

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

	§	
<b>NEW YORK PARTY SHUTTLE,</b>	§	
<b>LLC, d/b/a ONBOARD TOURS,</b>	§	
<b>WASHINGTON DC PARTY</b>	§	
<b>SHUTTLE, LLC, d/b/a ONBOARD</b>	§	<b>Case No. 02-CA-073340</b>
<b>TOURS, ONBOARD LAS VEGAS</b>	§	
<b>TOURS, LLC, d/b/a ONBOARD</b>	§	
<b>TOURS, NYC GUIDED TOURS,</b>	§	
<b>LLC, and PARTY SHUTTLE</b>	§	
<b>TOURS, LLC,</b>	§	
	§	
<b>and</b>	§	
	§	
<b>FRED PFLANTZER, AN</b>	§	
<b>INDIVIDUAL</b>	§	

**RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

New York Party Shuttle (“NYPS”), Washington DC Party Shuttle, LLC (“DCPS”), OnBoard Las Vegas Tours, LLC (“OBLVT”), NYC Guided Tours, LLC (“NYCGT”), and Party Shuttle Tours, LLC (“PST”),<sup>1</sup> collectively “Respondents,” file and serve this Brief in Support of Exceptions to the Supplemental Decision of the Administrative Law Judge in this Compliance Proceeding.

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<sup>1</sup> DCPS, OBLVT, NYCGT, and PST are referred to collectively herein as the “non-NYPS Respondents.”

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## INTRODUCTION

1. After a Compliance Hearing, the ALJ issued a 41-page decision that adopted virtually every allegation of fact and law proffered by Pflantzer and the General Counsel, despite the Judge's own admissions that multiple key components of the General Counsel's position were based on "pure speculation" and "uncorroborated testimony, lack of documentary evidence, and faulty memory." ALJ Order at p. 13, lines 38-42. The ALJ admitted that Pflantzer lied on his sworn tax returns and that Pflantzer often contradicted himself or documents in his testimony. The ALJ recited evidence that Mr. Pflantzer proved he was unable to keep a job, listing at least 11 different employers Mr. Pflantzer worked for from 2011 through 2018, including 9 different employers in the four years leading up to the hearing. Nevertheless, the ALJ found that Mr. Pflantzer would have worked for one employer (NYPS) for eight years if he had not separated from NYPS in early 2012, and the ALJ endorsed the incorporation of Pflantzer's uncorroborated (and often contradicted) assertions in calculating backpay.

2. On the other hand, the ALJ often ignored Respondents clear, uncontroverted, credible testimony. Noting that "there was no documentary evidence" to support the testimony and therefore either rejecting it or "indulging an assumption" in favor of the Charging Party. In the absence of even a scintilla of contrary evidence, this approach deprived Respondents of a fair hearing and fair determination. To the contrary, the ALJ (and the Compliance Officer) accepted all of Fred Pflantzer's uncorroborated and directly contradicted testimony on every issue, despite Pflantzer's admission that he lied on his tax returns in all seven years in issue – under oath.

3. In multiple sections of the Decision, the ALJ made the point that merely because the employee did something wrong does not disqualify the employee from receiving backpay. *See, e.g.*, ALJ Order at p. 19, lines 7-10. Respondent agrees with this tautology. However, the lack of

credibility of Mr. Pflantzer's testimony, his tax returns, his memory, and his story justifies significant reductions in his claimed amounts of backpay. The ALJ, however, disregarded the obvious errors, flaws, exaggerations, and lack of evidentiary support for the calculations and awarded all of the backpay requested, disregarding Respondents' alternative calculations and methods of determining backpay.

4. Respondents have had to assert a remarkable 59 exceptions to the Order because it is replete with incorrect assertions, typographical errors, misstatements of the facts, omission of contrary compelling evidence, and "straw man" arguments.

5. NYPS knows that it was found to have terminated Mr. Pflantzer in violation of the Act, and it accepts that decision as final.<sup>2</sup> It does NOT assert, and has never asserted, that Mr. Pflantzer should be awarded zero backpay in light of that decision. Rather, it conceded below, and it concedes here that it should be ordered to pay Mr. Pflantzer \$3,150.47, which is based on Exhibit R13.<sup>3</sup> Exhibit 13 was explained in detail. Tr. at 1832-1848. But an award of more than \$91,000 and a finding that other Respondents are liable for a violation by NYPS is unjust on this record.

#### **SUMMARY OF ARGUMENT**

6. Respondents have asserted numerous exceptions to the Supplemental Decision, but their position boils down to these six arguments: (1) the backpay calculation proffered by the Region and adopted by the ALJ is arbitrary, unreasonable, and just plain wrong;<sup>4</sup> (2) Mr. Pflantzer was properly reinstated by NYPS, and then was legally fired for operating a business in direct competition with NYPS, but Respondents were prohibited from introducing much of this evidence

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<sup>2</sup> NYPS still maintains that Mr. Pflantzer was originally not assigned tours because business was slow during the Winter and he had no seniority, and that ultimately he was not eligible to work shifts for NYPS because he operated a business, NY See Tours, that competed directly with NYPS.

<sup>3</sup> Respondents' Exhibit 13 was provided to the ALJ as a PDF static file, and also as an Excel spreadsheet. The Excel Spreadsheet allows the reader to see the formulas used and to test different assumptions

<sup>4</sup> Exception Nos. 1-2, 5-35, 58-59.

at the hearing;<sup>5</sup> (3) the non-NYPS Respondents have been deprived of the opportunity to assert the unconstitutionality of the underlying Board Order;<sup>6</sup> (4) the General Counsel should not have been permitted to add *alter ego* and *Golden State* successor arguments two thirds of the way through the hearing of this 6-year old case;<sup>7</sup> (5) the findings of *alter ego*, *Golden State* successor, and single employer are contrary to law and against the great weight and preponderance of the evidence;<sup>8</sup> and (6) the Board does not have jurisdiction over the non-NYPS Respondents.<sup>9</sup>

7. It would be a denial of due process to deny the non-NYPS Respondents the opportunity to contest the validity of the Board Order in light of the Supreme Court's ruling in *Noel Canning*. They were not parties to the underlying Charge, and were not added to the proceedings until years after the original Board Order was issued by two members that were not properly appointed. At every opportunity, they have attempted to contest the validity of the Order to which the ALJ now suggests they be held accountable. They ask that the Board deem the original Order invalid as to them as not having been issued by a properly appointed Board.

8. Respondents ask that the Board issue an Order declaring that NYPS owes Mr. Pflantzer \$3,150.47 in backpay, plus interest, with no excess tax liability, which represents the actual backpay he is owed. Respondents' Exhibit 13 (Exhibits R12, R13, and R14 were explained in detail. Tr. at 1832-1848). Respondents further ask that the Board excuse the non-NYPS Respondents from liability.

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<sup>5</sup> Exception No. 6, 59.

<sup>6</sup> Exception No. 4-6.

<sup>7</sup> Exception No. 3.

<sup>8</sup> Exception Nos. 36-56.

<sup>9</sup> Exception No. 57.

## ARGUMENT

9. The Board should reject the recommendations of the Administrative Law Judge in their entirety. It should enter an Order awarding backpay against NYPS in the amount of \$3,150.47, which excludes moonlighting income and an increase for tips. It should determine that the non-NYPS Respondents are not liable in any respect.

### PROCEDURAL EXCEPTIONS

**Exception No. 1.** The denial of Respondents' Motion to Recall Ms. Kurtzelben in their case in chief.

10. Rachel Kurtzelben was called by the General Counsel as the expert witness to prepare the backpay and interim earnings calculations for Mr. Pflantzer. She testified in the General Counsel's case in chief. During the hearing, it was learned that Mr. Pflantzer did not provide his actual tax returns to Ms. Kurtzelben or the Region. The ALJ authorized subpoenas to obtain those returns, and the parties received Mr. Pflantzer's tax returns during the proceeding. The ALJ refused to suspend the hearing and told Respondents they could recall the Compliance Officer once the tax returns were received. Tr. at 334-335. Upon receiving those returns, Respondents attempted to recall Ms. Kurtzelben in their case in chief to cross examine her about how the tax returns (and other information) affected her calculations. Tr. at pp. 1574-1580. The General Counsel's office refused to allow her to testify,<sup>10</sup> and the ALJ refused to allow Respondents to recall her. Tr. at pp. 1574-1579. As such, Respondents were deprived of the ability to conclusively rebut her calculations with regard to backpay, tips, and moonlighting income. This severely prejudiced Respondents' case. The General Counsel's office waived their ability to prevent Ms. Kurtzelben from testifying by proffering her as the expert on the backpay calculation. Once they called her as a witness, Respondents should have been allowed to recall

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<sup>10</sup> See Exhibits GCX-1VV and GCX-1WW.

her in their case in chief, especially given the fact that the ALJ limited the cross-examination and re-cross in multiple respects. *See* Tr. at 171-311. The missing 2011 tax return was also a basis for recalling her, but Respondents never got to ask her how that tax return would alter her calculations, and then the ALJ accepted her faulty calculations in their entirety. Either the ALJ should have suspended the hearing to allow the parties to obtain Pflantzer's tax returns, or he should have allowed her to be recalled. Doing neither was a violation of Respondents' due process rights under the Constitution.

**Exception No. 2.** The denial of Respondents' request to obtain Pflantzer's bank records upon learning that Mr. Pflantzer provided them to the NLRB and Ms. Kurtzelben did not review them in considering Pflantzer's interim earnings allegations.

11. Respondents requested that the ALJ order the General Counsel's office to provide Respondents with copies of the bank statements that Mr. Pflantzer provided to the NLRB in connection with their investigation into his backpay and interim earnings after Mr. Pflantzer's testimony and the request was refused. Tr. at 1641-1645. The bank statements were highly relevant to corroborating or contradicting Mr. Pflantzer's backpay and interim earnings. *See* Exception No. 31, *infra*. Mr. Kurtzelben could have, but did not, review them. Tr. 173-180 (showing that Kurtzelben was missing numerous documents that could have refuted or corroborated Mr. Pflantzer's story, including bank accounts).

12. Respondents challenge the ALJ's decision not to make the General Counsel's office provide copies of the bank statements, but the admission by counsel for the General Counsel that they had bank statements for Mr. Pflantzer's personal and business accounts and they were not reviewed by the Compliance Officer is sufficient evidence to call the backpay calculation into question and reject it altogether.

**Exception No. 3.** The granting of the General Counsel’s motion to amend its pleadings in the middle of the hearing to add entirely new claims that NYCGT is a *Golden State* successor to NYPS, and the *alter ego* of NYPS. ALJ Order at p. 32, fn.25.

13. The underlying Board Order in this matter was issued on May 2, 2013. Nearly three years later, the Compliance Specification was filed on February 29, 2016. The hearing took place more than five years after the Compliance Specification was filed, and after the Compliance Specification had been amended at least four times. NYCGT was added to the matter in the First Amended Compliance Specification on March 31, 2017. Despite having five years to investigate the facts and formulate its legal positions, the Office of the General Counsel never asserted that NYCGT was the *Golden State* successor to, or the *alter ego* of, NYPS until May 31, 2018, the ninth day of the 12-day trial. While minor amendments are permissible during a hearing, adding two entirely new theories of liability that late in the process stretches the bounds of reason, fairness and due process. Respondents objected to the late amendment, and over Respondents’ objections, the amendment was granted. The findings on those two claims should be rejected by the Board on the basis that they were late filed.

