

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

**NEW YORK PARTY SHUTTLE, LLC,
d/b/a ONBOARD TOURS, WASHINGTON DC PARTY
SHUTTLE, LLC, d/b/a ONBOARD TOURS, ONBOARD
LAS VEGAS TOURS, LLC, d/b/a ONBOARD TOURS,
NYC GUIDED TOURS, LLC, and
PARTY SHUTTLE TOURS, LLC, a Single Employer, and
NEW YORK PARTY SHUTTLE, LLC, d/b/a ONBOARD
TOURS and its Alter Ego and/or *Golden State* Successor,
NYC GUIDED TOURS, LLC**

and

Case No. 02-CA-073340

FRED PFLANTZER, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	4
I. RESPONDENTS’ PROCEDURAL EXCEPTIONS SHOULD BE REJECTED.....	5
II. THE JUDGE PROPERLY FOUND THAT THE COMPLIANCE OFFICER’S CALCULATION OF BACKPAY WAS REASONABLE AND THAT RESPONDENTS FAILED TO ESTABLISH THAT ANY REDUCTION IN THE COMPUTED BACKPAY WAS APPROPRIATE.....	9
A. Compliance Officer Kurtzleben Reasonably Calculated Gross Backpay Using Comparator Employee Edwin Jorge’s Hours and Bonuses and Pflantzer’s Estimated Tips	9
C. The Compliance Officer Reasonably Determined Pflantzer’s Moonlighting Earnings and Did Not Treat Those Earnings as Interim Earnings.....	15
D. The Compliance Officer Reasonably Calculated Excess Tax, In Accordance With the Board’s Order and Extant Board Law	17
E. Respondents Have Not Established Any Affirmative Defenses That Would Mitigate Their Liability.....	18
F. To the Extent Respondents Proffered an Alternate Method of Calculating Backpay, Their Formula Unreasonably Excludes Pflantzer’s Tips and Moonlighting Earnings from NY See Tours	22
III. THE BOARD SHOULD ADOPT THE JUDGE’S ADVERSE INFERENCES AS RESPONDENTS FAILED TO PROVIDE SUBPOENAED DOCUMENTS	24
IV. RESPONDENTS ARE ENGAGED IN COMMERCE WITHIN THE MEANING OF THE ACT.....	26
V. NYPS, DCPS, PST, OBLV, AND NYCGT ARE A SINGLE EMPLOYER	27
A. Applicable Legal Principles.....	27
B. Respondents Have Common Ownership or Financial Control	28
C. Respondents Share Common Management.....	31
D. Respondents Exercise Central Control of Labor Relations	33
E. Respondents’ Operations Are Deeply Interrelated.....	35
VI. NYCGT IS AN ALTER EGO OF NYPS.....	39
VII. NYCGT is a <i>Golden State</i> Successor to NYPS	44
A. Applicable Legal Principles.....	44
B. NYCGT Had Notice of NYPS’ Unfair Labor Practice and Continued NYPS’ Business in Substantially Unchanged Form.....	46
CONCLUSION	49

TABLE OF AUTHORITIES

Federal Cases

<i>Advance Electric</i> , 268 NLRB 1001, 1002 (1984).....	39, 43
<i>APF Carting Inc.</i> , 336 NLRB 73 fn. 4 (2001), <i>enfd. APF Carting, Inc. v. NLRB</i> , 60 Fed.Appx. 832, 2003 WL 1914206 (DC Cir. 2003).....	39, 40
<i>APF Carting, Inc.</i> , above 336 NLRB at 77.....	40, 42
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006).....	6
<i>Atlantic Limousine</i> , 328 NLRB at 258	14, 22
<i>Bagel Bakers Council of Greater New York v. NLRB</i> , 555 F.2d 304 (2d Cir. 1977)	9
<i>Basin Frozen Foods, Inc.</i> , 320 NLRB 1072.....	20
<i>Bellingham Frozen Foods</i> , 237 NLRB 1450 (1978), <i>enfd. in relevant part 626 F.2d 674, 681</i> (9th Cir. 1980).....	45
<i>Birch Run Welding & Fabricating</i> , 286 NLRB 1316, 1318 (1987)	15
<i>Bloch Enterprises, Inc.</i> , 172 NLRB 1678 (1968)	27
<i>Blumenfeld Theatres Circuit</i> , 240 NLRB 206, 215 (1979), <i>enfd. 626 F.2d 865</i> (9th Cir. 1980) .	28
<i>Bolivar-Tees, Inc.</i> , 349 NLRB 720 (2007)	28
<i>C.E.K. Industries Mechanical Contractors, Inc. v. NLRB</i> , 921 F.2d 350, 354 (1st Cir. 1990)	39
<i>Cable Car Advertisers</i> , 336 NLRB 927, 931 (2011)	20
<i>Cadillac Asphalt Paving Co., Inc.</i> , 349 NLRB 6, 9 (2007)), <i>enfd. 551 F.3d 722</i> (8 th Cir. 2008).	28
<i>Carolina Supplies & Cement Co.</i> , 122 NLRB 88 (1959)	27
<i>Cassis Mgmt Corp.</i> , 336 NLRB 961, 961 (2001).....	4, 18
<i>Catholic University of America</i> , 201 NLRB 929 (1973)	26
<i>Chicot County Drainage District v. Baxter State Bank</i> , 308 U.S. 371, 374–378 (1940)	6
<i>Commercial Forgings Co.</i> , 315 NLRB 162, 166 (1994)	45
<i>Crawford Door Sales Co.</i> , 226 NLRB 1144 (1976).....	39
<i>Dupont Dow Elastomers L.L.C.</i> , 332 NLRB 1071 fn. 1 (2000)	39
<i>Emsing's Supermarket, Inc.</i> , 284 NLRB 302 (1987), <i>enfd. 872 F.2d 1279</i> (7th Cir. 1989).....	27
<i>Essex Valley Visiting Nurses Assn.</i> , 352 NLRB 427, 440-441 (2008) (2 member Board) (<i>affd. 356 NLRB 146</i> (2010), <i>enforced</i> , 455 Fed.Appx. 5, 2012 WL 555567 (DC Cir. 2012).....	25
<i>Fallon-Williams, Inc.</i> , 336 NLRB 602 (2001).....	26, 39
<i>Flat Dog Productions, Inc.</i> , 347 NLRB 1180.....	29
<i>Freytag v. Commissioner</i> , 501 U.S. 868, 878.....	7
<i>Freytag v. Commissioner</i> , 501 U.S. 868, 878 (1991)	7
<i>Georgian, Inc.</i> , 281 NLRB 952 (1986).....	28
<i>Golden State Bottling Co., Inc. v. N.L.R.B.</i> , 414 U.S. 168 (1973).....	45
<i>Hacienda Hotel & Casino</i> , 279 NLRB 601.....	14
<i>Harran Transp.</i> , 330 NLRB 371, 373 (1999)	14
<i>Hospital San Rafael</i> , 308 NLRB 605 (1992).....	40, 41, 42
<i>In re Calvert</i> , 913 F.3d 697, 701 (7th Cir. 2014).....	7
<i>In Re Raynor</i> , 922 F.2d 1146 (1991)	6
<i>J.E.L. Painting & Decorating, Inc.</i> , 303 NLRB 1029 (1991).....	27
<i>Kansas Refined Helium Co.</i> , 252 NLRB 1156, 1157 (1980).....	9
<i>Lebanite Corp.</i> , 346 NLRB 748, 752, n. 17 (2006).....	45, 48
<i>Miami Coca-Cola Bottling Co.</i> , 151 NLRB 1701, 1710 (1965), <i>enforced</i> , 360 F.2d 569, 573 (5th Cir. 1966)	15
<i>Milco Importers, Inc.</i> , 177 NLRB 702 (1969)	26

<i>National Football League</i> , 309 NLRB 78 (1992).....	25, 27
<i>Nemaizer v. Baker</i> , 793 F.2d 58, 65 (2d Cir. 1986).....	6
<i>NLRB v. Noel Canning et al.</i> , 573 U.S. 513 (2014).....	5
<i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764, 795 (8 th Cir. 2013).....	7
<i>Omnitest Inspection Services</i> , 297 NLRB 752, 754 (1990).....	44
<i>Pace Industries, Inc.</i> , 320 NLRB 661, 667 (1996).....	26
<i>Pat Izzì Trucking Co.</i> , 162 NLRB 242 (1966).....	14, 21
<i>Redway Carriers</i> , 301 NLRB 1113 (1991).....	26
<i>Regional Import and Export Trucking Co.</i> , 318 NLRB at 820.....	9, 18, 21
<i>San Luis Trucking, Inc.</i> , 352 NLRB 211, 213 (2008), <i>affirmed</i> 356 NLRB 168 (2010), <i>enforced</i> 479 Fed.Appx. 743 (9 th Cir. 2012).....	25
<i>St. Barnabas Hosp.</i> , 346 NLRB at 735.....	15, 21
<i>St. Mary’s Foundry</i> , 284 NLRB 221 (1987).....	45
<i>Tropicana Products, Inc.</i> , 122 NLRB 121 (1959).....	27
<i>V.I.P. Radio, Inc.</i> , 128 N.L.R.B. 113 (1960).....	29

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

This case concerns Charging Party Fred Pflantzer's undisputed entitlement to backpay and an unconditional offer of reinstatement following his unlawful discharge from New York Party Shuttle, LLC¹ on February 12, 2012,² and Respondents' obligation to remedy that unfair labor practice. Contrary to Respondents' claims, the Administrative Law Judge properly found that (1) the Region's calculation of backpay was reasonable and not arbitrary, (2) Respondents are a single employer within the meaning of the National Labor Relations Act ("Act"), and (3) Respondent NYCGT is an alter ego and *Golden State*³ successor of NYPS. As explained below, the Board should uphold the judge's findings on these issues, reject Respondents' repeated attempts to re-litigate issues that have been previously litigated and adjudicated, and order Respondents to pay the full amount of backpay (with excess tax and interest) set forth in the judge's Supplemental Decision and offer Pflantzer reinstatement.

STATEMENT OF THE CASE

On May 2, 2013, the National Labor Relations Board issued a Decision and Order finding that NYPS violated Section 8(a)(3) and (1) of the Act. (GCX 1(a) (*New York Party Shuttle, LLC*, 259 NLRB 1046 (2013).)⁴ The Board ordered NYPS to offer Pflantzer full reinstatement to his

¹ Respondents will be abbreviated as follows: New York Party Shuttle, LLC ("NYPS"), "Washington DC Party Shuttle, LLC ("DCPS"), OnBoard Las Vegas Tours, LLC ("OBLV"), Party Shuttle Tours, LLC ("PST"), and NYC Guided Tours, LLC ("NYCGT").

² Though the judge's Supplemental Decision concluded (p. 40) that the backpay period commenced on February 12, 2011, the correct date is February 12, 2012, as properly stated elsewhere in the decision (pp. 5, 8).

³ *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973).

⁴ "ALJD" refers to the Administrative Law Judge's July 9, 2019 Supplemental Decision. Record references in this brief are to the hearing transcript ("Tr."), Joint Exhibits ("JX"), the General Counsel's exhibits ("GCX"), and Respondents' exhibits ("RX"). "Excs." and "Br." refer to Respondents' Exceptions and Brief in Support of Exceptions, respectively.

former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. *Id.* The Board also ordered that Pflantzer be made whole for any loss of earnings resulting from his discharge, less any net interim earnings, plus interest compounded daily. *Id.* The Board further ordered that Pflantzer be reimbursed an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him. *Id.* On November 19, 2013, the United States Court of Appeals for the Fifth Circuit enforced the Board's Order. (GCX 1(b).)

On February 29, 2016, the Regional Director for Region 2 issued a Compliance Specification and Notice of Hearing. (GCX 1(d).) On March 31, 2017, the Regional Director issued an Amended Compliance Specification and Notice of Hearing, which alleged that the above-named Respondents constitute a single employer within the meaning of the Act, maintained that Pflantzer is entitled to unconditional reinstatement, and set forth the amount of backpay owed to Pflantzer until a valid offer of reinstatement is made. (GCX 1(f).) On April 12, 2018, the Regional Director issued a Fourth Amendment to Compliance Specification, updating the backpay calculations to reflect additional information on Pflantzer's NYPS and interim employment. (GCX 1(jj).)

