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INTRODUCTION

1. The General Counsel filed a single cross-exception in this proceeding, asking that Mr. Pflantzer be reinstated. Because reinstatement was impliedly rejected by the ALJ, and because there is no basis in fact or law for reinstatement here, Respondents ask that the Board reject the cross exception.

SUMMARY OF ARGUMENT

2. The Board should reject the General Counsel's Cross Exception because it is meritless.

3. In order for the Board to sustain the Cross Exception, it must first find:

- a. That the Board has jurisdiction over the non-NYPS Respondents;
- b. That NYCGT is to be deprived of its right to contest the underlying Decision in light of *Noel Canning*;
- c. That NYC Guided Tours, LLC, is the *alter ego* or *Golden State* successor, or a single employer with New York Party Shuttle, LLC;
- d. That Mr. Pflantzer was not properly reinstated in 2014;
- e. That Mr. Pflantzer did not obtain more favorable employment since his termination;
- f. That Mr. Pflantzer would be eligible to work at NYCGT (or another Respondent) despite his continued operation of a competing business; and
- g. That Mr. Pflantzer is entitled to equitable relief despite his repeated false statements under oath, his understating his income (interim earnings) on his sworn tax returns, and his false statements to the Compliance Officer.

4. Respondents do not believe that the General Counsel has met its burden on any of those items, and therefore reinstatement is not warranted.

ARGUMENT

5. Reinstatement is not appropriate in this case.

NEW YORK PARTY SHUTTLE, LLC, IS NOT OPERATING TOURS AND HAS NO TOUR GUIDES

6. NYPS stopped operating tours in 2015. Tr. at 1880. As a result, Mr. Pflantzer cannot be reinstated at that company. Worst case, he should be awarded backpay through that date and no more, because if he had continued to be employed through that date, however unlikely that assumption is, he would have lost his employment at that time with the vast majority of the company's employees. That is the reason the ALJ did not recommend reinstatement.

THE BOARD DOES NOT HAVE JURISDICTION OVER THE NON-NYPS RESPONDENTS

7. The General Counsel did not establish jurisdiction over NYCGT, DCPS, OBLV, or PST. *See* Exception No. 57 in Respondent's Brief; *see also* Respondents' Reply. As a result, reinstatement at any of the non-NYPS Respondents is unwarranted and would be inappropriate.

MR. PFLANTZER IS NOT ELIGIBLE TO WORK AT ANY RESPONDENT COMPANY

8. The General Counsel continues to argue (without evidence) that NYPS knew of Mr. Pflantzer's competing business before his alleged termination in 2012. That is a surprising assertion in light of the fact that 2012 was the "Year of the Groupon" and it was not until after Mr. Pflantzer left NYPS that his business became a "competitor" to NYPS. In any event, by 2014, when Mr. Pflantzer was reinstated by NYPS, his business had grown, had reviews on TripAdvisor, and he was informed he could not work at NYPS simultaneously with a competitor, so when he refused to abandon the business (which speaks volumes by itself), he was terminated.

9. Regardless of that issue, there can be no question that NYCGT, the only Respondent company that has paid tour guides in New York in recent history, has a firm policy of not allowing tour guides or bus drivers to operate competing businesses, and did not know about Mr. Pflantzer's business in 2012 because NYCGT did not exist back then. Thus, Mr. Pflantzer is not eligible to work at NYCGT, and a reinstatement order would be futile. It should be presumed that the ALJ recognized this fact.

10. It does not appear that the General Counsel is suggesting that Mr. Pflantzer be instated at DCPS, PST, or OBLV, but out of an abundance of caution it should be noted that the record is clear that PST never had any employee, that OBLV ceased doing business years ago, and that DCPS does not conduct any business in or around New York City. It would be nonsensical to order Mr. Pflantzer to be hired by one of those Respondents.

MR. PFLANTZER WAS REINSTATED, AND TERMINATED, IN 2014

11. NYPS reinstated Mr. Pflantzer in 2014. He was warned before reinstatement that if he continued to operate and market a tour company that competes with NYPS, he would be terminated. Accordingly, re-reinstatement is not appropriate. Respondents incorporate their arguments from their Brief in Support of Exceptions, and Reply, on this topic. *See* Exception No. 59 and Respondents' Reply Brief.

MR. PFLANTZER HAS MAINTAINED SUPERIOR EMPLOYMENT FOR FIVE YEARS

12. Respondents contend that Mr. Pflantzer's interim earnings exceed his backpay since the third quarter of 2014.

13. Since the end of the first quarter of 2016, Mr. Pflantzer's interim earnings consistently exceeded backpay owed – even by the General Counsel's and ALJ's admission. *See*

Supplemental Decision, Attachment 1, at pp. 47-50.² Even the General Counsel conceded that no backpay was being sought after the end of 2017, so there is no basis for reinstatement, and a backpay award (if supported by evidence) is sufficient to compensate Mr. Pflantzer for any harm incurred. *See* Tr.

14. The ALJ made rulings in the Hearing based on the General Counsel's representations that there was no backpay sought after December 2017.

[By the ALJ] For the 2018 redacted version I've also reviewed the unredacted version and it is my understanding from counsel for the General Counsel, that they will be seeking back pay for Mr. Pflantzer at this point in time only up through the end of 2017. My review of the 2018 unredacted affidavit have statements and allegations concerning this witness's experience while working with the Wallstreet Experience company about circumstances after December 31st, 2017.

Since counsel for the General Counsel is not seeking back pay award at this time, subsequent to the end of December 2017, anything that this witness may have stated about his employment with the Wallstreet Experience is not relevant to this proceeding.