**Exception No. 4.** The granting of the General Counsel’s motion to prevent Respondents from contesting validity of the underlying order in light of *Noel v. Canning*. ALJ Order at p. 2, fn. 3.

14. The Board Order in this case is, was, and always has been invalid and unenforceable. Two of the three members of the National Labor Relations Board who issued the Board Order were not validly appointed under the Constitution of the United States. “Because the Board must have a quorum in order to lawfully take action, the order under review is void *ab initio*. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 493 (D.C. Cir.) *cert. granted sub nom. N.L.R.B. v. Canning*, 133 S. Ct. 2861, 186 L. Ed. 2d 908 (2013); *aff’d but criticized*, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014); *See also New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 130 S.Ct. 2635, 177 L.Ed.2d 162 (2010). This issue permeates the entirety of this case. It calls into question

whether the Regional Director was validly appointed, whether the ALJ was validly hired, and whether the underlying Order of the Board was valid.

15. The NLRB argues that because the Fifth Circuit dismissed an appeal of the Board Order by NYPS, it became an Order of the Fifth Circuit. However, the non-NYPS Respondents were not party to this case at that time, and have never been given the opportunity to contest the legality of the underlying Board Order as it relates to them. The non-NYPS Respondents cannot be held accountable for an Order they never got to challenge on any basis, let alone on the basis that it was void *ab initio* as held in *Noel Canning*.

16. With regard to NYPS, while the argument that the Fifth Circuit confirmed the Order might be persuasive if the underlying Order had been evaluated and passed on by the Fifth Circuit, it does not apply where, as here, the merits of the underlying Board Order were never passed on by the Fifth Circuit. The US Supreme Court has “previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate the claim or issue.” *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 480–81, 102 S. Ct. 1883, 1897, 72 L. Ed. 2d 262 (1982); *see also Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328–329, 91 S.Ct. 1434, 1442–43, 28 L.Ed.2d 788 (1971). “Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.” *Montana v. United States, supra*, at 164, n.11, 99 S.Ct., at 979, n.11.

17. A default judgment, like the one issued here by the Fifth Circuit, does not have issue preclusion or *res judicata* effect. *In re Raynor*, 922 F.2d 1146, 1150 (4th Cir. 1991).

18. Likewise, a default judgment is subject to attack on jurisdictional grounds. *Jackson v. FIE Corp.*, 302 F.3d 515, 518 (5th Cir. 2002). “Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 (2006); citing *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Thus, Respondents could not have waived their argument that the underlying Order was issued without authority, even after the decision of the Fifth Circuit. Perhaps other challenges might have been foreclosed by the Fifth Circuit’s ruling, but not a jurisdictional challenge to the underlying order, where the Fifth Circuit did not “actually litigate” any issue, but rather just entered a default decision, “rubber stamping” what always was a void determination of contested facts.

19. The above conclusions make sense, and the General Counsel’s position that the validity of the Order cannot be challenged “passes strange.” In *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 820 F.3d 592, 600 (3d Cir. 2016), the Court said: “[W]e note that as a policy matter “it would be passing strange for an *ultra vires* agency action to be ... insulated from judicial review.” *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014).” *Advanced Disposal*, 820 F.3d at 600. The Court continued by saying that if it did not allow review of the decision, “we would ultimately be overlooking and ‘insulating from review’ the actions of an improperly constituted, quorum-less Board issuing *ultra vires* orders. In other words, we would be foreclosing a challenge to the Board's statutory authority because it was not raised before the Board—which does seem “passing strange.” *Id.*; see also *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (explaining that “every federal appellate court has a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,’ even though the parties are prepared to concede it” (quoting

*Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934))). Similarly, here, it would be unjust to proceed as if the underlying Order was issued with authority.

**Exception No. 5.** That portion of the Order that confirmed that the ALJ refused to hear and to exclude evidence regarding Respondents' contentions in paragraphs a, c, d, 7, 8, 11, 29, 31, 40, 41, and 42 of its answer to the Fourth Amended Compliance Specification. ALJ Order at p. 3, lines 14-19.

20. The General Counsel filed a motion to strike Respondents' answer to the Fourth Amended Compliance Specification. The ALJ denied the motion to strike, but ruled that Respondents could not introduce evidence related to Respondents' contentions in paragraphs a (*Noel Canning*), c (NYPS objected to the Order based on *Noel Canning*), d (late amendment of Exhibits), 7 (proper reinstatement of Pflantzer), 8 (reinstatement, NYPS stopped operating tours, alternate method of calculating backpay), 11 (multiple issues regarding backpay and interim earnings), 29 (reinstatement), 31 (competing tour company), 40 (increase in value of NY See Tours), 41 (non-NYPS Respondents dispute wrongful termination), and 42 (paid as a 1099 contractor and received 7% higher pay as a result) of its answer. Tr. at pp. 8-9. The ALJ allowed Respondents to introduce evidence regarding Mr. Pflantzer's interim earnings from his business, so that portion of those paragraphs are moot for purposes of this proceeding. However, the ALJ prevented the non-NYPS parties from challenging the underlying Order finding improper termination and from contesting the validity of the Order under *Noel Canning* – both despite the fact that the non-NYPS Respondents were not parties to this case in 2013 and never had an opportunity to challenge the Order.

21. It also prevented Respondents from introducing evidence in support of paragraph 42 of its Answer regarding the fact that, because Mr. Pflantzer was paid as a 1099 employee and Mr. Jorge was not, that Mr. Pflantzer's \$20 per hour should have been reduced by 7%, to \$18.60

for purposes of the backpay calculation. Further, his 1099 status also eliminates any excess tax or social security liability on an award.

22. The Motion to Strike only referred to the *Noel Canning* argument and Pflantzer's 1099 status, but the ALJ's Order precluded significant additional evidence that was directly relevant to the proceeding. This was erroneous, and justifies the rejection of the ALJ's recommendations. To the extent that the exclusion of evidence flows from the granting of the Motion for Summary Judgment, Respondents incorporate their response to the Motion herein, and asks that the Board correct that decision in light of the issues and arguments made in connection with Exception No. 6 herein.

**Exception No. 6.** Refusing to accept Respondents' Response to Motion for Summary Judgment and the granting of the Motion for Summary Judgment as a result.

23. After the General Counsel filed a Motion for Summary Judgment in this matter, Houston, where counsel for NYPS resides, was hit by a hurricane on August 26 and 27. The storm produced the highest rainfall of any storm that has ever hit the United States, and it flooded Houston for weeks, a National Emergency was declared and the Texas Supreme Court declared that all filing deadlines in the state were suspended.<sup>11</sup> The offices of the Schmidt Law Firm were not returned to normal operations for 8 weeks, and the elevators were not repaired until nearly one year later. The Board granted an extension of the Response to the Motion as a result. After that extension, Respondents submitted the Response, timely, on September 13, 2017. For technical reasons Respondents cannot explain, the filing was apparently not accomplished. An IT consultant has suggested that it may have resulted from intermittent Internet connections in Houston after the severe flooding that had occurred.<sup>12</sup>

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<sup>11</sup> See, e.g., [https://en.wikipedia.org/wiki/Hurricane\\_Harvey](https://en.wikipedia.org/wiki/Hurricane_Harvey).

<sup>12</sup> See, e.g., <https://www.ustelecom.org/broadband-providers-working-to-keep-hurricane-harvey-victims-connected/>; <https://dyn.com/blog/internet-impacts-of-hurricanes-harvey-irma-and-maria/>

24. Upon learning that the filing did not go through, Respondents re-filed it on September 19, 2017, which was four business days after the Response was due, and one business day after learning that it had not been filed. Respondents filed a Motion to Accept Late Filing, and a Reply in Support thereof, which were denied. Respondents incorporate those filings as if set forth herein. The Motion for Summary Judgment was granted as a result of the lack of a response (not on its merits). Respondents ask that the Board correct that decision, particularly in light of the fact that it was outcome determinative, and in no way the fault of Respondents.

#### **SUBSTANTIVE EXCEPTIONS**

**Exception No. 7.** That portion of the ALJ's decision that found that the formula and calculation proposed by the Region accurately reflects the wages that Pflantzer would have been paid by the Respondents had he not been discharged. ALJ Order at p. 5, lines 10-13.

**Exception No. 8.** That portion of the ALJ's decision that found that the backpay calculation was reasonable despite "uncorroborated testimony, lack of documentary evidence, and faulty memory." ALJ Order at p. 13, lines 38-42.

25. Respondents will brief Exception Nos. 7 and 8 together. The ALJ was correct that Pflantzer's backpay calculation was based on "uncorroborated testimony, lack of documentary evidence, and faulty memory." The only "documentation" relied on by Ms. Kurtzelben and Mr. Pflantzer was his tax returns, which he admitted were fraudulent in that they omitted tips for every year, and in many years he admitted he omitted some employers from his tax returns altogether. Tr. 173-180. She never reviewed the bank statements Mr. Pflantzer provided the Region to confirm payment amounts, expenses, tips, or any other component of Mr. Pflantzer's unsworn story. *Id.* There was no analysis of business expenses charged against his interim earnings from NY See Tours to make sure they were legitimate, necessary, and/or reasonable. Ms. Kurtzelben testified that her predecessor had asked for business expenses backup evidence, but the Region never received it. Tr. at 287-288. Thus, they knew they needed to verify whether expenses were

reasonable, but they never did, despite having bank statements from Mr. Pflantzer. Pflantzer testified that he gave his bank statements to the NLRB. Tr. 1379-1381. There were no corroborating witnesses called to testify. There is zero documentation that Pflantzer ever received a tip while working at NYPS, or that he paid \$40 in tips to his bus drivers at NY See Tours. Tr. 173-180; Respondents' Exhibit 9A.

26. There was no documentation to support the notion that Mr. Pflantzer operated one tour per week, on every Saturday, during 2011 ("moonlighting" income). Even his testimony on that issue was contradictory and he admitted that he did not obtain moonlighting income while working at NYPS. Tr. at 1448-1449. His 2011 tax return, which was never provided to Ms. Kurtzelben or the Region until it was subpoenaed by Respondents during the Hearing, showed zero income and expenses from NY See Tours in 2011. Respondents' Exhibit 9A; 15. Based on that record, there is zero evidentiary support for the notion that Pflantzer was entitled to a \$335 per week reduction in actual interim earnings during the backpay period. His moonlighting allegation was thus affirmatively disproven.

27. From October 2014 to present, Ms. Kurtzelben was "guessing" how many hours Edwin Jorge would have worked, so is "guessing" as to Mr. Pflantzer's backpay. Tr. at 139. Mr. Jorge quit working at NYPS and never worked for NYCGT after NYPS ceased operations in 2015, so any assumptions based on his hours were arbitrary and capricious. Tr. at p. 1027.

28. There were at least six versions of the backpay calculation. Some of the changes were to add more recent information, but most completely changed the amounts for 2012, 2013, and 2014. *Compare* R. Ex. 11 (final version), *with* R. Ex. 17 (lower gross backpay, lower interim earnings), *with* R. Ex. 18 (different tips calculation), *with* R. Ex. 19 (much higher gross backpay, much higher interim earnings). The material differences in the various calculations put forward

by the Region without explanation calls into question whether the version relied on at the hearing has any credibility at all.