On June 20, 2017, Counsel for the General Counsel ("CGC") filed a motion seeking summary judgment on the validity of the underlying Board Order and Pflantzer's continuing entitlement to reinstatement after he was again terminated in August 2014 for the same asserted reasons as in February 2012. On November 16, the Board issued a Supplemental Decision and Order granting CGC's motion explaining that these issues were previously litigated in the unfair-labor-practice proceeding and Respondents were precluded from re-litigating those issues at the

compliance stage. (GCX 1(aa).) On May 3, 2018, CGC filed a Motion to Strike Portions of Respondents' Answer to Fourth Amendment to Compliance Specification (GCX 1(xx), and Respondents filed an opposition (GCX 1(pp)). After several postponements at Respondents' request,⁵ despite their claim to the contrary (Exc. 30, Br. 29), the compliance hearing was held in May and June 2018 before Administrative Law Judge Kenneth W. Chu. At the start of the hearing, the judge fully granted CGC's motion (but left the Answer as filed for appeal purposes) and prohibited Respondents from presenting evidence on that which the Board had already granted summary judgment: the validity of the underlying Board decision and Order; Pflantzer's entitlement to reinstatement and backpay after NYPS terminated him again on August 13, 2014; and Pflantzer's status as a statutory employee, not an independent contractor. (GCX 1(nn), 1(xx), Tr. 8-11.)

On May 31, 2018, about one month before the trial resumed and Respondents began their case-in-chief, CGC filed a Motion to Amend the Caption and Paragraph Six of the Amended Compliance Specification, alleging NYCGT as an alter ego and/or *Golden State* successor to NYPS. (GCX 1(rr).) After reviewing the response and CGC's reply (GCX 1(ss), 1(tt)), the judge issued an order granting CGC's motion, finding no lack of notice or delay and recognizing that Respondents would have a full opportunity to litigate the issues. (GCX 1(uu).)

On July 9, 2019, the ALJ issued a Supplemental Decision awarding backpay to Pflantzer in the amount of \$91,912, plus interest to the date of payment and excess tax, for the period of

⁵ The hearing was postponed from: June 27, 2017 to July 17, 2017 at the request of Respondent counsel; July 17, 2017 to July 19, 2017 due to the unavailability of any administrative law judge; July 19, 2017 to August 21, 2017 at Respondent counsel's request; August 21, 2017 to October 24, 2017 because CGC's Motion for Partial Summary Judgment, filed on June 20, 2017, was pending before the Board; October 24, 2017 to November 7, 2017 at the request of Respondent counsel; November 7, 2017 to November 15, 2017 at the request of Respondent counsel; and November 15, 2017 to January 16, 2018 due to the judge's unavailability.

February 12, 2012 to July 27, 2014 and August 14, 2014 to the present. To date, Pflantzer has not been given an unconditional offer of reinstatement, so backpay continues to accrue. *See Cassis Mgmt Corp.*, 336 NLRB 961, 961 (2001).

SUMMARY OF ARGUMENT

Respondents except to nearly all of the judge's Supplemental Decision, the Board's previous rulings on arguments it inexplicably continues to raise, and the judge's rulings during the hearing, but fails to show why they should be disturbed. For reasons already explained by the Board, judge, or General Counsel, Respondents' "procedural exceptions" lack merit. As to the "substantive exceptions," first, the judge properly found that Compliance Officer Kurtzleben's calculation of gross backpay reasonably approximated what Pflantzer would have earned at NYPS, using comparator employee Edwin Jorge's hours and bonuses and Pflantzer's estimated tips/tour while he worked at NYPS. Kurtzleben also reasonably determined Pflantzer's weekly "moonlighting" earnings from operating his own business while at NYPS. And Respondents have not met their burden of showing that her calculations are unreasonable or arbitrary, or presented an alternative method to the comparator method, let alone one that is more accurate.

Second, the credited record evidence supports the judge's finding that Respondents are a single employer, given the centralized control over labor relations, common management, interrelation of operations, and common ownership/financial control. Third, with respect to NYCGT as a continuation of NYPS, the evidence demonstrates that NYCGT is an alter ego of NYPS, as NYCGT President Fred Moskowitz was NYPS' President and NYCGT employed several of NYPS' former guides and drivers and used NYPS buses to continue to serve New York tourists, including those with NYPS tickets after NYPS ceased conducting tours. Should

the Board not find alter ego status, the evidence supports the judge's finding that NYCGT is a *Golden State* successor to NYPS because Moskowitz and Schmidt knew of NYPS' unfair labor practice and NYCGT continues to operate in basically unchanged form.

I. RESPONDENTS' PROCEDURAL EXCEPTIONS SHOULD BE REJECTED

Despite Respondents' renewed challenges to the Board's summary judgment ruling (Excs. 4, 6, 59, Br. 7-9, 11-12), the Board did not err in granting CGC's Motion for Partial Summary Judgment, nor did it find summary judgment was warranted because, as Respondents maintain, Respondents failed to timely file a response. As an initial matter, the Board granted summary judgment on Respondents' challenge to the validity of the underlying Order "because the Board has previously addressed and rejected the Respondents' contention." GCX 1(aa) p. 2. Indeed, as explained in CGC's Motion to Strike (GCX 1(xx) and cases cited), the Board has already considered and rejected the *Noel Canning* argument in its 2013 Decision and Order, two subsequent orders denying Respondents' petition to revoke subpoenas duces tecum in this case, and again, in its 2017 Supplemental Decision and Order granting partial summary judgment.

Respondents' assertion that they may contest the validity of the *Noel Canning*⁶ Board's 2013 decision at any time should be rejected, as Respondents have had a full and fair opportunity to raise this issue, which has been repeatedly addressed and rejected by the Board. The Board has repeatedly considered and rejected Respondents' arguments, and it should do so again here. In *New York Party Shuttle, LLC, d/b/a OnBoard Tours, et al.*, 365 NLRB No. 147 (2017) (Order granting Motion for Partial Summary Judgment), the Board acknowledged that the underlying Order was issued by a panel that included two invalidly appointed members but noted that it had repeatedly concluded that the Fifth Circuit's judgment enforcing the Board's underlying Order

⁶ *NLRB v. Noel Canning et al.*, 573 U.S. 513 (2014).

had become final before the Supreme Court's *Noel Canning* decision. In these circumstances, the Board regarded the matters finally resolved by the Court of Appeals as *res judicata* in this proceeding. *E.g.*, *New York Party Shuttle, LLC*, Case 02–CA–073340 at 2 n. 3 (Dec. 8, 2015) (citing *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374–378 (1940)); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)); *see also NLRB v. New York Party Shuttle, LLC*, No. 1:15-MC-00233-P1 (S.D.N.Y. Aug. 27, 2015).

The Board also found that, under Section 10(e) of the Act, it has no jurisdiction to modify an Order that has been enforced by a court of appeals because, upon the filing of the record with the court of appeals, the jurisdiction of the court is exclusive and its judgment and decree are final, subject to review only by the Supreme Court. *E.g.*, *New York Party Shuttle, LLC*, Case 02–CA–073340 at 2 fn. 3 (Dec. 8, 2015) (citing *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004), *enfd. sub nom.*, 448 F.3d 388 (D.C. Cir. 2006)). Decisions cited by Respondents in support of its argument are distinguishable and therefore inapposite. *In Re Raynor*, 922 F.2d 1146 (1991), was a direct and timely appeal of a bankruptcy proceeding, and the Fourth Circuit permitted the debtor to contest a bankruptcy court's default judgment that the debtor had timely appealed before the District Court and the Court of Appeals. Similarly, *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), involved a direct and timely appeal of a District Court finding that the Court lacked subject matter jurisdiction over the dispute.

Additionally, Respondents have not been deprived of an opportunity to raise the *Noel Canning* issue. Rather, Respondents closed off their opportunity to do so when NYPS failed to file its brief with the Fifth Circuit Court of Appeals, resulting in the Circuit's default judgment and finalization of the Board's underlying decision. The finality of the Circuit's judgment against Respondents is strictly because of Respondents' failure to timely file a brief with the Fifth

Circuit and its failure to petition the Circuit to vacate its decision. The Fifth Circuit's 2013 Order is the final, conclusive decision that NYPS engaged in an unfair labor practice. In the six years since then, after the Region investigated and learned that other related entities existed and indicated possible single employer status, it filed the Compliance Specification against all five Respondents; neither have asked the Circuit to vacate its decision on due process grounds, let alone any other reason. Instead, Respondents seek to collaterally challenge the Circuit's Order through these compliance proceedings years later, and their failure to timely petition the Circuit to vacate its Order is yet another reason to reject its argument. *In re Calvert*, 913 F.3d 697, 701 (7th Cir. 2014). Accordingly, the Board should reject Respondents' renewed attempt to contest the validity of the Board's six-year-old decision.

Even if Respondents had raised the recess appointment issue before the Fifth Circuit when the Supreme Court issued its *Noel Canning* decision, at least one Circuit has concluded that Respondents' failure to raise the issue to the Board in the underlying proceeding would have precluded it from belatedly raising it in 2013 on appeal. A challenge to the Board's appointments are not jurisdictional. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 795 (8th Cir. 2013), citing *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)). As such, it is not an "extraordinary circumstance" within the meaning of Section 160(e) of the Act, but rather, a "challenge to the legal composition of an agency" should be characterized as an "affirmative defense that can be waived if it is not timely raised." *RELCO Locomotives*, 734 F.3d at 797.

Moreover, as to the Board granting summary judgment on Pflantzer's entitlement to reinstatement and backpay after August 13, 2014 (Exc. 59, Br. 47-48), the Board found that Respondents were "attempting to re-litigate" the lawfulness of its claim that it discharged him for operating a competing business, which the 2013 Board rejected, "an issue that was decided in the

underlying unfair-labor-practice proceeding,” and therefore, “are precluded from doing so.” GCX 1(aa) p. 3. As the Board explained: “In the underlying decision, the Board found that [NYPS] unlawfully discharged Pflantzer because of his union activity” and “rejected any contention that Pflantzer was discharged for operating a competing business.” *Id.* (citations omitted).⁷ Therefore, the Board granted summary judgment on the merits, not due to its refusal to allow Respondents’ late-filed response (Br. 11), given that Respondents have incessantly raised those issues to the Board for several years. Accordingly, contrary to Respondents’ inability and refusal to accept the finality of the Board’s rulings (Exc. 59), Pflantzer is entitled to reinstatement and backpay after being discharged in 2014 for the same reason that the Board has repeatedly rejected.

In that vein, the judge correctly followed the Board’s ruling when he granted CGC’s Motion to Strike by limiting the evidence to issues on which the Board had not granted summary judgment, contrary to Respondents’ claim (Exc. 5, Br. 9-11). The Board ordered that “the hearing before an administrative law judge “shall be limited to taking evidence concerning paragraphs of the amended compliance specification as to which summary judgment has not been granted.” GCX 1(aa) at 3. Therefore, in excluding evidence on the aforementioned issues, raised in paragraphs 7, 8, part of 11, 29, 31, 41, and 42 and n.1 of Respondents’ Answer, the judge fully complied with the Board’s ruling and Board precedent. *See M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49, slip op. at 2 (2015) (matters decided in underlying ULP proceeding may not be re-litigated in the compliance stage).

⁷ The Board should simply dismiss Respondents’ Exception 9, as it again seeks to relitigate this issue. (Br. 14.)

II. THE JUDGE PROPERLY FOUND THAT THE COMPLIANCE OFFICER'S CALCULATION OF BACKPAY WAS REASONABLE AND THAT RESPONDENTS FAILED TO ESTABLISH THAT ANY REDUCTION IN THE COMPUTED BACKPAY WAS APPROPRIATE

A. Compliance Officer Kurtzleben Reasonably Calculated Gross Backpay Using Comparator Employee Edwin Jorge's Hours and Bonuses and Pflantzer's Estimated Tips

Respondents dispute the accuracy and reliability of the entire backpay calculation (Excs. 7-35), but still fail to show why the Region's formula was unreasonable and that they presented a more accurate method of calculating backpay. Respondents primarily attack (Exc. 10-15, Br. 15-18) the judge's findings that the "use of a comparator employee is the best method to address the average hours worked during seasonal changes in the tour industry," that Edwin Jorge was a valid comparator, and that Respondents failed to proffer an alternative backpay method, let alone one that was more accurate. (ALJD pp. 14-16). These claims do not pass muster, so the Board should affirm the calculations set forth in the judge's decision. (ALJD Att. 1.)

