 106, cited by Kumho in its Exceptions Brief, creates no such prohibition. (Exceptions Brief at 10 n.4) The Rule simply permits the introduction of additional portions of a recording or writing that are “relevant ... and necessary to qualify, explain, or place into context the portion already introduced.” *U.S. v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988). The exclusion of a partial recording is not a remedy available under Rule 106. *See, e.g., Campbell v. Shinseki*, 546 Fed.Appx. 874, 880 (11th Cir. 2013) (“The district court did not abuse its discretion in implicitly overruling [objection to introduction of a statement] because Rev. Campbell’s available remedy

After reviewing the evidence of statements made during the course of the pre-election period by Kumho Tire Georgia's President, Hyunho Kim, and Chief People Officer, Jerome Miller, Judge Amchan reviewed the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1968) and concluded as follows:

The facts regarding one employer covered by the *Gissel* opinion, Sinclair Company, are very similar to statements made by Jerome Miller and other Respondent's agents. Sinclair told employees that it was in precarious financial condition, suggested that the Union was likely to strike causing a plant shutdown and that employees would have a difficult time finding employment elsewhere. (ALJD at 16)

The Board should uphold the ALJ's determination here, because the *Gissel* holding is based on a finding that statements almost identical to those made by Kumho Chief People Officer Jerome Miller were unlawful threats. In *Gissel*, the Sinclair employer's president communicated to employees "that the Company was still on 'thin ice' financially, that the Union's 'only weapon is to strike,' and that a strike 'could lead to the closing of the plant,' since the parent company had ample manufacturing facilities elsewhere." *N. L. R. B. v. Gissel Packing Co.*, 395 U.S. at 588. Closer to the election, an employer in the *Gissel* case sent letters to employees "emphasizing that the parent company had no reason to stay in Massachusetts if profits went down." *Id.*

On the day before the election, the president "made a personal appeal" to employees in which he "repeated that the Company's financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make re-employment difficult." *Id.* Miller's speech followed the same pattern and conveyed the same message as the communications that the Supreme Court found to be unlawful in *Gissel*

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was to insist upon the inclusion of the entire statement, rather than the exclusion of the excerpt submitted by the VA."); *U.S. v. Sloan*, 381 Fed.Appx. 606, 610 (7th Cir. 2010) (rejecting motion for new trial based on admission of partial recordings into evidence where motion "presented no reasons why the remaining portions of the recordings were relevant beyond the vague assertion that they would have contextualized the conversations.").

fifty years ago. Miller mixed oblique references to the Employer's precarious position with creditors—"I don't want any of you looking at me later on and saying, hey, why didn't you tell me about the bank situation?"—with repeated warnings that if employees don't choose to "work together" with the Company—that is, vote against unionization—the result will be that the business will be shut down and work will be taken abroad.

Respondent excepts to the ALJ's determination that the October 11<sup>th</sup> speech conveyed unlawful threats, arguing primarily that the speech was a lawful expression of the Respondent's concern about "possible economic consequences of actions that would, could, or might be caused by events set into motion by third parties." (Exceptions Brief at 10) Respondent cites *General Electric v. N.L.R.B.*, 117 F. 3d 627, 632-33 (D.C. Cir. 1997) for its assertion that employers may threaten dire consequences if they are expressed as the result of third-party decisions. (Exceptions Brief at 11, 12) While Respondent's view massively overstates the holdings of *Gissel* and *General Electric*, the Board does not need to take a view on whether any and all predictions based on third-party conduct are lawful, because Miller's threats are not insulated by reference to third-party conduct.

In this case, Jerome Miller's October 11 speech does not refer to consequences beyond the employer's control, nor does it refer to the actions of third parties, save a few vague and passing allusions to "the banks." Miller's statements that a "no" vote is necessary to avoid the plant shutting down and that in the event of a vote for unionization, "the worst things will happen" and "we'll be looking at tires being shipped" abroad unequivocally express the direct link between a vote for the union and plant closure, transfer of work, and job loss. The D.C. Circuit in *General Electric* distinguished between unlawful "warnings" of dire consequences from statements that simply convey to employees an employer's "concerns with maintaining

competitive position” and the actual risks of becoming uncompetitive due to demonstrably likely increased costs associated with unionization. *Gen. Elec. Co. v. N.L.R.B.*, 117 F.3d 627, 633. Here, Miller made no reference to any actual costs of unionization, a loss of competitiveness, or actions that will be taken by third parties like customers.<sup>5</sup> *Id.* (distinguishing *Allegheny Ludlum Corp. v. N.L.R.B.*, 104 F.3d 1354, 1366 (D.C. Cir. 1997), where the “employer made no attempt to ground its warnings of loss of job security in objective circumstances, such as the competitive environment and need to contain costs”).

Instead, Miller’s speech repeatedly harped on the “five percent of production” represented by the Georgia plant, reminding employees that Respondent could choose to make tires elsewhere, and would be relatively unrestrained by any incentive to keep production in Georgia. The repeated assertion that “five percent of production can just quickly go away and be captured by someone else” demonstrates that the threatened plant closure is entirely within the employer’s control. Because the plant comprises a smaller portion of Respondent’s production, Respondent had the flexibility to close the plant or move the employees’ work. The “five percent” statement had nothing to do with factors outside Respondent’s control. To the contrary, because the percentage is small, Respondent could close the plant at its whim. Even where the threat is framed as a reaction to a hypothetical union strike, the “five percent” figure reminded employees that it is Kumho’s freedom to easily and quickly move production that governs its decisions in any situation.

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<sup>5</sup> Respondent’s election campaign did not convey the message that a union would subject the Employer to higher costs, for example by obtaining wage increases. To the contrary, Respondent campaigned on the prediction that wages would go down. Respondent’s consultant, Bill Monroe, showed employees a slide in a captive audience meeting claiming that wages could decrease to a figure presented as the local average. (R. Ex. 11)

Respondent characterizes Miller's threats as merely "statements of the Respondent's reasonable belief of possible economic consequences that were outside the control of Respondent." (Exceptions Brief 11-12) Respondent argues that a generalized employee awareness of "financial status that could have affected the future of the plant from an outside source" and the unspecified potential acts of "corporate creditors" suffices to transform all threats of plant closure, job loss, and transfer of work into lawful predictions. Respondent's failure to put on significant evidence regarding its communications to employees calls this reliance on "background information" into question. If the basis for Respondent's relentless predictions of plant closure are rendered lawful by the widely known background fact of its financial distress, Respondent did very little to show that this fact was adequately conveyed to its workforce. In its Exceptions brief, Respondent offers up a few instances as evidence: First, the brief asserts that "President Hyunho Kim testified that he told employees that the Company was not financially doing well," and cites the transcript at page 535:14-16. The exchange at this citation reveals no such statement.<sup>6</sup>

Respondent further relies on testimony that President Kim "told employees" that Kumho "was losing money" and that "we can be in serious issue." (Exceptions Brief at 11) This claim is based on a single statement that Kim claims to have made "around October 8<sup>th</sup>, 2017" to "employees." Respondent offered no evidence showing which employees or how many employees heard this statement, and there is no evidence that the statement was disseminated. Finally, the Exceptions brief relies on an article about Kumho Tire in the Korean Herald about the 2017 creditor-led debt-restructuring program titled "Creditors to restructure Kumho Tire with cash injection." (R. Exs. 7, 8) The article does not point to any adverse consequences of

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<sup>6</sup> The citation at page 535:14-16 reads: "Did you tell Mario Smith that Kumho would not be successful with a union, and to vote no? No".

potential unionization, nor describe how creditors would react to employees choosing representation by the USW. The article specifically notes that changes to capital investments were not on the table as part of the proposed restructuring. (R. Exs. 7, 8)

Judge Amchan held correctly that the Korean Herald article and a single statement by President Kim to an unidentified number of employees did not provide employees with sufficient objective facts showing demonstrably probable consequences of unionization such that later statements by Kumho representatives should be interpreted as lawful predictions. (ALJD p. 16) An unexplained reference to “the bank situation” did not transform Jerome Miller’s barrage of threats into a mere prediction. Miller never characterized the “tires being shipped somewhere else” or “the work taken abroad” or the business closing down as the results of forces outside of the Employer’s control. Instead, Miller directly linked these dire eventualities to a vote for union representation. Miller stated at the outset that “[w]e just cannot have this place shut down because we did not decide to get together and work together.” (G.C. Ex. 7; G.C. Ex. 8)