29. The General Counsel, therefore, did not meet its burden in establishing the proper amount of backpay or the proper amount of interim earnings, and the Board should reject the ALJ's suggestion as to backpay owed. At a minimum, the Board should adjust the backpay award by \$335 per week to eliminate the alleged moonlighting income because there is conclusive evidence that Pflantzer did not earn moonlighting income while he worked at NYPS in 2011.<sup>13</sup>

30. In rebuttal, Respondents offered multiple alternative formulas and bases for a backpay calculation. One was contained in Exhibit 1 to its Answers. That document shows a total of \$3123.59 in backpay owed based on eliminating the \$335 per week in moonlighting, eliminating tips because they were a "wash," and ending the backpay obligation in August of 2014 because Mr. Pflantzer was reinstated. *See* Exhibit 1 to Respondents' Answers. The other was in Respondent's Exhibit 13 at the hearing. Respondents' Exhibit 13 took the NLRB's calculation and adjusted the hours down by 29% to reflect the difference between the hours Mr. Jorge worked and Mr. Pflantzer worked, removed the \$335 per week in moonlighting, removed the tips, and recalculated the total backpay. The number on R13 that is owed in backpay is \$3,150.47.<sup>14</sup> Exhibits R12, R13, and R14 were explained in detail. Tr. at 1832-1848. This is the number that Respondents believe the Board should award.

**Exception No. 9.** That portion of the ALJ's decision that awarded backpay to Pflantzer despite the fact that Pflantzer's competing business justified his termination and made him ineligible to work at NYPS. ALJ Order at p. 2, lines 25-26.

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<sup>13</sup> Respondents' Exhibit 12 is an alternative backpay calculation the adds tips to the total and results in a total backpay award of \$9,852.86, but in Exception No. 35, Respondents challenge the inclusion of tips also.

<sup>14</sup> Assuming that the Board determines that the backpay period should have ended at Pflantzer's reinstatement in July of 2014, that number should be reduced by \$146.14.

31. One factor in the amount of backpay Mr. Pflantzer deserves is how long he would have worked at NYPS. There is no evidence to support the notion that he would have remained at the company for six years. NYPS had a policy of not allowing employees to operate competing businesses. Tr. at 759; 767; *see also*, 1040-1042 (Mr. Moskowitz testified to the policy at NYPS that tour guides cannot operate competing businesses). Respondents were not allowed to provide testimony that Mr. Pflantzer would have been legally terminated in 2012 for operating a competing business, so he is not entitled to any backpay. Further, after being properly reinstated in July of 2014, Mr. Pflantzer was legally terminated for continuing to operate a competing business, despite being warned that it was a violation of NYPS company policy. Tr. at 487-488; 490; 1040-1042.

**Exception No. 10.** That portion of the ALJ's decision that decided Edwin Jorge was a reasonable comparator employee for purpose of calculating backpay. ALJ Order at p. 9, lines 20-25, and p. 14, lines 3-19; *see also* ALJ Order at p. 15, lines 29-37.

32. Ms. Kurtzelben used Mr. Jorge as a comparator employee because she mistakenly thought that Mr. Jorge worked similar hours to Mr. Pflantzer while Pflantzer was working at NYPS. Tr. at pp. 138-139. In no way did she consider Mr. Jorge's qualifications or seniority or status versus Mr. Pflantzer as to who between them would have received more shifts. Tr. at pp. 197-200. Jorge was bilingual, which allowed him to conduct tours in Spanish and significantly increased his hours over the backpay period. Tr. at 1917-1918. The conclusive (and only) evidence in the hearing was that Mr. Jorge was a senior tour guide who was more reliable and had more skills than Mr. Pflantzer and would always have worked more shifts than Mr. Pflantzer. *See, e.g.*, Tr. at 1707-1708; 1826-1830. In fact, during the period Mr. Pflantzer was at the company, he received only 71% as many shifts as Mr. Jorge. Respondent's Exhibit 10; *see also* Gov't Exh. 2(a) and 2(b) (showing that Jorge worked from January 1 through February 12, but Mr. Pflantzer did not work at all during that period because of lack of seniority). Mr. Jorge did not work night tours because he had problems with his eyes. Tr. at 1708-1709.

33. The second reason Ms. Kurtzelben selected Mr. Jorge is that she “had payroll data that spanned across the entire span of payroll documents” she had. Tr. at pp. 138-139. This is yet another reason the backpay calculation is arbitrary and capricious. The fact that there was only one tour guide that worked consistently for NYPS from 2011 through the end of 2014 belies the notion that Mr. Pflantzer would have stayed an employee at NYPS during the entire backpay period.<sup>15</sup> After the fall of 2014, Ms. Kurtzelben was “just guessing” at what the payroll would have been and guessed that it would have been the same in every year thereafter, without considering the status of the company’s business. Tr. at 142-143.

34. Mr. Pflantzer was not a reliable or trustworthy employee. Mr. Jorge was. Pflantzer had at least 11 employers from 2011 to 2018. ALJ Order, *passim*. Edwin Jorge had one—NYPS. Pflantzer worked for so many tour companies from 2012 to 2017 that he couldn’t remember them all. Tr. at 1503. Mr. Jorge worked at NYPS for seven years, and the longevity of his employment resulted in him being assigned more tours. Tr. at 1707. The ALJ’s decision mentions 11 different employers Mr. Pflantzer testified about. ALJ Order, *passim*. To suggest that Pflantzer would have maintained employment at NYPS for six years or more is pure fantasy in light of his demonstrated history. This point is further evidence that the sixth version of the Region’s backpay calculation is arbitrary and capricious and based on speculation and patently inaccurate assumptions. It does not have enough credibility to support a monetary judgment.

**Exception No. 11.** That portion of the ALJ’s decision finding that the fact that Jorge did not work nights so therefore he had less hours during the evening/nights holiday tours than Pflantzer supported making Jorge the comparator employee. ALJ Order at p. 14, lines 18-19.

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<sup>15</sup> The fact that he worked at 11 different employers during that period further undermines the backpay calculation as discussed elsewhere herein.

35. Mr. Jorge did not work night tours, but Mr. Pflantzer did. Tr. at p. 1740. This fact skews the backpay calculation terribly because NYPS only operated night tours from November 30 to January 6 each year. That resulted in an artificially deflated number of hours Mr. Jorge worked from November 30 – December 31 in 2011 (the dates used to choose him as a comparator) and an artificially increased number of hours from January 7 to November 30 in 2012 and subsequent years (the dates his hours were used to calculate backpay). Tr. 1708-1709. This fact was not taken into account by Ms. Kurtzelben in the backpay calculations. Tr. at 309-311 (Compliance Officer did not consider the months of March through September in considering whether Mr. Jorge’s hours were a good comparator for Mr. Pflantzer’s).

**Exception No. 12.** That portion of the ALJ’s decision finding that “the reverse would be equally true” regarding the notion that Pflantzer would have worked during periods that Jorge did not work. ALJ Order at p. 14, line 29-44.

36. The ALJ made an assumption that Mr. Pflantzer would have worked in periods that Mr. Jorge did not work. There is zero evidence to support that assumption. Respondents’ Exhibit 10 directly contradicts that assumption in showing that Jorge worked more than Mr. Pflantzer and that Mr. Pflantzer did not work at all between January 1 and February 12 of 2012. R. Exhibit 10; GC Exhibit 2B. The Compliance Officer did not undertake to make any determination between the two employees. Tr. at 309-311 (Compliance Officer did not consider the months of March through September in considering whether Mr. Jorge’s hours were a good comparator for Mr. Pflantzer’s). Elsewhere in this Brief, Respondents have recited evidence that Mr. Jorge was a senior guide, one of the top 3 at NYPS, that he never worked nights because of problems with his eyes, and that he worked every Saturday to generate the hours that he did because Saturdays were the busiest tour days. *See* Exception Nos. 10, 14.

**Exception No. 13.** That portion of the ALJ’s decision suggesting that the fact that Jorge worked 29% more hours during the three weeks mentioned by the ALJ

supports that Jorge was a valid comparator employee. ALJ Order at p. 14, lines 38-43; *see also* ALJ Order at p. 15, fn. 16.

37. On page 15 of the Decision, the ALJ recited the hours worked for Messrs. Jorge and Pflantzer. If one adds up those hours and compares them it shows that Jorge worked 29% more hours than Pflantzer during that period. That contradicts, rather than supports, the notion that Mr. Jorge was a proper comparator, unless you reduce his hours by 29% (as Respondents did in Exhibits 12-14) to adjust for the difference. Respondents' Exhibits 10, 12, 13, and 14; *see also*, Tr at 1825-1826.

**Exception No. 14.** That portion of the ALJ's decision that states that Respondents did not show any "credible evidence ... that bonuses or work hours offered to Jorge were somehow based upon Jorge's seniority, foreign language skills, or expertise as a tour guide." ALJ Order at p. 16, lines 15-19.

38. This statement by the ALJ is patently false. Messrs. Moskowitz, White, and Schmidt all testified that Mr. Jorge received more tours than most tour guides because of his longevity, reliability, skill, experience, bilingual status, and willingness to work on Saturdays. Tr. at 1707-1708; 1826-1830. Jorge was bilingual, which allowed him to conduct tours in Spanish and significantly increased his hours over the backpay period. Tr. at 1917-1918. Respondents' Exhibit 10 shows that he worked more hours while he and Mr. Pflantzer were both employed. Jorge should not be treated as the comparator employee unless his hours are adjusted to match Mr. Pflantzers.

**Exception No. 15.** That portion of the ALJ's decision that finds that the comparator employee method, unadjusted for seasonality, is the best method to address the average hours worked during seasonal changes in the tour industry. ALJ Order at p. 15, lines 1-2.

39. There was no evidence to support this conclusion. To the contrary, by showing the differences between Mr. Pflantzer and Mr. Jorge's schedules of hours during the high season and low season, Respondents disproved that this method was appropriate. Given that there was no

employee that was a good comparator, the only reasonable approach was to adjust Mr. Jorge's hours down to reflect that Pflantzer worked 71% as many hours as Mr. Jorge. This was the basis of Respondents' Exhibit 13. Ms. Kurtzelben never looked at the seasonality of the business to determine its impact on her calculations—she just ignored it. Tr. at 188.

**Exception No. 16.** That portion of the ALJ's decision that states Respondents did not proffer an alternate method to calculate backpay. ALJ Order at p. 15, fn. 16.

40. Respondents proffered multiple alternative methods of calculating backpay, including Exhibit 1 to their Answers in this case and Respondents' Exhibit 12-14 (Exhibits R12, R13, and R14 were explained in detail. Tr. at 1832-1848). The ALJ completely ignored this evidence, which, given the testimony of Ms. Kurtzelben and Mr. Pflantzer, gave a much more reasonable calculation of backpay and interim earnings.

**Exception No. 17.** That portion of the ALJ's decision that awarded backpay to Pflantzer for dates after Respondent New York Party Shuttle, LLC, ceased conducting sightseeing tours. ALJ Order at p. 16, lines 9-13.

41. NYPS stopped operating tours in 2015. Tr. 1880. After that point, Mr. Pflantzer would not have been able to work any shifts because there were no shifts to work.

**Exception No. 18.** That portion of the ALJ's decision that awarded backpay to Pflantzer for the years 2015-2018 without any reasonable evidentiary support for the hours Pflantzer would have worked in those years. ALJ Order at p. 16, lines 9-13.

42. Additionally, from October 2014 to 2018, the Gross Backpay calculation offered by General Counsel is based on pure speculation and does not take into account the decline in business and closure of NYPS. Tr. at p. 1040. Ms. Kurtzelben testified that she merely used Edwin Jorge's actual hours from October 2013 to September 2014, and pasted them in to the entire period of October 2014 through 2018.