In a backpay proceeding, "the sole burden on the General Counsel is to show the gross amounts of backpay due" and any formula which approximates what the discriminatee would have earned absent the unlawful discrimination is acceptable if it is not unreasonable or arbitrary in the circumstances. *Harran Transp. Co.*, 330 NLRB 269, 372 (1999); *accord Regional Import and Export Trucking Co.*, 318 NLRB 816, 820 (1995); *Kansas Refined Helium Co.*, 252 NLRB 1156, 1157 (1980). The Board has broad discretion in selecting a formula that is reasonably designed to produce approximations of the backpay due. *Regional Import and Export Trucking Co.*, 318 NLRB at 820 (citing *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304 (2d Cir. 1977)). The Specification uses Formula Two of the of the Board's Compliance Manual, which calculates gross backpay on the basis of the earnings of another employee or group of employees, whose work, earnings, and other conditions of employment were comparable to

those of the discriminatee both before and after the unlawful action. NLRB Casehandling Manual (Part Three) Compliance Sec. 10540.3; *see Contractor Services*, 351 NLRB 33, 35 (2007) (“The comparable or representative employee approach is an accepted methodology for computing backpay.”).

First, as the judge found, Compliance Officer Kurtzleben reasonably selected a comparator specifically because Respondents’ operations are seasonal and Pflantzer’s employment at NYPS was only about 4 months. (ALJD p. 14, Tr. 137, 192.) The judge credited Kurtzleben’s uncontroverted testimony that she wanted to use the comparator employee method throughout the backpay period because it relies on average hours and did not want to switch up the method, which would have been inconsistent. (ALJD p. 14, Tr. 212-213.)⁸

Second, as the judge recognized (ALJD p. 14), Kurtzleben credibly testified that, after examining the payroll records that NYPS provided, she determined that Jorge was an appropriate comparator because his average hours were similar to Pflantzer and he was the only guide for whom there was data spanning the entire period covered by the payroll records, October 2011-October 20, 2014. (ALJD p. 14-16, Tr. 138-39, 205-08, GCX 2(a)-(d).) Choosing an employee with data over a “prolonged period,” as Section 10540.3 of the Casehandling Manual directs,

⁸ Respondents lament (Exc. 1, Br. 5-6) the General Counsel’s (and judge’s) refusal to allow Respondents to recall Kurtzleben in their case-in-chief under Section 102.118 of the Board’s Rules and Regulations. However, as the Associate General Counsel Beth Tursell explained (GCX 1(ww)), it was not the General Counsel’s responsibility to assist Respondents in advancing alternative theories of backpay to meet its burden of showing that Kurtzleben’s calculations were unreasonable. In any event, Respondents cross-examined and re-cross-examined Kurtzleben about her backpay calculations and the documents she reviewed and did not review and thus, were not denied due process. Respondents’ focus on Pflantzer’s bank statements (Excs. 2 and 31) is also misplaced because Kurtzleben did not rely on them for her calculations, Pflantzer did not deposit cash tips in his account, and CGC had no obligation to produce Kurtzleben for testimony on irrelevant matters.

was important because it enabled Kurtzleben to reduce the amount of “guessing” on the hours that any given tour guide would have worked for the rest of the period (Tr. 138-40).

In that vein, the judge also properly found that, for wages during the period February 12, 2012 through October 20, 2014, Kurtzleben reasonably based Pflantzer’s gross backpay on Jorge’s weekly hours multiplied by Pflantzer’s hourly rate at the time of his termination. (ALJD p. 15.) For the period after October 20, 2014 and continuing to date,⁹ because Respondents provided no further payroll information, Kurtzleben used Jorge’s hours for the last complete year shown in the payroll records (October 2013 to October 2014) and applied it to each subsequent year of the backpay period. (Tr. 142-43.) In this regard, any ambiguities, doubts, or uncertainties in the evidence with regard to alleged affirmative defenses are resolved in favor of the discriminatee and against the Respondents. *Performance Friction Corp.*, 335 NLRB 1117, 1131 (2001). Given those circumstances, Kurtzleben reasonably used Jorge’s hours from October 2013-2014 because she wanted a whole year of data to be able to reflect seasonal shifts and hours. (ALJD pp. 15-16, Tr. 142-43, GCX 2(c)-(d).)

Though Respondents continue to cite Jorge’s Spanish-speaking skills and seniority as bases on which to disqualify him as the comparator employee (Exc. 14, Br. 18), the judge properly disregarded such claims. Indeed, Respondents presented no evidence to corroborate those claims. Schmidt testified that he “would guess” about 5-10% of tours were in Spanish and he had “no idea” what percentage of tours were not in English. (Tr. 1917-18). Respondents offered no evidence as to the number or types of tours that Jorge actually worked at NYPS, or how many Spanish-speaking tours Jorge actually led, which would have impacted

⁹ The Board has found that the backpay period in this case continues to run until a valid offer of reinstatement is made. *New York Party Shuttle, LLC d/b/a Onboard Tours, Washington D.C. Party Shuttle, LLC*, 365 NLRB No. 147, slip. op. at 4 (2017).

the number of tours he was offered over the other tour guides. Further, Jorge's higher seniority does not disqualify him as a valid comparator employee. The record indicates that Pflantzer would have been one of the most senior employees at NYPS by October 2014 and eventually, at NYCGT, but for his unlawful discharge. As Moskowitz testified and NYCGT payroll records confirm, Jorge stopped working at NYPS in late 2014 and did not continue on at NYCGT. (Tr. 1036-37, GCX 148-49.)

Third, there is no basis for disturbing the judge's finding that, after choosing Jorge as the comparator employee, Kurtzleben reasonably attributed Jorge's bonuses to Pflantzer. It is well established that earnings for gross backpay purposes include not just wages, but all other forms of compensation, including bonuses and tips. *See, e.g., Atlantic Limousine*, 328 NLRB 257, 258 (1999) (tips); *Home Restaurant Drive-In*, 127 NLRB 635 fn. 2 (1960) (tips); *Hickman Garment Co.*, 196 NLRB 428, 429 fn. 2 (1962) (Christmas bonus); *Aerosonic Instrument Corp.*, 128 NLRB 412, 414 (1960) (incentive bonus). Kurtzleben determined from the payroll records that Jorge received intermittent bonuses and then reasonably attributed Jorge's bonuses to Pflantzer when Jorge earned them, which accounts for the seasonality of the tour business. (Tr. 138-39.) Contrary to its assertion (Exc. 14, Br. 18), as the judge noted (ALJD p. 16), Respondents offered no credible evidence that Jorge's bonuses were based on his seniority, language skills, or expertise, and even now, cites no credited evidence to substantiate its claim. Though Respondents assert that Jorge was a better tour guide and received bonuses when he was commended in TripAdvisor reviews, neither CEO and Counsel C. Thomas Schmidt nor former NYPS President Moskowitz testified as to NYPS' policy on awarding bonuses or the basis for such bonuses, provided no documentary evidence of any TripAdvisor reviews, and produced no evidence showing that Pflantzer would not have received bonuses had he not been discharged.

In using the comparator employee method, without any basis for excluding bonuses from gross backpay calculations, it would have been arbitrary not to include them.

Fourth, with respect to tips, the judge properly found that Kurtzleben reasonably relied on Pflantzer's estimates of tips at NYPS and properly included them in the backpay calculation. (ALJD pp. 16-17, GCX 1(jj) Exh. B.) As Kurtzleben credibly testified, and the judge highlighted, she conducted investigatory interviews with Pflantzer about his income and estimated tips from tours because NYPS payroll documents did not reflect tour guide tips. (ALJD p. 9, Tr. 131-39, GCX 1(jj) Exh. B, 2(a)-(d).) Pflantzer also admitted to her that he did not deposit cash tips into his bank account or report tips on his tax returns. (Tr. 138-39, 144, 296-97, 1283, 1382, 1688, GCX 2(a)-(d).) As the judge highlighted and Kurtzleben explained, it is customary for the compliance officer to have oral conversations with the discriminatee to assist in calculating backpay, and those conversations with Pflantzer provided essential information on tips. (Tr. 296-97.) Therefore, Kurtzleben reasonably and necessarily relied on Pflantzer for information about his approximate tips per tour and the estimated number of hours per tour at NYPS to calculate his weekly tips from tours, using comparator Jorge's hours.

Respondents' exception (Exc. 23, Br. 21-22) to the judge's approval of Kurtzleben's inclusion of \$35 in tips per tour ignores that NYPS' own records could not provide tip information, that tour guides typically earned tips during tours, and that compliance officers customarily interview discriminatees about tips. As the judge discussed, based on Kurtzleben's conversations with Pflantzer, Kurtzleben learned that he earned between \$20-50 in tips per tour at NYPS and that his tours generally lasted between 5 and 6 hours, so the judge correctly found that she reasonably used the midpoint numbers of \$35 and 5.5 hours. (ALJD pp. 9-10, 17; Tr. 135-36.) Indeed, Pflantzer testified consistently about these figures at the hearing, stating that he

conducted about 3-4 tours per week, that he earned \$20/hour and about \$35 in tips per tour, and that his tours lasted about 5.5 or 6 hours depending on traffic, weather, and other factors. (ALJD p. 5, Tr. 1220-21.) Although not cited by the judge, Ron White provided the only other uncontroverted testimony about the length of NYPS tours, but his testimony was specific to the NY See It All Tour: he said it was 5.5 hours but “would be comfortable” if guides reported six hours. (Tr. 937-39.) Given that Pflantzer’s approximation of the length of tours applied to all of his tours generally, not one type of tour, and that White confirmed that the NY See It All Tour took 5.5 hours, Kurtzleben’s use of the midpoint number of 5.5 hours per tour was not unreasonable. Thus, despite Respondents’ assertion to the contrary (Exc. 24, Br. 23), the judge’s finding that she appropriately used the midpoint numbers of \$35 for tips and 5.5 hours per tour should be affirmed. (ALJD pp. 9-10.)

Though Respondents argue otherwise (Exc. 23, 28, Br. 22, 28-29), Pflantzer’s failure to report tips on his tax returns “is not fatal to his claim” for backpay. *Harran Transp.*, 330 NLRB 371, 373 (1999); *accord Atlantic Limousine*, 328 NLRB at 258 (noting that “an admission of underreporting tips to the [IRS] does not preclude such tips from being considered and included in a backpay award” and recommending that copy of supplemental decision be furnished to IRS). Following settled Board law, the judge therefore properly concluded that “‘poor recordkeeping, uncertainty as to memory, and perhaps exaggeration’ do not automatically disqualify him from receiving backpay.” (ALJD p. 13) (citing *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966)). Indeed, to compute a discriminatee’s backpay solely on the basis of income reported to the IRS “would frustrate the purpose of the Act by allowing the Respondent as wrongdoer to benefit from [the discriminatee’s] failure to accurately report [tip] income to the IRS.” *Hacienda Hotel & Casino*, 279 NLRB 601, 601 n.4 (1986). Respondents did not offer any evidence to rebut

Pflantzer's tip estimates at NYPS (or his interim employers), so as to call into question Kurtzleben's reliance on that information. *See id.* at 604 (even where respondent called other waitresses to testify about their tips, judge rejected arguments that discriminatee's testimony on tips was "wholly uncorroborated," inconsistent with amount reported on tax returns, and supported only by discriminatee's own discredited testimony). As the judge highlighted, "it is pure speculation as to whether Pflantzer would have only received \$25 per tour as represented by Respondents since that amount is equally uncorroborated." (ALJD p. 17.) Thus, resolving the ambiguity in favor of the discriminatee, the judge properly found that Kurtzleben appropriately took the midpoint of Pflantzer's \$25-50 range to average out the high and low amounts of tips and not allow Pflantzer to fully benefit from not reporting his tips to the IRS. (ALJD p. 17.)

C. The Compliance Officer Reasonably Determined Pflantzer's Moonlighting Earnings and Did Not Treat Those Earnings as Interim Earnings

Though Respondents claim otherwise (Exc. 26-27, Br. 24-28), the judge properly concluded that Kurtzleben appropriately determined the amount of Pflantzer's moonlighting income as \$335 and deducted it from his interim earnings because it is income that he would have made had he not been unlawfully discharged by NYPS. (ALJD p. 18; Tr. 150.) Supplemental earnings from "moonlighting" jobs constitute an exception to the general rule regarding interim deductions and are deducted from interim earnings if the employee had the moonlighting job prior to his unlawful discharge. *Birch Run Welding & Fabricating*, 286 NLRB 1316, 1318 (1987); *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1710 (1965), *enforced*, 360 F.2d 569, 573 (5th Cir. 1966). The Board attributes to interim earnings only those net profits above what the discriminatee earned while operating his business at the time of his employment by the Respondent. *See St. Barnabas Hosp.*, 346 NLRB at 735.