The recording in evidence as General Counsel’s Exhibit 7 begins partly through Miller’s speech. Miller did not testify, and the Employer did not call any employee witnesses to testify to the content of the speech prior to the beginning of the recording. The Employer offered no evidence that prior to the recording’s start, Miller offered objective facts from which employees could draw independent conclusions regarding the likelihood of plant closure as a result of unionization. Judge Amchan appropriately inferred that the unrecorded portion of Miller’s speech did not preface the threats of the adverse consequences of unionization with objective facts that demonstrated probable consequences beyond the Employer’s control. *Daikichi Corp.*, 335 NLRB 622 (2001) (ALJ properly relied on employer’s failure to call witness who made unlawful threats of plant closure in drawing adverse inference regarding unlawful content of

speech to employees). Similarly, while Kumho Tire Georgia President Hyunho Kim spoke before Miller, there is no evidence in the record that Kim provided the employees with objective facts that would provide a lawful context for Miller's threats. Kim testified at the hearing, but did not provide testimony about his or Miller's comments at the October 11 captive audience meeting. (Tr. 530:5-536:18)

To the extent that Miller referenced "the banks," in his October 11<sup>th</sup> speech, he failed to provide any information permitting the employees to evaluate whether or how unionization would cause "the banks" to punish or close the plant. *McDonald Land & Mining Co.*, 301 NLRB 463, 466 (1991) (statement that creditors, because of unionization drive, "might get nervous and decide to throw us [into] Chapter 11" violated Sec. 8(a)(1)). Even assuming, despite the lack of evidence, that all employees were fully apprised of Kumho's financial situation, neither Miller's speech nor any other Employer communication pointed out "specific effects of unionization that might cause [the business] to become unprofitable." *National Micronetics*, 277 NLRB 993, 995 (1985). Miller "presented no evidence that the Union made any demands at all, let alone demands that, if met, would have the demonstrably probable consequence of driving the Respondent out of business." *Daikichi Corp.*, 335 NLRB 622, 624 (2001). *See also Evergreen Am. Corp.*, 348 NLRB 178, 200 (2006) ("The fact that in some of the conversations described above, the supervisors mentioned competitiveness or economic conditions, is not sufficient under *Gissel* to render the comments lawful."). While it may be true that Kumho Tire management was under pressure from Kumho's creditors, Miller's speech articulated no rationale that explained why these circumstances meant that a vote for the union would result in plant closure and transfer of work. Miller "cited no objective facts that would show if employees unionized either economic conditions or competitive pressures would force Respondent to close for reasons

beyond its control.” *Evergreen Am. Corp.*, 348 NLRB 178, 200 (2006). *See also National Micronetics*, 277 NLRB 993, 995 (1985) (employer failed to cite objective facts where it “merely noted that its Kingston plants were already uncompetitive, when compared to its plants in California and Mexico and to its Japanese suppliers, and stated that it could easily relocate these unprofitable plants if the Union won the election.”); *Southern Bakeries*, 364 NLRB No. 64 (Aug. 4, 2016) (employees would understand claim that “expenses related to the Union put jobs at risk” as a threat of plant closure).

Some of Miller’s comments allude to the possibility of a strike. However, this is by no means the frame for the entire speech or for Miller’s claims that the plant will shut down or Kumho will ship work overseas. A strike is simply one of the potential harms that Miller threatened – he asserts that “we could all be adversely impacted if the business shuts down or if the tires are shipped or there’s a disruption in the production and you sit idly by.” (G.C. Ex. 7; G.C. Ex. 8) As the Court of Appeals for the D.C. Circuit has explained, the *Gissel* court found that such statements were unlawful “even though the employer’s proffered link between unionization and layoffs was explicitly premised on an intervening causal factor within the union’s control—the decision to strike,” because the “employer conveyed this message without having any support for its ‘basic assumption’ that the union would have to strike to be heard, or for its assertion that local plant closings were attributable to unionism” *Allegheny Ludlum Corp. v. N.L.R.B.*, 104 F.3d 1354, 1366 (D.C. Cir. 1997).

Even if Respondent were able to show that Miller’s pre-election speech was referencing consequences beyond Kumho Tire’s control, the speech remains unlawful because it failed entirely to cite objective facts or to show that the threatened consequences were “demonstrably probable.” *Gissel Packing Co.*, 395 U.S. 575, 619. The Employer’s brief relies heavily on *Miller*

*Industries Towing Equip.*, 342 NLRB 1074 (2004) for the proposition that an Employer may lawfully threaten transfer of work and plant closure by adding a vague reference to third party conduct such as a strike or a customer reaction. In *Miller Industries*, however, the Board specifically found that the Employer’s lawful statements were “based on demonstrable facts, including sales and earnings (loss) figures, and verifiable accounts of past events.” *Miller Industries*, 342 NLRB at 1076. Unlike the employer speech in *Miller Industries*, the threats made by Miller and other Kumho representatives were not “vague and insubstantial.” Miller’s speech hammered home the consequences of choosing unionization—the “worst things” could happen, including the tire molds being shipped overseas. While the reasoning behind the threatened consequences is vague—relying on allusions rather than explanations—the speech left no question that plant closure was a very real and imminent eventuality.

In *Southern Bakeries*, the Board found that management statements about the effects of unionization were not “carefully phrased on the basis of objective fact” to convey a belief “as to demonstrably probable consequences beyond [the employer’s] control” where the general manager made a captive audience speech claiming that “unions had strangled companies in several industries across the country to death” and made specific references to plant closures at other companies. 364 NLRB No. 64 (Aug. 4, 2016) (*aff’d*, *Southern Bakeries, LLC v. N.L.R.B.*, 871 F.3d 811, 821 (8th Cir. 2017)). Dissenting in part, Member Miscimarra would have found that the employer did not threaten plant closure, because its statements “referred to historical facts” and stated “facts about what other parties ... have done in the past” rather than stating what the employer “may or would do in the event of a strike in the future.” *Southern Bakeries*, 364 NLRB No. 64 (Aug. 4, 2016). By contrast, Miller’s statements are threats under either the majority or the dissent’s standard in *Southern Bakeries*. Miller made no reference to historical

events involving the USW or other companies. Moreover, Miller specifically predicted that the result of unionization would be that the Employer will on its own initiative “move the work abroad,” either without provocation or in the event of a strike. (G.C. Ex. 7; G.C. Ex. 8)

That some of Miller’s threats appear to link plant closure to a theoretical strike by the Union, does not soften the coercive impact of the threats or make them lawful. Like the employer in *Gissel*, Miller’s communications “had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard.” 395 U.S. 575, 619–20. Instead, as in *AP Auto Systems*, where the Board found unlawful threats of plant closure, “the scenario conveyed to employees was that, if they chose union representation, the Petitioner would inevitably make exorbitant demands, which would hurt [the plant’s] competitive position, the Employer would not agree to these demands, a strike would ensue, and the plant would close.” 333 NLRB 581 (2001). And also as in that case, Miller’s speech “made no reference to objective facts indicating that this scenario constituted the likely outcome of bargaining” and “made no reference to other possible outcomes and gave no indication of the Employer’s willingness to bargain in good faith with the Petitioner.” 333 NLRB at 581. Instead, it simply made clear that a strike and a subsequent plant closure would be the inevitable results of a “yes” vote, and that if employees “risked choosing the Petitioner to represent them, they would inevitably face a strike, plant closure, and job loss.” 333 NLRB at 581.