Q BY MS. LANCIA: For the period after October 20, 2014, how did you determine the hours that Fred Pflantzer would have worked based on the comparator employee's, Edwin Jorge's hours?

A So I took the last full year of payroll data that we had, which is from October 2013 to October 2014, and then I just repeated those hours for each subsequent year of the backpay period so 2015, 2016, 2017, 2018, and so on. And I did that, because I want to reflect the whole year to reflect the seasonal shifts and hours. And it was the most recent data that we had.

Tr. at 142-143.

43. That means that entire section (2015-2018) of the backpay calculation is based on impermissible speculation. Ms. Kurtzelben admitted that the compliance manual instructs her office not to make guesses like that. To wit:

Q And why is a concern that Jorge had more data over the back pay period out of the payroll records you received important?  
A Because -- well, I reviewed the compliance manual first, regarding the specific calculation method and it said specifically that it's important for the comparator employee to have data spanning the entire back pay period and the reason is that you don't want to project. If you're comparator stops working for some reason, part way through the back pay period, ***then you're guessing as to what that comparator would have earned for the rest of the back pay period.***

Tr. at 139 (emphasis added). The portion of the backpay calculation that runs from October 2014 to present should be disregarded by the Board because NYPS was not operating and it is without any basis and is the product of Ms. Kurtzelben guessing. As such, the recommendation of the ALJ is impermissibly arbitrary and capricious.

**Exception No. 19.** That portion of the ALJ's decision that awarded backpay without taking into account the declining business of Respondents NYPS and NYCGT during the backpay period. ALJ Order at p. 9, lines 37-41.

44. The only evidence in the record conclusively established that the sales at NYPS declined significantly over time. Tr. at 1040. Ms. Kurtzelben did not take this fact into account, and assumed that Mr. Pflantzer's shifts would have stayed consistent from 2014 to the present. This despite the fact that the number of tours declined significantly and ultimately the company

stopped operating tours in late 2014 or early 2015. This is yet another reason why the backpay amount approved by the ALJ is arbitrary and capricious.

**Exception No. 20.** That portion of the ALJ's decision that awarded backpay without taking into account the seasonality of the business. ALJ Order at p. 9, lines 23-25, and *passim*.

45. The NLRB Compliance Officer calculated Mr. Pflantzer's Interim Earnings by taking his annual earnings, subtracting the moonlighting amount, and then dividing by the number of weeks in the year. That analysis ignores seasonality. The Compliance Officer did not consider the months of March through September in considering whether Mr. Jorge's hours were a good comparator for Mr. Pflantzer's or in calculating backpay. Tr. at 309-311. She did not consider how seasonal changes affected the business. Tr. at 188. During the periods when Mr. Pflantzer's Interim Earnings exceed his Gross Backpay, the delta between those two numbers is greater than during the periods in which the Gross Backpay exceeds the Interim Earnings. This artificially and impermissibly increases the amount of backpay owed to Mr. Pflantzer.

**Exception No. 21.** That portion of the ALJ's decision that found it is "pure speculation that Pflantzer would consistently not have worked from January 1 to February 12," and that "there is no reason why Pflantzer could not have worked those weeks for each year after 2012." ALJ Order at p. 16, lines 1-7.

46. Again, the ALJ's assumptions are backwards. There was zero evidence in the record that Mr. Pflantzer would have ever worked in January or February (the slow season). The General Counsel did not meet its burden on this point. The only evidence on that issue was that he did not work in those months in 2012. Respondents' Exhibit 10; GC Exhibit 2B. This is an example of how the backpay award recommended by the ALJ is arbitrary and capricious.

**Exception No. 22.** That portion of the ALJ's decision that awarded backpay without taking into account Pflantzer's waiver of reinstatement with GONY in connection with his NLRB charge. ALJ Order, at p. 6, lines 28-32 and fn. 8.

47. Pflantzer also filed a charge against another employer – Go NY Tours. In settling that claim, he waived reinstatement. Tr. 1423-1424. Obviously, had he been reinstated, he would

have had additional interim earnings. No adjustment for that amount was made by the Compliance Officer or ALJ.

**Exception No. 23.** That portion of the ALJ’s decision that approved the application of \$35 per tour in tips as additional backpay. ALJ Order at p. 17, lines 28-46, and fn. 17.

48. Mr. Pflantzer testified, in response to a question from the ALJ, that he averaged \$35 per tip across all of the tours he conducted during the backpay period – at NYPS and all of his other nine employers. Tr. p. 1634, line 13, through p. 1635, line 23.<sup>16</sup> That testimony contradicted what he told the Compliance Officers. Ms. Kurtzelben said he told her that he earned between \$20 and \$50 per tour in tips, and she picked the midpoint of \$35 without any investigation as to whether that was actually the average or if most of his tours at NYPS were at the \$20 level. Tr. at 291-292. Given that the amount of tips was the same at NYPS as it was in his other employment, there should be no increase in the backpay calculation for tips—it was a “wash.” Therefore, the total backpay award must be reduced by \$7,587.30. *See* footnote 18, *infra*. This is another issue that Ms. Kurtzelben could have clarified if she had been recalled as a witness. *See* Exception No. 1.

49. There is zero documentary evidence to support the tip numbers, and Mr. Pflantzer’s tax returns, which show no tips during a seven-year period, contradict it. That means Exhibit B to the Fourth Amended Compliance Specification has no credibility. Mr. Pflantzer signed his tax returns under oath, affirmatively representing that he did not earn any tips in 2011 at NYPS. Respondents’ Exhibit 15. He made similar sworn statements for his returns during the backpay period. This is the second reason that tips should be completely excluded from any backpay award

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<sup>16</sup> Mr. Pflantzer’s sole proprietorship is named “NY See Tours.” Obviously, it is a play on the term “NYC Tours.” In a number of instances in the transcript of the Hearing, the court reporter mistakenly typed “NYC Tours” when referring to “NY See Tours.”

– Mr. Pflantzer is equitably estopped from claiming he earned tips that he did not report on his tax return.

50. Respondents' Exhibit 18, which was provided to NYPS by the General Counsel's Office as the then-current backpay calculation, shows on page 4, in section 7, that Mr. Pflantzer originally reported much higher tip numbers for his NY See Tours business. On that page, it indicates he was earning \$75 to \$150 per tour at his business and \$50 to \$125 per tour at NYPS. R. Exh. 18, at p. 4. A far cry from what Ms. Kurtzelben says he told her. Yet more evidence of Mr. Pflantzer's lack of candor and credibility.

51. According to Respondents' 18, there should have been a *reduction* in backpay for the tips Mr. Pflantzer was able to earn running his own tours. The amount of the reduction would be \$25 per tour (the spread between \$75 and \$50 in the low season and \$150 and \$125 in the high season).<sup>17</sup>

**Exception No. 24.** That portion of the ALJ's decision that approved the division of Edwin Jorge's total hours for each year divided by 5.5 hours to determine the number of tours per year for purposes of calculating the amount of tips Mr. Pflantzer would have received. ALJ Order, p. 9, line 43, through p. 10, line 14, and fn. 12.

52. Ms. Kurtzelben calculated the amount of tips per week by taking the number of hours Mr. Pflantzer worked, and divided it by 5.5 hours per tour to determine the number of tours. Tr. at pp.135-136 This calculation was incorrect, and overstated tips in his backpay calculation, because the conclusive testimony was that, while tours lasted 5.5 hours each, tour guides were paid for time before and after the tours, and thus would have been paid for approximately 6.5 hours per

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<sup>17</sup> There is no evidence in the Record to support how many tours Mr. Pflantzer performed as Interim Earnings, and no consistent information on the average length of tours completed or his hourly rates, from which the number of tours could be calculated. This is fatal to the Government's claims because there is no basis for the Interim Earnings numbers.

tour. Tr. at 937-38. Ms. Kurtzelben was never told that information, and Respondents were prevented from asking her about it.

53. If the Board believes Mr. Pflantzer should be awarded backpay for tips after considering the other Exceptions herein, it at least needs to correct the amount of tips Mr. Pflantzer would have received. That minor adjustment (changing 5.5 to 6.5) reduces the amount of tips calculated on Exhibit B by \$7,587.30, so it is a significant error in the calculation.<sup>18</sup> The backpay award should be reduced by at least that amount based on the evidence in the record.

**Exception No. 25.** That portion of the ALJ's decision that determined it was reasonable for Pflantzer to tip a bus driver \$40 per tour and that Pflantzer paid such tips. ALJ Order at p. 5, line 46 and fn. 7, and p. 11, lines 7-10.

54. To calculate backpay properly, Pflantzer's weekly interim earnings must be increased by \$40 per tour for the tips he gave his NY See Tours drivers. That was not him sharing tips... he testified he paid them that out of his pocket (which is a business expense) and then he kept the \$45 on average he earned in tips. Tr. at 1438-39 ("A: No. There was no deal. That's what I gave them. Q: That was your election? A: Correct."). The \$40 was thus Pflantzer's earnings, and he chose to give it to his drivers as a gift. NYPS should not be penalized for that, otherwise, he could have given his drivers \$300 per day and artificially eliminated interim earnings. Additionally, there is no corroborating evidence in the record (or reviewed by the Compliance Officer) to support that Pflantzer actually gave the \$40 to drivers. Bank statements, 1099s to drivers, information from third-party witnesses, and other information was available to the Region to support that information, but they chose not to investigate it. Without a reasonable basis, it was arbitrary and capricious to include it in the backpay calculation.

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<sup>18</sup> The Total Tips shown on Exhibit B are \$49,317.48, which is 1409.07 tours at \$35 each. If you change the tour duration to an average of 6.5 hours, it reduces the number of tours to 1192.29, and yields a tips number of \$41,730.18.

**Exception No. 26.** That portion of the ALJ’s decision that determined Pflantzer would have earned \$335 per week—every week for seven years—as moonlighting income, based \$335 of total gross income for one tour allegedly completed during the five-month period Pflantzer worked at NYPS. ALJ Order at p. 10, line 40, through p. 11, line 26, and fn. 13; *see also* ALJ Order at p. 11, lines 47-48, and at p. 18, lines 2-24.

**Exception No. 27.** That portion of the ALJ’s decision that adopts Ms. Kurtzelben’s assumption as to how much Mr. Pflantzer earned per tour for purposes of calculating the \$335 per week of moonlighting income. ALJ Order at p. 18, lines 20-24

55. Respondents will argue Exceptions No. 26 and 27 together. The Government’s expert witness, Rachel Kurtzelben, testified that Mr. Pflantzer would have earned \$335 per week in “moonlighting” income throughout his employment with NYPS. Therefore, she deducted that amount from each week of his interim earnings throughout the backpay period – without any regard for whether he was actually conducting tours for NY See Tours during each period.

56. As discussed above, Mr. Pflantzer’s multiple contradictions in his testimony establish his lack of credibility. The issue of moonlighting is one of the strongest examples where his lack of honesty is made clear. It is also the most critical issue in this proceeding. The establishment of an honest and accurate reference point must be supported with at least a few morsels of facts. Without a reasonable and reliable data point, a six-year back pay calculation suffers immeasurable distortion. The NLRB elected to structure their determination of potential back pay on the hearsay of the complainant. The Compliance Officer elected not to analyze or verify the moonlighting claim (or gratuities). Although surrounded in evidence that disproved the moonlighting claim, the Region just turned a blind eye. If they had reviewed Mr. Pflantzer’s tax returns, bank statements, and business records, they could not have accepted the erroneous assertion that he would have earned \$335 every Saturday while working full time at NYPS.