As the judge found in the underlying unfair-labor-practice decision, Pflantzer worked weekdays only and was unavailable to work on weekends when he operated NY See Tours. (GCX 1(a) p. 1048, Tr. 1408, 1512-13.) Here, Pflantzer repeatedly testified on cross and re-cross examination that, beginning shortly after he was hired at NYPS in 2011, he conducted bus tours for NY See Tours on Saturdays. (Tr. 1253, 1337, 1384-90, 1500-01, 15-12-13.) Thus, to determine his weekly moonlighting, Kurtzleben reasonably calculated his total profit per tour from that one tour per week. It was reasonable to consider Pflantzer's reported business income and estimated number of tours in 2012, 2013, and 2014 only, because those years were closest to the time that he worked at NYPS and he stopped operating bus tours after 2014. (Tr. 215-16.) Based on her conversations with Pflantzer, it was not unreasonable for Kurtzleben to take the midpoint of his estimated tips per tour (\$45) and subtract what he tipped the driver (\$40) to arrive at \$5 in tips per tour. (Tr. 150-52, 268-69.) Consistent with his previous conversations with Kurtzleben, Pflantzer credibly testified that he earned about \$5 in tips per tour and tipped the driver \$40 generally and \$50 at Christmas time. (Tr. 1270-72.) Accordingly, the judge correctly found that the \$335 weekly moonlighting figure was reasonable.

Respondents' attack (Exc. 27, Br. 27) on the inclusion of moonlighting in gross backpay continues rests on the baseless assertion that Pflantzer never earned \$17,000 per year from his business after his discharge, an argument they raised at the hearing. (Tr. 1657-59.) However, their claim misses the mark for several reasons. First, the weekly moonlighting figure approximates what he *would have* earned from doing one Saturday tour each week and continuing to work at NYPS, had he not been discharged; however, because Pflantzer was discharged after about 4 months and the status quo (when he did those Saturday tours) changed, CGC need not show that Pflantzer ever actually earned \$17,000 from NY See Tours in one year. Nevertheless,

in 2012 and 2013, when he fully devoted his time to NY See Tours, Pflantzer earned \$27,503 and \$14,538 respectively, according to his tax returns (not including tips). (ALJD p. 10, GCX 3(a)-(b).) And after mid-2014, Pflantzer further mitigated his damages through interim employment with multiple employers (ALJD pp. 6-8), so his own business income would understandably be lower.

D. The Compliance Officer Reasonably Calculated Excess Tax, In Accordance With the Board's Order and Extant Board Law

The Board's Order, as enforced by the Fifth Circuit, requires Respondents to reimburse Pflantzer for the difference in taxes owed for receiving a lump-sum backpay award and taxes that he would have paid if he had not been discriminatorily discharged. (GCX 1(a).) Kurtzleben provided detailed, uncontroverted testimony about how she calculated the excess tax owed on backpay—by using federal income tax rates and brackets published on the IRS website and an average of New York state income tax rates applicable to a single filer, for each year of the backpay period. (Tr. 169-70.) Calculating the amount of excess tax liability on backpay in that manner was reasonable, and more importantly, was the only method offered for ensuring compliance with the Board's Order.

Respondents have indefensibly maintained (Exc. 35, Br, 31-32) that no excess tax should be awarded because Pflantzer did not report tips on his tax returns and was paid as a 1099 contractor. Indeed, Respondents have yet to cite any authority for their assertion that Pflantzer's failure to report tips or Respondent's classification of Pflantzer as an independent contractor¹⁰ relieve Respondents of their obligation to comply with the underlying final Order's make-whole

¹⁰ The Board has now twice rejected Respondent's contention that Pflantzer was an independent contractor and not a statutory employee—first in the underlying unfair labor practice proceeding (359 NLRB at 1049) and again, in the May 8, 2018 Order denying Respondent's motion to dismiss (GCX 1(OO)).

remedy. Moreover, Respondent has not offered any evidence nor even an explanation for its position so as to undermine the reasonableness of Kurtzleben's excess tax calculations. Accordingly, the Board should reject Respondents' claims and adhere to its own precedent.

E. Respondents Have Not Established Any Affirmative Defenses That Would Mitigate Their Liability

Respondents produced evidence that Pflantzer failed to make reasonable efforts to search for work or unjustifiably refused new desirable employment, and have not shown any additional interim earnings that should be deducted from his backpay. *Regional Import and Export Trucking Co.*, 318 NLRB at 820.

First, Respondents erroneously maintain that Pflantzer is not entitled to backpay in 2012 and 2013 because he "did not seek or obtain new employment" until he began working at GONY on July 4, 2014. (Exc. 33, Br. 31; *see* Tr. 1858-60). Board law makes clear that Respondents do, in fact, bear the burden of proving that Pflantzer failed to mitigate his damages, which they have not done here, as the judge found (ALJD p. 21). *Cassis Mgmt. Corp.*, 336 NLRB at 965 (stating that respondent "must establish *affirmatively* that the discriminatee failed to make a reasonably diligent search for equivalent interim employment"). The Board has long held that self-employment is an adequate way for a discriminatee to attempt to mitigate his loss of wages, such that a claimant in that category need not seek other employment. *Id.* at 968-69. Furthermore, because Pflantzer had embarked on a legitimate course of interim employment in operating NY See Tours, he had "no duty to search for more lucrative interim employment, nor to engage in the most lucrative interim employment," even during periods where his interim employment did not reach the level of earnings he previously enjoyed with NYPS. *Atlantic Limousine, Inc.*, 328 NLRB at 262.

Second, to the extent Respondents challenge Pflantzer's search for work in 2015 after GONY discharged him, which resulted in an NLRB settlement, they have offered no legal authority for that position. In any event, the judge discussed in detail Pflantzer's search for work and his employment with several companies and consequently, reasonably found that Pflantzer actively searched for work to mitigate his damages and increase his interim earnings. (ALJD pp. 20-22, Tr. 1244, 1278-1309, 1343-44, 1351-65, 1389, 1445.) As the judge noted (ALJD p. 6), after his discharge from GONY in 2014, he contacted and interviewed several other tour companies. Pflantzer demonstrated good recall in testifying about interim employment for which he applied but was not offered the position. For example, Pflantzer credibly testified that immediately after he was discharged from NYPS, he contacted Free Tours by Foot and Walks of New York, but did not receive job offers. (Tr. 1285-86.) Around 2014-2015, Pflantzer interviewed with Beyond Broadway and Inside Out, but was not hired. (Tr. 1285-86, 1355.) In 2015, even though he did familiarization or "fam" tours for Real New York Tours and Circle Lines, and also interviewed with Circle Lines, he was still not offered employment. Tr. 1301-03. That year, he also searched Craig's List and found an open house for Big Bus Tours, but after two interviews, did not get the position. (Tr. 1285-87, 1298-1300.) Thus, the credible evidence shows that Pflantzer began his search for work soon after NYPS discharged him, but was unable to find interim employment (apart from NY See Tours) until 2014.¹¹

To the extent Respondents argue that Pflantzer's decision to leave USA Guided Tours constitutes a willful loss of earnings, their claim lacks merit. Pflantzer openly testified that he

¹¹ Counsel for Respondents conceded at the hearing that Pflantzer made reasonable efforts to find other work, at least as of 2014, so to suggest or assert otherwise now would be absurd. Schmidt admitted that "anything that is owed . . . from the midpoint of 2014 to present should be awarded because I can't even disagree that Mr. Pflantzer . . . didn't mitigate his damages (sic)" and that "Mr. Pflantzer did a good job of mitigating once he got the GONY job [in 2014] and when he lost it, he went and got another job and another job." (Tr. 1859-60).

left the company after 3-4 months because they bounced tour guides' payroll checks, which he deemed "unconscionable" (Tr. 1249-50, 1492), which the judge correctly found it to be a "reasonable concern." (ALJD p. 21.) Indeed, as a discriminatee whose livelihood depends on conducting tours for pay, his decision was entirely reasonable. *See Cable Car Advertisers*, 336 NLRB 927, 931 (2011). Furthermore, following his departure, he actively sought and found new employment at HQ and Uncle Sam's, and continued operating NY See Tours. (Tr. 157-60, 1230, 1343-44.)

Third, Respondents have not shown that additional interim earnings should be deducted. Where "the amount of interim earnings is contested, or there is an allegation that other earnings were concealed, the Respondent bears the burden of proof." *Birch Run Welding & Fabricating*, 286 NLRB at 1318. As an initial matter, Kurtzleben's method of calculating interim earnings was reasonable and consistent—she found his interim earnings and subtracted his moonlighting to determine his total interim earnings, and total interim earnings were only deducted from gross backpay if his interim earnings exceeded his moonlighting. To the extent that Respondents contest Kurtzleben's deduction of Pflantzer's moonlighting earnings from interim earnings (Tr. 150-52), they bear the burden of showing "why the net earnings would not be considered supplemental income which is income from a moonlighting job held by the discriminatee prior to the unlawful discharge." *Basin Frozen Foods, Inc.*, 320 NLRB 1072, 1075 (1996); *accord Birch Run Welding & Fabricating*, 286 NLRB at 1318. Respondents have not done so, nor have they offered another method to account for Pflantzer's moonlighting, and it would be wholly unreasonable and arbitrary to omit it altogether.

Additionally, while a discriminatee's expenses in starting or expanding his business must be considered, as Kurtzleben did here in focusing on Pflantzer's net business profit or loss each

year, it is Respondents' burden to establish that the discriminatee's expenses listed on his Schedule C's were not incurred as a result of his business. *Cliffstar Transp. Co.*, 311 NLRB 152, 170 (1993); *see St. Barnabas Hosp.*, 346 NLRB at 735. Respondents made no such showing here. (Exc. 58.) At most, Respondents cast doubt on whether Pflantzer's listed expenses for advertising and utilities were inflated (Exc. 28, 32 and Tr. 1594-96, 1861), but have not established that the figures he reported were intentionally false or inaccurate. And it is settled that any uncertainties or ambiguities are rightfully to be resolved in favor of the wronged party, rather than the wrongdoer. *E.g., Performance Friction Corp.*, 335 NLRB at 1131; *Regional Import and Export Trucking Co.*, 318 NLRB at 820. Respondent counsels' "doubts" (Tr. 1861) about Pflantzer's claimed home office expenses, advertising, or utility costs are insufficient to override that standard.

Finally, despite Respondents' criticism of Kurtzleben's use of Pflantzer's tax returns and Schedule C's (Exc. 32, Br. 30-31, Tr. 1861), she reasonably relied on his tax returns, coupled with her investigatory interviews with Pflantzer to clarify any confusion or questions she had about his Schedule C's. (ALJD pp. 18-19, Tr. 145-47, 160-66.) Though certain wages were mistakenly reported as business income on Schedule C's attached to some tax returns, Kurtzleben discussed her concerns with Pflantzer to determine which Schedule C accurately reported his own business earnings and which reflected income from other employers, and properly factored all of his interim earnings into her calculations. She did not modify the Schedule C's, but only sought clarification on any errors in order to prepare the most accurate calculations. Moreover, as the judge noted (ALJD p. 19), the Board has a longstanding recognition of the value of using income tax returns in determining interim income, finding that "poor record keeping, uncertainty as to memory, and perhaps exaggeration" do not automatically

disqualify an employee from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966). Indeed, they proved to be invaluable here when CGC first learned during Pflantzer's testimony that he worked at Maxim and HQ in 2015 (Tr. 1226-29, 1453) and he testified on examination by Respondent counsel that those earnings (\$980 at Maxim and \$2,599 at HQ) were included within his gross business income of \$17,128. (Tr. 1456-57, 1678, GCX 3(d).) As such, they were already included as "gross receipts or sales" from NY See Tours, and the net profit listed on his tax return (\$8,341) on which Kurtzleben relied was unaffected by that revelation. (Tr. 156-60.) Because his business expenses did not exceed his business income in 2015, his Maxim and HQ earnings were fully accounted for in the Specification. Thus, Kurtzleben's reliance on those documents enabled her to prepare a "reasonable approximation" of the backpay due. *Atlantic Limousine*, 328 NLRB at 258.