Respondent further excepts to the ALJ’s findings that parts of the Miller speech conveyed that “selecting the Union would be an exercise in futility” and suggested that the Employer “would be punitively intransigent in the event the Union wins the election.” (Exception 37; ALJD at 16) Miller told the massed employees that a worker had told him that “when you go to collective bargaining, man, what I get now, it’ll really now become what the average is, because

you all won't have to give me what I'm earning." (GC Ex. 7; G.C. Ex. 8) Miller reinforced the threat, telling the massed employees that in "collective bargaining; we can start from scratch. So whatever you're getting paid now, hourly, could actually go down. That's just the – that's the way it works." (G.C. Ex. 7; G.C. Ex. 8)

These statements conveyed to the massed captive audience of employees that unionization and collective bargaining are futile enterprises, and threatened that Kumho would never give employees a raise through bargaining. The Board has held that statements that bargaining will start from "scratch" and could result in reduced wages are unlawful threats unless they "merely describe the bargaining process and/or are made in direct response to union promises." *BP Amoco*, 351 NLRB 614, 617 (2007). Here, the threats were not made in response to any Union wage demands. Miller's comments emphasized only that wages were likely to go down as a result of bargaining. Miller's characterization of the effect of unionization on employees' wages clearly "communicated an intention to punish employees for selecting the Union through regressive bargaining." *Sysco Grand Rapids*, 367 NLRB No. 111 (Apr. 4, 2019) (finding employer statements that negotiations with the Union would start with a "blank page," a "clean sheet," a "clean slate," a "blank sheet of paper," or "zero," and that wages could revert to minimum wage were "explicit threats about the bargaining process' futility").

Miller's threats of futility are not rendered lawful by limited testimony from employees who heard Kumho's union avoidance consultant, Rebecca Smith, tell employees that wages and benefits could go up or down as a result of collective bargaining. The ALJ correctly concluded that even if it was proven that Smith at some point described the collective bargaining process "in a non-violative manner," such prior statements do not negate a later unlawful threat. (ALJD at 16 n.24) The Employer did not call Rebecca Smith to testify, and did not produce its own

employee witnesses to testify to the content of her presentations. Any presentation by Smith would have been made prior to Miller's last-minute speech, and therefore could not serve to disclaim or remedy the coercive impact of Miller's statements. The Employer did not offer evidence of any subsequent clarification made after Miller's speech that negate its coercive effect. *President Riverboat Casinos of Missouri*, 329 NLRB 77, 78 (1999) ("In order to effectively negate a prior unlawful statement, a subsequent clarification must, *inter alia*, be timely and unambiguous, must specifically disavow the prior coercive statement, and must be accompanied by assurances against future interference with employees' Section 7 rights.") (citing *Passavant Memorial Hospital*, 237 NLRB 1 38 (1978)).

**D. The ALJ correctly found that statements by Kumho Tire Georgia President Hyunho Kim violated Section 8(a)(1) (Respondent's Exceptions 1, 2, 5, 27, 28)**

The ALJ found, based on employee testimony, that President Hyunho Kim told employee Landon Bradley that if the plant were unionized, employee jobs were in jeopardy. ALJD 5-6. The ALJ's finding was based on Bradley's testimony that President Kim, through a translator, spoke to him on the shop floor and said that "all of our jobs were in jeopardy if this happened." It was evident to Bradley that Kim was referring to the selection of the Union as representative. Tr. 183:4-184:15. Kim's statement made a direct link between selecting union representation and job loss.

Kim denied having made the "jobs in jeopardy" statement, but testified that he told employees to give him another chance and to vote "no" for the survival of the Company. Tr. 535-536. Kim's admitted statement that union representation will lead to financial ruin affecting the "survival" of the employer, where unsupported by objective facts, is an unlawful threat. *See*

*Evergreen Am. Corp.*, 348 NLRB 178, 200 (2006). The Board has held that where a statement is ambiguous, if there is “any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is a threat of retaliation.” *Student Transportation of Am.*, 362 NLRB 1276, 1277 (2015).

The ALJ properly evaluated Bradley’s credibility and the plausibility of his testimony. It is implausible, as Kumho’s Exceptions brief seems to suggest, that Kim was merely touring the shop floor during the pre-election period and explaining to employees that their jobs were in jeopardy for reasons unrelated to the union election. Nor is there any evidence to suggest that Kim’s statement to Bradley was limited to “possible economic consequences driven by third parties such as the creditors.” Exceptions Brief at 12. Kim did not refer to creditors or provide an explanation for why employees’ selection of union representation would lead to third parties taking an unspecified but “jeopardizing” action.

Judge Amchan additionally found that Kim told employee Mario Smith that “the plant would not survive if employees choose to be represented by the Union.” ALJD at 15. The judge properly credited Smith’s testimony that Kim approached him while touring the plant floor, and through a translator, said that he does not think the company will survive if the Union comes in. Tr. 75-76. Smith’s testimony is consistent with Kim’s admission on the stand that he told employees that he told employees to vote “no” for the survival of the Company. Tr. 535-536. Because neither Smith nor Kim testified that Kim provided a basis in objective fact for his prediction of plant closure, the Judge properly concluded that the statement conveyed an unlawful threat. *Evergreen Am. Corp.*, 348 NLRB 178, 200 (2006).

**E. The ALJ correctly found that statements by Respondent’s Team Leads violated Section 8(a)(1) (Respondent’s Exceptions 15-20; 38-46)**

With respect to each statement discussed below, it was the Respondent’s burden to show that a statement was “carefully made on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond its control”—not the Union or General Counsel’s burden to show that unionization would not cause the predicted effects. *Schaumburg Hyundai*, 318 NLRB 449, 450 (1995). In every instance, Judge Amchan properly found that the Respondent failed to meet this burden.

**1. Threats made by Team Lead Harry “Kip” Smith (Exceptions 38; 40)**

The ALJ correctly concluded that Team Lead Harry “Kip” Smith unlawfully threatened employees with transfer of work and/or plant closure in at least one mandatory pre-shift meeting. (ALJD at 16) The ALJ correctly credited the testimony of employees Brandyn Lucas, Marcus Horne, Chase Register, and Van McCook over that of Kip Smith. Smith’s testimony admitted that he made statements in mandatory employee meetings linking unionization to the Company shipping the plant’s tire molds to Korea, but framed the communications as a mere possibility among other possibilities, and omitted any mention of plant shut down or job loss. (Tr. 458:3-7) Weighed against the balance of testimony by employees, however, Smith’s account is not credible. Every employee who testified about Smith’s pre-shift meeting threats recalled that the statements clearly conveyed that a plant shutdown would be the result of a vote for union representation. (Tr. 264:16-20; Tr. 382:7-25; Tr. 22:2-13; Tr. 239:40 – 240:21) Employees did not recall Smith explaining that he was only talking about the possibility of contingency plans in

the event of production losses due to a strike, even when specifically asked about this on cross-examination. (Tr. 50:22-51:25)

Kumho excepts to this finding on the basis that Smith's statements communicated a possibility, rather than a certainty. Exceptions Brief 17-19. The Board has held that it is no defense to phrase a "prediction of plant closure as a possibility rather than a certainty." *Daikichi Corp.*, 335 NLRB 622, 624 (2001) (noting that "in *Gissel* itself, the employer's unlawful statements were to the effect that the union would probably strike and that a strike 'could lead to the closing of the plant.'). *See also SPX Corp.*, 320 NLRB 219, 221 (1995) (Board held that employer communications referencing "possibility" of loss customers "had a reasonable tendency to create and reinforce an atmosphere of fear among the employees that a union victory could result in loss of work, jobs, and customers, and in-plant closure.")

Nor do the cases cited by Kumho support a conclusion that Smith's statements were lawful predictions. In *Manhattan Crowne Plaza*, the Board noted that it was deciding a "close case," and found lawful an employer communication that "provided a recent, concrete example of a negative outcome for employees who were represented by the same union that seeks to represent the Employer's employees" and included the caveat that "each set of negotiations is different." 341 NLRB 619, 1-620 (2004). Here, there was no evidence that Smith provided any such caveat, and Kumho failed, in the CPP Pinkerton, also cited by Kumho, is inapposite. That case addressed an employer communication referencing the "possibility" of third party action, based on a concern for competitiveness supported by objective facts. 309 NLRB 723, 724 (1992). Here, the "possibility" warned of by Kip Smith was the Respondent's own actions – shipping material and work abroad.