57. He told Ms. Kurtzelben that he earned \$335 per week in net profit from NY See Tours while working for NYPS in 2011. That was the single most important fact she included in

her calculations for a six-year period. Even if it were true that he had earned that amount, relying on it and including it in every month of every low season for five years would have been unreasonable. There was, at most, a six-week history of those earnings (according to what he told her). But we know he never earned those amounts – especially while also working for another employer. In not one single period from February of 2012 through 2018 did he earn that amount while also working even a part-time job. Tr. at 1924; *see also* 1656-1662 (examining NY See Tours profits from tax returns). To the contrary, he testified that when he was working full time for other operators, he did not run regular tours for NY See Tours. He even testified at the hearing that he was not earning those amounts in the few weeks he worked at NYPS.

58. Mr. Pflantzer made clear that he did not conduct NY See Tours for moonlighting income in 2011. He testified:

Q You also testified under oath that in 2011 you operated bus tours for NY See Tours; is that true? Or was that -- maybe you were misremembering and it didn't start till 2012.

A I can't remember if I was working for you and CitySights. I don't remember operating bus tours for NY See Tours.

Q Same answer for walking tours for NY See Tours?

A That's correct.

Q I think we established that the first tours you did as NY See Tours were bus tours, not walking tours, right?

A That's correct.

Q Okay. So there were no NY See Tours in 2011.

Tr. at 1448-1449; *see also* Respondents' Exhibit 15 (showing no income for NY See Tours).

59. That testimony eviscerates any claim for moonlighting amounts to be deducted from Mr. Pflantzer's interim earnings. The fact that he never operated bus or walking tours for NY See Tours during his employment at NYPS means that there is no basis for the moonlighting claim. The General Counsel refused to allow Ms. Kurtzelben to be recalled to clarify this point. *See* Exception No. 1. They could have had her testify in rebuttal, but they did not. As a result, the

Board must assume that she would have confirmed that no moonlighting deduction should have been made because Mr. Pflantzer's sworn testimony was that he did not operate NY See Tours in 2011 while he worked at NYPS. His 2011 tax return showed the same.

60. Ms. Kurtzelben should have known that the "moonlighting" theory was baseless. When she looked at Mr. Pflantzer's *actual* earnings from his business in all of 2013 and the first half of 2014, Mr. Pflantzer's total earnings from his business were less than the "moonlighting" amount she calculated – even with alleged tips included. That's why her Interim Earnings numbers are zero for that period. That one fact completely disproves the moonlighting theory, so \$335 per week must be added back to the Interim Earnings column for every week in the backpay period. In some years, Mr. Pflantzer's Schedule C on his tax return shows that his business actually lost money for the year. Tr. at 1661-1662. Ms. Kurtzelben and the General Counsel's office should have known immediately that the moonlighting theory was misguided.

61. \$335 per week, for 52 weeks, is \$17,420. The *only year* in which the total revenues for NY See Tours exceeded that amount was 2012, and that is a year when he did not work any other jobs. See ALJ Order at p. 10, lines 26-38; GC Exhibit 3 (Mr. Pflantzer's Schedule C's to his tax returns show his income from his business); Respondent's Exhibit 10; Tr. at 1656-1662. There is no evidence to support Ms. Kurtzelben's theory that Mr. Pflantzer would have moonlighted at NY See Tours to the extent of \$335 per week. Thus, that amount has to be added to his Interim earnings for each week of the backpay period. Not only is there no evidence he earned that amount each week while running his business full time, there is certainly no evidence that he ever earned anywhere near that much money while working full time at a tour company. See GC Exhibit 3 (*Compare* Pflantzer's 2012 and 2013 tax return Schedule C's *with* the years 2014-2017 where he was working at other companies); Respondents' Exhibit 10; Tr. at 1656-1662. She should have looked at his 2011 tax return to see if he worked for NY See Tours in that year to support the moonlighting claim – but she never asked for or

looked at that tax return. Tr. at 144; GC Exhibits 3A-3F (2012-2017 tax returns provided to Ms. Kurtzelben). She had no information other than what Mr. Pflantzer told her and six of his seven relevant tax returns. Tr. at 175-178. The fact that she proffered a backpay calculation based on six years of \$335 weekly moonlighting income without every seeing proof that he moonlighted and after seeing tax returns for six years in which he never once generated that much income from his self employment demonstrates her total lack of credibility. The entire backpay calculation should have been rejected by the ALJ, and the Board should reject it now in favor of Respondents' Exhibit 13.

62. Respondents' Exhibit 18 further highlights the falsity of the General Counsel's latest backpay calculation. In that spreadsheet, the General Counsel reported to Respondent NYPS that Mr. Pflantzer earned significant interim earnings throughout the first half of 2013. Respondents' Exhibit 19 also shows Interim Earnings in 2013. Where did those interim earnings go? The answer is it was massaged out of the calculation by the Compliance Officers. The bottom line is that Mr. Pflantzer is owed very little backpay, if any.

63. More changes were made to the calculations over time. Comparing Respondents' Exhibit 11 with Exhibit 17 show that as late as 2017, the General Counsel's office was changing the amount of Gross Backpay and the amount of Interim Earnings for virtually every period in the backpay period—including for 2012 and 2013. There was no explanation from Ms. Kurtzelben at the Hearing of how or why the amounts Mr. Jorge earned in 2012 and 2013, or the amounts Mr. Pflantzer earned in those years, changed significantly on the last three iterations of the backpay calculation. Those changes are significant because, without explanation, they call into question the credibility of the version of the calculations used at the Hearing (the Fourth Amended). Either the Fourth Amended Compliance Specification misrepresented Pflantzer's Interim Earnings for the years 2012-2017, or the Third Amended one did. Respondents posit that the Board has no way to know, and thus cannot award backpay on the basis of the General Counsel's backpay calculation. At a minimum, the Board should

add \$335 per week for every pay period to Pflantzer's Interim Earnings and award the resulting backpay amount.

**Exception No. 28.** That portion of the ALJ's decision that states it was reasonable and appropriate to rely on Mr. Pflantzer's tax returns in calculating backpay and interim earnings. ALJ Order at p. 18, lines 29-30.

64. It was patently unreasonable for the Compliance Officers to rely on Mr. Pflantzer's tax returns in calculating backpay, but that was the only documentary evidence they chose to look at. Much evidence was adduced at the Hearing to demonstrate that Mr. Pflantzer's tax returns were, at best, inaccurate, and at worst, fraudulent. For example, Mr. Pflantzer did not report all of his income from Uncle Sam's on his sworn tax returns for in 2015, 2016, and 2017. Tr. 159-60; Tr. 1433-35; 1472. He never reported tips on seven sworn Federal and seven sworn State tax returns. Tr. 293. He left three employers off his tax return for 2016 and his Schedule C's were filed incorrectly. Tr. 163. He was paid by NYPS in 2012 for work he did in 2011, but did not report it on his 2012 tax return. Tr. at pp. 1650-1651; GC Exhibit 2-B. Respondents ask that the Board reject the backpay calculation proffered by Ms. Kurtzelben and accepted by the ALJ on the basis that it relies entirely on an interested witness who is untrustworthy and filed multiple false tax returns.

**Exception No. 29.** That portion of the ALJ's decision that states that Pflantzer's actual "Year of the Groupon" earnings of \$165,000 in 2012 were included in interim earnings. ALJ Order at p. 18 at line 45 to p. 19 at line 5.

65. The ALJ stated that Pflantzer's \$165,000 in revenues for NY See Tours in 2012 were included in his interim earnings. That is a false statement. What was deducted as interim earnings in 2012 from NY See Tours was \$27,503. ALJ Opinion, p. 10, line 26. Respondents object that there is no reasonable basis for allowing \$137,497 in business expenses to be deducted. The Compliance Officers should have investigated his expenses, and the Interim earnings should have been higher for 2012. At a minimum, this discrepancy shows that Mr. Pflantzer is not entitled

to \$335 per week in “moonlighting” income because at a 16.7% profit margin, he would have had to sell \$2005 in tours every week, while working full time for NYPS, to have generated \$335 in moonlighting income.

**Exception No. 30.** That portion of the ALJ’s decision that states that the limitation in evidence was due to the significant lapse in time due to the Respondent’s refusal to comply with Board orders. ALJ Order, at p. 19, lines 18-21 and fn. 18.

66. There is no evidence that Respondents failed to comply with any Board order. The delays in the proceeding were caused by the Region and/or Mr. Pflantzer not setting a hearing. All of Mr. Pflantzer’s documentation should have been provided to the Region within a month or two of his filing a complaint, and certainly prior to their filing of the Compliance Specification. Any lack of documentary evidence of Mr. Pflantzer’s tips, reasonable business expenses, backpay, and/or interim earnings is entirely the fault of the Charging Party and/or the Region.

**Exception No. 31.** That portion of the ALJ’s decision that states that Pflantzer’s bank records were not relevant. ALJ Order, at p. 19, lines 18-21 and fn. 18.

67. Ms. Kurtzelben never reviewed any of Mr. Pflantzer’s bank records. Tr. 177. Mr. Pflantzer, however testified that he gave his bank statements to the NLRB. Tr. 1379-1381.

68. His bank account information would have shown any deposits he made of tips earned. It would have shown all of the revenues of NY See Tours and the number of tours it ran in each year. Tr. at 1461-1462. They would have shown the expenses he taxed to NY See Tours and would have allowed the Region and/or Respondents to evaluate whether they were reasonable. Tr. 1380, *et seq.* They would have shown how many tour guides he hired and paid for NY See Tours, which directly would have affected the calculation of his alleged moonlighting income. They would have shown whether he ever conducted any “moonlighting” tours at NY See Tours during the time he worked at NYPS in 2011. *See* Exception Nos. 26 & 27, *supra*.

69. The fact that the Compliance Officer never looked at them undercuts the credibility of the interim earnings numbers, and thus the entire backpay award. The fact that the ALJ prevented Respondents from seeing them unfairly prejudiced Respondents in the Hearing.

**Exception No. 32.** That portion of the ALJ's decision that states that Kurtzelben's changing Pflantzer's Schedule Cs to wages "show[s] that the compliance officer was conscientiously adjusting the standard model when calculating self-employment earnings to meet the unique situations in 2016 and 2017." ALJ Order at p. 20, lines 14-15.

70. While Respondents concede that that "comparator employee" model must be modified to fit this case, and that Ms. Kurtzelben's handling of the 2016 and 2017 Schedule C errors shows she agreed that the model had to be adjusted for this case, Respondents disagree that it shows she was being conscientious or trying to be reasonable. Rather, the existence of that problem is further evidence of Mr. Pflantzer's understating of his interim earnings on his tax returns, and she should have disregarded them altogether. Her handling of the situation shows that she was willing to cover for Mr. Pflantzer's dishonest dealings and contradictory stories.

**Exception No. 33.** Those portions of the ALJ's decision that find that Pflantzer made a reasonable effort to obtain alternative employment from February 12, 2012, to July 4, 2014. ALJ Order at p. 20-21.