F. To the Extent Respondents Proffered an Alternate Method of Calculating Backpay, Their Formula Unreasonably Excludes Pflantzer's Tips and Moonlighting Earnings from NY See Tours

Respondents, through the non-expert testimony and calculations of C. Thomas Schmidt, presented an alternative backpay formula that disregards the credible evidence and fails to explain the basis for its calculations. First, Schmidt admitted that he never did backpay calculations before and "used" Kurtzleben's method except that instead of giving Pflantzer 100% of Edwin Jorge's hours, he gave him 71.28% of his hours. (Tr. 1851, RX 10.) Thus, notwithstanding Respondent's claim (Exc. 16, Br. 18-19) that the judge incorrectly noted that Respondents never actually proffered another method, they "used" the same employee but yet objected to Kurtzleben's choice of Edwin Jorge. (ALJD p. 15 n.16.) More troubling, Schmidt did not explain why, if he were going to abandon Kurtzleben's figures altogether, he chose Jorge in the first place as opposed to another employee who might have been less senior than Jorge and

whom he could have selected himself. Furthermore, taking only 71.28% of Jorge's hours assumes that Pflantzer would not have gained more seniority over the backpay period and that Jorge would have continued to work at NYPS and NYCGT, which he admittedly did not. (GCX 148-149.) It also assumes that Jorge's hours would have continued to increase over time, such that Pflantzer would still only have received 71.28% of those hours, and there is no evidence to support that assumption.

Second, Schmidt discussed two calculations, one with tips and one without tips, but neither reflects the realities of Pflantzer's NYPS employment or his interim earnings and both are unreasonable and arbitrary. (RX 12, RX 14.) As for his calculation without tips (RX 12), Schmidt's only explanation for not including tips was that Pflantzer made "more tips" at other employers than at NYPS, which has no bearing on his gross backpay at NYPS, and that there was "no documentation" of the tips. (Tr. 1835-37.) Indeed, it is not uncommon for service industry employees like tour guides not to maintain detailed logs of their tips and Pflantzer admitted he did not keep logs of them or report his tips, but he did estimate what he earned per tour to Kurtzleben, who factored them into her calculations. (GCX 1(jj) Exh. B.) And it is well accepted that the tour guide business is a tipping industry, a fact which has not been disputed throughout the hearing. Therefore, to completely eliminate and ignore tips for lack of documentation despite clear evidence showing they were reported to Kurtzleben, and a fabrication that counting tips in gross backpay rests on the amount of his tips at interim employers is unreasonable and arbitrary.

Third, Schmidt testified that he added \$335 in moonlighting back into interim earnings and counted it as interim earnings because his Schedule C for 2011 did not show business income for NY See Tours that year and Pflantzer working for NY See Tours while at NYPS

“never happened.” (Tr. 1835-37, 1845-46.) However, whether it showed business income on his 2011 tax return does not negate the fact that he did Saturday tours for his business while at NYPS (which served as NYPS alleged reason for discharging Pflantzer in the first place, resulting in an unfair labor practice and the need for a make-whole remedy in this compliance proceeding). Interestingly, Respondents have raised countless objections to using Pflantzer’s 2012-2017 tax returns to calculate backpay at all due to discrepancies and their disbelief as to their accuracy, yet want to rely on his 2011 tax return to substantiate their entire alternate backpay formula.

Finally, Respondents’ alternate backpay calculations do not include interest or excess tax as required by the court-enforced Board Order. Respondents fail to acknowledge that interest continues to accrue until payment of backpay is made pursuant to the Board Order or that Pflantzer is entitled to receive excess tax on the lump-sum backpay award. Thus, even if Respondents’ gross backpay calculation were determined to be more reasonable than the Region’s formula, which it is not, it would be insufficient to make Pflantzer whole.

In sum, the Board should affirm the judge’s conclusions (ALJD p. 40) that the Region’s formula for calculating gross backpay (using comparator employee Edwin Jorge and relying on Pflantzer’s tax returns and investigatory interviews), interest, and excess tax was reasonable.

III. THE BOARD SHOULD ADOPT THE JUDGE’S ADVERSE INFERENCES AS RESPONDENTS FAILED TO PROVIDE SUBPOENAED DOCUMENTS

Respondents claim (Excs. 51-53) that the judge erred in finding a lack of arms-length relationship between Respondents, but the judge properly found an adverse inference of single employer status due to Respondents’ failure to provide documents pursuant to subpoenas. (GCX S-11, S-12.)

As the Board has indicated, “A subpoena is not an invitation to comply at a mutually convenient time It is an exercise of the Board’s power under Section 11 of the Act. Respondent was compelled to produce the documents when directed to do so.” *McAllister Towing & Transportation Co.*, 341 NLRB 394, 417 (2004). “[T]o force the Government to rely on the documents that the Respondents saw fit to produce during the investigation, while being denied the relevant documents lawfully subpoenaed for trial, places an unwarranted burden on the Government...” *San Luis Trucking, Inc.*, 352 NLRB 211, 213 (2008), *affirmed by* 356 NLRB 168 (2010), *enforced*, 479 Fed.Appx. 743 (9th Cir. 2012). Thus, it is settled that in circumstances where relevant documents were subpoenaed, the documents would have assisted in resolving the factual issue in question, and the respondents would likely have such documents, a judge may make an adverse inference that the missing document was unfavorable to the party that failed to produce it. *National Football League*, 309 NLRB 78, 99 (1992); *San Luis Trucking*, 352 NLRB at 211. *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 440-441 (2008), *affirmed by* 356 NLRB 146 (2010), *enforced*, 455 Fed. Appx. 5, 2012 WL 555567 (DC Cir. 2012) (adverse inferences may be based on evidence in underlying and current proceedings and inherent probabilities that certain documents would exist and be maintained by respondent).

Here, Respondents failed to provide highly relevant documents that they would probably maintain, including leases, sales agreements, loan agreements, security agreements, financial statements, and tax returns. (GCX S-1, S-3, S-4, S-5, S-12.) The subpoenas were served on Respondents in September 2017, nearly eight months before the hearing opened, and no petitions to revoke were filed. About two months before the hearing, CGC submitted proposed stipulations listing every document that it believed was and was not provided, and invited Respondent to advise CGC of corrections. Respondents did not do so, and Schmidt admitted that

he did not review CGC's letters or verify the accuracy of CGC's summary. Given these circumstances, the judge properly made adverse inferences as to the production of documents on the single employer, alter ego, and successorship status of Respondents.

IV. RESPONDENTS ARE ENGAGED IN COMMERCE WITHIN THE MEANING OF THE ACT

Though Respondents dispute jurisdiction (Exc. 57, Br. 46-47), the record establishes that they are engaged in commerce and the judge properly concluded as much. (ALJD p. 22 n.20.) The Board and Court found in the underlying proceeding that NYPS was engaged in commerce. *New York Party Shuttle, LLC*, 359 NLRB 1046, 1051 (2013). Despite Respondents' contention that NYPS is no longer operating, mere discontinuance in business does not necessarily render unfair labor practices moot. *Fallon-Williams, Inc.*, 336 NLRB 602, 612 (2001).

For jurisdictional purposes, the revenues of two operations that are single employers are combined. *Pace Industries, Inc.*, 320 NLRB 661, 667 (1996) (where one entity of single-employer is subject to the Board's jurisdiction, all entities part of that single employer are subject to the Board's jurisdiction); *accord Milco Importers, Inc.*, 177 NLRB 702 (1969). DCPS, OBLV, and NYCGT are entities that conduct sightseeing tours. NYPS had been an entity that conducted sightseeing tours. The judge noted that PST owns the overwhelming majority of NYPS and DCPS and is the sole owner of OBLV and NYCGT, and that each Respondent has transferred at least \$50,000 annually to each of the other Respondents, which are scattered across four states.¹² (ALJD p. 22 n.20, JX 3.) Moreover, each Respondent clearly transfers funds directly to, and receives funds directly from, other states, and those funds exceeded \$5,000 per year by tenfold. Respondents' 2016 gross and combined revenues were over \$9,500,000 and

¹² DCPS operates in the District of Columbia, where the Board has plenary jurisdiction over employers. *Catholic University of America*, 201 NLRB 929 (1973).

2017 revenues were expected to be around \$10,000,000. (ALJD p. 22 n.20, GCX 51 PST 001238.)¹³ As discussed below, because Respondents constitute a single employer, their combined revenues may be used to establish whether they meet the Board's retail jurisdictional standard and the judge therefore properly concluded that Respondents are engaged in commerce within the meaning of the Act.¹⁴ *Carolina Supplies & Cement Co.*, 122 NLRB 88, 88 (1959).

V. NYPS, DCPS, PST, OBLV, AND NYCGT ARE A SINGLE EMPLOYER

A. Applicable Legal Principles

When two or more nominally separate entities are found to be a single employer for purposes of the Act, they are jointly and severally liable for remedying unfair labor practices committed by any of them. *Carnival Carting, Inc.*, 355 NLRB 297, 297 (2010) (single-employer within meaning of the Act jointly and severally liable for back pay owed in connection to unlawful discharge of employee), *enforced*, 455 Fed. Appx. 20 (2d Cir. 2012). In finding single employer status, the Board and Courts considers four factors: (1) common ownership or financial control; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations. *Broadcast Employees NABET Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965).

¹³ Respondents failed to produce subpoenaed financial statements and tax returns; given Respondents' failure to produce these documents, the judge properly concluded that these documents, if produced, would show that each Respondent received \$500,000 in gross revenues per year. *National Football League*, 309 NLRB at 99. Further, the record shows that the Board has statutory jurisdiction over each Respondent. *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1959); *J.E.L. Painting & Decorating, Inc.*, 303 NLRB 1029 (1991).

¹⁴ Even if two operations are not single employers, their revenues are combined when they serve the same customers and are conducted in such a manner as to supplement each other and to convey to the public the impression that they are both integral parts of a single enterprise. *Bloch Enterprises, Inc.*, 172 NLRB 1678, 1670 (1968). As discussed below, DCPS, OBLV, and NYCGT market themselves to the public as OnBoard Tours through the www.onboardtours.com website.

However, no single factor is controlling and not all of the factors need to be present.” *Id.* Rather, the ultimate determination takes into account all the circumstances of the case and turns on “the absence of the arm's-length relationship found among unintegrated entities.” *Id.* A single-employer analysis is appropriate where two or more ongoing businesses are coordinated by a common master. *Bolivar-Tees, Inc.*, 349 NLRB 720, 722, at n. 4 (2007). Ultimately, the fundamental inquiry is whether there exists overall control of critical matters at the policy level.” *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987), *enforced*, 872 F.2d 1279 (7th Cir. 1989); *accord Georjian, Inc.*, 281 NLRB 952, 954 (1986); *Sakrete of Northern California*, 332 F.2d 902, 907 (9th Cir. 1964), *enforcing* 140 NLRB 765 (1963).

B. Respondents Have Common Ownership or Financial Control

Despite Respondents’ attempts to disguise their single employer status (Exc. 41-43, 50-56, Br. 37-41, 44-46), the undisputed evidence supports the judge’s conclusion that all five Respondents share common ownership and financial control. Indeed, Respondents’ entire argument against a finding of common ownership consists of one sentence alluding to a nonexistent “mountain of evidence” that any two entities had common ownership. (Br. 38.)

First, as a holding company, PST owns 100% of OBLV and NYCGT, 98.87% of DCPS, and 92.46% of NYPS, and 70.79% of PST is owned by Infinity Trade Capital, LLC (“ITC”).¹⁵ (ALJD p. 23, 35, Tr. 351-52, GCX 44 PST 001155, GCX 48, 51.) And as the judge stated, Schmidt effectively owns 69.44% of ITC while the remaining 30.56% is owned by Charles Fridge. (Tr. 413; GCX 44 PST 001155.) That OBLV and NYCGT are wholly-owned

¹⁵ Around 2006, the NYPS owners decided to form PST as a holding company and to convert ownership of NYPS and DCPS into PST. (Tr. 1767, 414.) Mark D’Andrea, who owned a small amount of NYPS and DCPS, declined to convert his shares to PST shares. As a result, he retained a very small ownership share of NYPS (about 8%) and DCPS (just over 1%). (Tr. 1768, 352.) The remaining ownership of PST as of 2013 was split among about 41 investors, none of whom has more than 5% ownership. (ALJD p. 23.)

subsidiaries of PST and that PST is the majority owner of NYPS and DCPS conclusively establishes the factor of common ownership. (Tr. 351-52, GCX 44.) *See Masland Indus., Inc.*, 311 NLRB 184, 186 (1993) (finding that “the relationship of privately held corporate parent to wholly owned corporate subsidiary eliminates th[e] issue [of common ownership] from contention”); *accord Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006); *Spurlino Materials*, 357 NLRB 1510, 1515 (2011) (finding common ownership where owner of one entity owned only 50% of second entity), *enforced*, 805 F.3d 1131 (D.C. Cir. 2015); *V.I.P. Radio, Inc.*, 128 NLRB 113 (1960) (common ownership when 90% of the stock of one alleged single employer was held by the other alleged single employer).