The ALJ also properly found that Team Lead Kip Smith unlawfully threatened that unionization would lead to plant closure by showing employees a picture of an advertisement for work dismantling carnival equipment. (ALJD at 16) Referencing the ad, Smith told one employee that “If the Union’s voted in, I found y’all another job,” and told another employee that employees may need to look for new jobs if the plant votes for unionization. (Tr. 33; Tr. 356)

Smith admitted that he showed employees the photograph and made statements that employees would have to look for work. Smith admitted that his statement was with respect to the unionization vote, and not so some generalized possibility that the plant would be closed because of financial difficulties. He claimed, however, that the interaction took place after, and not before, the union election. Kumho argues that the judge erred in finding that Smith made the threat prior to the union election. Whether Smith made the statements before or after the election campaign is not determinative of whether the statement violated Section 8(a)(1). A threat that unionization will lead to plant closure and job loss is still a threat, even if made outside of the critical period.

Kumho further excepts to the Judge’s findings on the basis that “all employees, including those Smith spoke to, were informed that the Company was doing all it could do to prevent plant closure (actually company closure) and that it was creditors and customers who might take action in response to unionization, not the Company.” This assertion is uncited and unsupported. No facts in evidence suggest that “all employees” were apprised of any such thing. The evidence cited by Kumho in support of this assertion—a news article that does not mention unionization and a statement by President Kim that the Company was losing money—were not referenced by

Kip Smith, and in any event do not amount to objective facts showing demonstrably probable consequences beyond Respondent's control.

**2. Threats made by Quality Assurance Supervisor Michael Geer  
(Exception 39)**

Judge Amchan correctly found that statements by Quality Assurance Supervisor Michael Geer at a mandatory pre-shift meeting were unlawful threats. (ALJD p. 16) Geer told employees that if the union were voted in, Kumho could lose customer contracts. Employee Jason Bailey testified that the basis Geer communicated for this statement was that Kumho "didn't really have enough money to be getting a Union and all that" and that the reason that contracts would be lost was because "we were voting for the Union." (Tr. 345:25 -346:1; 348:20-349:7) Geer testified, and did not deny that he told employees that contracts could be lost as a result of unionization, but claimed that he had linked the loss of contracts to the eventuality of an "interruption in production." (Tr. 466:15-25) The ALJ properly credited the employees' testimony over Geer's, and found that Geer communicated that "unionization would result in Respondent losing contracts." (ALJD p. 16)

Unless supported by objective facts, predictions that unionization will cause customers to cancel contracts with an employer are unlawful. *Southern Labor Services*, 336 NLRB 710 (2001); *Blaser Tool & Mold Co.*, 196 NLRB 374 (1972). The Board has held statements "that customers would prefer to deal with nonunion companies over those that are unionized" and that as a result the employer "would lose jobs if the business went elsewhere" to be unlawful in the absence of a showing that these results are "demonstrably probable." *Sysco Grand Rapids*, 367 NLRB No. 111 (Apr. 4, 2019). The Board has held that threats of customer contract cancellation are unlawful even where accompanied by some relevant facts, as in *SPX Corp.*, 320 NLRB 219,

221 (1995) (employer noted that customers had canceled contracts with struck employer in the same industry).

Geer's communication was devoid of supporting facts. Apparently conceding that Geer failed to provide any objective facts to support his predictions, as required by *Gissel*, Kumho argues that employees would have had background knowledge of Kumho's financial difficulties. As discussed above, Kumho failed to put on evidence sufficient to show that employees were so familiar with the objective facts of Kumho's finances that Employer representatives did not need to mention these facts at all. Nor does Kumho's Exceptions brief explain the connection between the bank takeover—characterized by the Korean Herald as an injection of cash—and any likelihood of customers canceling contracts in the event of unionization.

Kumho further argues that Geer's statements were lawful based on his testimony that he placed the threat of contract cancelation in the context of an imagined union strike. Exceptions Brief at 20. However, linking the upcoming vote to the inevitability of a strike, particularly while predicting loss of customers and plant closure, is also coercive, as employees "should not be led to believe, before voting that their choice is simply between no union and striking." *Fred Wilkinson Associates*, 297 NLRB 737 (1990). Raising the specter of a union strike as the likely result of a unionization vote "without reference to objective facts indicating that this scenario constituted the likely outcome of bargaining" does not negate the implicit threat of reprisal in a threat of loss of work. *AP Auto Systems*, 333 NLRB 581 (2001).

### **3. Threats made by Team Leads Brad Asbell, Chris Wilson, and Eric Banks (Exception 41)**

Judge Amchan credited the testimony of employee Anthony Arnold and found that Team Leads Brad Asbell, Chris Wilson, and Eric Banks had made statements unlawfully threatening

plant closure. Kumho excepts to the Judge's credibility determinations, and asserts that Arnold's testimony is "unnatural and unlikely" because he provided evidence that three Team Leads made similar threats on the same day. However, it was proper for the judge to credit Arnold's testimony.

Arnold testified that shortly after the beginning of the election campaign, his Team Lead Brad Asbell stated that he had to attend a meeting for all team leads about the union. When Asbell returned from the meeting to the maintenance office that he shared with Arnold and another employee, he "walked back in despondent, put his head down and said if you get the union in this plant, they're going to shut the plant down." (Tr. 128:22-129:1) Wilson and Banks made similar statements on the same day. The ALJ could properly infer that at the meeting concerning unionization that all Team Leads were required to attend that day, all three Team Leads were informed that Kumho would retaliate with plant closure if the employees voted for USW representation, or that the Team Leads were instructed to convey that message to employees. There is nothing implausible about this inference, especially given the evidence of consistent messaging from Team Leads.

#### **4. Threats made by Team Lead Freddie Holmes (Exception 42)**

Judge Amchan found that statements by Team Lead Freddie Holmes to employee Jemel Webb that "Kumho would lose its contracts with Kia and Hyundai because those companies do not do business with unionized suppliers." (ALJD p. 16) Amchan properly credited Webb's testimony over Holmes' denials. Kumho once again asserts that because Holmes' threat refers to third party conduct, it is necessarily lawful pursuant to *Gissel*. Exceptions Brief at 25. This is a grotesque mischaracterization of the law. An employer may neither "impliedly threaten retaliatory consequences" within its control, nor, "in an excess of imagination and under the

guise of prediction, fabricate hobgoblin consequences outside [its] control which have no basis in objective fact.” *N.L.R.B. v. in Electric Co.*, 438 F.2d 1102, 1106 (1971).

Kumho further excepts to the Judge’s finding on the basis that Webb “knew” that despite any statement from Holmes, “Hyundai and Kia would not pull out simply because they do not buy from unionized facilities.” Exceptions Brief at 24-25. The only basis for this assumption is transcript testimony showing that Webb had attended a meeting conducted by Respondent’s union-avoidance consultant Rebecca Smith, in which Smith made statements that “companies shut down because of business problems or other economic reasons” and that “she was not saying . . . that the union causes the company to shut down.” (Tr. pp.230:12-25 to 231:1-12).

Respondent failed to call Rebecca Smith to testify. Smith’s presentation, even if it included lawful statements, did not inoculate Kumho against liability for all future threats made by its agents. *See President Riverboat Casinos of Missouri*, 329 NLRB 77, 78 (1999) (rejecting argument that a threat was negated by a supervisor’s subsequent lawful statement, because “a subsequent clarification must, inter alia, be timely and unambiguous, must specifically disavow the prior coercive statement, and must be accompanied by assurances against future interference with employees’ Section 7 rights”); *Teksid Aluminum Foundry*, 311 NLRB 711 n. 2 (1993) (subsequent clarifications which took place in “an atmosphere of unfair labor practices” and not “free from other contemporaneous illegal conduct” did not serve to unambiguously disavow unlawful statements).

## **5. Threats made by Team Lead Stevon Graham (Exception 46)**

The ALJ found that Team Lead Stevon Graham threatened plant closure to employees Annie Scott and Christopher Harris. Scott and Harris gave corroborating testimony that Graham told them that “if we got the union, we would be at risk of shutting down because we would lose

the two contracts -- our biggest contracts, which were, I think, Kia and Hyundai” and that employees would “be out of a job.” Graham’s explanation was that Hyundai and Kia “wouldn't want to work with us because they would be at risk of what they would think that we would go on strike.” (Tr. 146:20-147:8; Tr. 285:1-17)

Respondent excepts to the Judge’s credibility determinations. Judge Amchan properly credited Scott and Harris over Graham, an employer agent. *Flexsteel Industries*, 316 NLRB 745 (1995), *enfd* 83 F.3d 419 (5th Cir. 1996). Notably, Respondent’s Brief in Support of Exceptions egregiously misrepresents the record in an attempt to argue that Graham’s statements were responses to employee questions about likely customer reactions to unionization. Harris never testified that the unlawful statements made by Graham were in response to a question from employees. Harris testified that he would occasionally ask Graham questions in the course of “conversations” about “stuff.” (Tr. 146-153) Harris did not testify that he initiated these conversations, and did not testify that the particular statements alleged in the Complaint were in response to employee questions. To the extent that the Judge found that Graham made the alleged statement unprompted by employee questions, this finding should be upheld.