71. Mr. Pflantzer did not seek or obtain new employment from the time he left New York Party Shuttle in February of 2012 until mid-2014 when he began working at Go New York Tours. Tr. at 1417-18. The Fourth Amended Compliance Specification shows no interim earnings from the first quarter of 2013 through the end of the second quarter of 2014. Through those six quarters, there is no evidence that Mr. Pflantzer applied for any job. Mr. Pflantzer testified that the first job he got was Go NY Tours in mid-2014. Tr. at 1612. Because NYPS is not responsible

for his decision not to work at any of the 20+ other tour companies in NYC during that period, NYPS is not liable for any backpay during that period.<sup>19</sup>

**Exception No. 34.** That portion of the ALJ's decision that awarded Pflantzer excess taxes because his 1099 payment status eliminates additional liability for income taxes and social security. ALJ Order p. 40, lines 25-27, p.40, line 44 – p. 41, line 3; *see also* ALJ Order p. 12, line 46 through p. 13, line 2; *see also* ALJ Order p. 13, fn. 14.

72. The fact that Mr. Pflantzer was paid as a 1099 contractor was established in the original Board Order in this case. The Board determined that he was an employee for purposes of the Act, but that doesn't change how he was paid or what tax liability should have been.

73. His 1099 status was directly relevant to his backpay and excess tax award, because he paid his own taxes and his effective hourly rate at NYPS was \$18.60, which is 7% less than \$20 per hour to reflect the fact that he paid his own tax and social security and Medicare burden. *See* Exception No. 5, *supra*.

**Exception No. 35.** That portion of the ALJ's decision that awarded excess taxes to Pflantzer despite the fact that Mr. Pflantzer underreported his income in each year from 2011 to 2017. ALJ Order p. 40, lines 25-27, p.40, line 44 – p. 41, line 3; *see also* ALJ Order p. 12, line 46 through p. 13, line 2.

74. A critical component of the Excess Tax Liability calculations omitted from the General Counsel's Compliance Specification is the amount of unreported income Mr. Pflantzer has in tips and pay from Uncle Sam's Tours. Tr. 159-60; Tr. 1433-35; 1472. He never reported tips on seven sworn Federal and seven sworn State tax returns. Tr. 293. He left three employers off his tax return for 2016 and his Schedule C's were filed incorrectly. Tr. 163. The Board cannot

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<sup>19</sup> Interestingly, in Respondents' Backpay Calculation, the only period in which Mr. Pflantzer would earn backpay is during this 2013-2014 period when he did not seek other employment. *See* Respondents' Exhibit 13. In every other time period, he was able to earn more money in other jobs than Edwin Jorge did at NYPS. Respondents prepared their Backpay Calculator using Ms. Kurtzelben's numbers except for tips and moonlighting. It does not take into account whether Mr. Pflantzer was mitigating his damages in any period. Therefore, if the Board agrees that he did not mitigate damages during that 2013-2014 period, then Mr. Pflantzer should not be awarded backpay for those quarters.

rely on the Excess Tax Liability calculations, even if it awards the amounts requested by the Government, because they do not take into account the increased income Mr. Pflantzer should have reported. Without those calculations, the excess tax liability calculations are arbitrary and capricious, and no excess tax liability should be awarded.

**Exception No. 36.** That portion of the ALJ's decision that determined that NYC Guided Tours, LLC, is an *alter ego* of NYPS. ALJ Order, at p. 34, lines 39-43.

75. When an employer is alleged to be an *alter ego*, the Board considers whether the entities in question are substantially identical, including the management, business purpose, operating equipment, customers, supervision, operation, work force, and common ownership or control. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Advance Electric*, 268 NLRB 1001, 1002 (1984).

76. NYCGT does not meet any of the *Crawford Door* criteria. The ownership, management, business plan, equipment, customers, work force, and operation were all different. NYPS had different ownership in that Mark D'Andrea was not a shareholder of NYCGT, and Fred Moskowitz was not a shareholder of NYPS. *See* Exceptions No. 45, 48, and 50, *infra*. NYCGT was set up with a completely different business model, while NYPS continued with its bus tour model. Tr. at p. 1904-1906. The management team at NYCGT was different. *See* Exception No. 42 and 44, *infra*. Yes, it employed Fred Moskowitz, but one manager in common does not create an *alter ego*. With regard to equipment and assets, NYCGT has never owned any physical assets, whereas the core of NYPS's business was the fleet of buses it owned. Tr. at 1904-1906. For a few months, NYCGT leased the NYPS-owned buses to fulfil customer obligations of NYPS, for a fee, but that was a short-term project that was not the core of NYCGT's business. Tr. at 1793-1794; 1820-1821; 1035-1037. NYCGT maintained its own bank accounts, financials, tax returns,

payroll systems, and corporate documents. *See, e.g.*, Tr. at 1810 (tax returns); Tr. at 1006 (payroll systems); Tr. at 1779 (corporate documents)

77. NYPS generated most of its sales from concierges, tour operators, online resellers like Viator, and other third-party sellers. *See* Exception No. 48. It operated a transportation service between New Jersey and Manhattan for tours sold by New Jersey hotels. Tr. at 1726-1727. NYCGT did none of those things. Messrs. Moskowitz and Schmidt testified at length to the differences in the staffing, management, business plan, organization, equipment, and operations of the two companies. *See* Exception Nos. 44, 46, 47, 48, and 49. The mere fact that the two companies operated simultaneously for a while, and then ultimately NYCGT continued to operate, and NYPS closed down, demonstrates that the two entities were not *alter egos*, by definition.

78. An *alter ego* relationship is established when there is a “mere technical change in the structure or identity of the [old] employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management.” *N.L.R.B. v. Omnitest Inspection Servs., Inc.*, 937 F.2d 112, 118 (3d Cir. 1991); *Howard Johnson Co.*, 417 U.S. 249, 259 n. 5, 94 S. Ct. 2236, 2242 n. 5, 41 L.Ed.2d 46 (1974). The determination of alter ego status depends on whether there has been “a bona fide discontinuance and a true change [in] ownership” of the old employer, or “a disguised continuance of the old employer.” *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106, 62 S.Ct. 452, 456, 86 L.Ed. 718 (1942). For an alter ego relationship to exist, a purpose to avoid the old employer's labor obligations under a collective bargaining agreement or under the Act must underlie the formation of the new employer. *N.L.R.B. v. Omnitest Inspection Servs., Inc.*, 937 F.2d 112, 118 (3d Cir. 1991); *Fugazy Continental Corp.*, 265 NLRB 1301, 1301-02 (1982), *enforced*, 725 F.2d 1416 (D.C.Cir.1984). No such evidence was adduced in this case. Fred Moskowitz gave a list of specific business reasons that NYCGT was created.

That allegation was never made in the Compliance Specification, and no evidence was introduced to support it. There is no basis for asserting that NYCGT was set up to avoid NYPS's liability, particularly when NYCGT was started and was operated simultaneously with NYPS for approximately a year before NYPS closed down. The ALJ's suggestion to find *alter ego* liability should be rejected by the Board in light of the lack of supporting evidence.

**Exception No. 37.** That portion of the ALJ's decision that determined that NYC Guided Tours, LLC, is a *Golden State* successor to NYPS. ALJ Order at pp. 37-40.

79. NYCGT is not a *Golden State* successor to NYPS. An employer who acquires and operates a business in basically unchanged form can be held jointly and severally liable for unremedied unfair labor practices of its predecessor if the new employer had notice of those unfair labor practices. *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168 (1973). To be a successor, a company must have acquired the other company, or at least its assets. *Lebanite Corp. &/or R.E. Serv. Co. & W. Council of Indus. Workers, Local 2554, Affiliated with United Bhd. of Carpenters & Joiners of Am. & Oregon Panel Prod., LLC*, 346 NLRB 748, 752 (2006). There is no evidence of any such transaction here. NYCGT was set up by Fred Moskowitz as part of a new business plan to create a more profitable business—while NYPS was still operating—as he testified. Tr. at 1779-1781; *see also*, Tr. at 1904-1906

80. Not only was there no *Golden State* acquisition, but NYCGT was not operated in “basically unchanged form.” It did not own buses or have physical assets. Tr. at 1904. Numerous material substantive differences between NYPS and NYCGT were recounted by Mr. Schmidt and Mr. Moskowitz, and none were controverted. *See, e.g.*, Tr. at 1810-1819. They are further discussed in connection with Exception Nos. 36 and 41-49. It did not employ managers other than the President. *Id.* It did not offer the same list of tours, did not use the same vendors, did not use private boat cruises, did not use the same sales channels, nor did it utilize the same staff. *Id.* It

did not operate buses out of a garage in Long Island, with a manager (Ronnie White) who rode with the buses to the loading location in Times Square. *Id.* It did not use the same offices, did not have the same shareholders, and did not conduct business with any of NYPS's clients or customers. *Id.* Accordingly, it cannot be said that NYCGT was merely the continuation of NYPS's business "in basically unchanged form," particularly when NYCGT was started and was operated simultaneously with NYPS for months before NYPS closed down. *Id.*

81. There is no basis here for finding NYCGT to be a *Golden State* successor to NYPS.

The Board should reject that finding.

**Exception No. 38.** That portion of the ALJ's decision stating that "there is no requirement that a sale or purchase of NYPS is a prerequisite to a finding of a *Golden State* successor." ALJ Order at p. 38, lines 3-6.

82. The ALJ's reliance on *Lebanite* is misplaced. That case found that the alleged successor, which did not purchase the predecessor but took over all of its assets permanently, was NOT liable as a *Golden State* successor. *Lebanite Corp. &/or R.E. Serv. Co. & W. Council of Indus. Workers, Local 2554, Affiliated with United Bhd. of Carpenters & Joiners of Am. & Oregon Panel Prod., LLC*, 346 NLRB 748, 752 (2006). The facts of *Lebanite* were more closely aligned to *Golden State* than to this case. Although the successor did not "purchase" the predecessor, the situation was that the predecessor completely closed down its business before the successor came in and took them over by leasing all of the assets of the predecessor. Effectively, the successor completely took over the predecessor's business. That is not the case with NYPS and NYCGT. Rather, NYCGT engaged a few tour guides and drivers to operate tours sold by NYPS for a few months, and then got rid of all of the assets and went forward with a different business plan. Also, the two companies co-existed for many months, with NYCGT running a different business plan with different sales channels and a different workforce. The *Lebanite* Board noted that the short-term nature of the arrangement and the fact that it was a small arrangement in proportion to the

employment liabilities required a rejection of *Golden State* successor liability. There is no case where the Board or a Court has imposed *Golden State* successor liability on the facts at hand – where there was no purchase of assets or the company, where there was merely a few months of a lease agreement, and where the employment liability exceeded the financial value of the lease such that the successor had no viable way to insulate itself from liability. NYCGT is not a successor to NYPS, let alone a *Golden State* successor.

**Exception No. 39.** That portion of the ALJ’s decision supposing that NYCGT had the chance to avoid or mitigate NYPS’s unfair labor practice liability. ALJ Order at p. 39, lines 48-49.

83. First, as discussed *infra*, NYCGT did not exist at the time Mr. Pflantzer was hired or terminated in 2011-2012. It also did not exist when he was reinstated in July of 2014. To say that it could have avoided or mitigated the unfair labor practice is false. There was zero evidence in the record to support this statement by the ALJ. Further, as in *Lebanite*, the lease transaction between NYPS and NYCGT was so small and short-lived that NYCGT had no way to insulate itself. *Lebanite*, at p. 752. Ultimately, the evidence was that it did not get paid by NYPS for what it did do, let alone for any employment liability.

**Exception No. 40.** That portion of the ALJ’s decision that holds NYCGT liable for backpay obligations or wrongful termination that occurred or were accrued prior to its incorporation in October of 2014. ALJ Order at p. 40, lines 41-45.