Moreover, as the judge recognized (ALJD p. 23), Schmidt was the designated CEO of PST since its inception in 2006 and PST’s December 2006 Certificate of Formation show that its Managing Members were Schmidt, Fender, and Ripp. (Tr. 100-01, 338-39, GCX 45 PST 000572.) PST created the OnBoard Tours brand, under which all of the Respondents advertise and conduct their tours; PST’s 2012 prospectus states that it does business as OnBoard Tours, although it does not even operate tours. (ALJD p. 23, Tr. 364, GCX 49(a).) As for NYPS, besides Schmidt, the initial investors were Mark D’Andrea, Stephen Ripp, and Gary Fender. (Tr. 1767; GCX 45 PST 000572.) According to DCPS’ May 2006 Articles of Incorporation, Schmidt was its sole organizer. (GCX 22.) And, though not cited by the judge, when additional capital is sought for Respondents to take advantage of business opportunities or pay Respondents’ debt, PST, rather than NYPS, DCPS, OBLV or NYCGT, raises money from its investors through its prospectuses. (Tr. 381, GCX 49(a), GCX 50 PST 001221, GCX 51.)

Furthermore, overwhelming evidence shows that Schmidt and PST exercised financial control over NYPS, DCPS, OBLV and NYCGT. As the judge discussed at length (ALJD pp. 31-

32, 35), all of the Respondents used Galago Investments LLC—a company wholly owned by Schmidt—to provide administrative, bookkeeping, and management services, which included handling employee health insurance payments, processing workers’ compensation claims, transferring funds between Respondents, handling payroll for all Respondents, and even administering job applications for new hires and payroll at NYCGT. (Tr. 58-60, GCX 50 PST 001228, GCX 51 PST 001244, GCX 126 NYPS 001099-001116.) Indeed, Schmidt managed the cash flow of all Respondents and made hundreds, if not thousands, of significant transfers between all of Respondents each year to fund various routine expenditures, such as issuing replacement paychecks to employees when pay checks were not honored, addressing cash flow issues, paying another Respondent’s rent, making substitute payments when checks bounced, repaying “loans,” and making bus repairs. (ALJD p. 35, Tr. 650-652, GCX 71-73.) The judge properly found “significant” the loans owed by DCPS, NYPS, OBLV, and NYCGT to PST. (ALJD p. 36, GCX 23, 70-73, Tr. 1909.)¹⁶ And there is no evidence showing any loan agreements, repayment schedules or other fee arrangements between Respondents, though it was subpoenaed, which warranted an adverse inference that such documents did not exist and therefore, that the transfers were not made at arms’ length. (ALJD p. 36, Tr. 651-59.)

Accordingly, the Board should adopt the judge’s finding that all five Respondents have common ownership and financial control.

¹⁶ In addition, the documents show thousands of dollars in direct transfers from one non-PST Respondent to another. For example, on December 31, 2015, DCPS owed NYPS \$124,807 (GCX 23 DCPS 001159-61; GCX 70 NYPS 001412), and OBLV owed NYPS of \$89,266 (GCX 70 NYPS 001412). On December 31, 2014, DCPS owed a balance of \$729,163 to NYPS (GCX 23 DCPS 001171-75). OBLV owed NYPS \$475,894 on December 31, 2014. (GCX 70 NYPS 001427.)

C. Respondents Share Common Management

The Board should reject Respondents' exception (Exc. 55, Br. 45-46) to the judge's substantiated finding of common management among all five Respondents, by Schmidt in addition to other managers. First, Schmidt admitted that he was simultaneously the CEO of NYPS, DCPS, PST, and OBLV, and believed that he is CEO of NYCGT. (ALJD pp. 23-30, Tr. 61, 77, 89, 100, 345.) He had "total and absolute control" over Respondents' affairs, according to the PST Prospectuses. (GCX 49(b) PST 001209, GCX 50 PST 001229.) See *Pathology Inst.*, 320 NLRB 1050, 1061-63 (1996) (substantial overlap between the board of directors of one entity and the board of trustees of the other entity is evidence of common management), *enforced sub nom. Alta Bates Corp. v. NLRB*, 116 F.3d 482 (9th Cir. 1997). Schmidt even signed Powers of Attorney on behalf of NYPS and on behalf of NYCGT, as "CEO," "manager," and "member" of both Respondents. (Tr. 344.)

Second, as the judge explained, the management team was "readily fungible" among the Respondents. (ALJD p. 36.) For example, Shawn Mengel served as the managing director of OBLV until 2012 when he transferred over to DCPS (Tr. 68, 583, 1769); Howard McCoy was the president of NYPS before becoming president of DCPS (Tr. 817, 828); Levi June was a vice president of both NYPS and, after it began operating, DCPS (Tr. 817, 1915); Jerry Abshire, a PST investor, was PST's Vice President of Sales and Marketing, but created a call center in Houston to direct calls to all customer service associates at NYPS, OBLV, and DCPS; Ron White, NYPS' Director of Operations, often traveled to DC to assist with USDOT audits of DCPS and even helped develop the training policies and procedures for drivers in all three cities; Larry Lockhart was DCPS' Managing Director and also Vice President of Sales at PST (Tr. 60-64, GCX 51 PST 001240); and finally, Moskowitz, who had been an NYPS sales employee,

became NYPS' President and remained in that position until NYPS ceased operations, when he then became President of NYCGT. (Tr. 847, 949.)

Third, only Schmidt and the PST Board participated in the most significant management decisions—the decisions to commence operations at NYCGT, to close NYPS, and to continue operating OBLV. (Tr. 954, 1049, 1102, 1727, 1743-45, GCX 57 000428-429, GCX 130.) *See Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964) (“If there is overall control of critical matters at the policy level, the fact that there are variances in local management decisions will not defeat application of the ‘single employer’ principle.”). When the PST Board decided to proceed with establishing NYCGT, it was Schmidt who informed Moskowitz that the project had received approval. Similarly, Schmidt decided at the end of 2011 that he would not be closing the OBLV operation. And it was Schmidt who informed Moskowitz of the PST Board's decision to cease operation at NYPS.

Fourth, Schmidt managed daily operations at NYPS, DCPS, OBLV, and NYCGT, directing subordinate Respondent managers in even the smallest details of their jobs. (ALJD pp. 25-26, GCX 85-87, 89-90.) *See RBE Electronics of S.D.*, 320 NLRB 80, 80 (1995) (common management established where one individual controlled day-to-day operations of both companies). For example, in July 2011, Schmidt e-mailed DCPS' Tyree Cook and Lockhart, with copies to OBLV's Mengel, NYPS' Ford and White, and sales consultant Scott Wilson regarding driver policies and procedures and directed Cook to provide Nextel phones to everyone within 24 hours, “no excuses.” (GCX 86.) Schmidt also directed DCPS' Mengel and Cabral to be in the office “every single day—no exceptions,” when to be available by telephone, when to greet returning buses, which employees should be given training, what training those employees would receive, and even directed them to terminate an employee. (GCX 112.)

Additionally, Schmidt demonstrated his command of the details of all Respondents' operations when he issued an e-mail update concerning operational issues in all three cities. (GCX 113.) Schmidt even had "multiple" meetings with the New York tour guides about dishonored pay checks. (Tr. 648.) Pflantzer was called into a meeting in the NYPS office to discuss dishonored pay checks with Schmidt, other NYPS guides, and DCPS guides. (Tr. 838, 1304-1307.) Therefore, because CEO Schmidt controlled financing, establishing and terminating operations, purchasing assets, transferring funds, transferring buses, and virtually every detail of Respondents' daily management, the judge's finding of common management among Respondents should be affirmed. *See Sakrete of Northern Cal., Inc.*, 332 F.2d at 906 (single-employer relationship where "the management of both resides virtually in one man" and "both are commonly owned and financially controlled").

D. Respondents Exercise Central Control of Labor Relations

Schmidt's undisputed managerial role in Respondent NYPS, DCPS, OBLV and NYCGT's operations is ubiquitous. *RBE Electronics of S.D.*, 320 NLRB 80, 80 (1995) (centralized labor relations control when an individual sets employers' employment policies and takes personnel actions such as hiring, lay off, and recall of employees). Significantly, the record supports the judge's finding that Schmidt on various occasions directly hired employees and reviewed discipline and terminations, and addressed employee complaints over terms and conditions of employment at NYPS, DCPS, OBLV, and NYCGT. (ALJD p. 37.)

As to NYPS, Schmidt met with employees who had complaints about issues such as dishonored paychecks and about then-President Moskowitz; he also had a meeting with NYPS and DCPS employees about bounced paychecks. (Tr. 648, 838, 1304-07.) When Schmidt and the PST Board decided to terminate NYPS' operations, Schmidt informed Moskowitz that he

was no longer President of NYPS. For DCPS, Schmidt approved Cook's promotion to Head CSA, and told Cook that he had made the decision to promote Cook to Director of Sales and Operations and later, to Managing Director. (Tr. 1050, 1093.) As the judge noted (ALJD p. 25), Schmidt also rehired terminated employee JePhree White over Cook's objection and allowing her to telecommute from the Midwest, as well as Germaine Salmon but required that he be placed on probation when he returned. (Tr. 1064-69.) Additionally, after a DCPS manager terminated Cook, Schmidt decided to reinstate Cook and give him a higher-ranking position with greater pay. (Tr. 1132-33.) With respect to OBLV, Schmidt and DCPS Managing Director Cook interviewed prospective job candidates in Las Vegas and decided to hire at OBLV based on DCPS and NYPS criteria. For NYCGT, Schmidt and the PST Board decided to terminate the drivers as direct employees and instead treat them as 1099 employees for tax purposes. When Schmidt and the PST Board approved the plan to establish NYCGT, Schmidt informed Moskowitz that he would now be the President of NYCGT, after previously serving as NYPS' President for about two years. (Tr. 954.) Moskowitz became NYCGT President within 2 to 4 weeks after he stopped being NYPS President and the hiatus between NYPS operations closing and NYCGT starting, if any, was two to four weeks. (Tr. 961.)

As the judge explained, Schmidt and other PST officials' control of labor relations included establishing and administering employment policies and procedures. (ALJD p. 25, 37.) Schmidt implemented labor policies at NYPS, DCPS, and OBLV, including nearly identical driver hiring and training policies and disciplinary procedures, a common employment application (originated by PST Vice President of Sales and Marketing Abshire and approved by Schmidt), uniformed company shirts and baseball caps, and timely responses to customer e-mails. (GCX 14(b), 85, 87, 90, 103, Tr. 825-27, 903, 1818-19.) NYPS, DCPS, and OBLV also

had common Respondent-wide hiring policies for diversity in hiring, hiring of candidates with limited skills, and promoting from within. (Tr. 791-93.) Therefore, Schmidt was involved in nearly all aspects of Respondents' labor relations.

Thus, the record supports the judge's finding of centralized control of labor relations.

E. Respondents' Operations Are Deeply Interrelated

As to the final element, overwhelming evidence supports the judge's finding that Respondents' operations are interrelated. (ALJD p. 36.) In assessing interrelationship of operations, the Board examines whether the supposedly separate companies have an arm's-length relationship, which here they did not. *Bolivar-Tees, Inc.*, 349 NLRB at 721. Indicia of operational interrelation include advertising to the public as a single-integrated business enterprise ((*Southern Interiors, Inc.*, 319 NLRB 379 (1995)); unrecovered loans from one company to another (*Associated Constructors*, 325 NLRB 998, 999 (1998), *enforced*, 193 F.3d 532 (D.C. Cir. 1999)); shared use of bookkeeping (*NLRB v. Carson Cable TV*, 795 F.2d 879, 883 (9th Cir. 1986)); and shared office resources (*Hydrolines, Inc.*, 305 NLRB 416, 418 (1991)). All are present here.