Respondent further excepts on the basis that Graham’s statements concerned the conduct of third parties. However, it is well-established that threats that customers will cancel contracts, resulting in plant closure or job loss, are unlawful unless they are carefully phrased on the basis of objective fact. *Southern Labor Services*, 336 NLRB 710 (2001); cf. *Eagle Transport Corp.*, 327 NLRB 1210 (1999) (objective basis shown). Kumho has failed to articulate a single objective fact underlying the pervasive threats that Hyundai and Kia would cancel their contracts with Respondent if the Macon plant unionized.

**6. Threats to change work rules and practices made by Team Lead Harry “Kip” Smith (Exceptions 51; 52).**

The ALJ correctly found that Team Lead Kip Smith made statements violative of Section 8(a)(1) that he “would no longer be able to assist them in their work” and that he “would have no flexibility” regarding time-off requests if employees selected the USW as their representative. (ALJD p 18)

It is well-established that “comments to employees conveying that rules would be enforced more strictly if employees chose the union, without any basis in objective fact, are inherently coercive.” *Sysco Grand Rapids*, 367 NLRB No. 111 (Apr. 4, 2019) (finding unlawful statements that “supervisors wouldn't be able to talk to [employees] anymore”; that “once the Unions [sic] in here you can't talk to me anymore”; that “everything would be totally different if the Union prevailed”; and warning of “stricter discipline if the Union came in because the Company would have no discretion and employees would have to ‘be written up for everything’”). The ALJ found these statements to be unlawful on the basis that Smith’s predictions were fabrications with no objective basis. There was no reason for Smith to believe that the Union would bargain for harsher rule enforcement or for strict preservation of work in particular classifications, and he offered no basis for this belief.

Kumho excepts to the Judge’s findings and asserts that employer representatives are permitted to threaten that they will “go by the book” if the union is selected. The cited cases, however, do not support this conclusion. In *Trash Removers*, the Board approved the ALJ’s finding that a manager “did nothing more than say that [employees’] demands would have to be considered by higher authority, and that assuring them of any improvements was beyond his authority.” 257 NLRB 945, 951 (1981). In *Beverly Enterprises*, the Board found lawful a general statement that management would have to “go by the book” under a union contract, because it

did not “contain any threats.” 322 NLRB 334, 344 (1996). Here, Smith’s statements clearly conveyed threats, because specified the conditions of employment that would change for the worse, and exactly how they would change.

**F. The ALJ correctly found that Respondent’s representatives unlawfully interrogated employees in the pre-election period (Exceptions 47 – 50).**

**“When your employer is constantly telling you that unionization will doom his company, an inquiry regarding your union sympathies is not benign, even if the employer is aware of your union support” (ALJD p. 7 n. 10)**

The Respondent correctly identifies *Rossmore House* as an important Board decision regarding unlawful interrogation under the Act. However, many of the exceptions rely on misapplication of *Rossmore House*’s “totality of circumstances” test and/or ignore Judge Amchan’s application of the *Bourne* factors in determining whether the interrogations violated the Act. (ALJD p. 17) Questions by supervisors that are “intended to elicit the subject employee’s union predilections during the election campaign” constitute the “calculated probing of union sympathies” and violate Section 8(a)(1). *President Riverboat Casinos of Missouri*, 329 NLRB 77, 78 (1999). Where questioning by a supervisor has “no legitimate purpose” and questions are “designed to determine [the employee’s] involvement in protected activities,” the interrogation is presumed to have a coercive effect. *Hunter Douglas*, 277 NLRB 1179, 1181 (1985), *enfd.* 804 F.2d 808 (3d Cir. 1986).

**1. The ALJ correctly found the interrogation by William Monroe of Michael Cannon violated Section 8(a)(1).**

William Monroe was a labor consultant contracting with a company named Road Warrior Productions that Kuhmo hired to run an anti-union campaign. (Tr. 433, 436) Judge Amchan found that Mr. Monroe asked Mr. Cannon “why Kumho employees needed a union.” (ALJD p.

6:15-20) Though Monroe denied that he questioned Cannon about his opinions regarding the need for a union, Judge Amchan credited Cannon's testimony because, among other things, (1) his testimony was consistent with testimony of 17 other witnesses, including 10 current employees and that it was extremely unlikely they all fabricated their testimony and (2) Kuhmo only called supervisors to deny the accuracy/veracity of the General Counsel's witnesses, often through a series of leading questions with a one word response. (ALJD p.14:1-15)<sup>7</sup> Judge Amchan also correctly credited Cannon because Monroe testified that after a session while "walking the floor," he walked over to Cannon's machine but didn't ask Cannon a single question only answered them. (Tr. 430-31) That testimony defies common sense and experience.

The case Respondent cites *P.S. Elliott Servs.*, 300 NLRB 1161, 1162 for the proposition that Monroe's "conversation" with Cannon was lawful because there was no promise of a benefit or threat of a reprisal did not involve unlawful interrogation but a statement from a supervisor that the employer (who purchased a union organized company) was a non-union company. Board law does not require a showing of a promise or threat as a condition of finding that questions into an employee's position regarding a union constitute unlawful interrogation.

**2. The ALJ correctly found that Monroe's questioning of Chase Register constituted unlawful interrogation.**

The Respondent advances no argument in support of its exception to Judge Amchan's findings that (1) Monroe approached Register at his work station and told Register that he heard from a supervisor Harry "Kip" Smith that Register had questions for him; (2) that Register said he did not have questions for Monroe and (3) that Monroe then asked Register how he felt about

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<sup>7</sup> Judge Amchan relied on these considerations, among others, to credit testimony of other GC witnesses. Accordingly, the answers to the Respondent's arguments assume this finding on credibility.

the union. (ALJD p. 6:35-40) Monroe's conduct with Register resembled his conduct with Cannon.

Instead, Respondent argues that the interaction between Monroe and Register was a brief "5 to 10 minute" conversation and that because Register was an open supporter of the Union, Monroe's question about Register's feelings about the union is not enough to establish unlawful interrogation in the absence of a promise of benefit or a threat of reprisal. First, Judge Amchan found that when Monroe questioned Register about the union, he did not know that Register was a union supporter. (ALJD p. 7:1-4) Respondent points to no evidence that Monroe knew prior to his first encounter with Register that Register supported the union. In fact, Register testified that Monroe was the first manager or consultant that he disclosed his union support to. (Tr. 46:15-25) That Register disclosed his support for the first time during this conversation is irrelevant to whether the questioning was unlawful. *See, Regency Service Carts*, 325 NLRB 617, 622 (1998)(ALJ observing that it is irrelevant that an employee openly disclosed his union supporter to a supervisor if the supervisor did know of such support); *UNF, West Inc.* 363 NLRB No. 96 (2016), *enf'd UNF West, Inc. v. NLRB*, 844F.3d 451 (5th Cir. 2016)(observing that a consultant questioning a union supporter about the union was unlawful because no evidence that consultant was aware of the employee's activity.)