84. NYC Guided Tours, LLC, should not be held liable for damages that occurred prior to its existence. It had no opportunity to prevent or mitigate those amounts. As such, if the Board finds that it was NYPS’s *alter ego*, or a *Golden State* successor, or part of a single employer, it should only be liable for that portion of any backpay award that accrued after it was incorporated in October of 2014. ALJ Order at p. 30, line 11.

**Exception No. 41.** That portion of the ALJ’s decision that determined that NYC Guided Tours, LLC, OnBoard Las Vegas Tours, LLC, Party Shuttle Tours, LLC,

Washington DC Party Shuttle, LLC, and New York Party Shuttle, LLC, comprise a “single employer.” ALJ Order, pp. 35-37.

85. To determine whether several entities are a single employer within the meaning of the Act, the Board looks to four factors: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile Inc.*, 380 U.S. 255, 256, 85 S. Ct. 876, 13 L.Ed.2d 789 (1965) (per curiam); *N.L.R.B. v. DMR Corp.*, 699 F.2d 788, 790–91 (5th Cir. 1983). “The factors of common control over labor relations, common management, and interrelation of operations are more critical than the factor of common ownership” and “centralized control of labor relations is of particular importance.” *Oaktree Capital Mgmt., L.P. v. NLRB*, 452 Fed. Appx. 433, 438 (5th Cir. 2011) (per curiam) (quoting *Covanta Energy Corp.*, 356 N.L.R.B. 706, 726 (2011)).

86. A mountain of evidence in this case conclusively negated all four factors. No two Respondents have common ownership. *See* Gov’t Exhibit 44; *see also* Exception Nos. 45, 48, and 50. The management of each of the entities is different, as testified to by Ronnie White, Fred Moskowitz, Larry Lockhart, Tyree Cook, and Tom Schmidt. *See* Exception Nos. 54, 55, and 56. The evidence recounted under those Exceptions was not controverted. The same witnesses consistently testified that the operations of NYPS, DCPS, and OBLV were kept separate and were not integrated, with separate management of each. *Id.* Certainly, Party Shuttle Tours, LLC, which doesn’t have any operations, was not integrated with any of the other Respondents. Likewise, there was no centralized control of labor relations. *See* Exception Nos. 56. Each company recruited, hired, trained, set salaries, disciplined, and fired its own employees with complete autonomy from the other companies. *Id.* There was no evidence that any person affiliated with

any of the Respondents other than NYPS had anything to do with Mr. Pflantzer's separation from the company.

87. The fact that the ownership group and/or PST provided some general oversight to NYPS, DCPS, OBLV and NYCGT does not constitute "interrelated operations." *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1977) ("Attention to detail,' not general oversight, is the hallmark of interrelated operations" for purposes of single employer doctrine under federal discrimination laws). Time and time again it was demonstrated that that the day-to-day management of the staff and operations was under the control of local managers in different cities. *See* Exception Nos. 42, 54-56. There was no evidence that any employee of any of the Respondent companies except for NYPS ever heard of, let alone met in person, Mr. Pflantzer. This was because their operations were distinct and managed locally in New York, Washington DC, or Las Vegas.

88. There was no evidence to support any of the factors in the single employer doctrine. The General Counsel introduced financial transaction information showing that Respondents have loaned money back and forth among each other, but the only testimony about those transactions was that they were at arm's length and were booked on the various companies' financials. Every significant company in the world engages in similar transactions. Without more, those transactions do not show that the entities are a single employer. Intercompany loans is not even a factor in the test for single employer status.

89. There is no evidence whatsoever to suggest that OBLV was part of any single employer. The same is true for PST, which was never an employer and had no operations. There was testimony about New York employees attending meetings in DC and vice-versa, but all of the

managers that testified confirmed they had autonomy over operations and labor relations. *See* Exceptions No. 54-56.

90. Respondents ask that the Board reject the ALJ's finding of single employer liability because there is no evidence to support such a finding, and overwhelming evidence from multiple witnesses that contradicts it.

**Exception No. 42.** The omission in the ALJ's decision of evidence that each of the Respondents made its own hiring and firing decisions. ALJ Order at pp. 23-31.

91. There was substantial evidence in the record from Tom Schmidt, Fred Moskowitz, Larry Lockhart, Ron White, and Tyree Cook that each of the Respondents made their own hiring and firing decisions. The ALJ completely disregarded that evidence in his Supplemental Decision. Mr. Schmidt testified that he did not have responsibility for day-to-day operations. Tr. at p. 353. He also testified that Mr. Moskowitz had management authority at NYCGT after the members of the prior management team left the company. Tr. at pp. 354-355. Ron White testified that he had responsibility for hiring, training, scheduling, and firing tour guides and drivers at NYPS. Tr. at pp. 815-816. He also listed a number of people who had responsibility for hiring customer service people at NYPS, and none of those people had similar responsibility at DCPS, OBLV, or PST. Tr. at 817. Mr. White testified that he never communicated with the managers of OBLV and almost never communicated with DCPS managers about hiring or firing or managing employees. Tr. at p. 826. Mr. White was hired by John Bilello, the founder of NYPS, and was promoted by Levi June. Tr. at 846. Mr. White, who ran NYPS for many years as Operations Manager and then Director of Operations, never received any pay from any respondent or individual other than NYPS. Tr. at pp. 873-874. Mr. White prepared the payroll for NYPS and submitted it to the bookkeeper at an outside service for printing, but he never participated in any payroll for DCPS or OBLV. Tr. at pp. 878-880. Mr. White testified to multiple job responsibilities he had related to

employee relations at NYPS and confirmed that he was never involved in any of those matters with DCPS or OBLV. Tr. at pp. 886-889; 893. Mr. Moskowitz confirmed that he, Mr. White, and Henry Flores handled hiring and firing at NYPS. Tr. at 1017-1024. No one outside of New York City assisted in the hiring process at NYPS or NYCGT. Tr. at 1030-1031. Tyree Cook testified that while he was at DCPS, he had responsibility for hiring employees in Washington DC, but not in any other cities. Tr. at pp. 1202; 1145-1149. Mr. Cook also testified about differences in the business models of the various Respondents. Tr. at p. 1141-1144. Virtually all of Volume 11 of the Transcript provides support for the differences in labor management at the various Respondent companies. All of this, and a significant volume of evidence too voluminous to refer to in a 50-page brief was ignored by the ALJ in his Decision. It directly refutes his suggested rulings related to *alter ego*, *Golden State* successor, and single employer.

**Exception No. 43.** The omission in the ALJ's decision of evidence that each of the Respondents has a different business model. ALJ Order at pp. 23-31.

92. The Washington DC Party Shuttle business is very different from New York Party Shuttle. Tr. at 563. Washington DC Party Shuttle has employees who work in hotels as concierges and operated transportation services, neither of which was part of the NYPS, OBLV, or PST business model. Tr. at 557. There was no testimony about the business model at OBLV – the ALJ merely made an assumption that it was the same as NYPS, and DCPS, but there was zero evidence to support that finding. Mr. Cook testified about differences in the business models of the various Respondents. Tr. at p. 1141-1144. NYPS and NYCGT had different business models. Tr. at 1779-1780. Each of the Respondent companies had a very different business model. Tr. at p. 1781-1784. NYCGT was set up with a completely different business model, while NYPS continued with its bus tour model. Tr. at p. 1904-1906. All of this evidence was ignored by the

ALJ, but it was uncontroverted and compels a ruling by the Board that Respondents were not a single employer, in light of the evidence on the other elements.

**Exception No. 44.** That portion of the ALJ’s decision that found that the management of NYPS and NYCGT is identical. ALJ Order at p. 33, lines 27-32

93. There was substantial evidence in the record that the management of NYPS and NYCGT was different at all times, and that it changed over time so it could not have been “identical.” Tr. at p. 353-355; 815-817; 826; 846; 1017-1024. The only evidence that supports the ALJ’s decision on this point is that Mr. Schmidt served as CEO of both NYPS and NYCGT and that Mr. Moskowitz worked at both companies. That is a “similarity” of management. Not an identity of management. Without more, this factor does not support a finding of *alter ego* or *Golden State* successor liability.

**Exception No. 45.** That portion of the ALJ’s decision that found that there is common ownership of NYCGT and NYPS through Schmidt. ALJ Order at p. 33, lines 39-42.

94. It is true that, through Infinity Trade Capital and Party Shuttle Tours, Mr. Schmidt has an indirect ownership interest in both NYCGT and NYPS. However, Mark D’Andrea was an owner of NYPS but not NYCGT. GC Exhibit 44; Tr. at p. 347. Mr. Moskowitz had an equity interest in NYCGT but not NYPS. The ownership of PST was not, and was not shown to be identical from 2011 to 2015 versus 2015-2018, so there is no evidence that the ownership of NYCGT and NYPS was the same. General Counsel’s Exhibit 44 makes clear that the ownership structure of each Respondent is different – there was no identity of ownership of any entity with NYPS. GC Exhibit 44; Tr. at 341-349. “Common ownership” in the test for *alter ego* liability, is not “an owner in common” as the ALJ seems to suggest. There is no authority for that proposition. It means that the ownership of the two proposed *alter egos* is identical. As such, there is insufficient evidence in the record to support this finding by the ALJ.

**Exception No. 46.** That portion of the ALJ's decision that found that the initial operation and purpose of NYPS and NYCGT are identical. ALJ Order at p. 33, line 46 through p. 34, line 12.

95. The only evidence in the record that addresses this point is directly contradictory. NYCGT was set up with a completely different business model, while NYPS continued with its bus tour model. Tr. at pp. 1779-1780; 1904-1906. The statements made by the ALJ are not necessarily incorrect, but they do not demonstrate identical operation and purpose. If they did, then every sightseeing tour company in New York City would qualify. The fact that two companies operated tours does not make their operation and purpose identical, for instance.

**Exception No. 47.** That portion of the ALJ's decision that found that lease or rental documents did not exist between NYPS and NYCGT for bus leases and that therefore the transfer of the buses from NYPS to NYCGT was not at arm's length. ALJ Order at p. 34, lines 18-23.

96. Mr. Schmidt testified that written bus leases existed between NYPS and DCPS and NYCGT, and they were produced if they still existed at the time of the trial. Tr. at 516-517. Mr. Moskowitz testified that there was an arm's length agreement between NYPS and NYCGT. Tr. at 1035-1037. This evidence was ignored, even though there was no contrary evidence in the record.

**Exception No. 48.** That portion of the ALJ's decision that found that "NYPS and NYCGT had the same managers, supervision, and owners; substantially identical customers, and the same operations." ALJ Order at p. 34, lines 30-35.

97. With regard to management, supervision, and operations, Respondents have demonstrated that they were not "substantially identical" in the sections above for Exceptions 42 and 44. Those references to the record that relate to NYCGT and NYPS are incorporated here.

98. With regard to ownership, Mr. Moskowitz testified that he had an equity interest (through warrants) in NYC Guided Tours, but did not have an ownership interest in NYPS. Tr. at

pp. 1711-1713. Meanwhile, Mark D'Andrea was an owner of NYPS, but not NYCGT. GC Exhibit 44; Tr. at p. 347.