First, the record evidence strongly supports the judge's observation (ALJD p. 36) that the entities held themselves out to the public as parts of a single integrated business enterprise under the "OnBoard" sightseeing tours logo. Advertising brochures issued by NYPS, DCPS, OBLV and NYCGT all prominently featured the "OnBoard Sightseeing Tours" logo, and none of the brochures in evidence refer to the NYPS, DCPS, OBLV or NYCGT corporate name. (GCX 142(a) NYCGT 000645, GCX 142(b) NYPS 001990, GCX 142(c) NYPS 001996, GCX 142(d) DCPS 001507, GCX 142(e) OBLV 000645.) The brochures that were distributed to the public and to resellers all listed the www.onboardtours.com website. Customers going to that website

are able to “click through” to book tours on the booking agent website used by the particular respondent, including NYCGT. (Tr. 1814.) One version of the website prominently stated “Welcome to OnBoard Tours” and stated that the companies offered “Comprehensive Bus Tours of New York, DC & Vegas”. It featured photographs of tourist sites in all three cities and listed tour departure times for tours in all three cities. (GCX 163.) The photographs rotated to show all of the cities. (GCX 105.) Additionally, the draft PST 2017 Prospectus refers to the Respondents as a single company, notes that it was installing a new management team, lists the addresses of NYCGT, DCPS and OBLV, and states that “OnBoard Tours” is an established provider in New York, Washington, and Las Vegas. Even DCPS and NYPS buses had decals that stated “OnBoard” on the side of the bus (Tr. 849, 1170.)

Moreover, as discussed above (pp. 26-30), Respondents’ financial records show regular, unsecured, and open-ended loans between Respondents for large sums of money, mostly with exorbitant end-of-year balances owed to PST. (See pp. 25-29, above.) *NLRB v. Rockwood Energy & Mineral Corp.*, 942 F.2d 169, 174 (3d Cir. 1991) (parent’s transferring money to subsidiary as needed shows integration of operations). Non-PST Respondents owed each other significant amounts of money. (GCX 23, 70-72.) Though termed as loans, there is no evidence that any Respondent’s principals signed a promissory note or any agreement that pledged any security interest, indicating that the transactions were not at arms-length. (ALJD p. 36.) *Hydrolines*, 305 NLRB at 418; *Hahn Motors*, 283 NLRB, 901, 906 (1987) (open ended system of credit was evidence of functional integration). The fundamental financial interdependence here is underscored by the reasons for the transfers: Respondents’ underlying chronic cash flow problems and precarious balance sheet, with employee paychecks bouncing and Respondents

delaying vendor payments until money could be found somewhere. (Tr. 650-52, 1119, GCX 70-72.)¹⁷

For NYCGT, when NYCGT began its operations, it did so using NYPS buses, yet there is no evidence of any lease or other agreements between NYPS and NYCGT for NYCGT's use of the buses. (ALJD p. 39, Tr.472-77, 987.) Though Moskowitz claimed there was an agreement, he did not know any terms of the purported agreement between the two companies. Further, NYCGT assumed NYPS' vehicle and liability insurance policies, and PST "loaned" funds to NYCGT for payments to Ally Financial and for repairs to a GMC Yukon, which was among the vehicles owned by NYPS. Then, when NYPS ceased operations, Respondents decided that NYCGT would honor about one million dollars' worth of tickets that customers had purchased from NYPS without any extra charge to the customers. (ALJD p. 30, 39, Tr. 1896-97.) No cash was exchanged to cover the cost of this agreement; instead, NYPS' and NYCGT's accounts were adjusted. *See Spurlino Materials*, 357 NLRB at 1517 (finding lack of arms'-length dealing where entities involved "d[id] not actually invoice each other" but recorded charges on ledger and did not charge actual cost of services). While Schmidt asserted that NYPS owed NYCGT money at the time of the trial, there is no evidence of any effort by NYCGT to collect the money.

Additionally, the evidence shows shared use of bookkeeping. As discussed, Respondents' financial records were centrally maintained by the Houston office, and funds transfers were made by Schmidt or Shelly Hogan with Schmidt's authorization. (ALJD p. 31, Tr. 57-60, 983, 1885-86.) Payroll was submitted to Galago for processing and Galago prepared

¹⁷ Respondents also paid one another's creditors. (GCX 23.) DCPS transferred about \$57,000 to Bell Trans, which provided buses to OBLV. PST transferred payments to Capitol River Cruises, which provides DCPS customers with boat rides on the Potomac River, and to Statue Cruises, which provides boat rides to NYCGT customers. *Rogan Bros. Sanitation Inc.*, 362 NLRB 61 slip op. at 5 (2015) (payments by one employer to creditors of another employer evidence of interrelated operations), *enforced*, 651 Fed. Appx. 34, 35-36 (2d Cir. 2016).

Respondents' tax forms. *See Emcor Group, Inc.*, 330 NLRB 849, 849 fn. 1 (2000) (bookkeeper's performance of payroll functions cited as a factor in finding two companies had interrelated operations). Schmidt and Hogan secured health insurance for NYPS employees, and liability insurance, vehicle insurance, and workers compensation insurance for all Respondents; Galago paid for those policies on Respondents' behalf. Additionally, Respondents purchased items such as Google advertising and brochures together; the cost of such purchases would be paid to the vendor by one of the Respondents, then apportioned later by Hogan. (Tr. 531, 1882-84.)

In that vein, the evidence also shows shared office resources. Galago is wholly owned by Schmidt and provides all payroll, recordkeeping, and accounting services to all of the Respondents. (ALJD p. 31.) Galago's office in Houston, TX effectively served as the office for all Respondents and each Respondent paid a share of Galago's rent. (GCX 50 PST 001228.) While NYPS, NYCGT, and DCPS have had physical offices, all three eventually abandoned them. Records deemed important to Respondents' businesses were maintained either online through DropBox or physically in the Houston administrative office. (GCX 50 PST 011228, GCX 51 PST 001244.)

Finally, as the judge pointed out (ALJD p. 36), Jerry Abshire and Scott Wilson played a significant role in directing NYPS, DCPS and OBLV managers regarding Respondent-wide efforts to boost sales. (ALJD pp. 27, 36-37, Tr. 585-87, 592, 644-45, 1083, 1790.) Abshire established the call center in Houston that accepted calls from customers dialing into NYPS, DCPS, and OBLV local numbers, such that, if a customer could not reach a CSA in those offices, the call center was designed to field those calls. (ALJD p. 36, Tr. 586, 592, 1818.) They also established weekly sales staff conference calls and training calls with staff from NYPS,

DCPS, and OBLV, and participated in them with Schmidt. (ALJD p. 36, Tr. 644-45, 1790.) Additionally, at Schmidt's direction, Abshire worked with managing directors in the three cities to develop common sales scripts to increase sales at NYPS, DCPS and OBLV. (GCX 161, Tr. 1083.) Abshire and Wilson even screened and interviewed sales candidates for Respondents.

In sum, the Board should affirm the judge's conclusion that the Respondents are a single employer in light of the multitude of credited evidence illustrating common ownership, common management, centrally controlled labor relations, and interrelated operations.

VI. NYCGT IS AN ALTER EGO OF NYPS

A. Applicable Legal Principles

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). The Board and the courts have applied the alter ego doctrine in those situations where one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. *Fallon-Williams Inc.*, 336 NLRB 602 (2001), *C.E.K. Industries Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990). Though the Board may consider whether one entity was created in an attempt to enable another to avoid its obligations under the Act, such a motive is not necessary for finding alter ego status. *See, e.g., APF Carting Inc.*, 336 NLRB 73, 74 n. 4 (2001), *enforced*, 60 Fed. Appx. 832, 2003 WL 1914206 (D.C. Cir. 2003); *Dupont Dow Elastomers L.L.C.*, 332 NLRB 1071, 1071 n. 1 (2000).

B. All Potential Indicia of Alter Ego Status Are Present

Contrary to Respondents' assertions (Exc. 36, Br. 32-34), the credited record evidence supports the judge's conclusion that NYCGT and NYPS are alter egos based on the aforementioned indicia. First, the Board has found substantially common management when two hospitals alleged to be alter egos had the same President and shared three officers or directors. *Hospital San Rafael, Inc.*, 308 NLRB 605 (1992), *enforced*, *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45 (1st Cir. 1994). The Board has also found common management when the General Manager of one entity was the Vice President of another. *APF Carting, Inc.*, 336 NLRB at 77. In the instant case, as previously discussed, Schmidt is CEO of both NYPS and NYCGT, and Moskowitz is President of both organizations. Moskowitz was in charge of the day-to-day operations of NYPS, and he is in charge of the day-to-day operations of NYCGT. (Tr. 847, 949.) Moskowitz oversaw Ron White's supervision of NYPS employees until White left NYPS in 2013, appears to have directly supervised employees after White's departure, and supervises the NYCGT employees and guides. Accordingly, as the judge noted (ALJD p. 33), even if the secondary line supervisors like Ron White are not employed by NYCGT, the management of NYPS and NYCGT is identical through Schmidt (as CEO of both entities) and Moskowitz (NYPS president prior to becoming NYCGT's sole manager). (ALJD p. 33.) Thus, NYPS and NYCGT management is substantially identical. *Hospital San Rafael*, 308 NLRB at 605; *APF Carting, Inc.*, 336 NLRB at 77.

Second, based on these facts, common supervision is also evident from the record. There is no evidence that White was replaced after he left NYPS in October 2013, and the record thus shows that Moskowitz took on these responsibilities at that time and continued to exercise them until NYPS stopped operating. Indeed, Moskowitz is the sole NYCGT manager responsible for

hiring, disciplining, and firing employees and guides. And there is no evidence that NYPS and NYCGT supervision differed in any way.

Third, the credited record evidence illustrates that the initial operation and purpose of NYPS and NYCGT are identical. (ALJD p. 33.) The Board will find two entities with similar, but not identical, business purposes to have a common business purpose for alter ego purposes. In *Hospital San Rafael*, 308 NLRB at 605, one hospital operated a 300-bed tertiary care hospital that presumably drew from a larger area while the other hospital was a local hospital with just over 100 beds. The old hospital effectively planned the new hospital, helped finance it, and the Court (and Board) concluded that the two hospitals shared a common business purpose even though one hospital had triple the beds of the other. *Hospital San Rafael*, 308 NLRB at 621. The Court concluded that, despite these differences, “[b]oth in origin and function, the new hospital is essentially an enlargement of the old one.” *NLRB v. Hospital San Rafael*, 42 F.3d at 52.

Here, NYPS and NYCGT provided tours to New York City-area tourists; indeed, some of NYCGT’s customers were actually NYPS customers, given that customers who had already bought tickets for NYPS were allowed to use them with NYCGT after NYPS ceased operating. (ALJD pp. 30-31, Tr. 1734-48.) Both entities provide deluxe tours and stress the smaller size of their comfortable, climate controlled buses, and that a guide will get off the bus, escort customers to the tourist site, and return to the waiting bus with the customers. Indeed, NYPS’ and NYCGT’s advertising brochures (GCX 142(a), produced by NYCGT and GCX 142(b), produced by NYPS) are nearly identical to one another, with both offering “NY See It All” “Premium NY See It All,” and “NY See The Best” tours, and nearly identical itineraries. Schmidt and Moskowitz, the CEO and President of NYPS, planned the new NYCGT operation, and by the end of 2016 PST had extended almost a half million dollars in loans to NYCGT.

Respondents' reliance on Schmidt's "naked" testimony (ALJD p. 34) and Moskowitz's incredible testimony regarding alleged differences in staffing, management, business plan, and operations (Br. 35) ignores the credited record evidence. As the judge noted, at the inception of NYCGT, there were four employees, but Moskowitz ultimately hired more tour guides and drivers who had previously worked at NYPS, such as Joseph Cruz and Melvin Brewster. (ALJD p. 34, Tr. 995.) Indeed, Moskowitz testified that Henry Flores was a NYPS Logistics Manager, and that after NYCGT began operating, Flores helped in hiring tour guides and drivers. (Tr. 961, 1019.) Moskowitz testified that believes that Flores' brother, Adrian, as well as Gregory Boyd, Ronnie Kelly, Jr., and Luis Valencia Espin, who are on NYCGT payroll records, were NYPS employees. (Tr. 1003, 1018, 1021.) The record further shows that NYPS employees Melvin Brewster, Tom Ickert, Matthew Kiernan, Ricardo Molina, and David Roffe were also employed by NYCGT. (GCX 2(c)-(d), 148, 149.) As the judge highlighted, "there is no evidence that the NYPS employees who worked for NYCGT applied for new employment with NYCGT; they were simply transferred and continued to receive their wages through Galago," at least until the end of 2016. (ALJD p. 34.) Even if Moskowitz had provided sound business reasons for starting NYCGT (Exc. 36, Br. 34), the existence of a legitimate business reason does not negate the fact that all factors for an alter ego situation exist here. Thus, in origin and function, NYCGT is but another version of NYPS, with similar if not business purposes. *NLRB v. Hospital San Rafael*, 42 F.3d at 52.