Second, Register testified that on September 30, 2017, about two weeks prior to the election, he stopped being vocal at captive audience meetings. (Tr. 47:9-11) This undisputed fact is important under the totality of circumstances test because it demonstrates the overall effectiveness of the Respondent's anti-union campaign. The Board has recognized that when assessing whether one encounter supports a finding of unlawful interrogation, it is important to consider contemporaneous events occurring during the campaign. *Westwood Health Care*

*Center*, 330 N.L.R.B. 935, 940 (2000)(“a proper analysis must take all of [the] incidents into account rather than considering each one in isolation. Suggestions conveyed in one conversation may contribute to the impact of the next.”)(brackets added)

Finally, Register’s initial open support for the union (which he subsequently curtailed) is only one factor in determining whether the interrogation was unlawful. *See, L.S.F. Transportation, Inc.* 330 NLRB 1054, 1063 (2000)(adopting ALJ’s reasoning that the “fact that the recipient of the interrogation openly and actively supports the union is simply one factor to be considered in evaluating the total context of the interrogation.”) The Respondent fails to address the other *Bourne* factors that Judge Amchan analyzed and found supported the allegations of unlawful coercion. (ALJD p. 17:1-35) The Respondent doesn’t dispute Judge Amchan’s finding that it was openly hostile toward unionization; the most significant *Bourne* factor when applying the “totality of circumstances” test. *See, Westwood Health Care Center*, 330 N.L.R.B. at 941 (“Finally, and most significantly, the conversations at issue were against "a background of hostility" and unlawful conduct.”)

**3. The ALJ correctly found that Harry “Kip” Smith’s interrogation of Sterling Lewis violated Section 8(a)(1).**

Respondent argues that the General Counsel did not credibly establish that Mr. Smith questioned Mr. Lewis about how he felt towards the Union. Respondent first contends that Smith denies he ever had a conversation with Lewis about the Union and testified that Lewis works another shift and would only interact with him if Lewis was working overtime. Smith actually testified that he didn’t recall the conversation with Lewis. (Tr. 462) Lewis however testified that he specifically recalled a conversation with Smith during which he was asked how he felt about the union and that he told Smith he “didn’t feel either way.” (Tr. 320)

Respondent next argues that if Smith asked Lewis how he felt about the Union, such interrogation was not unlawful because (1) there was no history of hostility, (2) Smith wasn't seeking information on which to take action against Lewis, (3) Smith was not Lewis's direct team leader and (4) the inquiry was made while walking together between departments and it was brief. First, contrary to the Board's expansive "totality of circumstances" approach, Respondent narrows the alleged interrogation to this one instance. Respondent's argument ignores the other findings involving Mr. Smith and other supervisors. The Respondent was openly hostile to unionization and clearly threatened employees with job loss if they supported the Union. Second, Smith's interrogation of Lewis fits a pattern; other supervisors and consultants were seeking employee views about the union which would give Respondent a sense of how much support the Union had. Third, as to the argument that Smith wasn't seeking information to act against Lewis, the Board has long recognized that "an employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer." *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, n. 7 (5<sup>th</sup> Cir. 1980)

Finally, though the encounter between Smith and Lewis occurred walking between departments, there is no evidence indicating it was a casual and innocuous inquiry. Respondent's reliance on *Sunnyvale Med. Clinic*, 277 NLRB 1217 (1985) is misplaced. As ALJ Eleanor Laws observed in *Decker Truck Line, Inc.*, 2014 NLRB LEXIS 728 (September 23, 2014), *Sunnyvale Med. Clinic*, "involved a conversation between an employee and her personnel director to whom she was presenting a union dues check-off card. The employee initiated the meeting as well as the topic of the union, and was on a friendly basis with the personnel director." *Id.* at \* 72-73.

There is no evidence that Smith and Lewis had the type of relationship where a causal reference to union support can be viewed as non-coercive.

**4. The ALJ correctly found that Smith's interrogation of Van McCook and Marcus Horne violated Section 8 (a)(1).**

Judge Amchan credited the testimony of Mr. Van McCook and Mr. Horne over Mr. Harry Smith's denials. The Respondent's brief advances no substantive reason for disturbing Judge Amchan's credibility determination. Indeed, as the testimony from several witnesses indicates, Mr. Smith was an active participant in the Respondent's aggressive anti-union campaign.

Respondent first argues that the Board should reject Judge Amchan's finding that Smith unlawfully interrogated McCook and Horne because their testimony does not exactly match the allegation in paragraph 22. Paragraph 22 alleges that Mr. Smith interrogated employees by asking them if they were going to vote no. Mr. Horne testified that Mr. Smith had been asking other employees how they were "going to vote" and that Smith came to him for the first time and asked the same question. Horne told Smith he "wasn't sure" how he would vote. (Tr. 383-384) Smith then said "be careful how we vote, you know, because it's a new company just starting up and it's a chance that the company could fail if the comes in." (Tr. 384:7-10)

The context of Mr. Horne's testimony supports the allegation in paragraph 22 of complaint of unlawful interrogation. Mr. Smith was asking employees how they would vote and then warning them that a "yes" vote could hurt the company. An employer's questioning of an employee violates Section 8(a)(1) if "either the words themselves or the context in which they are used . . . suggest an element of coercion or interference." *Rossmore House*, 269 N.L.R.B. 1176, 1177 (1984)

With respect to McCook, he testified that Smith asked him how he felt about the union. (Tr. 235-236) Van McCook also testified that Smith told him he knew others were talking to him about the union and that Smith wanted McCook to tell him how he felt about the union. (Tr. 236) The Board may find an unalleged violation if (1) "the issue is closely connected to the subject matter of the complaint" and (2) "has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enfd*, 920 F.2d 130 (2d Cir. 1990); *Evergreen Am. Corp.*, 348 NLRB 178, 200-01 (2006). Paragraph 22 alleges that Smith interrogated McCook by asking him if he was going to vote no. The credited testimony established that Smith interrogated McCook by asking him if he supported the union. Both the complaint and the testimony concern interrogations in violation of Section 8(a)(1), identify the individuals involved and the nature of the interrogation (i.e. attempting to determine whether an employee supports the union). Based on the credited testimony and the fact that the interrogations occurred during a union organizing drive, under *Evergreen Am. Corp.*, 348 NLRB 200-201, the Board can find that Smith unlawfully interrogated McCook.

**5. The ALJ correctly found that Michael Geer's unlawfully interrogated Andre Mormon.**

The Respondent's brief advances no substantive reason for disturbing Judge Amchan's credibility determination regarding whether Geer asked Mormon how he felt about the union. Respondent argues that Geer should be credited because Mormon didn't not smoke and the conversation occurred at the guard shack where people congregate to smoke. Mormon, however, testified that he encountered Geer at the guard shack "while coming to work." (Tr. 196)

According to Mormon, Geer asked him how he felt about the union. (Tr. 196:24-25) Mormon responded that he didn't think it was a big deal. (Tr. 197:1-5) Geer then launched into an explanation of why it was a "big deal" because "stuff good get bad for us" and that he had

prior experience with the United Steelworkers and that they didn't do the company he worked with any good. (Tr. 197:6-15) Mormon then testified that he was trying to avoid the conversation and wanted it to end. (Tr. 197)

The credited testimony establishes that Geer interrogated an unwilling employee about his views on the Union. Given Respondent's background of open hostility towards the Union, Geer's statement that if the union comes in "stuff could get bad", lack of evidence that Geer and Mormon were friends, the fact that the interrogation happened as Mormon was coming to work and there was no evidence Mormon was an open union supporter, Judge Amchan correctly determined that Geer's interrogation of Mormon violated Section 8(a)(1). *See, BJ's Wholesale Club*, 319 NLRB 483, 484 (1995) (interrogation was unlawfully coercive where a supervisor unexpectedly approached an employee who was not an open union supporter, began to directly question the employee about her stance on the union, and communicated an antiunion message).

**6. The ALJ correctly found that Eric Banks unlawfully interrogated Chauncey Pryor.**

The Respondent's arguments regarding the finding that Eric Banks unlawfully interrogated Mr. Pryor lack merit. Pryor testified that Banks called team members into his office one by one and that Troy Collins (the production manager) was present. (Tr. 159) While in the team leader's office with Collins, Banks asked Pryor how he felt about the Union. (Tr. 159) Pryor responded that he didn't really know about the union because he had never been part of one. (Tr. 159) Banks then told Pryor that if there was a union, he would have to sign up for overtime. (Tr. 159) Though Banks denied asking Pryor how he felt about the Union, he didn't deny the statement about overtime or that he had employees come to his office one by one. Troy Collins did not testify.