Tr. at 1313-14.

15. The fact that Mr. Pflantzer's interim earnings, even with flawed calculations deducting \$335 per week for moonlighting and factoring tips in backpay but not interim earnings, showed no backpay obligation for eight consecutive quarters (2016-2018) demonstrates that he obtained superior employment and reinstatement is not warranted.

16. Respondents' backpay calculation, which adjusts for the difference in hours between Pflantzer and Jorge, equalizes tips, and removes the fictitious moonlighting deduction,

² The GC's backpay calculation includes one period since early 2016 in which Mr. Pflantzer is shown to be owed \$119 of backpay, but his total earnings from April 1, 2016 to the time of the compliance hearing were tens of thousands of dollars more than his calculated backpay, and the period in which the \$119 is shown includes a four-week period where, had he worked, his interim earnings would have exceeded backpay as they did the rest of the year, so that number is an obvious error in the calculation.

shows that Mr. Pflantzer earned literally tens of thousands of dollars more from interim earnings than he would have from working at NYPS.³ This was true beginning with the 3rd Quarter of 2014. *See* Respondents' Exhibit 13. Therefore, there is no basis for reinstatement at this point.

17. The Board should infer from the ALJ opinion that the lack of a reinstatement recommendation was intentional, not an oversight.

NYCGT IS NOT THE *ALTER EGO* NOR *GOLDEN STATE* SUCCESSOR TO NYPS

18. Respondents incorporate the arguments in their Brief in Support of Exceptions, and Reply, related to the *alter ego* and *Golden State* Successor arguments as if set forth here. *See* Exceptions Nos. 36-39, 42-56; *see also* Respondents' Reply. Because NYCGT is not the *alter ego* nor *Golden State* Successor of NYPS, Mr. Pflantzer cannot be ordered to be reinstated at that company.

RESPONDENTS ARE NOT A SINGLE EMPLOYER

19. Respondents incorporate the arguments in their Brief in Support of Exceptions and Reply Brief related to the single employer argument as if set forth here. *See* Exceptions Nos. 41-56; *see also* Respondents' Reply. Because Respondents are not a single employer, Mr. Pflantzer cannot be ordered to be reinstated at any Respondent company other than NYPS.

THE *NOEL CANNING* DECISION RENDERED THE LIABILITY FINDING VOID, SO REINSTATEMENT IS INAPPROPRIATE

³ Respondents note that even Respondents' Exhibit 13 does not correct Ms. Kurtzelben's analysis for (1) seasonality, (2) the fact that Mr. Pflantzer would not have ever worked in January or February in any year, (3) that NYPS's business declined substantially from 2012 to the day it closed, (4) that NYPS closed its doors and stopped employing tour guides, (5) that Mr. Pflantzer never kept any job for 18 months, let alone 5 years, (6) that Pflantzer's waiver of reinstatement with GONY artificially reduced interim earnings, (7) that it was not reasonable to rely on Mr. Pflantzer's tax returns, (8) that Mr. Pflantzer's testimony contradicted his tax returns regarding "the year of the Groupon," (9) the fact that the compliance officer never considered the bank statements in her files, (10) Mr. Pflantzer's failure to look for work from 2012-2014, (11) that Mr. Pflantzer's focus on his competing business resulted in growth in the value of his business, (12) that Mr. Pflantzer was reinstated in July of 2014, or (13) that Mr. Pflantzer never could have worked at NYCGT because of the operation of his competing business. *See, e.g.*, Exceptions Nos. 7-12, 17, 19-22, 28-29, 31-33, 35, 58-59 in Respondents' Brief; *see also* Respondents' Reply.

20. Respondents incorporate the arguments from their Brief in Support of Exceptions and Reply related to the fact that the Supreme Court's *Noel Canning* decision made the underlying liability finding void *ab initio*. See Exceptions Nos. 4, 5. NYPS asserts that Mr. Pflantzer was never found to have been terminated improperly by a proper Board or the Fifth Circuit. The non-NYPS Respondents assert that it denies them due process to prevent them from ever contesting the validity of the underlying order on the basis that the Board was appointed improperly. The non-NYPS Respondents contend that this Board should not order reinstatement against them because the underlying decision was void *ab initio*. As to them, the non-NYPS Respondents challenge all of the ALJ's findings and any further award against them on this basis.

MR. PFLANTZER'S UNCLEAN HANDS MILITATE AGAINST EQUITABLE RELIEF

21. Throughout Respondents' Brief in Support of Exceptions, they pointed out the myriad lies and contradictions told by Mr. Pflantzer, the vast majority of which were under oath, either in these proceedings or on his sworn tax returns. His repeated false testimony before the ALJ, his admitted failure to properly report his income on his tax returns, and his false statements to the Compliance Officer show his bad faith attempts to use the Act and the NLRB to receive a windfall compensation in this proceeding. The General Counsel and the ALJ chose to "look the other way" and support Mr. Pflantzer's efforts, but Respondents are counting on this Board to see through them and not reward Mr. Pflantzer for inflating his claims. While the Board might make a nominal backpay award based on Respondents' Exhibit 13, it should not grant Mr. Pflantzer equitable relief in light of his bad faith deceptions.

CONCLUSION

Reinstatement is not an appropriate remedy where the employer is no longer in business, the complainant is not eligible to work at any Respondent, he has held superior employment for at

DECLARATION OF SERVICE

I certify and declare, under penalty of perjury, that a true and correct copy of the foregoing document was served on the National Labor Relations Board through its Regional Director on the 29th day of October, 2019, in the manner indicated below.

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