Furthermore, as to common operating equipment, the Board has found that the common operating equipment criteria to have been met. *APF Carting, Inc*, 336 NLRB at 77. The Board has also found this test is met when there is no formal documentation showing the transfer of vehicles, equipment, and supplies from one entity to another and "not even an attempt to observe

any business formalities such as contracts or bills of sale in connection with these transactions.” *Advance Electric*, 268 NLRB at 1003. Both Respondents used the same equipment: NYPS ran tours with its own buses that were driven by its own employees. When it began operations, NYCGT ran tours with the buses that had been owned by NYPS and were driven by NYCGT drivers, who in many cases had been NYPS employees who drove NYPS buses. (ALJD pp. 33-34.) And, as discussed (pp. 24-25), Respondents did not produce subpoenaed documents as to the transfer of vehicles and other equipment, so the judge properly drew an adverse inference that such documents did not exist or at least, were not favorable to Respondents. That NYCGT eventually stopped using its own buses on tours does not change its business purpose of providing tours of New York City to tourists or its use of the same NYPS buses even if only for the first few months after opening. Indeed, by 2015 DCPS had changed from operating its own buses to using outsourced buses and OBLV had no choice but to use buses from Bell Trans and other third party sources. (Tr. 61.) Given that Schmidt and Moskowitz believed that the New York City Department of Consumer Affairs (“DCA”) would not allow NYPS to operate buses as long as Schmidt was affiliated with the company, NYPS would likely have had to outsource its bus operations as well if it had remained in business. (Tr. 1721, 1904.)

With respect to common ownership or control, the Board has deemed this factor satisfied when two entities shared a common owner, even if an individual’s ownership share of the first entity differs from his ownership of the second entity, and some other owners of the first entity did not have any ownership interest in the second entity. *See R.L. Resinger Co.*, 312 NLRB at 915 (finding common ownership where husband was sole proprietor of one entity but owned only 49% of a second entity, the alleged alter ego, and his wife owned the other 51% of that latter entity); *Advance Electric*, 268 NLRB at 1003 (common ownership existed where one entity

was owned by two brothers and one brother bought out his brother's share of second entity, notwithstanding that second brother no longer had any ownership of second entity); *see also Omnitest Inspection Services*, 297 NLRB 752, 754 (1990) (finding common ownership even where an individual owned as little as 20% of one entity, because his effective control of both entities' operations was sufficient to substitute for actual ownership). Here, PST owns about 92% of NYPS and 100% of NYCGT, and Schmidt, as CEO of PST, NYPS, and NYCGT, ultimately controls both NYPS and NYCGT. Indeed, Schmidt and the PST Board decided to terminate NYPS' operations and begin operating NYCGT and Schmidt then informed Moskowitz that he was no longer President of NYPS. (Tr. 954.) Thus, even if PST (of which Schmidt essentially owns a majority through his majority ownership of ITC) did not own such an overwhelming percentage of NYPS and NYCGT, Schmidt's effective control over both Respondents alone would suffice to establish common ownership.

In sum, given NYPS' and NYCGT's common management, business purpose, operating equipment, customers, supervision, and common ownership and control, the Board should uphold the judge's findings and conclusion that NYCGT is an alter ego of NYPS to prevent NYPS from evading its responsibilities to Pflantzer under the Act.

VII. NYCGT is a *Golden State* Successor to NYPS

If the Board does not agree with the judge that NYCGT is an alter ego of NYPS, it should still affirm the judge's finding and conclusion that NYCGT is a *Golden State* successor to NYPS.

A. Applicable Legal Principles

An employer who acquires and operates a business in basically unchanged form can be held jointly and severally liable for un-remedied Section 8(a)(3) and (1) violations 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, 184-85 (1973). If the successor, despite notice, fails to insulate itself, but nevertheless proceeds with the transaction, it does so at its own risk, and there is no unfairness in imposing liability. *Bellingham Frozen Foods*, 237 NLRB at 1466 n. 26. Significantly, a sale or purchase of the predecessor is *not* a prerequisite to a finding of successorship. *Lebanite Corp.*, 346 NLRB 748, 752, n. 17 (2006). Rather, the issue is whether a successor had notice of the predecessor's unfair labor practice and could seek indemnification or other modification in the terms of the acquisition to reflect the potential liability of the unfair labor practice. *Golden State*, 414 U.S. at 185.

The Board will find liability when the successor operates the business without interruption or substantial change in operations, employee complements, or supervisory personnel, with the knowledge of the unfair labor practice litigation, and full opportunity to contest its successorship at the hearing. Nor is it necessary that employees of the "old" employer constitute a majority of the new employer's work force for the imposition of monetary remedies. *St. Mary's Foundry*, 284 NLRB 221, 221 n.1 (1987) (citing *Bell Co.*, 243 NLRB 977, 978-979 (1979)); *Bellingham Frozen Foods*, 237 NLRB 1450, 1450 (1978), *enforced in relevant part*, 626 F.2d 674, 681 (9th Cir. 1980). The Board will also impute knowledge to the successor through the person who was employed by both employers and who was involved in the conduct found to constitute an unfair labor practice, as in the instant case through Moskowitz.¹⁸ *Commercial Forgings Co.*, 315 NLRB 162, 166 (1994).

¹⁸ Liability is not imposed on the successor only when there is a total absence of any business relationship between the predecessor and successor, and the successor has not acquired anything of value from the predecessor, unlike here. *Glebe Electric, Inc.*, 307 NLRB 883, 885 (1992).

B. NYCGT Had Notice of NYPS' Unfair Labor Practice and Continued NYPS' Business in Substantially Unchanged Form

First, NYCGT CEO Schmidt and President Moskowitz had actual knowledge that Fred Pflantzer's discharge was found to be an unfair labor practice charge many months before NYCGT was incorporated and began operating OnBoard Tours that had been operated by NYPS. (ALJD p. 39, Tr. 975-77, GCX 146, 152.) Schmidt, who is CEO of and attorney for NYPS, represented NYPS throughout the 2012 investigation and trial of the underlying unfair labor practice charge, as well as the Court's enforcement of the Board Order. Moskowitz, who had become NYPS President well before early 2014, knew by February 2014 that the NLRB and the Fifth Circuit had found Pflantzer's discharge unlawful. (Tr. 975-77.) Moskowitz and the Board Agent handling compliance with the Board's order in February of 2014 exchanged e-mails that referred to NYPS' obligation to offer Pflantzer reinstatement, that the case involved NYPS and Pflantzer, and included as the case number of the unfair labor practice charge. (ALJD p. 33, GCX 152; Tr. 977.) Thus, because NYCGT principals Schmidt and Moskowitz both had knowledge that Pflantzer's discharge was an unfair labor practice, at least eight months before NYCGT was incorporated and about a year before NYCGT began operating OnBoard Tours, the record evidence supports the finding that NYCGT had actual knowledge of those violations.

Second, there was substantial continuity in the transition from NYPS to NYCGT. As discussed above (pp. 40-44), NYPS provided deluxe bus tours to tourists in New York City. In advertising, it emphasized that its buses were smaller and climate controlled, and that a guide will get off the bus, escort customers to the tourist site, and return to the bus with the customers. (GCCX 135-138.) NYCGT continued NYPS' business by providing deluxe New York City bus tours with the same advertised features. Further, both Respondents conducted "NY See It All,"

“Premium NY See It All,” and “NY See The Best” tours, and NYPS and NYCGT tours had nearly identical itineraries. (ALJD p. 30, GCX 137-138, 142(a).)

Moreover, when it began operations, NYCGT operated tours using buses owned by NYPS. NYCGT maintained vehicle insurance policies on all eight of the former NYPS vehicles through October 2015 and on three of the former NYPS vehicles through October 2016; both Respondents had insurance policy number BA164556, issued to NYPS through April 2015 and to NYCGT beginning October 31, 2014. (GCX 13(a), (b), (c), GCX 106-109.) And Both Respondents obtain customers through sales from the websites (operated by PST or Creativerse, which is owned by PST) (Tr. 1891); phone sales; sales through third party websites such as Viator and Expedia, and resellers. (Tr. 550, 1814, 1891).

Furthermore, the record makes abundantly clear that Schmidt is CEO of both Respondents and that Moskowitz became President of NYCGT after formerly serving as NYPS’ President. At NYPS, Moskowitz oversaw the supervisory activities of Ron White until White’s departure in October 2013, then directly supervised employees until NYPS stopped operating tours around 1.5 to 2 years later. (Tr. 962.) At NYCGT, Moskowitz supervises the staff and admittedly oversees “every aspect” of its operation. (Tr. 952.) At least 7 NYPS employees became NYCGT employees. (Tr. 1003, GCX 2(c)-(d), 148-149.) And again, the overwhelming majority of NYPS is owned by PST, and NYCGT is wholly owned by PST. Both Respondents hold themselves out to the public as “OnBoard Tours.” Finally, as noted, NYCGT honored tour tickets sold by NYPS, which Schmidt estimated were valued at about \$1,000,000. (Tr. 780, 1035, 1784.) Accordingly, the record evidence demonstrates that NYCGT continued NYPS’ business without substantial change in operations or employee complement.

Though Respondents attack (Exc. 38, Br. 35-36) the judge's brief mention of *Lebanite Corp.*, 346 NLRB 748, 754 (2006), it is Respondents who mistakenly rely on that case to support their denial of *Golden State* successorship. As an initial matter, the judge cited the case for the proposition that it is not necessary to find that NYPS was sold to NYCGT or that NYCGT purchased NYPS in order for NYCGT to be a *Golden State* successor. (ALJD pp. 37-38). In that vein, the judge also correctly cited *Lebanite* for the proposition that, once CGC had showed that NYCGT had notice of the potential unfair labor practice liability, the burden shifted to Respondents to rebut that presumption and show that they were not on notice, which they failed to do. The record evidence conclusively shows Moskowitz's firing of Pflantzer in July 2014 and his knowledge of the unfair labor practice from February 2012, after Schmidt delegated authority to him to discuss settlement with the NLRB and those conversations continued in October 2014 after he became president of NYCGT. (ALJD p. 39; GCX 152, Tr. 977.) As a result, the judge concluded that NYCGT failed to meet its burden. (ALJD p. 40, l. 1-8.) Thus, the judge correctly cited *Lebanite* for the burden-shifting legal principle and the proposition that a sale or purchase is not a prerequisite to finding *Golden State* successorship.

In any event, the facts in *Lebanite* are vastly different from those in the instant case. In *Lebanite*, the predecessor leased its relevant operations to the successor, but the lease was terminable on 30 days' notice by both parties. Consequently, the Board concluded that the successor did not have any practical opportunity to negotiate the lease price in a way that could reflect potential unfair practice liability and found no *Golden State* successorship. *Id.* at 751-52. However, here, the successor (NYCGT), through common owners Schmidt and PST and a common manager Moskowitz, had complete control over the assignment of the predecessor's assets and obligations, as well as the entire operations and finances of the predecessor.

Accordingly, Respondents have cited no basis for rejecting the judge's mere restatement of settled Board precedent or his finding that Respondents' did not meet their burden.

In sum, given Schmidt's and Moskowitz's knowledge of NYPS' unfair labor practice in 2014, Moskowitz's authority to discuss settlement with the NLRB Agent, and the credited record evidence showing that NYCGT operated in substantially unchanged form, the Board should find that NYCGT is a *Golden State* successor to NYPS.

CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully request that the Board affirm the judge's findings and conclusions (1) that the Region's backpay formula was reasonable, (2) that Respondents are a single employer, and (3) that NYCGT is an alter ego of NYPS or (4) alternatively, that NYCGT is a *Golden State* successor to NYPS. Accordingly, we ask that the Board order Respondents to pay Pflantzer the full amount of backpay as stated in the judge's decision, from February 12, 2012 to July 27, 2014 and August 14, 2014 to the present. CGC further asks that the Board order Respondents to reinstate Pflantzer to his former job or, if that no longer exists, a substantially equivalent position at one of Respondents' existing companies like NYCGT.

CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that she caused a true and correct copy of the foregoing to be filed electronically with the National Labor Relations Board on September 24, 2019, and served electronically on the same date at the following addresses:

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