The Respondent erroneously argues that the questioning of an employee about how their views on unionization does not constitute an unlawful interrogation in the absence of a promise of benefit or threat of reprisal in connection with the alleged interrogation. The *Rossmore House* “totality of circumstances” test does not require a showing of a promise of benefit or threat of reprisal in order for an interrogation to violate Section 8(a)(1). Moreover, *Hotel Roanoke*, 293 NLRB 182, 227 (1989) does not support the argument that such showing is a necessary precondition to finding an interrogation unlawful. In *Hotel Roanoke*, the Board found that the employer unlawfully interrogated employees about whether or not they planned on striking and without analyzing the factors identified in *Rossmore House*, the ALJ found “interrogation followed by threats is to tell employees they would lose their jobs if they engaged in a strike, and announcing a predetermination that the employer would refuse to bargain and intended to undermine the Union makes the “total context” of the interrogation unlawful.” 293 NLRB at 224. Thus, *Hotel Roanoke* does not stand for the proposition that a promise of benefit or threat of reprisal is required but rather emphasizes that the “total context” can make a specific interrogation unlawful.

**7. The ALJ correctly found that Freddy Holmes unlawfully interrogated Jemel Webb.**

Respondent argues that Judge Amchan erred when he found that Holmes interrogated Webb by asking Webb on more than one occasion what the Union could do for him. (ALJD p.10:40-45; Tr. 220:1-7, 221:10-12) Webb testified that Holmes asked the question about the union after Webb had returned from captive audience meeting. (Tr. 221:10-12) This fits the pattern of supervisors and consultants interrogating employees about the union after a captive audience meeting. Such interrogation allows the employer to measure if its anti-union message is working and is clearly unlawful.

Though Holmes denies initiating the conversation about the Union with Webb, he concedes that he spoke to Webb and Bradley about his experience with the Teamsters while working for UPS and going on strike. (Tr. 486) Holmes, however, maintained a list of the views of employees regarding the union and their opinion about what they believed was important. (G.C. Ex. 9)<sup>8</sup> Keeping the check list discredits Holmes's denial and shows that these conversations and interrogations were **not** casual questions that occur as part of ordinary conversation but planned as part of an effort to gauge support for the union.<sup>9</sup> *See, Sysco Grand Rapids*, 367 NLRB No. 111 (Apr. 4, 2019) (employer engaged in unlawful polling and interrogation by creating "permanent record of each employee's perceived support for the Union" and "a database of its supervisors' daily observations of each employee's conduct, demeanor, and reactions to conversations with supervisors respecting unionization, and assigned each employee a ranking denoting his or her perceived support for the Union"); *see also Space Needle*, 362 NLRB 35, 37 (2015) (supervisor recorded whether individual employees obtained sample union membership resignation letter from employer, allowing employer to "closely track" who requested and completed such letters).

Respondent again argues that Judge Amchan erred in concluding the Holmes unlawfully interrogated Webb because there was no promise of benefit or threat of reprisal. This is not a

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<sup>8</sup> Holmes's question to Webb is consistent with the "what can they promise you" notification on the clipboard document, and the notation "money" next to Webb's name is consistent with Webb's answer. The clipboard document, on which Holmes noted "yes," "none union," or "?" next to employees' names, is evidence that Homes also interrogated the other employees on the list as to their union support. G.C. Ex. 9.

<sup>9</sup> Respondent contends that Webb had a pecuniary interest in the outcome of the election and thus his testimony should be discredited. First, the pecuniary interest must relate to the outcome of the case in order for such interest to factor in a credibility determination. Webb had not pecuniary interest in the outcome of this case. Second, a witness's support for a union because he or she believes unionization may result in higher wages is not a pecuniary interest in the outcome of a case such that the witnesses testimony can be discredited.

required showing under Board law. First, Respondent's brief does not make a substantive argument that Judge Amchan's application of the *Bourne* factors was incorrect. (ALJD p. 17:5-20) Moreover, when Holmes's threat of plant closure or loss of business is considered, the "total context" supports a finding of unlawful interrogation. Finally, the fact that Webb answered Holmes's question about how he felt about the union is irrelevant if Holmes did not know in advance that Webb openly and vocally supported the Union. *UNF, West Inc.* 363 NLRB No. 96 (2016), *enf'd UNF West, Inc. v. NLRB*, 844F.3d 451 (5th Cir. 2016)(observing that a consultant questioning a union supporter about the union was unlawful because no evidence that consultant was aware of the employee's activity.)

**8. The ALJ correctly found that Stevon Graham's interrogation of Landon Bradley violated Section 8(a)(1).**

Though there is no allegation in paragraph 20 that Graham interrogated Bradley, Judge Amchan correctly concluded that Bradley's undisputed testimony that Graham asked him what he planned to do and then said he knows Bradley will make the right decision established an unlawful interrogation in violation of Section 8 (a)(1). The Respondent does not contest that this questioning violates Section 8(a)(1) but simply claims that the complaint does not make an allegation that Graham unlawfully interrogated employees.

At trial, however, Respondent called Graham as a witness asked him about conversations with Bradley. Graham admitted that he spoke to Bradley about the Union. Judge Amchan credited Bradley's testimony because, among other things, it was consistent with Respondent's pattern of interrogation that other employee witnessed testified to and Graham did not directly dispute Bradley's account. Accordingly, Graham's unlawful interrogation of Bradley is closely connected to the widespread interrogation of employees by Respondent's supervisor and agents. Moreover, the Respondent had the opportunity to and did in fact litigate this alleged

interrogation. (Tr. 493-94); *see, Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), *enf'd*, 920 F.2d 130 (2d Cir. 1990).

**9. The ALJ correctly found that Lorenzo Brown unlawfully interrogated Landon Bradley.**

Judge Amchan correctly found that Lorenzo Brown unlawfully interrogated Landon Bradley when he asked Bradley what he thought about Kumho remaining non-union. (ALJD p. 12:5-10; 18:5-10) Bradley had not previously disclosed his support for the union and was clearly uncomfortable and did not want to answer Brown's question. (Tr. 178) Respondent provides no substantive reason for rejecting Judge Amchan's determination to credit Bradley's testimony.

Respondent again contends that Brown's alleged questioning of Bradley was not unlawful because there was no promise of benefit or threat of reprisal and Brown was not seeking information to base taking action against Bradley. First, the promise of benefit or threat of reprisal is not a required showing to establish that an interrogation of an employee regarding his or her views on the union is unlawful under Section 8(a)(1). Second, when viewed in the context of widespread threats of job loss and threats of plant closure if employees vote to unionize, asking an employee if they support the union is coercive.

Finally, Respondent argues that the question was not unlawful because Brown was not Bradley's direct supervisor. Rather undermining the finding of unlawful interrogation, this fact supports the finding. Brown had no relationship to Bradley and no legitimate reason for asking the question. *See Gelita USA Inc.*, 352 NLRB 406, 406 (2008), *aff'd*. 356 NLRB No. 70 (2011) (noting that relevant circumstances can also include the relationship between the supervisor and the questioned employee and whether the employer communicated a legitimate purpose for the questions and provided assurances against reprisal.) Moreover, Brown's interrogation of Bradley fit the pattern of widespread interrogation by team leaders, consultants, managers and

agents. The questioning carried out by Team Leads and other management representatives was pervasive, and strongly suggests a “scheme to find out definitely which employees were involved and what they were doing and to crush those activities quickly.” *Yerger Trucking*, 307 NLRB 567, 569 (1992).

**10. The ALJ correctly found that Cliff Kleckley unlawfully interrogated Chase Register and Van McCook.**

Judge Amchan correctly concluded that Cliff Kleckley was a 2(13) agent of the Respondent. Kleckley was responsible for enforcing Respondent’s health and safety standards. (ALJD p. 13) Kleckley maintained an office with team leaders and did not work on the production line. Judge Amchan also correctly noted that employees reasonably believed that Kleckley spoke for management.<sup>10</sup> (ALJD p. 13)

Respondent contends that even if Kleckley is an agent, his statement to McCook and Register was not unlawful interrogation because the alleged statement asking employees “can I count on you to vote no” is not coercive. First, a supervisor “asking” an employee if they can count on them to vote no is different than just stating that they should vote no. Second, Kleckley’s conduct is consistent with the widespread pattern of interrogation by team leaders and consultants designed to unlawfully determine whether employees supported unionization. Finally, Kleckley had no legitimate reason for inquiring whether Register and McCook would vote no.