99. There was no evidence in the record that the customers were identical among Respondents. The two companies had different websites that found different sets of customers. Tr. at 1812-1813. NYPS sold through hotels, and NYCGT did not, so they were targeting different audiences of customers. Tr. at 1814; 1816. NYPS, DCPS, and OBLV also sold tickets through international tour operators, but NYCGT did not. *Id.* NYPS used salespeople on the streets, but NYCGT did not. Tr. at 1815. The corporate clients were distinct, the website channels were distinct, and the customers were different between the two entities.

100. None of these factors support *alter ego* or *Golden State* successor liability.

**Exception No. 49.** That portion of the ALJ's decision that found that "Equipment and assets were transferred from NYPS to NYCGT without any payment." ALJ Order at p. 34, lines 34-35.

101. There is no evidence in the record to support this statement. The actual testimony is that there was a written agreement between NYPS and NYCGT that set out the terms of the use of buses (no other equipment or assets were transferred) and payments between the companies therefor. Tr. at 1793-1794; 1820-1821. There was a written agreement between NYPS and NYCGT that governed payments between the companies for buses used. *Id.*

**Exception No. 50.** That portion of the ALJ's decision that found that "there is no question that NYPS, DCPS, OBLV are owned by PST." ALJ Order at p. 35, lines 32-33.

102. NYPS was owned by PST and Mark D'Andrea. GC Exhibit 44; Tr. at p. 347. The ownership of PST was not, and was not shown to be identical from 2011 to 2015 versus 2015-2018, so there is no evidence that the ownership of NYPS, DCPS, and OBLV was the same. General Counsel's Exhibit 44 makes clear that the ownership structure of each Respondent is

different – there was no identity of ownership of any entity with NYPS. GC Exhibit 44; Tr. at 341-349. As such, there is insufficient evidence in the record to support this finding by the ALJ.

**Exception No. 51.** That portion of the ALJ’s decision that found that “There is nothing in the record of any loan arrangements, fees, and interest paid on these loans, or any other documents to evidence that the loans were negotiated at arm’s-length.” ALJ Order at p. 36, lines 7-9.

**Exception No. 52.** That portion of the ALJ’s decision that found that repayments of loans from NYPS to PST from 2012 to 2015 “shows a lack of arm’s length relationship and an effort of NYPS to deplete its assets by transferring them to PST.” ALJ Order at p. 36, lines 9-11.

**Exception No. 53.** That portion of the ALJ’s decision that drew an adverse inference that loans were at less than arm’s length. ALJ Order at p. 36, lines 9-15.

103. Respondents will address Exceptions No. 51, 52 and 53 together. Repaying loans does not in any way show “an effort to deplete assets.” NYPS had debts it owed, it continued operating to pay down those obligations in the hopes of surviving as a viable business. Tr. at 1904-1905. There is no evidence in the record to support this allegation. All loans between the entities were documented and recorded to the penny on the books of the various companies. GC Exh 73; Tr. at 1571; Tr. at 1805-1807. There was direct testimony that loan documents and bus leases existed for the transfers between entities. *See, e.g.*, Tr. at 516-517; 528-529. Loan and lease transactions between the companies was documented “meticulously.” Tr. at 1809-1810. The formal bus leases between NYPS and DCPS were negotiated between those two entities and were based on market rates for bus rentals. Tr. at 564-566; Tr. at 1793-1794. There was a written agreement between NYPS and NYCGT that governed payments between the companies for buses used. Tr. at 1820-1821; Tr. at 1793-1794. Every corporate conglomerate in America makes intercompany loans and either repays them or doesn’t. That fact in no way suggests that they were not at arm’s length or that they were somehow sinister.

**Exception No. 54.** That portion of the ALJ's decision that found an interrelation of operations sufficient to declare Respondents a single employer. ALJ Order at p. 36, lines 17-42.

**Exception No. 55.** That portion of the ALJ's decision that found that there was common management among the Respondents. ALJ Order at p. 36, line 44 through p. 37, line 7.

**Exception No. 56.** That portion of the ALJ's decision that found centralized control of labor operations. ALJ Order at pp. 9-23.

104. Respondents will address Exception Nos. 54-56 together. In the section under Exception No. 42, *supra*, Respondents set out significant evidence that showed different management structure at various Respondent companies with regard to hiring, firing, and employee management. It reincorporates that evidence here to show that there was not an interrelation of operations, common management, or centralized control of labor operations. There was significant testimony from Tyree Cook, Ron White, Fred Moskowitz, Larry Lockhart, and Tom Schmidt as to the differences in operations, business model, management, and labor management that is too voluminous to recite here. None of that testimony was rebutted. Some examples include: different management teams at different Respondents had their own interests and did not always get along and cooperate (Tr. at 601); Mr. Cook testified that he ran the management at DCPS (Tr. at 1201); Larry Lockhart confirmed that he controlled operations and management and labor issues at DCPS and that he had no involvement in those issues at other Respondents (Tr. at 1538-1542); Mr. Lockhart had no role or involvement with NYCGT (Tr. at 1553-1554); and no one at NYPS had any management involvement at DCPS or OBLV or vice versa (Tr. at 1710). There was significant testimony throughout Volume 11 of the Transcript about the myriad differences in operations, employment policies, pay scales, decisionmaking, and management at the different Respondent companies. Tr. at 1765-1874. All of this clear, concise, uncontroverted evidence was ignored by the ALJ.

105. With regard to Respondent Party Shuttle Tours, LLC, there is zero evidence in the record and zero evidence referred to in the ALJ Order to suggest that it had any operations or employees. There is zero evidence that it ever conducted a tour. Thus, there is no evidence to support the notion that it was an “employer,” let alone a “single employer.”

**Exception No. 57.** That portion of the ALJ’s decision that concluded that the Board had jurisdiction over Respondents, because there was evidence in the record that any Respondent conducted more than \$500,000.00 in annual sales or purchased or sold more than \$5000.00 in goods or services outside of its home state at any time. ALJ Order at p. 22, fn. 20.

106. The Board does not have jurisdiction over OnBoard Las Vegas Tours, LLC, Washington DC Party Shuttle, LLC, Party Shuttle Tours, LLC, or NYC Guided Tours, LLC, because there is no evidence that any of them conducted more than \$500,000.00 in annual sales and no evidence that any of them purchased or sold more than \$5,000.00 in goods or services outside of their home states at any time. The General Counsel did not introduce any evidence to establish jurisdiction over those parties. In fact, there is no information in the record from which the Board can determine any sales or purchases by any of the companies either individually or in the aggregate. The ALJ relied on GC Exhibit 51 as evidence that Respondents, in the aggregate, expected to generate \$10 million in revenues in 2017. ALJ Order at p. 22, fn. 20. However, that document was a draft. Tr. at 399. It was only admitted in evidence as a draft. Tr. at 402-403. It also included sales information from City Info Experts, LLC, which was expected to generate over \$10 million in revenue.<sup>20</sup> Tr. at 401. Other than that “draft,” there was zero documentation or evidence of any sales or purchases by any of the Respondents.

107. The General Counsel did not meet its burden. There is no jurisdiction over the non-NYPS Respondents. This case should, therefore, be dismissed as against them.

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<sup>20</sup> The highest annual revenue that the business City Info Experts conducts was \$31 million.

**Exception No. 58.** That portion of the ALJ's backpay award that did not consider the increase in enterprise value of NY See Tours, Mr. Pflantzer's tour company, that resulted from his departure from NYPS and focus on building that business.

108. The ALJ prevented Respondents from introducing evidence of the increase in the value of Mr. Pflantzer's tour business (NY See Tours). *See Exception No. 5, supra.* Mr. Pflantzer generated \$165,000 in revenues in 2012 for NY See Tours as the result of him leaving employment at NYPS. He continues selling tours through that business today and has benefited from that increase in value each year since 2012. No offset was included against the backpay calculation for this amount. Tr. at p. 1928. The Compliance Officer did not include any increase in the value of the business as interim earnings. Tr. at p. 214-215. As such, the Board should reject the ALJ's recommendation of a backpay award and order that a new hearing be held on this issue.

**Exception No. 59.** That portion of the ALJ's backpay award that awarded backpay after Mr. Pflantzer was reinstated by NYPS on July 28, 2014.

109. Pflantzer was properly reinstated on July 28, 2014. His reinstatement was unconditional, other than that he had to comply with company policies and procedures, both written and unwritten, just as any other employee or independent contractor had to do. Tr. at pp. 1040-1042. NYPS alleges that, had Pflantzer ended his operation of a business that directly competed with NYPS, he could have worked for NYPS until it shut down tour operations. Tr. at pp. 1040-1042. However, he was warned before reinstatement, at the time of reinstatement, and after reinstatement that the company did not maintain tour guides who operate competing businesses and that he would be terminated if he failed to close down his competing business. *Id.* He elected to continue to compete with the company, so NYPS elected to terminate his employment rather than funding the growth of a competitor and teaching a competitor its methods of marketing and operating tours. *Id.* No backpay should have been awarded after his reinstatement. There has never been a finding that he was wrongfully terminated in 2014.

## CONCLUSION

The backpay calculation proffered by the Compliance Officer and accepted in its entirety by the ALJ had no basis in fact and was demonstrated to be materially false in multiple respects. Any award based on the calculation, Mr. Pflantzer's unsworn statements, and Mr. Pflantzer's false tax returns would make a mockery of the National Labor Relations Act. The Board should reject it and accept Respondents' unrefuted contrary model, set forth in Respondent's Exhibit 13, or, in the alternative Respondent's Exhibit 14. The findings of *alter ego*, *Golden State* successor, and single employer liability are against the great weight and preponderance of the evidence and contrary to law. Respondents disproved every element of each theory. Respondents ask that the Board excuse the non-NYPS Respondents from liability for an unfair labor practice of which they had no knowledge, participation, or ability to remedy.

## PRAYER

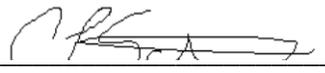
WHEREFORE, Respondents respectfully pray that the ALJ's recommendations be rejected by the Board as arbitrary and capricious as to the backpay award and contrary to law with regard to the non-NYPS Respondents.

August 20, 2019

Respectfully submitted,

**SCHMIDT LAW FIRM, PLLC**

By: \_\_\_\_\_

  
C. Thomas Schmidt  
Email: firm@schmidtfirm.com  
7880 San Felipe, Suite 210  
Houston, Texas 77063  
Tel: 713-568-4898  
Fax: 815-301-9000

**ATTORNEYS FOR RESPONDENT NEW  
YORK PARTY SHUTTLE, LLC**

**KILHENNY & FELIX**

By: \_\_\_/s/ James M. Felix, Esq. \_\_\_\_\_

James M. Felix, Esq.  
Attorneys for Defendant  
New York Party Shuttle LLC  
350 West 31 Street, Suite 401  
New York, NY 10001  
(212) 419-1492

**ATTORNEYS FOR RESPONDENTS  
WASHINGTON DC PARTY SHUTTLE, LLC,  
NYC GUIDED TOURS, LLC, PARTY  
SHUTTLE TOURS, LLC, AND ONBOARD  
LAS VEGAS TOURS, LLC.**

**DECLARATION OF SERVICE**

I certify and declare, under penalty of perjury, that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 20th day of August, 2019, in the manner indicated below.

John J. Walsh, Jr., Regional Director  
National Labor Relations Board, Region 2  
26 Federal Plaza, Room 3  
New York, NY 10278-0104

*By Electronic Mail*

Nicole Lancia  
Eric Brooks  
Counsel for National Labor Relations Board

*By Electronic Mail*

Fred Pflantzer  
Real Party In Interest

*By Electronic Mail*



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C. Thomas Schmidt