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<sup>10</sup> The 2(13) agency test is whether, under all the circumstances, employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987). Under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

**11. The ALJ correctly concluded that Chris Butler unlawfully interrogated Marcus Horne.**

The ALJ correctly found that Chris Butler unlawfully interrogated Marcus Horne when he asked Horne about voting for the Union and how he planned on voting. (ALJD p. 13, Tr. 378-379) Horne responded that he did not know how he planned on voting. *Id.* Butler then asked Horne to give the Respondent more time to “get everything right.” (Tr. 379)

The Respondent simply argues that Horne’s testimony is not consistent with the allegation in paragraph 21(a) of the Amended Complaint. Paragraph 21(a) alleges that Butler interrogated Horne asking what they thought about the union. Horne testified that Butler asked him about the Union and how he planned on voting. (Tr. 378) Interrogating an employee about whether he or she plans to vote for the Union clearly encompasses a question about what they think about the union. Moreover, this particular question is on its face coercive. *See, Novato Healthcare Center*, 365 NLRB No. 137 (2017)(noting that the Board has long recognized that questions going specifically to how an employee himself intends to vote have a uniquely coercive tendency.)(internal citations omitted).

**12. The ALJ correctly concluded that Chris Butler unlawfully interrogated Landon Bradley when he offered him a “Vote No” hat.**

Judge Amchan correctly found that Chris Butler unlawfully interrogated Landon Bradley when (after giving out “Vote No” hats) asked Bradley if he wanted a “Vote No” hat. (ALJD p. 13:25-30) Respondent contends that the evidence does not support the allegation in paragraph 29 of the Amended Complaint because Bradley testified that Butler only asked him whether he liked hats and whether he wanted a hat. This argument takes Bradley’s testimony out of context. When asked about the conversation with Butler regarding hats, Bradley testified as follows:

Q. How did that conversation start?

A. He asked me did I want a hat? Did I like hats and did I want a hat? And I replied, no. Because I -- he had already given out the "Vote no" hats to everybody else, and then he asked me, did I want a hat, did I like wearing hats, and did I want one, and I said no. (Tr. 180-181)

The context of Bradley's answer clearly supports the inference that Butler offered Bradley a "Vote No" hat. Moreover, Bradley had not revealed his position regarding the Union when he offered the hat and repeatedly told Butler that he did not want a hat. It is settled Board law that a supervisor offering an employee paraphernalia against the union in manner that required the employee to disclose views about the union constitutes unlawful interrogation in violation of Section 8(a)(1) *See, A.O. Smith's Automotive Products Company*, 315 NLRB 994 (2000).

**13. The ALJ correctly concluded that Harry Smith unlawfully interrogated Chase Register.**

Judge Amchan found that Harry Smith unlawfully interrogated Chase Register when he asked him "what team on you on." (ALJD p. 7:15-20, fn. 10) The Respondent argues that Judge Amchan did not specifically list paragraph 32 of the Amended Complaint when he listed the findings of unlawful interrogation. However, in footnote 10, Judge Amchan concluded that asking the question "which team of you on" during an organizing campaign would reasonably be understood as an inquiry into whether or not one supported the Union. He further noted that "Moreover, given the context of the inquiries by Smith and other supervisors (threats of plant closure etc.) I find that these interrogations violated Section 8(a)(1) even if the employee interrogated was an open union supporter, *Fontaine Body and Host Co.*, 302 NLRB 863, 864-65 (1991)."

The Respondent next argues that it's unclear from Register's own testimony what Smith meant by "which team on you on" and therefore the testimony did not support the allegation in

paragraph 32 of the Amended Complaint. However, Register's testimony leaves no ambiguity about that Smith was referring to the union:

Q. Did Mr. Smith ever ask your opinion about the Union?

A. He asked me -- he walked up to me one day, and he asked me what team I was on.

Q. And did you respond?

A. I asked him what he was referring to. Was he referring to he was a pro-Union or not? And he said, yes, that's what he was referring to. And I told him I wasn't sure. (Tr. 29:8-13)

Respondent then argues that even if Smith was asking Register whether he was pro-union or not it was not coercive because Register openly supported the Union. First, the mere fact that an employee is an open union supporter does not authorize the employer to engage in coercive interrogations. *See, Beverly California Corporation*, 326 NLRB 153, 157 (1998)(noting directing questions to a widely-known union adherent does not validate otherwise coercive interrogation.) Second, Register testified that he told Smith he wasn't sure whether he supported the Union. As noted above, Register testified that he stopped vocally asking questions at captive audience meetings on September 30. Other than the questions he asked at meetings, there was no other evidence that he openly supported the Union.

Finally, the fact that he stopped openly challenging the information provided during captive audience meetings approximately two weeks before the election supports the inference that the widespread threats of job loss and/or plant and the Respondent's aggressive anti-union campaign was having the desired chilling effect.<sup>11</sup> As Judge Amchan noted, in this context (which the Respondent never directly addresses), interrogating a known union supporter about his or her support for the union is still an unlawful interrogation under Section 8(a)(1) of the Act.

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<sup>11</sup> Register also became concerned that he was known as the "ringleader." (Tr. 28)

**G. The ALJ correctly found that Respondent’s representatives unlawfully interfered with protected conduct (Exceptions 53; 54, 56, 57)**

Respondent excepts to the ALJ’s holding that Quality Assurance Supervisor Michael Geer threatened employee Annie Scott with discipline for talking with other employees about her support for the union. (ALJD at 18) Scott testified that Geer told her “that’s harassment if you talk to anyone about the union,” and asked her to do him a “favor” and “don’t talk to anyone about the union.” (Tr. 282: 23-24) The ALJ properly gave little weight to Geer’s testimony that an unnamed employee complained that Scott was bothering him or her, and that his comments were only in response to the complaint. Respondent did not present testimony from the unnamed employee or furnish any further evidence of the interaction.

Geer’s prohibition to Scott violated Section 8(a)(1), because “the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited.” *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005). Geer explicitly forbade Scott from engaging in the protected activity of discussing the union election with her co-workers. *Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017).

Respondent excepts to the ALJ’s finding that Team Lead Aaron Rutherford created an impression of employer surveillance by telling employee Marcus Horne that employee Mario Smith was fired for “posting stuff on Facebook” on a private site for union supporters, and that Respondent has “people that’s watching, and they know everything that you post on that site.” (Tr. 386) The Judge concluded that Rutherford’s statement “created the impression that the company would place employees’ union activities under surveillance in violation of Section 8(a)(1).” (ALJD at 18-19) The ALJ properly credited the testimony of Marcus Horne, a current Kumho employee, over the blanket denials of Aaron Rutherford, an agent of Respondent. *Merrill*

*Iron & Steel*, 335 NLRB 171, 180 (2001); *Flexsteel Industries*, 316 NLRB 745 (1995), *enf'd* 83 F.3d 419 (5th Cir. 1996).

Respondent cites *Frontier Telephone of Rochester*, 344 NLRB 1270 (2005), in support of its exception, but fails to explain how that case militates against the Judge's findings. In that case, the Board held that the test for creating an unlawful impression of surveillance is "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." 344 NLRB 1270, 1276. Horne's conclusion that his employer was surveilling employees' online activity in support of the Union was a reasonable understanding of Rutherford's statements, and Respondent has not shown why the Judge should have concluded otherwise.

Respondent further excepts to the ALJ's finding that Quality Assurance Supervisor Michael Geer, after the election, suggested that Respondent would get rid of some or all of the employees who voted for union representation. (ALJD at 19) The record shows that Geer stated, within earshot of hourly employees Brandyn Lucas and Jamal Denson, that "we won, so now that -- we have to find out who the 136 people are and get rid of them." (Tr. 261:13-25) Judge Amchan correctly held that Geer, who he did not find to be a credible witness, made the statement as alleged. Respondent excepts to the Judge's credibility findings, but fails to show that a "preponderance of the evidence" demonstrates that the Judge incorrectly rejected Geer's denials. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951).

## **H. CONCLUSION**

Charging Party / Petitioner USW respectfully urges that the Board should affirm the ALJ's findings and conclusions and adopted his proposed remedial order in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this the 2<sup>nd</sup> day of August 2019, I electronically filed the above USW's Answering Brief with the National Labor Relations Board's e-filing service. I have also emailed a copy to the following counsel of record:

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